Partial Defences to Murder

OVERSEAS STUDIES

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Partial Defences to Murder in Australia and India

Provocation, Diminished Responsibility and Excessive Defence

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Preface

Australian criminal law is in a constant state of change due to the fact that there are nine jurisdictions whose judges and legislators have a healthy interest in the criminal law. There is also the High Court of Australia, the highest appellate court for all criminal matters, which has sought wherever possible to establish uniform principles of criminal law across the nine jurisdictions. The governments in these jurisdictions accept the value of having a national criminal code and, towards this end, have established a committee to produce a Model Criminal Code. In addition to the work of this committee, several Australian states have their own law reform commissions which have been active in recommending changes to the criminal law.

In the light of such intense activity, this paper on the Australian law of provocation, diminished responsibility and excessive defence has necessarily been quite selective. The paper has focused primarily on the law of New South Wales because it has been by far the most active among the Australian jurisdictions in considering and developing all the three defences under consideration. New South Wales has the added distinction of being the only Australian jurisdiction which recognises all three defences.

The inclusion of Indian law in this paper was requested by the Law Commission of England and Wales. Given the lengthy discussion required for the Australian law of provocation (Chapter One), it was expedient to consider the Indian law in a separate chapter (Chapter Two). The defence of diminished responsibility in Australia is the subject of Chapter Three; Indian law does not recognise such a defence. Chapter Four considers and compares the Australian and Indian laws of excessive defence.

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Chapter 1

The Australian Law of Provocation

Introduction

[1.1] The Australian defence of provocation originated from the English common law of the second half of the nineteenth century. That law accepted that a killing ought not to be reduced from murder to manslaughter unless the provocation offered by the deceased was sufficient to deprive a reasonable man of the powers of self-control, and such provocation had caused the accused to kill when deprived of his power of self-control.[1] This English expression of the defence continues to be maintained by the current Australian common law[2] and statutory formulations[3] of the defence. Thus, the High Court in *Masciantonio v The Queen* recently described the defence at common law as follows:

> The provocation must be such that it is capable of causing the ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has the opportunity to regain his composure.[4]

[1.2] Similarly, the *Criminal Code* 1914 of Western Australia provides that:

> When a person who unlawfully kills another under circumstances which … would constitute … murder, does the act which causes death in the heat of passion by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.[5]
>
> The term "provocation" … means and includes … any wrongful act or insult of such a nature as to be likely, when done to an ordinary person … to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.[6]

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1 See, for example, *R v Welsh* (1869) 11 Cx CC 336 at 338 per Keating J.

2 In South Australia, Victoria and Queensland, the defence is governed by the common law. The provision on provocation under s 304 of the Queensland code has been held to embody the common law as it is expounded from time to time: see *R v Herlihy* [1956] St R Qd 18; *R v Callope* [1965] Qd R 456.

3 The Australian Capital Territory, Northern Territory, New South Wales and Western Australia have statutory provisions governing the defence. The Tasmanian criminal code had a provision until it was abolished in 2003.

4 (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ.

5 Section 281.

6 Section 245.

The equivalent provisions in the criminal legislation of the Australian Capital Territory,[7] New South Wales,[8] and the Northern Territory[9] are cast in the same mould. Certainly, these provisions differ in some respects and comparative analysis of these differences might prove useful. However, many of the differences will be due to the choice of particular words and phrases together with the historical explanations for them which will only be of passing interest outside of Australia.

[1.3] The better course, and the one taken here, will be to primarily consider the most progressive of the statutory formulations, namely, the New South Wales provision, together with recent common law pronouncements on the defence of provocation. This will present and assess the latest efforts by Australian legislators and judges to inject contemporary notions of criminal justice and community values and expectations into the defence.

[1.4] The New South Wales formulation of the defence appears as s 23 of the *Crimes Act* 1900 (NSW). That provision has undergone several revisions over the years,[10] the most recent of which occurred in 1982 when it embodied many of the recommendations of a New South Wales Task Force on domestic violence.[11] Additionally, various words and phrases of the provision have since been judicially interpreted in ways which seek to better reflect contemporary understanding and acceptance of human reactions to provocation, particularly by battered women who kill. Nevertheless, some deficiencies in the provision remain which were sought to be rectified by the New South Wales Law Reform Commission in its 1997 report on provocation.[12] The recommendations of the Commission have yet to be implemented but they will be mentioned wherever appropriate in this report.[13]

[1.5] Section 23 of the *Crimes Act* 1900 (NSW) reads as follows:

> 1. Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

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7 *Crimes Act* 1900 (ACT), s 13.

8 *Crimes Act* 1900 (NSW), s 23.

9 *Criminal Code Act* 1983 (NT), s 34.

10 The defence of provocation was first statutorily recognised under s 370 of the *Criminal Law Amendment Act* 1883 (NSW).

11 New South Wales, Task Force on Domestic Violence, *Report of the New South Wales Task Force on Domestic Violence to the Honourable NK Wran, Premier of New South Wales* (Government Printer, Sydney, 1981). For an evaluation of the changes to the law, see Weisbrot, D, "Homicide Law Reform in New South Wales" (1982) 6 *Criminal Law Journal* 248.

12 New South Wales Law Reform Commission, Report 83, *Partial Defences to Murder: Provocation and Infanticide* (NSWLRC, Sydney, 1997). Hereinafter referred to as "NSWLRC Report 83".

13 The Commission's revised s 23 is reproduced in para **1.54**.

2. For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where –

   (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused and;

   (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

   whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

3. For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if –

   - there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;
   - the act or omission causing death was not an act done or omitted suddenly; or
   - the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

4. Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

5. This section does not exclude or limit any defence to a charge of murder.

[1.6] Until 1982, the penalty for murder in New South Wales was a mandatory sentence of life imprisonment. In that year, the courts were given limited discretion to impose sentences of less than life imprisonment for murder in cases where the offender's culpability was significantly diminished by mitigating circumstances.[14] Legislative amendments in 1990 have given the courts full discretion to impose a lesser penalty than life imprisonment for murder, with life imprisonment remaining the statutory maximum penalty.[15] The courts always have had full sentencing discretion for manslaughter.[16]

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[14] *Crimes (Homicide) Amendment Act* 1982 (NSW) Sch 1[1]. See further *R v Bell* (1985) 2 NSWLR 466.

[15] *Crimes (Life Sentences) Amendment Act* 1989 (NSW), Sch 1[4]. "Life" means the term of the offender's natural life.

[16] Section 24 of the *Crimes Act* 1900 (NSW) which prescribes a maximum penalty of 25 years' imprisonment.

Provocative conduct

[1.7] Not any type of conduct will amount to provocation in law. Specific common law rules have been devised which the New South Wales legislature has subsequently dopted or modified to describe the types of conduct which will be recognised as provocation for the purpose of the defence.

Suddenness of the provocation

[1.8] The common law requires the deceased's provocative conduct to have occurred suddenly in the sense that the conduct took the accused by surprise.[17] In line with this limitation, the common law requires a triggering incident to have occurred which was wholly unexpected and which ignited the accused's loss of self-control and homicidal behaviour.[18] However, this limitation has been expressly abrogated by the 1982 amendments to the *Crimes Act* (NSW), s 23(2)(b) of which provides that conduct can amount to provocation whether that conduct occurred immediately before the act or omission causing death or at any previous time. The New South Wales Court of Criminal Appeal case of *Chhay v R*[19] applied this provision to a case involving domestic homicide where there was evidence of a lengthy period of physical and emotional abuse. Gleeson CJ noted that in such a case a triggering incident for the loss of self-control was not necessary but, of course, if such an incident was present it would assist in the success of the defence of provocation.[20] It has been suggested that the real distinction "is between deliberate premeditated killing, perhaps motivated by revenge, and the spontaneous loss of self-control which is brought about by a gradual accretion of intolerable factors."[21]

Cumulative provocation

[1.9] This issue is an extension of the one concerning sudden provocation. The common law is replete with case authorities which recognise that previous provocative incidents can constitute provocation and should not be construed as a setting for a triggering provocative incident which caused the accused to lose self-control.[22] Section 23 of the *Crimes Act* (NSW) adopts this stance by providing that the provocative conduct may have "occurred immediately before the act or omission *or at any previous time*."[23] Invoking this clause, the New South Wales Court of Criminal Appeal in *Chhay* held that

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17 *R v R* (1981) 28 SASR 321 at 326 per King CJ.

18 *R v Croft* [1981] 1 NSWLR 126 at 140 per O'Brien CJ; *R v Osland* (1998) 2 VR 636 at 647-648 per Winneke P, Hayne and Charles JJA.

19 (1994) 72 A Crim R 1.

20 *Ibid*, at 13-14.

21 O'Connor, D and Fairall, P, *Criminal Defences* (Butterworths, Sydney, 3rd ed, 1996) para [11.27].

22 For example, *Parker v The Queen* (1963) 111 CLR 610 at 630 per Dixon CJ (HCA); *R v Jeffrey* [1967] VR 467 at 484 per Smith J.

23 Emphasis added.

the accused's loss of self-control could be the result of cumulative instances of domestic violence inflicted on her by the deceased, her husband.[24]

Hearsay provocation

[1.10] The common law requires the provocative conduct to have occurred in the presence of the accused.[25] This requirement has been modified to the limited extent that, when considering the gravity of the provocation occurring in the accused's presence, the jury may take into account hearsay reports to the accused from third parties about past provocative conduct of the victim.[26] An explanation for this limitation is that it ensures that the accused had actual grounds for believing that the deceased had done something provocative. This limitation, known as the rule against "hearsay provocation", seems to have been left intact by the 1982 amendments to s 23 of the *Crimes Act* (NSW).[27] The rule has been criticised for ignoring circumstances where the accused may have had reasonable grounds for believing that the deceased had been provocative even though such belief was not based on direct evidence. If the accused had lost self-control in circumstances which an ordinary person could have lost self-control even without direct evidence of the provocation, the defence should be available in principle.[28] The New South Wales Law Commission on provocation agreed with this position and accordingly recommended the abolition of the rule against hearsay provocation.[29]

Indirect provocation

[1.11] The common law has long recognised that provocative conduct could be directed at someone other than the accused.[30] The law does not require some kinship or friendship ties between the accused and the person receiving 'direct' provocation although evidence of such a relationship will assist in determining whether the accused had actually lost self-control due to the deceased's provocation. Section 23(2)(a) of the *Crimes Act* (NSW) incorporates this common law position by stipulating that the provocative conduct could be "towards or *affecting* the accused."[31]

Misdirected retaliation

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[24] (1994) 72 A Crim R 1 at 13-14 per Gleeson CJ.

[25] *R v Arden* [1975] VR 449; *R v Terry* [1964] VR 248.

[26] *R v R* (1981) 28 SASR 321 at 323-325 per King CJ.

[27] Section 23 appears silent on its face, but the New South Wales Court of Criminal Appeal in *R v Quartly* (1986) 11 NSWLR 332 at 339 interpreted it as retaining the common law rule against "hearsay provocation". However, the High Court, in refusing leave to appeal in *Davis v The Queen* (1998) 73 ALJR 139, opined that there was a strong case for saying that *Quartly* was wrongly decided on the point.

[28] O'Connor and Fairall, above note 21, para 11.16; Lanham, D, "Provocation and the Requirement of Presence" (1989) 13 *Criminal Law Journal* 141 at 149.

[29] NSWLRC Report 83, paras 2.91 and 2.133-2.136. See proposed s 23(2)(a)(ii).

[30] *R v Terry* [1964] VR 248.

[31] Emphasis added.

[1.12] The common law requires the provocation to have emanated from the deceased.[32] Consequently, an accused who kills someone who did not offer provocation will be denied the defence. However, there are exceptions to this rule. First, an honest mistake of fact by the accused that the deceased's conduct had been directed at him or her may operate jointly with provocation to reduce the offence of murder to manslaughter.[33] There is recent judicial authority suggesting that the mistaken belief must be reasonable.[34] Secondly, the defence may be relied on where an innocent bystander was killed accidentally by the accused who had intended to injure the provoker.[35] Thirdly, the defence will be available to an accused who killed an innocent bystander who had intervened to stop the accused's attack on the provoker.[36] Fourthly, there is a single case ruling that, where individuals are closely related or physically proximate, the provocative conduct of one may be attributed to another.[37]

[1.13] Section 23 of the *Crimes Act* (NSW) endorses the common law rule that the provocation must have emanated from the deceased since the provocation is described throughout the section as "the conduct of the deceased". However, the provision does not mention any of the common law exceptions to this rule. The New South Wales Law Reform Commission recommended that s 23 should be revised to recognise the first three exceptions emphasising in particular that, where the accused was operating under a mistaken belief, such belief had to be based on reasonable grounds.[38] In the Commission's view, the fourth exception should not be afforded recognition because it lacked the support of strong case authority and was too inconsistent with the general rule that the provocation must emanate from the deceased.[39]

Verbal provocation

[1.14] There is common law authority recognising that words alone in certain circumstances could amount to provocation in law.[40] In *Moffa v The Queen,*[41] the High Court agreed with the proposition in *Holmes v Director of Public Prosecutions*[42] that words alone could not amount to provocation unless they were of a most extreme and exceptional character.[43] As early as 1883, the New South Wales legislature abolished

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32 *R v Kenney* [1983] 2 VR 470 at 473; *R v Peisley* (1990) 54 A Crim R 42 at 50 (CCA NSW).

33 *R v Kenney* [1983] 2 VR 470 at 473 per Brooking J.

34 *R v Abebe* (2000) 1 VR 429 at 445 per Charles JA.

35 *R v Kenney* [1983] 2 VR 470 at 472 per Brooking J.

36 *R v Scriva (No 2)* [1951] VLR 298; *R v Fricker* (1986) 42 SASR 436 at 448 per Zelling J.

37 *R v Gardner* (1989) 42 A Crim R 279 (CCA Vic) and criticized in *R v Abebe* (2000) 1 VR 429 at 445 per Charles JA.

38 NSWLRC Report 83, paras 2.92 to 2.100. Proposed s 23(2)(a)(iv) and (v).

39 NSWLRC Report 83, p 57, note 126.

40 *Moffa v The Queen* (1977) 138 CLR 601 (HCA); *R v Webb (*1977) 16 SASR 309; *R v Dutton* (1979) 21 SASR 356; *R v R* (1981) 4 A Crim R 168 at 131 per King CJ (CCA SA).

41 (1977) 138 CLR 601 (HCA).

42 [1946] AC 588 at 600.

43 For a recent reaffirmation of this ruling, see *R v Kumar* (2002) 5 VR 193.

the rule prevailing at the time under English common law that insulting words could not amount to provocation.[44] The present s 23(2)(a) of the *Crimes Act* (NSW) refers to "any conduct of the deceased (including grossly insulting words or gestures)". The adjective "grossly" merely reflects the common law pronouncement in *Holmes* and *Moffa* that the words have to be sufficiently violent or extreme to constitute operative provocation.

Self-induced provocation

[1.15] It is a well established common law rule that the defence of provocation will be denied to a person who had sought the provocation as an excuse to kill or harm the deceased.[45] In such a case, the accused has not really killed as a result of loss of self-control. This rule was formerly contained in a proviso to s 23 of the *Crimes Act* (NSW) which stated that the jury must find that "such provocation [as is relied upon by the accused] was not intentionally caused by any word or act on the part of the accused."[46] In *Parker v The Queen*, the High Court regarded this proviso as "merely a repetition of the old common law rule that a contrived provocation will not suffice."[47] Regrettably, the proviso was removed from the present version of s 23 when it was amended in 1982. The section now requires the accused to have been "induced by any conduct of the deceased" to lose his or her self-control. Conceivably, where the accused had sought the provocation, the loss of self-control would have been induced by the conduct of the accused and not by that of the deceased. The meaning of this phrase has yet to be considered judicially. The New South Wales Law Reform Commission has recommended the inclusion of a clause which clearly states that the defence is unavailable where the accused had provoked another with a premeditated intention to kill or cause serious harm in response to any retaliation.[48]

[1.16] Cases of self-induced provocation are differentiated from those where the accused had merely risked being provoked in the sense of doing something which the accused knew might provoke the deceased into attacking him or her but which the accused had not deliberately done in order to solicit such a response from the deceased. The courts have adopted the Privy Council ruling in *Edwards v the Queen*[49] that the defence is unavailable to a person who had lost self-control in the face of reasonably predictable results of her or his own conduct.[50] In respect of s 23 of the *Crimes Act* (NSW), the previous criticism concerning the ambiguity over situations of self-induced provocation applies with even greater force in relation to cases of risking the provocation. The New South Wales Law Reform Commission basically supported the

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44 *Criminal Law Amendment Act* 1883 (NSW), s 370.

45 *R v Newman* [1948] VLR 61 at 66; *R v Allwood* (1975) 18 A Crim R 120 (CCA Vic).

46 Section 23(2)(a).

47 (1963) 111 CLR 610 at 658.

48 NSWLRC Report 83, para 2.109. See proposed s 23(5). The Commission also included "foresight of the likelihood of killing a person" because it is a type of mental state for murder in New South Wales: see para **[1.24]**.

49 [1973] AC 648. *Edwards* was an appeal from Hong Kong.

50 *R v Radford* (1985) 20 A Crim R 388 at 401 (CCA SA); *R v Allwood* (1975) 18 A Crim R 120 (CCA Vic). Cf. *R v Voukelatos* [1990] VR 1 at 19 which regarded *Edwards* as a case involving seeking, as opposed to risking, the provocation.

ruling in *Edwards* by proposing that the defence should be denied to an accused who had killed "in response to the *expected* retaliation of the deceased or of any other person."[51] In the words of the Commission:

> It may be that, as a question of fact, where it seems that the victim's reaction to the accused's conduct was predictable, the jury may determine that the accused really did foresee that reaction and consequently did not act as a result of a loss of self-control … [52]

Lawful provocation

[1.17] On one view, the common law does not require the deceased's provocative conduct to have been unlawful.[53] The opposing view contends that there should be a rule preventing the defence from applying to cases where the provocation constituted the act of someone who was lawfully discharging a legal duty.[54] The counter-argument is that a lawful arrest may be effected in an officious and excessive manner which could constitute operative provocation.[55] Section 23 of the *Crimes Act* (NSW) is silent on whether the provocative conduct must be unlawful. The New South Wales Law Reform Commission has lent its support to the view that the defence should not require the provocation to have been unlawful.[56] The Commission thought that any automatic exclusion of lawful conduct might lead to arbitrary or unjust results in individual cases. It acknowledged the concern that an accused might be permitted to rely on the defence of provocation where he or she had resisted lawful arrest. However, the Commission believed that it was unlikely that any undeserving cases involving lawful arrest will succeed under the Commission's proposal for the jury to be left to determine whether the accused warranted his or her offence being reduced from murder to manslaughter. [57]

Actual loss of self-control

[1.18] For the common law defence of provocation to succeed, the provocative conduct must have caused the accused to lose self-control during which time he or she committed the homicidal act. Section 23(2)(a) of the *Crimes Act* (NSW) reiterates this requirement without further elaboration.

Nature of loss of self-control

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[51] Proposed s 23(5).

[52] NSWLRC Report No 83, para 2.110.

[53] *R v R* (1981) 28 SASR 321 at 327 per King CJ.

[54] *R v R* (1981) 28 SASR 321 at 339 per Zelling J who did not confine his comment to lawful arrests but to all types of lawful acts.

[55] *R v Fry* (1992) 63 A Crim R 263 at 276 per White ACJ.

[56] NSWLRC Report 83, para 2.104. See proposed s 23(3)(f).

[57] NSWLRC Report 83, para 2.105. For the Commission's proposal regarding the jury's determination of the culpability of the accused, see para **[1.35]**.

[1.19] While the subjective condition of loss of self-control is clearly required, what is unclear is the nature of such a condition.[58] Due to "our [limited] understanding of consciousness and mental processes"[59] the courts have resorted to metaphor to express what constitutes a loss of self-control for the purpose of the defence of provocation. Examples of metaphors used are "blood boiling" and "reason losing its seat". Conceivably, the degree of lost self-control required for the defence is much higher than normal anger but its precise extent is uncertain. There is judicial authority suggesting that the extent of loss of self-control required comprises the mental state of a person who becomes so emotionally charged as to form a murderous intent. Thus, in *Chhay*, Gleeson CJ opined that "the extent of the loss of self-control that is involved is such a loss as resulted in the act or omission by the accused causing death, and as could have resulted in an ordinary person in the position of the accused forming an intent to kill or inflict grievous bodily harm upon the deceased."[60]

[1.20] The conventional view used to be that the loss of self-control experienced by an accused must be of very short duration. However, the courts have recently revised this stance in the light of research on human behaviour showing that some people, particularly battered women, might respond to provocation by suffering a "slow-burn" of anger, despair and fear which eventually erupts into the killing of the provoker. The following comment by Gleeson CJ in *Chhay* is instructive:

> The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least worthy of compassion.[61]

[1.21] The New South Wales Law Reform Commission initially considered incorporating a separate defining provision which spelt out the degree of actual loss of self-control required by the defence. The Commission eventually concluded that such a provision was unnecessary given the Commission's proposed replacement of the ordinary person test.[62] The replacement requires the jury to determine whether the accused should be excused for having so far lost self-control as to form the mental state for murder and to warrant reducing murder to manslaughter.[63] In the Commission's view, this question invariably involves the jury's determination of the appropriate degree of actual loss of self-control.

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58 See Reilly, A, "Loss of Self-Control in Provocation" (1997) 21 *Criminal Law Journal* 320 for a discussion of self-control in relation to the "narratives of excuse" in cases where the defence is pleaded.

59 *Chhay v R* (1994) 72 A Crim R 1 at 9 per Gleeson CJ (CCA NSW).

60 (1994) 72 A Crim R 1 at 13 per Gleeson CJ. See also *R v Croft* (1981) 3 A Crim R 307 at 321 per O'Brien J, and discussed in Yeo, S, *Unrestrained Killings and the Law* (Oxford University Press, New Delhi, 1998) pp 48-49.

61 (1994) 72 A Crim R 1 at 11 per Gleeson CJ.

62 NSWLRC Report No 83, para 2.122.

63 This test is discussed below in para **[1.35]**.

Characteristics of the accused relevant to actual loss of self-control

[1.22] The common law requires the jury to consider all personal characteristics of the accused which may have contributed to his or her losing self-control when deciding whether the accused actually lost self-control. Hence, ethnic origin,[64] temperament and intoxication[65] may all be relevant to this inquiry. Of course, these personal characteristics merely contribute to the reaction to the provocative conduct. It is the provocative conduct itself which remains the primary cause of loss of self-control.

Provocation and intentional killings

[1.23] At common law, the accused may have intended to kill or inflict grievous bodily harm on the deceased and still plead provocation. The defence is available so long as the murderous intention was formed as a result of the provocation. The defence will be unavailable where such intention was premeditated and formed prior to the provocative incident, not least because the accused cannot claim to have lost self-control due to the provocation. The distinction is between cases where the formation of a murderous intent arose from a loss of self-control in response to provocative conduct, and where such intention arose from emotions of hatred, resentment, fear or revenge.[66] In *Parker (No 2) v The Queen*,[67] the Privy Council had to interpret the former s 23(2)(c) of the *Crimes Act* (NSW) which excluded homicidal acts committed "without intent to take life". It held that the phrase referred to premeditated intent only. The current s 23(2)(c) clearly states that there is no rule of law which negatives provocation if the homicidal act was committed with intent to take life or inflict grievous bodily harm.

[1.24] The definition of murder appearing in s 18(1)(a) of the *Crimes Act* (NSW) provides that the mental state for that offence can be an intention to kill, an intention to inflict grievous bodily harm, or reckless indifference to human life. The last type of mental state for murder has been judicially interpreted as constituting foresight of the likelihood of killing any person.[68] Only the first two types of mental states are mentioned in s 23(2)(c) of the *Crimes Act* (NSW). The revised s 23 proposed by the New South Wales Law Reform Commission rectifies this anomaly by adding such foresight of the likelihood of killing a person to the formulation.[69]

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64 *R v Dincer* [1983] VR 460.

65 *R v Cooke* (1985) 39 SASR 225. The defence would be denied if the loss of self-control was the result of intoxication rather than provocation: see *R v Perks* (1986) 41 SASR 335 at 340-344 per White J.

66 *Chhay v R* (1994) 72 A Crim R 1 at 9 per Gleeson CJ.

67 (1964) 111 CLR 665 (PC).

68 *Royall v The Queen* (1990) 172 CLR 378 at 431 per Toohey and Gaudron JJ (HCA).

69 NSWLRC Report 83, para 2.109. See proposed s 23(5).

The 'ordinary person'[70] test

[1.25] Both the common law and statutory formulations of the defence require that, in addition to an accused having to lose self-control as a result of provocation, an ordinary person in the same or similar circumstances could likewise have lost self-control and formed the mental state required for murder. For instance, s 23(2)(b) of the *Crimes Act* (NSW) leaves the common law objective test basically intact by providing that the provocation "was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon the deceased." Since the provision does not elaborate further upon the concept of "an ordinary person" or the meaning of the phrase "in the position of the accused", it has been left to the courts to do so.

The role of the objective test

[1.26] The primary reason for having this test is that the law of provocation "obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life."[71] A necessary consequence of this compromise is the requirement, to some degree at least, of objectivity. That objectivity is cast in terms of requiring the accused to have complied with "an objective and uniform standard of the minimum powers of self-control"[72] of members of the society to which he or she belongs.

Characteristics of the 'ordinary person'

[1.27] Although the ordinary person test involves an objective evaluation of an accused's perception of and response to the provocation, the test also has a subjective component. The leading case authority on this matter is the High Court case of *Stingel v The Queen*[73] which ruled that certain personal characteristics of the accused could be attributed to the ordinary person depending on the function served by such attribution. The function could be to assess the gravity of the provocation offered to the accused, or to assess the power of self-control expected of an ordinary person. In respect of the first function, all of the accused's personal characteristics which have a bearing on the gravity of the provocation will be recognised. Relevant characteristics may include age, sex, ethnicity, physical features, personal attributes, mental states, personal relationships

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[70] The Australian courts prefer this term to the "reasonable man" used in the English law of provocation because "ordinary person" points to the fact that the concept is brought into the defence of provocation "for the purpose of denying the benefits of it, not to all those who react unreasonably to provocation, but only to those whose reactions show a lack of self-control falling outside the ordinary or common range of human temperaments.": *Kearnan v R* (unreported, Tasmanian Court of Criminal Appeal, 2 August 1968) per Neasey J and cited with approval in *Stingel v The Queen* (1990) 171 CLR 312 at 328-329 (HCA).

[71] *Johnson v The Queen* (1976) 136 CLR 619 at 656 per Gibbs J (HCA).

[72] *Stingel v The Queen* (1990) 171 CLR 312 at 327 (HCA).

[73] *Ibid*. The case was an appeal from Tasmania and involved the interpretation of s 160 of the *Criminal Code Act* 1924 (Tas) which is the provision on provocation. The High Court stated that its pronouncements on the ordinary person test in this case were equally pertinent to the common law. Interestingly, the Tasmanian legislature repealed s 160 in 2003, making Tasmania the first Australian state to have done so.

and past history.[74] For the second function, only the accused's age (in the sense of youthful immaturity) will be attributed to the ordinary person.[75]

[1.28] Difficulties may arise where the particular characteristic relates to both the gravity of the provocation and the capacity for self-control.[76] For example, a person suffering mental illness may have killed in response to taunts directed at his or her illness. The accused's mental illness will clearly be taken into account when assessing the gravity of the provocation but it is doubtful whether the illness will also be recognised when assessing the capacity for self-control. This follows from the High Court's refusal in *Masciantonio* to attribute the ordinary person with the accused's ethnicity in relation to the capacity for self-control despite the accused's argument that he possessed the capacity for self-control found among ordinary members of his ethnic community.[77]

[1.29] On the issue of ethnicity affecting the power of self-control of an ordinary person, McHugh J in his dissenting judgment in the High Court case of *Masciantonio* thought that it should be recognised alongside age. He reasoned that:

> unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.[78]

In its recent issues paper on defences to homicide, the Victorian Law Reform Commission agreed with McHugh J when it stated that "where minority groups are not adequately represented either on juries or as judges, objective standards may be determined exclusively by the values of the dominant culture."[79] The Commission said that it would seek ways to negotiate the difficulty of applying the objective test fairly in Australia's multicultural and heterogeneous society.

Criticisms of the test

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74 *Masciantonio v The Queen* (1995) 183 CLR 58 at 67 per Brennan, Deane, Dawson and Gaudron JJ (HCA); *R v Curzon* [2000] 1 VR 416.

75 *Stingel v The Queen* (1990) 171 CLR 312 at 327 (HCA) reaffirmed in *Masciantonio v The Queen* (1995) 183 CLR 58 at 66 per Brennan, Deane, Dawson and Gaudron JJ (HCA) and *Green v The Queen* (1997) 191 CLR 334 (HCA) which applied the ruling in *Stingel* to s 23 of the *Crimes Act* (NSW).

76 Cf. *R v Mogg* (2000) 112 A Crim R 417 (CCA Qld) where the accused's age (18 years) was held to be relevant in determining both the gravity of the provocation upon him and whether the provocation was sufficient to cause an ordinary 18 year old to lose self-control and kill the deceased.

77 (1995) 183 CLR 58 at 66-67 and applied in *R v Mankotia* (2001) 120 A Crim R 392 (CCA NSW).

78 (1995) 183 CLR 58 at 74.

79 Law Reform Commission of Victoria, *Issues Paper, Defences to Homicide* (LRCV, Melbourne, 2002), para 6.27.

[1.30] The ordinary person test has been criticised for being out of step with human reality. The following comment by Murphy J in the High Court case of *Moffa* is worth citing in full:

> The objective test is not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances … The same considerations apply to cultural sub-groups such as migrants. The objective test should not be modified by establishing different standards for different groups in society. This would result in unequal treatment … The objective test should be discarded. It has no place in a rational criminal jurisprudence.[80]

Murphy J's call for the objective test to be replaced by a purely subjective test of actual loss of self-control has the support of two Australian law reform bodies.[81] However, the objective test has continued to receive strong judicial and legislative support in all the Australian jurisdictions possessing the defence of provocation.

[1.31] The distinction drawn by the law between personal characteristics affecting the gravity of the provocation and the power of self-control has been criticised for running counter to human reality.[82] Take, for example, the case of a sexually impotent man killing a prostitute who had taunted him about his impotency.[83] The law permits the jury to consider the accused's sexual impotency for the purpose of assessing the gravity of the deceased's taunts. However, the law will disallow the jury from considering any personality trait of the accused occasioned by his having grown up with the knowledge of such a physical disability. This treatment of the accused's personality is contrary to the opinion of behavioural scientists that an individual's personality must be taken as a whole and cannot be dissected into the way he or she would *view* some provocative conduct and the way he or she would *respond* emotionally to that conduct..[84]

[1.32] In the High Court case of *Masciantonio*, McHugh J accepted the above criticism but thought the inconsistency perpetrated by the distinction could only be removed by

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80 (1977) 138 CLR 601 at 625-626 (HCA). This passage was expressly relied on by the Irish Court of Appeal in *The People v MacEoin* (1978) 112 ITLR 53 to abrogate the objective test.

81 The Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law* (Government Printer, Adelaide, 1977) and the Law Reform Commissioner, Victoria, Report No 12, *Provocation and Diminished Responsibility as Defences to Murder* (LRCV, Melbourne, 1982).

82 Yeo, S, "Power of Self-control in Provocation and Automatism" (1992) 14 *Sydney Law Review* 3 at 7.

83 These were the facts of *Bedder v Director of Public Prosecutions* [1954] 2 All ER 801 (HL).

84 Brett, P, "The physiology of provocation" (1970) *Criminal Law Review* 634.

abolishing the ordinary person test.[85] In his view, the 'ordinary person' standard would become meaningless if it incorporated the personal characteristics of the accused both in relation to the gravity of the provocation and the power of self-control. McHugh J was not prepared to do so since it would effectively abolish the objective test which, he observed, was too firmly entrenched in the common law to be excised by judicial decision.[86]

[1.33] Reverting to the accused's personal characteristics affecting the gravity of the provocation, it may be questioned whether the law really makes no exceptions to the types of characteristics which might be so recognised. Arguably, the defence of provocation should be denied to members of a cultural sub-group which promotes the use of violence against those who disagree with or are disagreeable to them. Such groups may be regarded as the present-day equivalents of the dueling sub-culture which the law afforded a measure of indulgence to in earlier times but completely frowned upon by the nineteenth century. The closest the High Court has come to considering this issue was in *Green v The Queen*,[87] a case involving homophobic violence against the deceased who had made homosexual advances towards the accused. Kirby J quoted a statement from a governmental discussion paper that a murderous reaction towards non-violent homosexual advance "should not be regarded as ordinary behaviour but as an exceptional characteristic of the accused."[88] Kirby J went on to hold that:

> For the law to accept that a non-violent sexual advance, without more, by a man to a man could induce in an ordinary person such a reduction in self-control as to occasion the formation of an intent to kill, or to inflict grievous bodily harm, would sit ill with contemporary legal, educative, and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear.[89]

[1.34] The New South Wales Law Reform Commission on provocation considered several options to replace the ordinary person test currently existing under Australian law. It rejected a purely subjective test on the ground that such a test prevented the jury from evaluating the blameworthiness of the accused, and that it may be unduly lenient to permit every case of unlawful homicide occasioned by loss of self-control to be reduced to manslaughter.[90] The Commission also rejected a proposal to expand the ordinary person test to permit consideration of sex and ethnicity on the issue of self-control.[91] The Commission noted the uncertainty of whether members of one group actually have

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85 (1995) 183 CLR 58 at 72-73 per Brennan, Deane, Dawson and Gaudron JJ (HCA).

86 *Ibid*, at 73.

87 (1997) 191 CLR 334 (HCA).

88 New South Wales Attorney-General's Department, Discussion Paper, *Review of the 'Homosexual Advance Defence'* (Sydney, 1996), para 57.

89 (1997) 191 CLR 334 at 408. See further De-Pasquale, S, "Provocation and the homosexual advance defence: the deployment of culture as a defence strategy" (2002) 26 *Melbourne University Law Review* 110.

90 NSWLRC Report 83, para 2.77.

91 NSWLRC Report 83, paras 2.66 to 2.69.

a lower threshold for exercising self-control than other groups and that such an assertion would result in speculation and ill-informed stereotyping.[92] The Commission also questioned permitting the outcome of a plea of provocation to depend on whether violent loss of self-control was more prevalent among members of an accused's sex or ethnic group. Furthermore, the Commission thought that the law should not be seen to apply different standards of criminal behaviour to different groups in society by measuring blameworthiness according to the accused's sex or ethnicity. The Commission considered a further proposal which was for the accused's sex and ethnicity to affect the likely response of the ordinary person after losing self-control.[93] While finding this proposal preferable to the one attributing ethnicity and/or gender to the power of self-control, the Commission thought that it relied on artificial and subtle distinctions which were unworkable practice.

[1.35] Ultimately, the New South Wales Law Reform Commission proposed replacing the ordinary person test with a subjective test combined with the application of community standards of blameworthiness.[94] Under this proposal, after establishing that the accused had actually lost self-control to the extent of forming the mental state for murder, the jury will be required to make a value judgment about the accused's blameworthiness and whether he or she deserves to be convicted of the lesser offence of manslaughter. In its deliberation, the jury may take into account all of the accused's personal characteristics and circumstances.[95]

[1.36] The Commission specifically considered the impact of its proposal on cases where the accused was intoxicated, noting that under the present law of provocation the ordinary person is deemed to have the powers of self-control of an ordinary sober person.[96] The Commission acknowledged that its proposed excision of the ordinary person test has the potential to widen the scope of the defence to cover people whose powers of self-control were weakened by alcohol or drugs.[97] To prevent this, the Commission devised a specific provision which stipulates that self-induced intoxication is to be disregarded for the purpose of assessing the accused's claim of provocation.[98]

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92 See also para **[2.18]**.

93 NSWLRC Report 83, paras 2.70 to 2.72.

94 NSWLRC Report 83, paras 2.81. See proposed s 23(2)(b). The Commission reached this conclusion after noting various criticisms of the test: see paras 2.50 to 2.58.

95 NSWLRC Report 83, paras 2.78 to 2.80. The Commission acknowledged that the accused's mental impairment would be included and this would create an overlap between the defences of provocation and diminished responsibility. For the Commission's response to this overlap, see para **[3.27]**.

96 *R v Croft* [1981] 1 NSWLR 126.

97 NSWLRC Report 83, para 2.152.

98 Proposed s 23(4). The Commission also justified this specific provision on the ground that it achieved consistency with the legislative policy on self-induced intoxication expressed in Part 11A of the *Crimes Act* 1900 (NSW). Part 11A was introduced in 1996 and basically adopts the English law on intoxication pronounced in *Director of Public Prosecutions v Majewski* [1977] AC 443 (HL). For a critique of the NSW legislation, see Tolmie, J, "Intoxication and criminal liability in New South Wales: A Random Patchwork?" (1999) 23 *Criminal Law Journal* 218.

The provision also states that a mistaken belief resulting from self-induced intoxication that some provocative conduct had occurred, must also be disregarded.[99]

[1.37] The Commission believed that its reformulation of the objective test looked more realistically at cases involving domestic homicide particularly where women had killed their battering partners. The Commission observed that its reformulated test would enable the jury to take into account all factors which might affect a female defendant's power of self-control, including a long history of abuse.[100] In particular, the Commission noted that its reformulation would recognise the impaired powers of self-control of battered women whereas the "ordinary" powers of self-control under the current objective test would not.

[1.38] The Commission acknowledged that its reformulated test involved the risk of jurors being wrongly influenced by prejudice or by ignorance but argued that such risk was inherent in the jury system itself.[101] The Commission thought that its test had the decisive advantages of being clearer and easier to apply than the ordinary person test, avoided the complexity generated by the ordinary person test, and focused attention on the principal question of whether the accused had so far lost self-control as to warrant the reduction of murder to manslaughter.[102] In addition, the Commission noted that it had recommended a similar approach in respect of diminished responsibility, a closely related partial defence to murder recognised under New South Wales law.[103]

The response to the provocation

[1.39] The accused's response to the provocation has been the subject of several requirements aimed at ensuring that the accused deserves to have his or her offence reduced from murder to manslaughter. First, there used to be a requirement that the accused must have reacted suddenly in the sense of losing his or her self-control and killing the provoker very soon after the provocative incident. Another requirement was that the degree of retaliation had to be roughly commensurate with the degree of provocation in order to prevent trivial provocation from excusing a retaliatory act of killing. A third requirement evaluated the mode of killing, that is the manner in which the victim was killed, in order to deny the defence of provocation where a person had killed through acts of inexcusable cruelty or savagery.

Suddenness of the response

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99 This reinforced the proposed s 23(2)(a)(ii) that the accused's belief as to the provocation must be based on reasonable grounds: see para **[1.13]**.

100 NSWLRC Report 83, para 2.144.

101 NSWLRC Report 83, para 2.83.

102 NSWLRC Report 83, para 2.83.

103 NSWLRC Report 82, recommendation 4. See further paras **[3.18]** and **[3.33]**.

[1.40] This aspect of the defence is integrally connected with the nature of actual loss of self-control. It was noted earlier that the law no longer requires the loss of self-control to have occurred within a short duration after the last provocative incident.[104] In line with this, the common law does not insist that the accused must have committed the homicidal act very soon after the last provocative incident or immediately upon losing his or her self-control.[105] For instance, in *R v R*,[106] the South Australian Court of Criminal Appeal held that the defence of provocation was open to a battered wife even though there was an interval of over twenty minutes during which time her husband was asleep before she killed him. Section 23(3)(b) of the *Crimes Act* (NSW) incorporates this liberal approach by providing that "there is no rule of law that provocation is negatived if the act or omission causing death was not an act done or omitted suddenly." Hence, the provision expressly envisages that there may be cases where the defence could succeed even where a lengthy interval existed between the time when an accused lost self-control and when he or she performed the homicidal act. Of course, the longer the time interval, the harder it may be for an accused to successfully raise the defence, and the easier it will be for the prosecution to prove that the accused's killing was a premeditated act of revenge and not a result of lost self-control.[107]

The reasonable retaliation rule

[1.41] The common law used to subscribe to the rule laid down in *Mancini v Director of Public Prosecutions* that "the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter."[108] However, the courts have now relegated the rule to a factor which the jury may consider when determining whether an ordinary person could have so lost self-control as to form a murderous intent.[109] Section 23(3)(a) of the *Crimes Act* (NSW) expressly rejects the reasonable retaliation rule by providing that:

> There is no rule of law that provocation is negatived if … there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission.

The provision further omits all references to the nature of the retaliation in its formulation of the ordinary person test. This is achieved through s 23(2)(b) which requires the jury to consider whether the conduct of the deceased "could have induced the ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased." While this provision achieves its purpose, it has the unfortunate effect of doing away

104 See paras **[1.8]** and **[1.9]**.

105 *Parker (No 2) v The Queen* ((1963) 111 CLR 610 at 630 per Dixon CJ (HCA).

106 (1981) 28 SASR 321. See also *Chhay v R* (1994) 72 A Crim R 1, (CCA NSW).

107 *Chhay v R* (1994) 72 A Crim R 1 at 13 per Gleeson CJ (CCA NSW).

108 [1942] AC 1 at 9 per Viscount Simon LC (HL).

109 *Johnson v The Queen* (1976) 136 CLR 619 (HCA).

with the rule relating to the mode of killing which is distinct from the reasonable retaliation rule.

The rule concerning the mode of killing

[1.42] The Australian courts had, until recently, unreservedly adopted Viscount Simon's ruling in *Holmes* that the jury must form the view that an ordinary person "so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces death."[110] However, in *Masciantonio*, a majority of the High Court said:

> … the question whether an ordinary person could form an intention to kill or do grievous bodily harm is of greater significance than the question whether an ordinary person could adopt the means adopted by the accused to carry out the intention.[111]

It is unlikely that the High Court in *Masciantonio* meant to completely remove the rule pertaining to the mode of killing. At most, the case stands for the proposition that the accused's mode of killing is of lesser significance than the need for an ordinary person to have formed a murderous intent. But the mode of killing continues to be given significance.

[1.43] Section 23 of the *Crimes Act* (NSW) has done away with the moral relevance of the manner of the accused's physical response to the provocation. All that matters is whether the provocation was sufficient to induce an ordinary person to have so far lost self-control as to have formed a murderous intent.[112] The new provision proposed by the New South Wales Law Reform Commission is to the same effect. While the ordinary person test is excised from s 23, the Commission's proposal continues to focus on the subject of murderous intent and says nothing about the mode of killing.[113]

[1.44] It has been submitted that the moral evaluation of the accused's mode of killing inevitably informs the jury as to whether an ordinary person might have reacted likewise when deprived of self-control, and the legislative abrogation of this evaluation unduly undermines the moral underpinnings of the defence.[114] In the words of James Fitzjames Stephen:

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110 [1946] AC 588 at 597 (HCA) and approved of in *Moffa v The Queen* (1977) 138 CLR 601 at 613 (HCA) and *Stingel v The Queen* (1990) 171 CLR 312 at 325 (HCA).

111 (1995) 183 CLR 58 at 69 per Brennan, Deane, Dawson and Gaudron JJ. In support of this ruling, the majority relied on a statement by Barwick CJ in *Johnson* (1976) 136 CLR 619 at 639 that "it is the induced intent to kill rather than the induced fatal act which is the critical consideration." McHugh J alone (at 611) gave unqualified support to the *Holmes* ruling.

112 Section 23(2)(b).

113 Proposed s 23(2)(b).

114 Yeo, above, note 60, p 111.

> The moral character of homicide must be judged of principally by the extent to which the circumstances of the case show, on the one hand, brutal ferocity, whether called into actions suddenly or otherwise, or on the other, inability to control natural anger excited by serious cause.[115]

On this view, the defence should be denied to a parent trampling his child to death; a person who had electrocuted his provoker by placing live electric wires into her mouth[116]; or a husband who had stabbed his wife forty-eight times with a long bladed kitchen knife including eight times in the heart.[117]

Procedural and evidentiary matters

Onus and standard of proof

[1.45] The prosecution bears the onus of negating provocation beyond a reasonable doubt.[118] Section 23(4) of the *Crimes Act* (NSW) expressly adopts this position. The prosecution could discharge its onus by disproving the existence of the provocative conduct or establishing that the accused had formed the murderous intent independently of the provocation.[119] The prosecution could also show that the provocation, if it existed, was insufficient to deprive an ordinary person of self-control to the extent of causing him or her to form a murderous intent.[120] The question here is whether the ordinary person *could* have done so.[121] To achieve this, the prosecution must satisfy the jury beyond a reasonable doubt that an ordinary person *would not* have formed such an intention.[122]

[1.46] The courts have acknowledged that it is notoriously difficult to explain to a jury that provocation is not an affirmative defence but something which the prosecution must negate. One approach is for a judge to direct the jury that the prosecution must prove beyond reasonable doubt either that the accused did not lose self-control or that an ordinary person would not have done so. Another is to tell the jury that they must not convict the accused if there is a reasonable possibility both that the accused lost control and that an ordinary person might have done so.[123]

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115 *A History of the Criminal Law of England, Vol III* (Macmillan, London, 1883), p 171.

116 *R v Clarke* [1991] Crim LR 383.

117 *R v Parsons* (2000) 1 VR 161 at 166-167 where Brooking JA said that "to hold that provocation arose in this case would be to encourage savagery at the expense of civilised behaviour."

118 *Moffa v The Queen* (1977) 138 CLR 601 at 609 per Barwick CJ (HCA); *R v Lilley* (1983) 12 A Crim R 335 at 339 (CCA Vic).

119 *Parker (No 2) v The Queen* (1964) 111 CLR 665 at 681-682 per Lord Morris (PC).

120 *Johnson v The Queen* (1976) 136 CLR 619 at 641 per Barwick CJ (HCA).

121 *R v Dincer* [1983] 1 VR 460 at 466-468 per Lush J; *R v Palazoff* (1986) 43 SASR 99 at 108 per Cox J.

122 *R v Shea (No 2)* (1990) 48 A Crim R 455 at 462 per Phillips J (CCA Vic).

123 *R v Anderson* (1997) 94 A Crim R 335 (CCA Vic).

The role of judge and jury

[1.47] As a preliminary matter the trial judge has to decide as a question of law whether, on the version of events most favourable to the accused as suggested by the evidence, the jury might fail to be satisfied beyond a reasonable doubt that the killing was unprovoked. Only if the judge answers this question in the affirmative can the defence be left to the jury.[124] Whether or not provocation is relied on by the defence, the judge has a duty to leave the issue of provocation to the jury if, at the end of the trial, there is evidence suggesting that the killing may have occurred while the accused was deprived of self-control.[125] Where there is evidence to support a finding that a killing may have been provoked, the trial judge has a duty to put the issue to the jury regardless of objections by the defence that to do so will damage the defences relied upon by the accused of self-defence and automatism.[126] While the trial judge is empowered to decline to leave provocation to the jury because he or she regards the evidence as incapable of satisfying the ordinary person test, this power should be exercised with caution.[127]

[1.48] What amounts to actual loss of self-control and whether the accused had experienced it are matters of fact for the jury. In particular, the judge must not direct the jury to regard the proportionality of the force to the provocation offered when determining whether the accused had actually lost his or her power of self-control.[128] Furthermore, it is for the jury, and not for the judge, to decide whether the provocation was sufficient to deprive an ordinary person of the power of self-control to the extent of forming a murderous intent.[129]

The gendered nature of provocation

[1.49] Many elements of the defence of provocation have developed in response to patterns of male aggression. Consequently, the defence has been criticised for operating primarily to excuse male anger and violence toward women. Additionally, the defence may be biased against female defendants because it was not designed for them. Lately, the courts and legislatures have sought to redress this by removing the requirement of suddenness as well as the need for a triggering incident, recognising cumulative provocation, and admitting expert evidence of battered woman syndrome to inform juries of the heightened perception of danger and helplessness of these women.[130] These

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124 *Stingel v The Queen* (1990) 171 CLR 312 at 334 (HCA); *Masciantonio v The Queen* (1995) 183 CLR 58 at 67-68 (HCA); *R v Tuncay* [1998] 2 VR 19.

125 *R v Da Costa* (1968) 118 CLR 186 at 214 per Owen J (HCA) citing *Holmes v Director of Public Prosecutions* [1946] AC 488 at 597 per Viscount Simon (HL).

126 *R v Thorpe* (1998) 102 A Crim R 278 (CCA Vic).

127 *Parker v The Queen* (1963) 111 CLR 610 at 616 per Dixon CJ (HCA); *Stingel v The Queen* (1990) 171 CLR 312 at 334 (HCA); *R v Parsons* [2000] 1 VR 161.

128 *R v Petroff* (1980) 2 A Crim R 101 at 132 per Roden J (NSW CCA).

129 *Johnson v The Queen* (1976) 136 CLR 619 at 644 per Barwick CJ (HCA).

130 *R v Kontinnen and Runjanjic* (1991) 56 SASR 114 and affirmed in *Osland v The Queen* (1998) 73 ALJR 173 (HCA).

changes enable the defence to operate in favour of battered women whose anger had intensified rather than diminished with time. The changes also contextualise the provocative incident by reference to the history of long standing physical, mental and emotional abuse suffered by the female defendant at the hands of her batterer.

[1.50] These changes persuaded the Victorian Law Reform Commission to conclude that female patterns of behaviour are now sufficiently accommodated by the defence. The Commission drew support from an empirical study conducted in Victoria which suggested that the defence had not been working in a gender biased way. [131] Similarly, the New South Wales Law Reform Commission referred to an empirical study conducted in New South Wales which suggested that the defence has not been biased against female accused nor unduly favoured male accused.[132] The Commission thought that its proposal to abolish the rule against hearsay provocation and to replace the ordinary person test with one based on community standards about culpability for murder or manslaughter took greater account of female accuseds' experiences than the current s 23.[133] The Commission acknowledged that its proposed reformulation of the defence, like the current s 23, hinges on the concept of actual loss of self-control which would deny the defence to women who killed in cold blood out of self-preservation or to save their children from further abuse.[134] The Commission noted the suggestion that the most appropriate defence for these women was self-defence and that the law governing that defence in New South Wales might not adequately account for women's experiences.[135] At this point, the Commission concluded by saying that a review of the plea of self-defence lay outside its terms of reference.[136]

[1.51] The Model Criminal Code Officers Committee has taken the opposite view, contending that the defence of provocation is so deeply male-oriented that the recent changes to the law have merely been cosmetic.[137] The Committee argued that the structure of the defence is inherently gender biased because it operates to partially *excuse* homicidal acts on the basis of *loss of self-control.*[138] This emphasis on excuse and loss of control stands in contrast to situations where the law recognises that homicidal acts are *justified* as a response to imminent *danger*. Women who kill in

131 The study suggested that, while the defence is used more frequently by men who kill women than women who kill men, the women who raise provocation appear to be more successful with the defence than the men.

132 NSWLRC Report 83, para 2.142. The study was by Donnelly, H, Cumines, S and Wilczynski, A, *Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study* (Judicial Commission of New South Wales, Monograph Series No 10, 1995), Chapter 5.

133 NSWLRC Report 83, para 2.144.

134 NSWLRC Report 83, paras 2.145 to 2.146.

135 The Commission was referring to the common law defence as pronounced in *Zecevic v Director of Public Prosecutions* (1987) 162 CLR 645 (HCA). The common law has since been replaced by statutory provisions: see para **[4.18]**.

136 NSWLRC Report 83, para 2.148.

137 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper, Draft Model Criminal Code: Chapter 5. Fatal Offences against the Person* (MCCOC/SCAG, Canberra, 1998), p 91. (Hereinafter referred to as "MCCOC").

138 MCCOC, p 93.

response to domestic violence do so out of fear of the danger posed by their male batterers rather than through loss of self-control. Consequently, in order to plead the defence of provocation, these women have to distort their experiences so as to fit the requirements of the defence. The Committee utilised the psychological theory of "battered woman syndrome" to support its view:

> The theory illustrates the unsatisfactory nature of provocation as presently formulated. The defendant, who in such cases often kills her partner after years of abuse, may adopt a method of killing that is undoubtedly premeditated, but is actuated by no less psychological stress and trauma than persons who kill in response to an immediate provocation. Any argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense.[139]

The Committee's view that the defence of provocation is gender biased and unjust was among a number of reasons which led it to recommend the abolition of the defence.[140] As against this view, some legal theorists contend that abolishing provocation would disadvantage women as "there is an attendant risk that more women who kill a chronically violent spouse will be convicted of murder and sentenced accordingly."[141]

[1.52] In apparent support of the view of the Model Criminal Code Officers Committee, the Tasmanian legislature abolished the defence of provocation to murder in May 2003.[142] The legislature believed that provocation could be adequately considered as a factor in sentencing since the mandatory sentence of life imprisonment for murder had been removed in that jurisdiction. Among the reasons given by the Minister for Justice for abolishing the defence was the following:

> [T]he defence of provocation is gender biased and unjust. The suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome'. While Australian courts and laws have not been sensitive to this issue, it is better to abolish the defence than to try to make a fictitious attempt to distort its operation to accommodate the gender-behavioural differences.[143]

Reforming the law

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139 MCCOC, p 91.

140 MCCOC, p 87.

141 Brown, H, "Provocation as a Defence to Murder: To Abolish or Reform" (1999) 12 *Australian Feminist Law Journal* 137 at 138.

142 By virtue of the *Criminal Code Amendment (Abolition of Defence of Provocation) Act* 2003 which repealed s 160 of the *Criminal Code Act* 1924 (Tas), the provision on provocation.

143 Tasmanian Parliament, House of Representatives *Hansard*, 20th March 2003, p 60.

[1.53] The arguments for and against retaining a defence of provocation have been fully canvassed elsewhere. [144] On the assumption that the defence should be retained, a primary aim of this paper has been to determine whether there exists an Australian formulation of the defence which is conceptually sound, operates justly, is acceptable to the community generally, and is workable in practice. It is submitted that the revised provision proposed by the New South Wales Law Reform Commission largely meets these criteria, and could serve as a sound model for the criminal law of England and Wales. There appear to be only two concerns about the proposed section. The first is whether a rule pertaining to the mode of killing should be incorporated into the provision.[145] The second is whether the proposed test of community standards is too vague and does not provide sufficient guidance to the jury in their determination of whether or not to reduce the offence to manslaughter.[146]

[1.54] The revised s 23 of the *Crimes Act* (NSW) proposed by the New South Wales Law Reform Commission reads as follows:

1. A person who would otherwise be guilty of murder shall not be guilty of murder but shall be guilty of manslaughter if that person committed the act or omission causing death under provocation.
2. For the purpose of subsection (1), a person commits an act or omission causing death under provocation if:
   (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by:
      (i) the conduct; or
      (ii) a belief of the accused (based on reasonable grounds) as to the existence of the conduct;

   of someone towards or affecting the accused, in circumstances where the accused kills:
      (iii) the person who offered the provocation; or
      (iv) the person believed on reasonable grounds to have offered the provocation; or
      (v) a third party when attempting to kill or injure the person who offered or was believed on reasonable grounds to have offered the provocation; and
   (b) the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as

144 See MCCOC, pp 87-101; NSWLRC Report 83, pp 22-31 with the Commission concluding in favour of retaining the defence in New South Wales.

145 See paras **[1.42]** to **[1.44]**. This could be done by adding the phrase "and to have performed the same or similar conduct as the accused did so" to the Commission's proposed s 23(2)(b) immediately after the words "human life".

146 For the Commission's reply to this concern, see NSWLRC Report 83, para [2.82].

to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.

(c) For the purpose of subsection 2(a), "conduct" includes grossly insulting words or gestures.

3. For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2) there is no rule of law that provocation is negatived if:

(a) the conduct of the deceased or of any other person did not occur immediately before the act or omission causing death;

(b) the conduct of the deceased or of any other person did not occur in the presence of the accused;

(c) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased or of any other person that induced the act or omission;

(d) the act or omission causing death was not an act done or omitted suddenly;

(e) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm; or

(f) the conduct of the deceased or of any other person was lawful.

4. Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of self-control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

"Self-induced intoxication" in this subsection has the same meaning as it does in s 428A[147] [of the *Crimes Act* 1900 (NSW)].

5. For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if that person provoked the deceased or any other person with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of killing any person in response to the expected retaliation of the deceased or of any other person.

6. Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond a reasonable

147 Section 428A defines "self-induced intoxication" as "any intoxication except intoxication that:
(a) is involuntary, or
(b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or
(c) results from the administration of a drug for which a prescription is required in accordance with the prescription of a medical practitioner, a person authorised under the *Nurses Act 1991* to practise as a nurse practitioner, or dentist, or of a drug for which no prescription is required administered for the purpose, and in accordance with the dosage level recommended, in the manufacturer's instructions."

doubt that the act or omission causing death was not any act done or omitted under provocation.

7. The section does not exclude or limit any defence to a charge of murder, with the exception that no claim to the defence of provocation shall lie other than as provided by this section.

Chapter 2

The Indian Law of Provocation

Introduction

[2.1] The Indian Penal Code 1860 lends itself particularly well to comparative study with the English law because it was a carefully reasoned and creafted effort by leading English jurists of the day as to what the criminal law of England ought to have been.[1]

[2.2] The defence of provocation appears as Exception 1 to s 300 of the *Indian Penal Code*, that is, the provision defining the crime of murder. The Exception reads:

> Culpable homicide is not murder if the offender while deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of another person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> *Explanation:* Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

[2.3] In recent years, the courts have found it necessary to expand upon and clarify certain aspects of the Exception. Due to the English origins of the Code, the courts have often turned to English case authorities for instruction. However, they have charted their own courses whenever they perceive that the English law does not achieve justice, is not suited to the social conditions, or is inconsistent with the values and expectations of Indian society.

[2.4] The leading Indian case on provocation is the Supreme Court decision in *Nanavati v State*.[2] The court read the following propositions into the Exception:

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1 See the comment by Sir James Fitzjames Stephen quoted in Trevelyan, G.O, *The Life and Letters of Lord Macaulay* Vol 1 (Longmans, Green and Co, London, 1920), p 417. See further, Patra, AC, "An Historical Introduction to the Indian Penal Code" (1961) 3 *Journal of the Indian Law Institute* 351; Bose, V, "The Migration of the Common Law: India" (1960) 76 *Law Quarterly Review* 59.

(1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society to which the accused belongs, and placed in the situation in which the accused was placed, would be so provoked as to lose his self-control.

(2) In India, words [or][3] gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the [Exception] …

(3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.

(4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.[4]

Some of the concepts in these propositions were culled from English common law existing in 1962 when *Nanavati* was decided. Notably, there is the "reasonable man" test which does not appear on the face of the Exception. However, several other concepts were not part of the English common law at the time and, as we shall see, were progressive innovations of the Indian courts.

Provocative conduct

Suddenness of the provocation

[2.5] Despite the Exception requiring the provocation to be "sudden", the courts have taken a broad approach. The fourth proposition of the Supreme Court in *Nanavati* clearly expresses the law on the matter. The real question is whether the accused was still deprived of his or her power of self-control at the time of killing. Hence, there is no strict rule requiring the homicidal act to have immediately followed the provocation. Conversely, the longer the time interval between the provocative incident and the homicidal act, the more likely the accused killed due to premeditation or revenge.[5] However, there is no strict requirement that the time interval must have been short. Thus, there have been cases where the defence succeeded even though it had taken the accused a considerable period of time to find the victim and to kill him or her.[6] There do

2 AIR 1962 SC 605.

3 The original word is "and" which appears to be an oversight or typographical error. Earlier on (at 628), the court posed the issue as being one of "whether words or gestures unaccompanied by acts can amount to provocation."

4 AIR 1962 SC 605 at 630 per Subba Rao J, who delivered the judgment of the court.

5 *Nanavati v State* AIR 1962 SC 605 at 630 per Subba Rao J.

6 For example, see *Chanan Khan v Emperor* (1944) Cr LJ 595; *Abalu Das v Emperor* ILR 28 Cal 571 (1901).

not appear to be any reported cases of domestic homicides involving women killing their husbands under provocation.[7]

Cumulative provocation

[2.6] The courts have recognised this concept ever since the inception of the Code.[8] This is remarkable given that the English law at the time of the Code's promulgation restricted the provocative conduct to that which occurred immediately prior to the killing.[9] The third proposition of the Supreme Court in *Nanavati* merely reaffirmed this long standing position.

Hearsay provocation

[2.7] There are case authorities which recognise hearsay provocation provided the accused had reasonable grounds to believe that the provocation had actually occurred. For example, in the Punjab High Court case of *Gohra v Emperor*,[10] the court considered the English case of *R v Fisher*[11] where a father had killed a man whom he heard had sodomised his young son. It held that had the case been tried under the Indian Penal Code the defence of provocation would also have failed because the accused had sufficient time to cool. As for being informed of the act of sodomy, the court opined that this amounted to provocation because the accused had heard of it from several people and had received confirmation from the person who had actually witnessed the incident.

Indirect provocation

[2.8] The wording of the Exception does not require the provocation to have been directed at the accused. All the Exception states is that the accused must have killed while deprived of power of self-control caused by grave and sudden provocation. Accordingly, the defence is available to a person who was affected by provocative conduct which was aimed at someone else.[12]

Misdirected provocation

[2.9] The Exception does not require the provocation to have emanated from the deceased. The relevant wording of the Exception states that the defence is available where the accused "causes the death of another person by mistake or accident." This

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7 A likely explanation is that such cases are extremely rare due to the particular social, cultural, religious and gender-specific frameworks within which the inhabitants of India live and operate.

8 For example, see *Khogayi v Emperor* ILR (1879) 2 Mad 122; *Boya Munigadu v R* (1881) ILR 3 Mad 33; *Mani Pradhano v Empress* (1882) 1 Weir 306.

9 Stephen J.F, *Digest of the Criminal Law* (Macmillan, London, 3rd ed, 1883), Arts 224 and 225.

10 (1890) PR No 7 of 1890. See also *Chanan Khan v Emperor* (1944) Cr LJ 595.

11 (1837) 8 C & P 182.

12 *Emperor v Thirupathuran* AIR 1934 Mad 722; *Indreswar v State* (1981) Cr LJ 1887.

equates with the first two exceptions described in Chapter One to the Australian common law rule that the provocation must have emanated from the deceased.[13]

Verbal provocation

[2.10] It is well established under Indian law that words alone, whether in the form of insults or providing information such as a confession of adultery, can constitute provocation. The Supreme Court's second proposition in *Nanavati* simply reaffirmed a line of early Indian case authorities on the matter.[14]

Self-induced provocation

[2.11] The first proviso to the Exception expressly disallows the defence where the accused had sought the provocation as an excuse for killing or doing harm to any person. The Exception is however silent on cases where the accused had risked being provoked. There is Indian case authority which is closely similar in approach to that taken by the Privy Council in *Edwards v The Queen*.[15] In the Karnataka High Court case of *State v Kamalaksha*,[16] D (the accused) had visited the wife of V (the deceased) while V was at work and thereby risked provoking V. Upon discovering this occurrence, V confronted D and uttered the "most filthy abuse" at D for two hours and then attacked him with a knife. In these circumstances, the court was prepared to admit the defence of provocation.

Lawful provocation

[2.12] The Exception permits lawful conduct to amount to provocation apart from the instances specified in the second and third provisos to the Exception. The second proviso states that the defence is unavailable where the provocation comprised conduct performed by a public servant lawfully exercising his or her powers. It follows that legal acts performed in an illegal manner are not covered by the proviso and could constitute provocation.[17] The third proviso states that the defence is unavailable where the provocation comprised conduct involving the lawful exercise of the right of private defence.[18] Here again, the proviso does not cover cases where the deceased had not complied with the requirements of private defence specified by the Code.[19]

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13 See para **[1.12]**. The Indian law does not appear to support the third and fourth exceptions mentioned in the paragraph.

14 For example, *Din v Emperor* AIR 1934 Lah 600; *Girdhari Lal v Crown* (1940) 42 Pun LR 45.

15 [1973] AC 648 and discussed in para **[1.16]**.

16 (1978) Cr LJ 290.

17 Morgan, W and MacPherson, A, *The Indian Penal Code with Notes* (GC Hay and Co, London, 1861), pp 252-253.

18 The requirements of private defence are contained in ss 96-106 of the *Indian Penal Code*. For a discussion of some of these provisions, see paras **[4.23]** and **[4.24]**.

19 Gour, H.S, *Gour's Penal Law of India* Vol III (Law Publisher, Allahabad, 10th ed, 1983) p 2345.

Actual loss of self-control

Nature of actual loss of self-control

[2.13] There is case authority defining loss of self-control as rage or intense anger. In the Court of Criminal Appeal of Ceylon (now Sri Lanka) case of *Appuhamy v R*[20], Nagalingam SPJ said that:

> provocation may be said to be grave when it arouses violent anger or violent passion. Here 'violent anger' or 'violent passion' … is the equivalent of 'rage' … In fact the term 'violent' in these expressions means nothing more than intense or very strong.[21]

Nagalingam SPJ found support for this definition from the Code framers themselves who said that they "would not visit homicide committed in violent passion which had been suddenly provoked with the highest penalties of the law."[22]

Provocation and the mental states of murder

[2.14] The defence of provocation is regarded as an "Exception" to murder as defined in s 300 of the Indian Penal Code. This clearly means that the defence is available to an accused who possessed any of the types of mental states for murder prescribed in s 300. This accords with the proposal of the New South Wales Law Reform Commission that s 23 of the *Crimes Act* (NSW) should be amended to include the mental state of "reckless indifference to human life" which is recognised as a form of mental state for murder under s 18(1)(a) of the *Crimes Act* (NSW).[23]

The "reasonable man"[24] test

[2.15] The concept of a reasonable person losing self-control was not contemplated by framers of the Indian Penal Code.[25] When the Indian courts first began applying the concept found in the English law, they realised that a purely objective test would be inoperable and would create injustice if applied to a multi-cultural, multi-religious and multi-class structured society like the one in India. The first proposition of the Supreme Court in *Nanavati* is a good example of the way the courts have modified the purely objective test found in English law at the time. By placing the reasonable person in the "same class of society as the accused" and in the "situation in which the accused was

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20 (1952) 53 New LR 313. Exception 1 to s 294 of the Sri Lankan Penal Code is identical to Exception 1 to s 300 of the Indian Penal Code.

21 *Ibid*, at 316.

22 Macaulay T.B., MacLeod, J.M., Anderson, G.W. and Millett, F, *The Indian Penal Code as originally framed in 1837 with Notes*, Note M, Reprint (Higginbotham and Co, Madras, 1888), p.144.

23 See para **[1.24]**.

24 The Indian courts have borrowed this term from the English law instead of the "ordinary person" advocated by the Australian courts and legislators.

25 Para **[2.4]**.

placed", the court was contemplating that certain of the accused's personal characteristics and circumstances would have a bearing on the reasonable person test.

Characteristics of the "reasonable man"

[2.16] Like its Australian counterpart, the Indian test categorises the accused's personal characteristics and circumstances according to whether they affect the gravity of the provocation or the power of self-control of a reasonable person. Generally, the Indian law recognises all characteristics of the accused which are relevant to the gravity of the provocation provided the provocation was directed at the characteristic.[26] However, there are some judicial statements suggesting that the law will not recognise certain types of anti-social characteristics. One such statement is that:

> provocation … must … be capable of being considered grave, according to the norms and standards which govern the accused. … In every case, the test applied is an objective one in the sense that it must be capable of acceptance by reasonable men.[27]

Based on this statement, a jury is unlikely to accept, say, a leader of the Thugees (a subcultural criminal group) killing a subordinate for being disrespectful to him in breach of the group's code of conduct.

[2.17] The Indian courts have insisted that the reasonable person be held to a single standard of self-control save for a few limited exceptions. Like the Australian law, the courts have recognised youthful immaturity as capable of affecting the power of self-control of a reasonable person.[28] With regard to sex, there do not appear to be Indian cases directly on the point which suggests that the courts do not differentiate the capacity for self-control according to the accused's sex. However, the Indian courts have recognised that an accused's ethnic, cultural or social background can also influence the power of self-control of a reasonable person.[29] The level of self-control contemplated here is that of a whole class of normal people of a particular ethnic, cultural or social group.[30] Accordingly, the temperaments of individuals whose powers of self-control are regarded as abnormal within their own class or group will be excluded.

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26 See Yeo, S, *Unrestrained Killings and the Law* (Oxford University Press, New Delhi, 1998), p 87 for examples of personal characteristics which have been recognised for this purpose.

27 *Akhtar v State* AIR 1964 All 262 at 269 per Beg J.

28 *Nga Paw Yin v Emperor* AIR 1936 Rang 40; *State v Bhand Jusub Mamad* (1982) Cr LJ 1691.

29 For example, *Jamu Majhi v State* 1989 Cr LJ 753; *Atma Ram v State* (1967) Cr LJ 1697; *Madi Adma v State* (1969) 35 Cuttack LT 336. For a discussion of these and other cases, see Yeo, above, note 26, pp 89-91.

30 *Nanavati v State* AIR 1962 SC 605 at 630.

The viability of the test

[2.18] The attraction of the Indian law is that it fully appreciates that an accused's reaction to the provocation is not solely the result of the provocation being an affront to the accused's ethnic or cultural values but is also the result of her or his emotional and psychological disposition moulded by those values.[31] However, there are likely to be significant practical difficulties in the application of ethnicity in jurisdictions like Australia and England. Unlike the characteristic of age which triers of fact have personally experienced and observed, the ethnicity of a particular accused and the way it may affect her or his capacity for self-control may be far removed from their experiences. Consequently, expert witnesses would be required to inform the triers of fact on this issue, and these experts can, at best, only make generalisations about the ethnic or cultural variations in the capacity to exercise self-control. Furthermore, the evidence of these experts may have a measure of accuracy provided they are studying an essentially homogenous ethnic group living in relative isolation from other ethnic groups. This is still largely the situation in India where a multitude of communities continue to be rigidly separated from one another by caste, race, religion and socio-economic conditions. The same, however, cannot be said of recent migrants to Australia or England who would, as individuals, have undergone different degrees of assimilation into their host country. This would make it virtually impossible for experts to indicate, except in a speculative manner, the capacity for self-control of migrants.[32]

The response to the provocation

The reasonable retaliation rule

[2.19] The courts have not subscribed to the rule, asking instead only whether the provocation could have caused a reasonable person to lose self-control and to do what the accused did.[33] Thus, it has been held that the multiplicity of blows inflicted will not prevent the defence from succeeding. On the contrary, it may be evidence confirming that self-control was lost.[34]

The rule concerning the mode of killing

[2.20] While the Indian courts have not adopted the reasonable relationship rule, they have implemented a rule pertaining to the mode of killing. That rule requires the trier of fact "to consider whether a reasonable person placed in the same position as the accused was, would have reacted under that provocation in the manner in which the accused did."[35] Thus, the defence of provocation was denied to an accused who had beaten his

31 See para **[1.31]**.

32 This opinion was also expressed in the NSWLRC Report 83: see para **[1.34]**.

33 *Akhtar v State* AIR 1964 All 262; *Krishnan Nair v State* (1965) Kerala LT 150.

34 *State v Bhand Jusub Mamad* (1982) Cr LJ 1691; *Narbahadur Darjee v State* AIR 1965 Assam and Nagaland 89.

35 *Shyama Charan v State* AIR 1969 All 61 at 64 per Chanadra J. See also *Upendra Mahakud v State* (1985) Cr LJ 1767; *State v Kamalaksha* 1978 Cr LJ 290.

provoker severely and then severed his head,[36] and another accused who had used the broken end of a bottle to inflict numerous wounds on the victim's face and to then twist her neck so as to fracture the vertebra.[37]

A final observation

[2.21] From this brief survey, it may be contended that the Indian law of provocation was greatly advanced for its time. While the Indian defence of provocation may have originated from English common law, the courts modified it in ways which better reflect the human and social realities of the parties to provoked killings. Many of the rules devised by the Indian courts many years ago have only recently been implemented by the Australian and English courts. Indeed, some of these rules have still to become law in these other jurisdictions, such as the recognition of hearsay provocation. Had the Australian and English lawmakers made a practice of studying the Indian law, it is likely that many of these improvements to the law would have been implemented sooner.

36 *Yashin Sheikh v Empress* 12 WR (Cr) 68 (1869).

37 *Balasaheb v State* (1984) Cr LJ 1014.

Chapter 3

The Australian Law of Diminished Responsibility

Introduction

[3.1] Diminished responsibility is a partial defence to murder,[1] operating to reduce the offence committed by the accused to manslaughter. As its name suggests, the defence applies to a person who would otherwise be guilty of murder but, on account of some mental dysfunction, her or his criminal responsibility is diminished. The defence was introduced by legislation[2] into the Australian Capital Territory,[3] New South Wales,[4] Queensland[5] and the Northern Territory[6] because it was thought that such an accused should avoid the mandatory sentence of life imprisonment imposed at the time for murder. No other Australian jurisdiction recognises the defence.[7]

[3.2] The Australian Capital Territory formulation of the defence is as follows:

> Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged, the person was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.

This provision was derived from the *Crimes Act* 1900 (NSW) which, in turn, had adopted the provision appearing in the *Homicide Act* 1957 (UK).[8] The New South Wales provision was revised in 1997 and appears below.

[3.3] The Queensland formulation reads as follows:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute … murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of

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1 Including felony murder in New South Wales: see *R v Thompson* (1988) 36 A Crim R 223 (CCA NSW).

2 The defence originated from Scotland where it is a common law defence: see *HM Advocate v Savage* [1923] SLT 659 (HC); *HM Advocate v Braithwaite* [1945] SLT 209 (HC); *Carraher v HM Advocate* [1946] SLT 225 (HC).

3 *Crimes Act* 1900 (ACT), s 14, as inserted by the *Crimes (Amendment) No 2 Act* 1990 (ACT).

4 *Crimes Act* 1900 (NSW), s 23A as inserted by the *Crimes and Other Acts (Amendment) Act* 1974 (NSW).

5 *Criminal Code* 1899 (Qld), s 304A.

6 *Criminal Code* 1983 (NT), s 37.

7 Although such a defence is also recognised under s 13 of the *Defence Force Disciplinary Act* 1982 (Cth).

8 Section 2.

> mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

The Northern Territory defence is broadly similar to the Queensland provision.[9]

[3.4] The New South Wales formulation was amended in 1997[10] and is stated in full here because it will be frequently referred to in the ensuing discussion. Section 23A reads:

1. A person who would otherwise be guilty of murder is not to be convicted of murder if:
   (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and
   (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.
2. For the purposes of subsection (1)(b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.
3. If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced (within the meaning of section 428A[11]), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.
4. The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.
5. A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.
6. The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.

9 *Criminal Code Act* 1983 (NT), s 37.

10 Section 23A as amended by the *Crimes Amendment (Diminished Responsibility) Act* 1997 (NSW).

11 See para **[1.54]**, note 147.

7. If, on the trial of a person for murder, the person contends:

   (a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or

   (b) that the person is not liable to be convicted of murder by virtue of this section,

   evidence may be offered by the prosecution tending to prove the other of those contentions, and the court may give directions as to the stage of the proceedings at which that evidence may be offered.

8. In this section:

   underlying condition means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

[3.5] The above formulations of the defence, while not identical, are comparable insofar as they all require accused persons relying on the defence to prove that, at the time of the killing, they were operating under an abnormality of mind stemming from a specified cause which so substantially impaired their criminal responsibility as to warrant reducing the offence of murder to manslaughter.

Elements of the Defence

[3.6] The following three elements of the defence of diminished responsibility must be proven for it to succeed: (1) The accused must have been suffering from an abnormality of mind at the time when he or she did the act or omission causing death; (2) the abnormality of mind must have stemmed from a legally recognised cause; and (3) the abnormality must have substantially impaired the accused's criminal responsibility for the act or omission causing death. Furthermore, there must be appropriate links established by the evidence between these three elements of the defence.[12] For example, the abnormality of mind must have been the result of some legally recognised factor and not some other causal factor, and the impairment must have been "substantial" on account of the legally recognised factor alone.

Abnormality of mind

[3.7] The expression "abnormality of mind" appearing in the Australian Capital Territory provision (and previously the NSW provision) was borrowed directly from the English formulation of the defence. Since that formulation did not elaborate on the meaning of the expression, it was left to the English courts to do so. This was done by the Court of Appeal in *R v Byrne* which ruled that:

[12] *R v Tumanako* (1992) 64 A Crim R 149 at 159-161 per Badgery-Parker J (CCA NSW).

> "Abnormality of mind", which is to be contrasted with the time-honoured expression in the *M'Naghten* Rules 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man [sic] would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.[13]

Several inferences may be drawn from this judicial definition. The first is that the scope of the defence of diminished responsibility is wider than that of insanity under the *M'Naghten* Rules insofar as the former, unlike the latter, is not restricted to defects of reason (that is, understanding or cognition) but extends to volitional defects. Secondly, the degree of incapacity to understand the nature of acts and matters, or to judge between right and wrong is less severe for the defence of diminished responsibility compared to what is required by the Rules. A third inference is that so-called normal propensities such as anger, jealousy, temper and particular prejudices and attitudes will not be regarded by ordinary people as abnormal.[14] This relates directly with the earlier two inferences in that, before a person will be regarded as having a mind falling outside the bounds of normality, he or she must have manifested one or more of the designated incapacities in a substantial way. A fourth inference is that what constitutes an abnormality of mind is not within the province of clinical experts to decide, but for jurors representing ordinary people, to do so.[15] In line with this, the courts have refused to limit the defence to clinically recognised mental illnesses.

[3.8] Recent statutory formulations of the defence have incorporated the *Byrne* definition into their wording. The Queensland, Northern Territory and the latest New South Wales provisions are good examples of this. While these provisions use the expression "abnormality of mind" they, unlike the English provision, go on to explain that such a mental condition involves a substantial impairment of the capacity to understand events, judge the rightness or wrongness of one's conduct, or control one's conduct.

[3.9] More generally, any definition of abnormality must ensure mercy for the "harassed and incapable" and withhold it from the "callous and wicked".[16] It must distinguish mad from bad. This is pre-eminently a jury function. The concept does contain a policy element, to the extent that abnormal mental states associated with certain factors (such as drunkenness, so-called normal propensities such as jealousy, anger, temper, and particular prejudices and attitudes) are excluded as a matter of

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13 [1960] 2 QB 396 at 403 per Lord Parker CJ.

14 *R v Whitworth* [1989] 1 Qd R 437 at 445-446 per Thomas J.

15 *R v Rolph* [1962] Qd R 262 at 288 per Hanger J.

16 *R v Whitworth* [1989] 1 Qd R 437 at 447 per Thomas J.

policy.[17] It is always necessary to lay an evidentiary foundation for the defence by reference to a specific abnormal mental state defined in terms other than a bare propensity for anti-social behaviour or a lack of impulse control.[18] In Queensland it has been suggested that the test is whether the alleged abnormality of mind (or behaviour) was "definitely" beyond the limits marked out by varied types of people met day by day, taking account of the diversity of human behaviour and personality.[19] A more recent decision of the Queensland Mental Health Tribunal equates mental abnormality with such mental illnesses as are recognised by medical science generally or in the specialised field of psychiatry.[20]

Specified causes of the abnormality

[3.10] The Australian Capital Territory, Queensland and the former New South Wales provisions follow the English formulation by prescribing an exhaustive[21] list of causes of the abnormality of mind.[22] These are (1) an arrested or retarded development of the mind; (2) an inherent cause; and (3) induced by disease or injury.[23] Mental abnormality which is not due to any of these specified causal factors is not capable of supporting the defence of diminished responsibility. While these causal descriptors are loosely based on clinical science, they are subject to judicial interpretation. Thus, the descriptors are legal rather than clinical concepts although the determination as to whether a specific cause has been established is based on clinical evidence. Consequently, these descriptors have been the source of much uncertainly and complexity in practice.

[3.11] Arrested or retarded development of mind has been held not to be confined to organic disorders although it is uncertain whether it extends to personality disorders such as psychopathy.[24] This category of specified cause embraces the conditions of "natural infirmity" as used in s 27 of the Queensland code.[25]

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[17] *R v Whitworth* [1989] 1 Qd R 437 at 445–6 per Thomas J.

[18] Otherwise, as Thomas J said in *R v Whitworth* [1989] 1 Qd R 437 at 449: "an expert would be free to give a circular opinion by simply asserting that a "lack of impulse" control substantially impaired the capacity of the accused to control his actions, without backing it up by identifying a condition recognised by the discipline he professes."

[19] *R v Rolph* [1962] Qd R 262 at 288 per Hanger J.

[20] *R v Hinze* (1986) 24 A Crim R 185 at 187 per Vasta J (Mental Health Tribunal, Qld). The Tribunal rejected a defence based on 'reactive depression' associated with a state of distress because of the accused's plight or severe human unhappiness. *Hinze* is consistent with early Scottish cases which equated abnormality of mind with some form of mental disease, or at the very least, a state of mind "bordering on, though not amounting to, insanity.": *R v Savage* [1923] SLT 659 at 660–1, per Lord Alness.

[21] However, the wording of the provisions does not clearly require this as noted by Roden J, dissenting, in *R v Purdy* [1982] 2 NSWLR 964 at 967-968.

[22] *R v Whitworth* [1989] 1 Qd R 437 at 439 per Matthews J; *R v Purdy* [1982] 2 NSWLR 964 at 965 per Glass JA.

[23] For the origin of this list of causes and criticism of them, see E Griew, "The Future of Diminished Responsibility" [1988] *Criminal Law Review* 75 at 77.

[24] *R v Hodges* (1985) 19 A Crim R 129 at 134-135 per Smith J (CCA WA). See further Fairall, P and Johnston, PW, "Antisocial Personality Disorder (APD) and the Insanity Defence (1987) 11 *Criminal law Journal* 78.

[25] *R v Rolph* [1962] Qd R 262 at 270 per Mansfield CJ.

[3.12] An inherent cause is one which is natural to a person's mind and originating from within it, whether or not from birth.[26] That said, an *inherited* factor is neither a necessary nor a sufficient condition of an inherent cause.[27] Inherent causes do not include external factors such as a traumatic event or other environmental influence which produces mental dysfunctioning. However, where such external factors so materially affect the person as to permanently damage her or his psyche, the latter may be regarded as an inherent cause giving rise to the defence of diminished responsibility. Hence, poor ability of a person to withstand stress due to some trauma having produced a durable change in her or his personality constitutes an inherent cause.[28] The courts have also held that an inherent cause must be permanent in nature even though the abnormality of mind itself need only be transitory.[29] Furthermore, in some cases, the inherent cause is indistinguishable from the abnormality of mind with the result that the first two elements of the defence (namely, abnormality of mind and prescribed cause) are collapsed into one so as to result in an "inherent abnormality of mind".[30] This has been criticised for requiring the jury to draw unduly difficult and fine distinctions.[31] It is also uncertain whether excessive anger, passion or jealousy amount in themselves to an inherent cause.[32] One the one hand, these moods are transitory so as not to meet the requirement of permanence; on the other hand, they may be regarded as stemming from a permanent origin such as a damaged personality.[33]

[3.13] "Disease" or "injury" includes organic disorders such as physical harm or physical deterioration of the brain,[34] epilepsy[35] and delirium from fever.[36] The descriptors also cover functional disorders such as neurosis,[37] psychosis[38] and personality disorders.[39] Stress may cause injury such as post-traumatic stress disorder. Longstanding substance abuse such as prolonged intoxication may cause a disease in the

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26 *R v Whitworth* [1989] 1 Qd R 437 at 454 per Derrington J.

27 *R v McGarvie* (1986) 5 NSWLR 270 at 272 per Street CJ.

28 *R v Whitworth* [1989] 1 Qd R 437 at 455 per Derrington J.

29 *R v McGarvie* (1986) 5 NSWLR 270 at 272 per Street CJ; *R v Tumanako* (1992) 64 A Crim R 149 at 162 per Badgery-Parker J (CCA NSW).

30 *R v Tumanako* (1992) 64 A Crim R 149 at 168 per Badgery-Parker J (CCA NSW).

31 Model Criminal Code Officers Committee, Discussion Paper, *Fatal Offences Against the Person* (MCCOC/SCAG, Canberra, 1998), p 119.

32 O'Connor, D and Fairall, P, *Criminal Defences* (Butterworths, Sydney, 3rd ed, 1996), para [15.14].

33 In which case, it would be preferable to regard these cases as involving a disease or injury, as to which, see para **[3.13]**.

34 *R v Whitworth* [1989] 1 Qd R 437 at 457 per Derrington J; *R v Jones* (1986) 22 A Crim R 42 at 43-44 per Street CJ (CCA NSW).

35 *R v Dick* [1966] Qd R 301.

36 *R v Whitworth* [1989] 1 Qd 437 at 450 per Derrington J.

37 *R v Biess* [1967] Qd R 470; *R v Ford* [1972] QWN 8.

38 *R v Corry* [1966] QWN 59.

39 *Walton v The Queen* [1978] AC 788 (PC); *R v Turnbull* (1977) 65 Cr App R 242. *Contra*. The recent Court of Appeal decision in *Sanderson* (1994) 98 Cr App R 325 at 336 per Roch LJ who opined that the phrase "induced by disease or injury" appearing in the English provision on diminished responsibility referred to organic or physical injury or disease of the body and not functional disorders. For a criticism of this opinion, see Mackay, RD, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] *Crim LR* 117 at 121-123.

form of delirium tremens or alcoholic dementia. In contrast, a temporary state of intoxication will not suffice as a disease. Similarly, it has been held that the transitory effects of steroids on the brain cells do not qualify as injury.[40]

[3.14] The preceding descriptions of the specified causes of abnormality of mind readily explain why, in practice, expert witnesses have often had difficulty nominating the origin of a condition with any certainty or else disagreed on the diagnosis of a particular accused person.[41] This has resulted in many complex, technical and confusing debates over the meaning of each of the specified causes listed and in attempts to fit a specific condition into one of them. This prompted the following observation by Gleeson CJ in the New South Wales Court of Criminal Appeal case of *R v Chaya*:

> The variety of psychiatric opinion with which the jury were confronted strongly suggests that the operation of s 23A of the *Crimes Act* (NSW) depends upon concepts which medical experts find at least ambiguous and, perhaps, unscientific … [I]t appears to me that the place in the criminal law of s 23A is a subject ripe for reconsideration.[42]

To remove these complications, the New South Wales provision was amended to replace the specified causes with the concept of an "underlying condition" by which is meant "a pre-existing mental or physiological condition, other than a condition of a transitory kind".[43]

Substantial impairment of responsibility

[3.15] While all the formulations of the defence include the concept of substantial impairment, the subject matter of such impairment is not identical. In the Australian Capital Territory (and previously in New South Wales) following the English provision, it is the accused's "mental responsibility for her or his acts or omissions" supporting the murder charge which must have been substantially impaired. In Queensland, the Northern Territory and the revised New South Wales provisions, it is the specified capacities of understanding, judging and controlling which must have been substantially impaired.

[3.16] In Queensland, the Northern Territory and New South Wales the accused must establish that at least one of three stated incapacities arising from the mental abnormality was substantially impaired, namely, incapacity to understand what is being done, incapacity for self-control; and incapacity for understanding the wrongness of the accused's conduct. Hence, there is a material difference

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40 *R v De Souza* (1997) 41 NSWLR 656.

41 New South Wales Law Reform Commission, Report 82, *Partial Defences to Murder: The Defence of Diminished Responsibility* (NSWLRC, Sydney, 1997), para 3.39. Hereinafter referred to as "NSWLRC Report 82".

42 (1993) 66 A Crim R 178 at 191 (CCA NSW).

43 *Crimes Act* 1900 (NSW), s 23A(8).

between the Australian Capital Territory provision which requires the accused's "mental responsibility" to have been substantially impaired, and the other provisions which require the stated capacities to be substantially impaired.

[3.17] This difference signifies an important feature of the defence of diminished responsibility which may have been frequently overlooked. It is that the defence actually involves two distinct types of substantial impairment with the first resulting in the second. The first requires certain capacities of the accused to have been substantially impaired at the time of the killing. Such incapacity provides the basis for the jury to decide upon the second type of substantial impairment, namely, whether the accused's criminal responsibility for murder was so substantially impaired as to warrant a verdict of manslaughter..[44] In this regard, the New South Wales reformulation is laudable for articulating both these types of impairments. The provision stipulates that, upon proof by the accused that one or more of the specified capacities had been substantially impaired by an abnormality of mind, the jury will be instructed to decide whether the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.[45]

[3.18] The New South Wales reformulation was the initiative of the New South Wales Law Reform Commission.[46] The Commission noted that "mental responsibility" appearing in the then s 23A was an ambiguous term which had caused confusion among juries and clinical experts. The Commission's solution was to reformulate this requirement so as to require the accused to prove that her or his "capacity to understand events, or judge whether that person's act was right or wrong, or control himself or herself was so substantially impaired by an abnormality of [mind][47] arising from an underlying condition as to warrant reducing murder to manslaughter." The Commission regarded this reformulation to be superior to the one proposed by the English Criminal Law Revision Committee.[48] It found the English proposal wanting in clarity and failing to provide the jury with guidance on the criteria for deciding whether to acquit of murder or to convict of manslaughter on the ground of diminished responsibility.[49] In contrast, the Commission's proposal required juries to decide whether murder should be reduced to manslaughter by considering the extent to which the accused's capacity in

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[44] This is what the ACT, English and former NSW provisions meant by a substantial impairment of "mental responsibility". Noting the obvious ambiguity of the expression "mental responsibility", the English Criminal Law Revision Committee recommended that the English provision be reformulated to require that there be "substantial enough reason to reduce [the accused's] offence to manslaughter.": see the Committee, Report 14, *Offences against the Person* (HMSO, London, Cmnd 7844, 1980), para 94. See also Law Commission, No 177, *Criminal Law: A Criminal Code for England and Wales* (HMSO, London, 1989), cl 56 of its draft Criminal Code.

[45] *Crimes Act* 1900 (NSW), s 23A(1).

[46] Above, note 41.

[47] The Commission proposed that "mind" be replaced by "mental functioning" which was an expression devised by the Commission with the assistance of forensic psychiatrists and psychologists: see NSWLRC Report 82, para 3.50. However this change was not adopted by the New South Wales legislature.

[48] Above, note 44, para 94.

[49] NSWLRC Report 82, para 3.58.

relation to one of the specified capacities was affected by an underlying condition. For the sake of certainty, the Commission proposed including a subsection which distinguished between the respective roles of the expert and the jury, with the jury left to determine the ultimate issue of whether the accused should be convicted of manslaughter.[50] The New South Wales legislature subsequently approved this reformulation.

[3.19] What constitutes a "substantial" impairment of one of the specified capacities has been the subject of judicial elaboration. The law does not require the impairment to be total but neither is it sufficient for the impairment to have been minimal or trivial.[51] Furthermore, it is sufficient for any one of the specified capacities to have been substantially impaired and it is for the jury rather than the judge to say whether the evidence supports the claim of substantial impairment.[52] Whether an accused person's criminal responsibility for murder was so substantially affected by the abnormality of mind as to warrant reducing the offence to manslaughter is a question for the jury, not clinical experts. [53] This is because it comprises a moral judgment which is properly left to the jury, as representatives of the community, to decide.

Comparison with concurrent defences

[3.20] The importance of having a clear definition of the elements of the defence of diminished responsibility is highlighted by the need to contrast it with other closely related exculpatory pleas such as insanity, sane automatism, provocation and intoxication which are all concerned with mental dysfunctioning.

Insanity

[3.21] Diminished responsibility is distinguishable from the defence of insanity in certain material respects, depending on the jurisdiction under consideration. In the Australian Capital Territory and New South Wales, the distinction is one of degree and kind. While insanity requires a complete or total deprivation of the requisite capacities, diminished responsibility requires only a substantial impairment of these capacities. Furthermore, while insanity is restricted to capacities of cognition alone, diminished responsibility also covers volitional capacity.[54] Thus, uncontrollable impulses and personality disorders are covered by diminished responsibility but not insanity.[55] In the Northern Territory and Queensland, the distinction is only one of degree and not of kind since the defence of insanity in these jurisdictions covers both cognitive and volitional

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[50] NSWLRC Report 82, para 3.57. This division of roles was confirmed in *R v Sherwood* (unreported, NSW CCA, 24 July 1998, Priestly JA, Grove and Sperling JJ).

[51] *R v Ryan* (1995) 90 A Crim R 191 (CCA NSW); *R v Biess* [1967] Qd R 470.

[52] See paras **[3.31]** and **[3.33]** on the roles of judge and jury.

[53] See para **[3.32]** on role of expert witnesses.

[54] *R v Byrne* [1960] 2 QB 396.

[55] *R v Sodeman* (1936) 55 CLR 230 (HL); *AG (SA) v Brown* [1960] AC 432 (PC).

defects.[56] Irrespective of which jurisdiction, the distinction between diminished responsibility and insanity is sufficiently material to require avoiding the use of potentially confusing descriptors of diminished responsibility such as partial insanity and borderline insanity.[57]

[3.22] The concept which underlies the defence of diminished responsibility is of mental abnormality of a kind sufficient to *reduce* but not exclude liability for homicide. Insanity has the effect of excluding rather than diminishing criminal responsibility. What is the position if the defence counsel eschews insanity[58] and pleads diminished responsibility, but the evidence discloses a clear case of insanity? Can the court decline to accept what is in effect a plea of guilty to manslaughter if the evidence discloses that the defendant was not criminally responsible by reason of insanity? Or, at another level, if the evidence discloses a clear case of insanity which is accepted by the jury against the wishes of defence counsel, would it be open to appeal on the ground that the jury ought to have accepted the defence plea of diminished responsibility? The answers to these questions are not clear. It is submitted that if the evidence does establish insanity, a verdict of manslaughter by diminished responsibility would not be appropriate. A finding of murder is a pre-requisite to a verdict of manslaughter by diminished responsibility. A jury cannot find murder if the accused was insane at the time of the act.

Sane automatism

[3.23] Sane automatism and diminished responsibility may be raised concurrently.[59] If the jury entertains a reasonable doubt as to whether the acts were willed, an outright acquittal is appropriate. The question of diminished responsibility does not arise unless and until the jury has found murder.[60] If the jury is satisfied beyond reasonable doubt that the relevant acts were willed, it should turn to consider the mental element necessary to constitute murder. If the judge rules that the evidence presented in support of involuntariness is not capable of leading to a complete acquittal but is relevant to insanity, the rejection of insanity on the balance of probabilities does not preclude a verdict of manslaughter by reason of diminished responsibility.

Intoxication

[3.24] In the Australian Capital Territory, Queensland and, previously, New South Wales, the law is clear that intoxication on its own does not come within the defence of diminished responsibility because it does not fall within any of the specified causes of abnormality of mind. Since such intoxication does not cause significant brain damage but only temporarily affects mental functioning, the accused's condition is not an

56 *R v Rolph* [1962] Qd R 262 at 271-272 per Mansfield CJ.

57 *R v Rose* [1961] AC 496 at 507 per Lord Tucker (PC).

58 The prospect of indefinite confinement in a psychiatric institution may be less appealing to the accused than a determinate sentence for the crime of manslaughter.

59 *R v Low* (1991) 57 A Crim R 8 (CCA NSW); *R v Milloy* (1991) 54 A Crim R 340 at 342 per Thomas J (CCA Qld).

60 *R v Kolalich* (1991) 57 A Crim R 237 at 239 per Mason CJ, Deane, Gaudron and McHugh JJ (HCA).

"injury"[61] nor an "inherent cause" within the meaning of the provision.[62] The defence may, however, succeed where an accused suffers from a pre-existing condition such as substantial brain damage arising from protracted substance abuse. In such a case, it must be shown that it is the brain damage and not simply the temporary state of intoxication which has caused the abnormality of mind.[63] In England, the defence has been made available to an accused person whose craving for alcohol or other drug was so great as to be described as 'involuntary' and thereby constituting a "disease".[64] It is uncertain whether the Australian Capital Territory and Queensland courts will follow suit.

[3.25] Since the reformulated New South Wales provision removes any requirement to identify the aetiology of the impairment, it was thought necessary to have a subsection which expressly excludes self-induced intoxication from the definition of diminished responsibility. In doing so, the provision reflects recent legislative changes to the law of intoxication in New South Wales which distinguished cases of self-induced intoxication from cases of non self-induced intoxication. Hence, under the reformulated provision, an accused person who chooses not to resist the impulse to consume alcohol or other drugs will be denied the defence. However, should the accused have an irresistible impulse to consume alcohol or drugs to feed her or his addiction, the intoxication arising from such consumption will have been non self-induced and will therefore be covered by the defence. These changes to the law are commendable except for one flaw. Under the new arrangement, cases of non self-induced intoxication will also be denied the availability of the defence of diminished responsibility because the intoxicated state of the accused will fail to satisfy the requirement that the mental abnormality must have stemmed from an "underlying condition". Surely, this runs counter to the legislative policy which only seeks to exclude cases of self-induced intoxication. This flaw could be rectified by slight modifications to the provision on diminished responsibility. Section 23(3) could read:

> If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was non self-induced [within the meaning of section 428A], the effects of that intoxication are to be regarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

To add further clarity, section 28(8) could also be amended to read:

> Subject to subsection (3), "underlying condition" means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

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61 *R v Jones* (1986) 22 A Crim R 42 (CCA NSW); *R v DeSouza* (1997) 41 NSWLR 656.

62 *R v Purdy* (1986) 22 A Crim R 42 at 44 per Street CJ (CCA NSW).

63 *R v Jones* (1986) 22 A Crim R 42 at 44 per Street CJ (CCA NSW); *R v Ryan* (1995) 90 A Crim R 191 at 196 per Hunt J (CCA NSW); *R v Whitworth* [1989] 1 Qd R 437 at 457 per Derrington J (CCA Qld).

64 *R v Tandy* [1989] 1 All ER 267.

Provocation

[3.26] The defences of diminished responsibility and provocation are often raised together. Since both defences may involve a substantial impairment of volitional capacity to control one's conduct, they can be difficult to distinguish. However, the two defences are conceptually different. In diminished responsibility, the focus is on the accused's mental abnormality and the factors giving rise to it which are all internal and particular to the accused. In provocation, the focus is on the external events of the provoker's conduct and the accused's response to it. Consequently, diminished responsibility, unlike provocation, requires a degree of permanence in the underlying aetiology of the mental responsibility whereas provocation can be based on a fleeting loss of self-control. Diminished responsibility considers whether the accused's mental disorder was so different from the normal mind as to warrant reducing murder to manslaughter. In contrast, provocation is a defence for those who are "in a broad sense, mentally normal",[65] having powers of self-control which are comparable to those expected of ordinary people. Where diminished responsibility and provocation are raised together, the jury may be required to inform the judge as to the basis of a verdict of manslaughter.[66] This again highlights the difference between the two defences, with diminished responsibility alone involving a mental abnormality which may require special disposition orders.

[3.27] The New South Wales Law Reform Commission has recommended replacing the ordinary person test in the law of provocation with a test based on community standards.[67] The reformulated test permits any personal characteristics of the accused, including mental impairment, to be considered in determining whether culpability should be reduced to manslaughter. The Commission acknowledged that this greater subjectivity made the distinction between provocation and diminished responsibility less clear.[68] This led the Commission at one stage to consider combining the two defences. Ultimately, the Commission recommended retaining the distinction between the two defences because they were conceptually different and were long established and well understood in the New South Wales legal system.[69] The Commission then turned its attention to whether to propose legislation expressly requiring juries to indicate the basis for their verdict of manslaughter in cases whether both diminished responsibility and provocation were pleaded.[70] The Commission decided against doing so because juries may not always be unanimous in their reasons for returning a manslaughter verdict with some jurors basing their

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65 Ashworth, A, "The Doctrine of Provocation" (1976) 35 *Cambridge Law Journal* 292 at 312.

66 *R v Veen* (1979) 143 CLR 458 at 465 per Stephen J (HCA); *R v Low* (1991) 57 A Crim R 8 at 15 per Lee J (CCA NSW); However, in *R v Isaacs* (unreported, Court of Criminal Appeal, New South Wales, 9 April 1997) it was held that a trial judge should refrain from asking a jury the basis of their verdict except in exceptional cases.

67 See para **[1.35]**.

68 NSWLRC Report 83, para 2.137.

69 NSWLRC Report 83, para 2.138 to 2.139.

70 NSWLRC Report 83, para 2.163.

decision on diminished responsibility and others on provocation. The Commission thought that requiring juries to specify the basis for their verdict may distract them from their primary task of achieving unanimity on a general verdict.[71]

Complicity and diminished responsibility

[3.28] In the Australian Capital Territory and New South Wales, an accessory may raise diminished responsibility as a defence to murder.[72] Moreover, there is no rule of law which prevents the various parties to a criminal offence from being convicted of different degrees of crime and this is reflected in the provisions.[73] Where the principal offender raises diminished responsibility and the jury returns a verdict of not guilty by reason of insanity, it appears that an accessory is nonetheless liable to be convicted of murder. Similarly, acquittal of the principal party on the ground of insanity does not prevent the conviction of a secondary party for the same offence.

[3.29] The Northern Territory and Queensland provisions do not have express clauses dealing with accessories. On their face, the provisions seem to deny the defence to accessories who did not participate in the very act which caused death. This is because they stipulate that the defence extends only to the person who "unlawfully kills another". It might therefore be argued that where a secondary party has not taken part in the very act which causes death, he or she is not able to rely upon diminished responsibility. However, the better view is that the difference in wording between the Queensland and Northern Territory provisions, and the Australian Capital Territory and New South Wales sections, does not reflect any substantial difference of law, and that their effect is the same.

Procedural and evidentiary matters

Onus and standard of proof

[3.30] All the provisions on diminished responsibility provide that an accused seeking to rely on the defence bears the burden of proving it.[74] Where the defence is raised by the prosecution and disclaimed by the defence, it seems just to place the burden of proof on the prosecution.[75] The standard of proof is on the balance of probabilities[76] and this is so whether the defence is relied on by the defence or the prosecution.[77]

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71 NSWLRC Report 83, para 2.164.

72 *Crimes Act* 1914 (ACT), s 14(3); *Crimes Act* 1900 (NSW), s 23A(5).

73 *Crimes Act* 1914 (ACT), s 14(4); *Crimes Act* 1900 (NSW), s 23A(6). See also *Osland v The Queen* (1999) 197 CLR 316 at 335 per Gaudron and Gummow JJ (HCA).

74 *Crimes Act* 1914 (ACT), s14(2), s 23A(4); *Criminal Code* 1899 (Qld), s 304A(2).

75 *R v Ayoub* [1984] 2 NSWLR 511 (CCA NSW). *Contra R v Grant* [1960] Crim LR 424 which held that the prosecution had to prove the defence beyond a reasonable doubt.

76 *R v Dunbar* [1957] 2 All ER 737.

77 *R v Ayoub* [1984] 2 NSWLR 511 at 515 per Street CJ.

Role of the judge

[3.31] In those jurisdictions which stipulate a list of specified causes, and the defence relies on more than one of these causes, the trial judge must ensure that each cause is evaluated and subject to appropriate directions.[78] The trial judge should decide whether the evidence is capable of proving an abnormality of mind and that such abnormality was due to one or more of the specified causes. Should there be sufficient evidence, the trial judge should leave it to the jury to decide whether the accused's criminal responsibility was so substantially impaired as to warrant reducing the offence from murder to manslaughter.[79] It is immaterial that the trial judge is of the view that the accused was not deserving of such a reduction of the offence.[80] The judge should direct the jury to consider the defence of diminished responsibility when there is sufficient evidence of it, even though the matter is not raised by the defence.[81] In exceptional cases where all the elements of the defence are established by unchallenged and uncontradicted evidence, the trial judge has the power to direct the jury to acquit of murder and to convict of manslaughter.[82]

Role of expert witnesses

[3.32] In jurisdictions which require the abnormality of mind to have stemmed from a specified cause, expert opinion is crucial in deciding whether the accused was suffering from one or more of those causes.[83] The defence will not be withdrawn merely because the expert was unwilling to describe the alleged cause in the terms specified by the provision.[84] The same is probably true for the revised New South Wales provision which requires the abnormality of mind to have been caused by an underlying condition. It is unnecessary for the abnormality of mind to be established by the expert evidence standing alone. Such evidence may be combined with evidence from the accused as to her or his mental condition when the killing occurred to prove that the abnormality was present then.[85] The extent to which expert evidence can be relied on depends on whether the factual assumptions on which the expert witnesses based their opinion are made out. Where those assumptions are inconsistent with the accused's conduct at the time of the killing, it is open the jury to reject the expert evidence.[86]

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78 *R v Whitworth* [1989] 1 Qd R 437 at 447 per Thomas J.

79 *R v Purdy* [1982] 2 NSWLR 964 at 966 per Street CJ; *R v Tumanako* (1992) 64 A Crim R 149 at 160 per Hunt J (CCA NSW).

80 *Maxwell v The Queen* (1996) 184 CLR 501 (HCA).

81 *R v Corry* [1966] QWN 59; *R v Cheatham* [2000] NSWCCA 282. *Contra* under English law, the trial judge cannot direct the jury on the defence unless it has been raised by the accused: see *R v Kooken* (1981) 74 Cr App R 30; *R v Campbell* (1986) 84 Cr App R 255.

82 *R v Bowman* (1987) 49 NTR 45 (SC NT); 87 FLR 469.

83 *R v Whitworth* [1989] 1 Qd 437; *R v Tumanako* (1992) 64 A Crim R 149 (CCA NSW).

84 *R v Purdy* [1982] 2 NSWLR 964 at 966 per Street CJ.

85 *R v Purdy* [1982] 2 NSWLR 964 at 967 per Roden J; *R v Elliott and Hitchins* (1983) 9 A Crim R 238 at 244 per Lee J (CCA NSW).

86 *R v Majdalawi* (2000) 113 A Crim R 241 at 245 per Spigelman CJ (CCA NSW).

Role of the jury

[3.33] What constitutes an "abnormality of mind" is an issue for the jury, and not for expert witnesses, to decide.[87] It is also within the sole province of the jury to determine whether the accused's criminal responsibility for murder had been so substantially impaired by abnormality of mind as to warrant a reduction of the offence to manslaughter.[88] When carrying out this exercise, the jury is entitled to consider not only the expert evidence but the evidence as to the whole facts and circumstances of the case and any history of mental abnormality.[89]

[3.34] In all jurisdictions which recognise the defence, except Queensland, the issue of diminished responsibility is regarded as exclusively a jury question and not to be dealt with by specialist tribunals. In Queensland, however, where a person is charged with murder and pleads diminished responsibility or insanity, the case may be referred by the prosecution or defence to the Mental Health Tribunal.[90] Should the tribunal determine that the accused was suffering from diminished responsibility or insanity at the time of the killing, the proceedings in respect of the murder charge are discontinued.[91] If the tribunal determines that diminished responsibility did not exist, the accused may still raise the defence at trial and evidence of the tribunal's determination is not admissible.[92] The New South Wales Law Reform Commission considered the Queensland model but ultimately rejected it because, in the Commission's view, the defence of diminished responsibility requires value judgments which should be left to be determined within the criminal trial process by the jury and not by a specialist panel of experts.[93]

Battered women and diminished responsibility

[3.35] The defence of diminished responsibility may be particularly relevant for battered women who kill. When applied to these women, the defence would focus on whether or not they were suffering from an abnormality of mind at the time of the killing. However, the defence may not be appropriate in some of these cases because it would divert attention away from the external circumstances leading to the battered woman's disturbed condition.[94] Arguably, the plea of self-defence is to be preferred for concentrating on these external circumstances and recognising that the battered woman

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87 *R v Rolph* [1962] Qd R 262 at 288 per Hanger J. See also paras **[3.7]** and **[3.9]**.

88 *R v Tumanako* (1992) 64 A Crim R 149 (CCA NSW); *R v Ryan* (1995) 90 A Crim R 191 (CCA NSW); *R v Majdalawi* (2000) 113 A Crim R 241 (CCA NSW). See also *Crimes Act* 1900 (NSW), s 23A(2).

89 *R v Chester* [1982] Qd 252 at 256 per Campbell J approving of *Walton v The Queen* [1987] AC 788 at 793 per Lord Keith (PC).

90 *Mental Health Act* 1974 (Qld), s 28D.

91 *Mental Health Act* 1974 (Qld), s 35A.

92 *Mental Health Act* 1974 (Qld), s 43A.

93 NSWLRC Report 82, para 3.84.

94 This led the Law Reform Commission of Victoria in its *Issues Paper on Homicide* (LRCV, Melbourne, 2002) at para 7.32 to ask whether it was "appropriate to claim that such killings are the result of an 'abnormality of mind', or would it be better to instead create a new defence to cover such circumstances?"

may have killed out of self-preservation rather than as a result of a disturbed mind.[95] Furthermore, a successful plea of self-defence results in a complete acquittal. Whether or not the law of self-defence adequately accommodates the experiences of battered women who kill is outside the scope of this paper.

[3.36] A recent New South Wales empirical study has shown that diminished responsibility was not the defence of choice for women charged with murdering their partners.[96] These women relied more frequently on the defence of provocation. A likely explanation is the greater flexibility afforded by the defence of provocation under s 23 of the *Crimes Act* 1900 (NSW) due to the removal of the requirement of suddenness, abrogation of the need for an isolated triggering event, and recognition of cumulative provocation. However, it has been suggested that this greater reliance on provocation has not resulted in a corresponding shift from viewing the battered woman's conduct as abnormal to normal. As one commentator has observed, in cases where women have relied on the defence of provocation, there has been a "tendency to de-emphasise provocation or subsume it into the psychological explanation given for the offence."[97]

The case for having a defence of diminished responsibility

[3.37] The continuance of the defence of diminished responsibility in those jurisdictions which recognise it has been challenged[98] on the basis that it is an anachronism dating from a time when a murder conviction attracted a mandatory sentence of life imprisonment. Another reason for its abolition is that the defence succeeds in too wide a range of circumstances and may be susceptible to false claims of mental impairment. Furthermore, the defence has created major problems in practice such as conflicting expert testimony and complicated directions to juries. Rather than have such a defence, it has been suggested that diminished responsibility is appropriately considered as a mitigating factor in sentencing, which is the practice in jurisdictions which have never recognised the defence. Also, it would be preferable to redefine and broaden the defence of insanity rather than create a "back-door" excuse for people who do not fit into the rather narrow tests required by the current defence of insanity. These were the main reasons which persuaded the Model Criminal Code Committee to recommend against recognising a defence of diminished responsibility for murder.[99]

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95 Stubbs, J, "Provocation and Self-Defence for Battered Women Who Kill?" in Yeo, S (ed), *Partial Excuses to Murder* (Sydney, Federation Press, 1990), pp 63-64.

96 Bradfield, R, "Women who Kill: Lack of Intent and Diminished Responsibility as the other 'defences' to Spousal Homicide" (2001) 13 *Current Issues in Criminal Justice* 143. This may be contrasted with an English study which found that the defence was successfully relied on most frequently by women who were convicted of manslaughter for killing their spouses: see Chan, W, *Women, Murder and Justice* (Palgrave, Hampshire, 2001), p 53.

97 Henning, T, "Psychological Explanations in Senetencing Women in Tasmania" (1995) 28 *Australian and New Zealand Journal of Criminology* 298 at 311.

98 For a fuller discussion of the reasons for abolishing the defence, see NSWLRC Report 82, paras 3.10 to 3.20 and the Model Criminal Code Officers Committee, above, note 31, pp 123-129.

99 Model Criminal Code Officers Committee, above, note 31, p 131. See also the Law Reform Commission of Victoria, Report 34, *Mental Malfunctioning and Criminal Responsibility* (LRCV, Melbourne, 1990), p 53.

[3.38] In contrast, the New South Wales Law Reform Commission proposed the retention of the defence subject to certain revisions which would assist the application of the defence in practice.[100] The New South Wales legislature has accepted this proposal and revised the provision on diminished responsibility accordingly. One of the main reasons given by the Commission for retaining the defence was that it was essential in order to enable the community (as represented by juries) to participate in a meaningful way in the process of assessing culpability in cases of this kind.[101] Another reason was that the defence accorded with the fundamental principle of criminal justice requiring culpability for serious offences to be measured according to an accused's mental state when committing the offence. Accordingly, it is essential that factors which significantly affect that mental state should be taken into account when determining degrees of culpability as opposed to being considered at the sentencing stage.[102] As for the risk of fabrication of evidence, the Commission noted that such evidence could be tested within the trial process with the accused bearing the burden of proving that the defence of diminished responsibility had been established.[103] With regard to tampering with the defence of insanity, the Commission's response was that "diminished responsibility provides the flexibility to determine responsibility according to degrees of mental impairment, rather than according to a strict contrast between sanity and insanity".[104] The defence is therefore required for offenders whose mental impairment was not so severe as to warrant an acquittal and ensuing indefinite hospitalisation, but whose mental condition was nonetheless such that they should not be convicted of murder.

[3.39] As with the some other controversial criminal law defences (such as provocation and insanity) the viability of the defence depends upon ongoing community acceptance, which in turn depends upon the ability of juries to apply the prescribed legal and clinical standards with fairness and common sense.[105] On balance, a strong case can be made for recognising a defence of diminished responsibility, with the revised New South Wales provision holding up as a sound model.

[3.40] If the defence of diminished responsibility is to be recognised, should it be extended to cover attempted murder and other offences? In favour of doing so, it seems illogical to restrict the defence to murder when offenders who attempt murder or commit other crimes may likewise be acting under impaired mental capacity. The New

100 NSWLRC Report 82, recommendation 2, p 28.

101 NSWLRC Report 82, paras 3.11 to 3.12.

102 NSWLRC Report 82, para 3.18.

103 *Ibid.*

104 NSWLRC Report 82, para 3.19.

105 The psychological, philosophical and moral assumptions underlying diminished responsibility are controversial. For a critique of diminished responsibility see the Law Reform Commission of Victoria, Report No 34, *Mental Malfunction and Criminal Responsibility* (LRCV, Melbourne, 1990), paras 135 to 148. For a stimulating discussion see Fraser, D, "Still crazy after all these years: A critique of diminished responsibility", in Yeo, S (ed), *Partial Excuses to Murder* (Federation Press, Sydney, 1990), p 112.

South Wales Law Reform Commission considered this issue and recommended against extending the scope of the defence for several reasons.[106] First, the other offences do not carry the same stigma as does a conviction for murder. Secondly, it was not evident how diminished responsibility could reduce culpability in respect of offences other than murder. Unlike unlawful homicide which is divided into murder and manslaughter, other offences cannot be readily divided into categories which reflect degrees of culpability. Extending the scope of the defence would require redefining offences or creating new ones, or else permitting an accused person to receive a complete acquittal. Thirdly, the Commission warned that extending the scope of diminished responsibility could have an adverse impact on the efficiency of court administration and court time. The Commission concluded that the defence should remain confined to murder and that an accused's mental impairment in relation to other offences could appropriately be left to the sentencing stage. This recommendation was subsequently adopted by the New South Wales legislature.

106 NSWLRC Report 82, para 3.77.

Chapter 4

The Australian and Indian Laws of Excessive Defence

Introduction

[4.1] The partial defence to murder of excessive defence has had a chequered history in Australia both at common law[1] and under statute.[2] The defence was first recognised at common law in 1957[3] and subsequently abolished by the courts themselves in 1987.[4] The defence was re-introduced in statutory form in South Australia in 1991.[5] As that provision was found to be unworkable in practice it was replaced in 1997 by a much more clearly articulated formulation.[6] New South Wales followed suit in 2002[7] with a statutory provision closely similar to the South Australian formulation but with a notable difference to be discussed below. In Victoria, its Law Reform Commission was also of the view that people who kill using excessive force in self-defence should not be convicted of murder.[8] However, instead of a partial defence to murder, the Commission proposed the creation of a new offence of culpable homicide. The Victorian legislature has yet to adopt this proposal.

[4.2] South Australia and New South Wales are therefore the only Australian jurisdictions which currently recognise the plea of excessive defence. As for the Indian law, such a defence has been recognised ever since the inception of the Indian Penal Code 1860.[9] The ensuing discussion will commence with a brief description of the defence and its underlying rationale. This will be followed by a presentation and critical appraisal, each in turn, of the Australian common law, the South Australian provision, the New South Wales provision, the Victorian Law Reform Commission proposal and, finally, the Indian provision.

Description and rationale of the defence

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1 The common law jurisdictions in Australia are the Australian Capital Territory, New South Wales, South Australia and Victoria. The remaining jurisdictions have their own criminal codes, none of which recognises excessive defence as a partial excuse to murder.

2 *Criminal Law Consolidation Act* 1935 (SA), s 15(2) and 15A; *Crimes Act* 1900 (NSW), s 421.

3 *R v McKay* [1957] VR 560.

4 As a result of a majority decision of the High Court in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645.

5 *Criminal Law Consolidation Act* 1935 (SA), s 15 as amended by the *Criminal Law Consolidation (Self-Defence) Amendment Act* 1991 (SA).

6 *Criminal Law Consolidation Act* 1935 (SA), ss 15(2) and 15A(2), as amended by the *Criminal Law Consolidation (Self-Defence) Amendment Act* 1997 (SA).

7 *Crimes Amendment (Self-Defence) Act* 2001 (NSW).

8 Law Reform Commission of Victoria, Report No 40, *Homicide* (LRCV, Melbourne, 1991). Hereinafter referred to as "LRCV Report 40".

9 It appears as Exception 2 to s 300 (the murder provision) of the Indian Penal Code.

[4.3] This form of partial defence to murder has been variously called "excessive defence", "over-reactive defence", and "excessive force in self-defence". The South Australian Court of Criminal Appeal in *R v Howe* gave the following clear and succinct description of the defence and its effect:

> A person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man [sic] would consider necessary in the circumstances, but no more than what he [or she] honestly believed to be necessary in the circumstances, is guilty of manslaughter and not of murder.[10]

This description appears to limit the defence to cases where the accused had acted in defence of himself or herself alone. However, the defence is not so confined and applies equally to cases where the accused was acting in defence of another person. In some jurisdictions, it may even apply where the accused had used excessive force and killed in defence of property[11] or when arresting an offender.[12]

[4.4] The primary rationale for the defence is that the culpability of a person who kills another while defending himself or herself or another, and who honestly believes the force to be reasonable when it was not, falls short of the culpability normally associated with murder. In the words of Aickin J in the High Court case of *Viro v The Queen*:

> [There is] a real distinction in the degree of culpability of an accused who has killed having formed the requisite intention without any mitigating circumstance, and an accused who, in response to a real or a reasonably apprehended attack, strikes a blow in order to defend himself, but uses force beyond that required by the occasion and thereby kills the attacker.[13]

[4.5] In the same vein, the framers of the Indian Penal Code provided the following illustration justifying their inclusion of the partial defence to murder in the Code:

> [T]hat a man should be merely exercising a right by fracturing the skull and knocking out the eye of an assailant, and should be guilty of the highest crime in the code if he kills the same assailant, that there should be only a single step between perfect innocence and murder, between perfect impunity and liability for capital punishment [for murder], seems unreasonable. In a case in which the

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10 (1958) SASR 95 at 121-122 per Mayo J.

11 This was the position under Australian common law prior to the abolition of the defence. It is expressly provided for under the South Australian legislation and the Indian Penal Code, but not under the New South Wales provision.

12 This was the position under the Australian common law, and is expressly provided for under the South Australian legislation.

13 (1978) 141 CLR 88 at 180 and cited by Gaudron J in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 684.

> law itself empowers an individual to inflict any harm short of death, it ought hardly we think, to visit him with the highest punishment if he inflicts death.[14]

[4.6] Elsewhere, it has been noted that recognition of excessive defence avoids the anomaly of allowing a concession to a killer who reacts to provocation with anger but denying it to persons who have the right to use some force to defend themselves in circumstances which make the precise measuring of their blows extremely difficult.[15]

[4.7] Thus far, the rationale for the defence has been viewed in terms that it is unjust to convict and punish a person for murder who had applied excessive force while acting in defence. The recognition of such a partial defence could also do justice to victims and their loved ones. A person who has grossly overstepped his or her use of force in self-defence and killed is not entirely free of moral blame and deserves to be punished. Juries should not acquit such a person because they are unwilling to convict him or her of murder. Likewise, it would be unjust for the Crown to decide not to prosecute at all because it was thought that a murder charge was inappropriate.[16]

[4.8] In jurisdictions where discretionary sentencing of murderers is recognised,[17] it might be contended that the lesser culpability of an accused in cases of excessive defence could be taken into account at the sentencing stage. The counter argument is that it is unjust to label such a person a murderer. Additionally, there will be cases where the sentencing judge will not know whether the jury had convicted of murder because it had rejected self-defence outright, or had accepted it in part but concluded that the force used was excessive.[18]

The defence under Australian common law

[4.9] The defence was first recognised by the Victorian Court of Criminal Appeal in *R v McKay*.[19] The defence reached its peak of recognition by the common law in the High Court case of *R v Viro*.[20] There, Mason J formulated six propositions on the law of self-defence which were subsequently regarded by trial judges as constituting a model direction on self-defence in murder trials.[21] The first four propositions dealt with the

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14 Macaulay, T.B., Macleod, J.M., Anderson, G.W. and Millett, F, *The Indian Penal Code as Originally Framed in 1837 with Notes* (Higginbotham and Co, Madras, 1888), Note M, p 147.

15 Law Reform Commission of Canada, Working Paper 33, *Homicide* (The Commission, Ottawa, 1984), p 71.

16 LRCV Report 40, para 217.

17 Sentencing discretion for murder is available in New South Wales but not in South Australia.

18 LRCV Report 40, para 216.

19 [1957] VR 560. This case involved the killing by the accused of a fleeing chicken thief. The facts were used in a report to the English Law Commission to illustrate the defence: see Law Commission No 143, *Codification of the Criminal Law* (1985), p 234. The defence was recognised a year later by the High Court in *R v Howe* (1958) 100 CLR 448.

20 (1978) 141 CLR 88 (HCA).

21 *Ibid*, at 146-147 and approved of in the same case by Stephen and Aickin JJ.

complete defence of self-defence which, if successfully pleaded, resulted in a full acquittal. These propositions required the jury to consider whether the accused had reasonably believed that he or she was being threatened with death or serious bodily harm and, if so, whether the force used by the accused was reasonably proportionate to the perceived danger. The fifth and sixth propositions comprised the plea of excessive defence and were as follows:

5. If the jury is satisfied beyond reasonable doubt that more force was used, then its verdict should be either manslaughter or murder depending on the answer to the final question for the jury – did the accused believe that the force which he used was reasonably proportionate to the danger which he believed he faced?

6. If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

[4.10] A decade later, the High Court in *Zecevic v Director of Public Prosecutions(Vic)*[22] took the opportunity to revisit these six propositions because trial judges were experiencing great difficulty expressing them in comprehensible terms to a jury. By a majority of five to two, the court abolished excessive defence in an effort to simplify the law of self-defence.[23] In particular, the majority held that the fifth and sixth propositions of the *Viro* formulation "necessarily contain refinements which cannot be expressed in a way which makes them readily understandable."[24] Another reason given by the majority was that removal of the defence might assist the accused because it made the jury focus on the defence of provocation.[25] The majority described the common law defence of self-defence as follows:

> The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide.[26]

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[22] (1987) 162 CLR 645 (HCA).

[23] For a critical evaluation of the majority's decision, see Fairall, P, "The demise of excessive self-defence manslaughter in Australia: a final obituary?" (1988) 12 *Criminal Law Journal* 28.

[24] (1987) 162 CLR 645 at 660 per Wilson, Dawson and Toohey JJ. The other majority judges were Brennan J and Mason CJ who delivered separate judgments.

[25] (1987) 162 CLR 645 at 654 citing a passage from *R v McInnes* (1971) 55 Cr App R 551 at 562. Other reasons given by the majority for abolishing excessive defence were that it lacked strong Australian judicial authority and that its abrogation would bring the common law into line with the Code jurisdictions. These reasons are not discussed here because they are specific to the Australian law.

[26] (1987) 162 CLR 645 at 661 per Wilson, Dawson and Toohey JJ.

> … [T]he use of excessive force in the belief that it was necessary in self-defence will not automatically result in a verdict of manslaughter. If the jury concludes that there were no reasonable grounds for a belief that the degree of force used was necessary, the defence of self-defence will fail and the circumstances will fail to be considered by the jury without reference to that plea.[27]

[4.11] The minority judges in *Zecevic* contended that excessive defence should be retained on account of its underlying rationale.[28] They were adamant in maintaining that, so long as there was a possibility of a case arising where a person applied fatal force which he or she honestly but unreasonably believed to be necessary, the doctrine of excessive defence should be available to enable the offender to avoid the stigma of a murder conviction and to permit a more lenient sentence for manslaughter. The minority acknowledged the complexity of the sixfold *Viro* formulation but believed that it was possible to simplify the law without abolishing the plea of excessive defence.[29] They also rejected the majority reasoning concerning the defence of provocation by pointing to cases where the accused had not lost self-control. The minority also noted the inconsistency of an accused contending that he or she honestly believed the force to be necessary and at the same time claiming to have lost self-control.[30]

The South Australian statutory formulation

[4.12] South Australia was the first jurisdiction to re-introduce the plea of excessive defence by legislative enactment. The provision, which came into force in 1991,[31] was found by the courts to be unworkable,[32] lending support to the view of the majority in *Zecevic* that a comprehensible formulation of the defence was not possible. Undeterred, the legislative drafters produced the current formulation which came into force in 1997. That formulation is in two parts with the first dealing with the defence of a person's life, bodily integrity and liberty, and the second concerning the defence of property, criminal trespass to land and making a lawful arrest.

[4.13] To properly understand this formulation of excessive defence, a brief examination of the general defence under South Australian law is required. The general defence appears in s 15(1) of the *Criminal Law Consolidation Act* 1935 (SA) in relation to defending a person's life etc, and s 15A(1) in relation to defending property etc.[33] With regard to the threatening circumstances, the general defence requires the accused

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27 (1987) 162 CLR 645 at 664 per Wilson, Dawson and Toohey JJ.

28 The minority judges were Deane J and Gaudron J.

29 For a discussion of the minority's suggested reformulation of the law of self-defence including excessive defence, see Yeo, S, *Unrestrained Killings and the Law* (New Delhi, Oxford University Press, 1998), pp 158-160.

30 (1987) 162 CLR 645 at 678-679 per Deane J. See also *R v Faid* (1983) 2 CCC (3d) 513 at 524-525 per Dickson J.

31 The provision described the defence in terms of whether the accused's belief as to the nature or extent of the force used was grossly unreasonable and was accompanied by criminal negligence.

32 See *R v Gillman* (1995) 76 A Crim R 553 (CCA SA). See further Grant, M, "Self Defence in South Australia: A Subjective Dilemma" (1994) 16 *Adelaide Law Review* 309.

33 Reproduced in Appendix I of this paper.

to have genuinely (that is, honestly) perceived the threat to be of a specified nature.[34] The law is therefore only concerned with the accused's purely subjective belief.[35] In relation to the response to the threatening circumstances, the general defence requires the accused's conduct to have been reasonably proportionate to those circumstances as the accused genuinely perceived them.[36] Hence, the law prescribes partly objective and partly subjective components for the issue of force used in defence.[37] With this requirement in place, the law then provides for the partial plea of excessive defence in murder cases where the accused genuinely believed that the excessive force used was necessary to defend her or his person, property etc.

[4.14] The partial defence is in two parts, corresponding with the general defence. The first part is to be found in s 15(2) read with (3) of the *Criminal Law Consolidation Act* 1935 (SA) and concerns cases where the accused had applied excessive force to defend her or his life, bodily integrity or liberty. The second part is contained in s 15A(2) of the Act and deals with cases of excessive force in defence of property, criminal trespass to land or to arrest an offender.

Subsection (2) and (3) of s 15 of the Act provide as follows:

> (2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if –
>
> (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but
>
> (b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.
>
> (3) For the purposes of this section, a person acts for a defensive purpose if the person acts –
>
> (a) in self defence or in defence of another; or
>
> (b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

Subsection (2) of s 15A of the same Act extends the partial defence to circumstances where the accused had applied excessive force in killing the deceased but had genuinely believed the force to be necessary and reasonable:

> (i) to protect property from unlawful appropriation, destruction, damage or interference; or

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34 Sections 15(1)(a), 15(2)(a), 15A(1)(a) and 15A(2)(a). But see s 15(4) which requires the belief as to the unlawfulness of the threat to be reasonable in cases of resisting arrest or resisting a response to an unlawful act.

35 This differs from the Australian common law which requires the belief to be based on reasonable grounds: see paras **[4.9]** and **[4.10]**. The South Australian position accords with the English law on the matter

36 Sections 15(1)(b) and 15A(1)(c).

37 This again differs from the Australian common law which is in terms of whether the accused believed on reasonable grounds that the force used was necessary: see para **[4.10]**. The South Australian position accords with the English law on the matter.

(ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or

(iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and

the defendant did not intend to cause death …

[4.15] A feature of the South Australian formulation worth highlighting is the specification in s 15A(2) of property offences and criminal trespasses against which a person may defend herself or himself. The fact that these offences do not involve personal violence or threat of violence probably explains why the subsection is unavailable to an accused who had intended to cause death to the person threatening his or her property or criminally trespassing on land. In comparison, to be completely acquitted by virtue of the general defence under s 15A(1), the accused must not have intended to cause death and not have acted recklessly realising that her or his conduct could result in death.[38] As might be expected, this restriction is lessened where the partial defence is pleaded under s 15A(2) which denies the defence only to persons who intended to cause death. It is noteworthy that the South Australian legislation does not impose similar restrictions in respect of cases of causing death in defence of life, bodily integrity or liberty.[39] The explanation for these restrictions must therefore be that, in the legislature's view, no interest in property or land is so valuable as to warrant protection by conduct performed with the intention of causing death or, in the case of the general defence, of recklessly causing death.

[4.16] The South Australian formulation of excessive defence appears to be working well in practice with trial judges resorting to written directions to assist the jury in comprehending the formulation and its relationship with the general defence of self-defence. Although juries may continue to encounter difficulty comprehending the law, trial judges have been able to remove that difficulty by clear and precise directions.[40]

The New South Wales statutory formulation

[4.17] New South Wales was the next Australian jurisdiction to re-introduce excessive defence by legislative enactment.[41] The provision, which came into force in 2002, is s 421 of the *Crimes Act* 1900 (NSW) and reads:

(1) This section applies if:

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[38] Section 15A(1)(b). The common law, which governs the law of murder in South Australia, recognises that the mental state of murder is made out if the accused intended to kill, or intended to inflict grievous bodily harm, or was reckless as to the probable risk of causing death or grievous bodily harm: see *R v Crabbe* (1985) 156 CLR 464. (HCA). It is unclear why the subsection omits any reference to an intention to inflict grievous bodily harm.

[39] Section 15(1).

[40] For a good case illustration of a trial judge's use of written directions and clear explanations to the jury, see *R v Clothier* [2001] SASC 9 (CCA SA).

[41] By virtue of the *Crimes Amendment (Self-Defence) Act* 2001 (NSW). The legislation was the initiative of the Attorney-General's Department, not the result of a law reform commission recommendation.

(a) the person uses force that involves the intentional or reckless infliction of death,[42] and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them.

but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.[43]

There are, as yet, no cases which have considered this statutory formulation of excessive defence.

[4.18] This provision has several features which it shares with the South Australian formulation.[44] Like the South Australian legislation, the general plea of self-defence under the *Crimes Act* 1900 (NSW) requires the accused to have genuinely believed the threatening circumstances to be of a specified nature.[45] Also, like its South Australian counterpart, the general defence under the New South Wales legislation requires the accused's conduct to have been a reasonable response to the threatening circumstances as he or she perceived them.[46] The partial defence under s 421 comes into play when the accused's conduct of killing is determined by the jury to have been an unreasonable response to the threatened circumstances. Like the South Australian formulation, the section provides that accused persons are guilty only of manslaughter and not murder if they genuinely believed that the killing was necessary to protect themselves or another person or to prevent the unlawful deprivation of liberty.

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42 Section 18(1)(a) of the *Crimes Act* 1900 (NSW) provides that the mental state of murder can be an intention to kill, an intention to inflict grievous bodily harm, or reckless indifference to human life. As with the equivalent South Australian provision (see above note 38), it is unclear why s 421(1)(a) omits any reference to an intention to inflict grievous bodily harm.

43 The clause "otherwise criminally responsible for manslaughter" is unclear. It appears to refer to cases where the general defence did not operate to avoid liability for manslaughter because the accused's conduct was "not a reasonable response" in the circumstances as he or she perceived them: see s 418(2). Section 421 then operates to secure a conviction of manslaughter.

44 This is only to be expected since the New South Wales legislation was modeled on the South Australian provisions: see the speech of Mr Debus, the Attorney-General, when introducing the Crimes Amendment (Self-Defence) Bill 2001, *NSW Parliament, Legislative Assembly Hansard*, 28 November 2001, p 19094.

45 Section 418(2). The New South Wales provisions on defence of person and property are reproduced in Appendix II of this paper. Prior to the enactment of these provisions, the common law governed the defence of person and property in New South Wales.

46 *Ibid*.

[4.19] However, s 421 differs from the South Australian formulation in one material respect. Unlike the relevant South Australian provision, s 421 is unavailable where the accused has killed in defence of property, criminal trespass to land, or when lawfully arresting an offender. It is perhaps understandable that the New South Wales legislature decided against permitting the defence where the accused believed, unreasonably, that killing was necessary to protect property or to prevent criminal trespass. As the Attorney-General asserted when introducing the Bill, "life is more valuable than property" and "[t]here can be no circumstances where it is appropriate to intentionally or recklessly take a human life in the protection of property or to prevent criminal trespass, although it may be permissible to do serious bodily harm in certain circumstances if necessary and reasonable."[47] However, it is much more difficult to understand why s 421 is also unavailable in cases where a person had used excessive and fatal force when lawfully arresting an offender. No reason was given for this exclusion.

The Victorian Law Reform Commission's proposed formulation

[4.20] The Commission recommended an alternative approach to the re-introduction of excessive defence, which was to create a new offence of culpable homicide:

> A person who kills another in self-defence on the basis of a belief that was grossly unreasonable either in relation to the need for force or in relation to the degree of force that was necessary should be guilty of the offence of culpable homicide.[48]

[4.21] The Commission advocated this approach because it had proposed the abolition of all objective requirements for the general plea of self-defence.[49] Under this proposal, a person who had honestly but unreasonably believed that deadly force was necessary and proportionate to the threatened circumstances would be acquitted of murder.[50] However, the Commission thought that such a person should not be completely acquitted of any offence given her or his grossly unreasonable mistake concerning the force used in self-defence. The Commission also regarded the crime of manslaughter as inappropriate because such a person was less culpable than one who had put others at risk by gross negligence.[51] This explains why the Commission considered it desirable to enact a new offence which was less serious than manslaughter.[52]

The Indian Penal Code formulation

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47 Above, note 44, p 19094.

48 LRCV Report 40, recommendation 27, at p 98.

49 *Ibid*, recommendation 28, p 98.

50 If enacted, this would radically alter the law of self-defence in Victoria which is governed by the common law as pronounced in *Zecevic*.

51 LRCV Report 40, para 222.

52 The Commission proposed a maximum penalty of 7 years imprisonment which is the same as that for the offence of culpable driving causing death under s 318 of the *Crimes Act* 1958 (Vic). In Victoria, manslaughter is punishable with a maximum of life imprisonment.

[4.22] Excessive defence comprises one of several Exceptions to murder under the Indian Penal Code.[53] If successfully pleaded, the Exception results in a conviction for the lesser offence of culpable homicide not amounting to murder which is the Code equivalent of manslaughter. Exception 2 to s 300 of the Code provides:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without an intention of doing more harm than is necessary for the purpose of such defence.

[4.23] To understand the operation of the Exception, it is necessary to briefly outline the general plea of the defence of person and property under the Code.[54] That defence gives everyone the right to defend themselves or another person against any offence affecting the human body.[55] The right is also given to defend one's own property or that of another against theft, robbery, mischief, criminal trespass or attempts to commit these offences.[56] To successfully rely on the defence, the accused must not have caused "more harm than it is necessary to inflict for the purpose of defence": see s 99(4). This involves an objective appraisal of the necessity for the accused's conduct in the circumstances as reasonably perceived by the accused.[57] The defence places further limitations on the use of fatal force in protection of person or property. With regard to protection of the person, killing is permissible only when it was necessary to repel an attack which caused reasonable apprehension of death, grievous hurt, rape, gratification of unnatural lust, abduction or kidnapping: see s 100. Where property was being protected, killing is permissible only when it was necessary to repel a robbery, housebreaking by night, mischief by fire committed on a human dwelling, or theft, mischief or house-trespass in circumstances which caused reasonable apprehension that death or grievous hurt would result if the right of defence were not exercised: see s 103.

[4.24] The above provisions require a court to undertake the following line of inquiry in cases where an accused claims to have killed in defence of person or of property. The court first determines whether the killing was done to repel any of the kinds of threats specified in s 100 or s 103. Should none of these threats have been present, the killing was excessive and the general defence fails. If one of these threats was present, the court then determines whether the killing was necessary in the circumstances for the purpose of defence, as required by s 99(4). Should the killing be found to be necessary, the general defence operates to acquit the accused of any offence. If the killing was unnecessary (that is, excessive), the general defence fails. Where the accused's conduct of killing is determined by the court to be excessive (either because none of the

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53 One of these is provocation which was discussed in Chapter 2 of this report.

54 The relevant provisions are reproduced in Appendix III of this paper.

55 Section 97(1).

56 Section 97(2).

57 Sections 102 and 105. The partly subjective and partly objective test of the accused's perception of the threatening circumstances accords with the Australian common law: see para **[4.9]**.

specified threats were present or the killing was unnecessary), the court proceeds to inquire whether the Exception operates to reduce the offence committed by the accused from murder to culpable homicide not amounting to murder. The offence will be so reduced if the requirements of the Exception are satisfied, namely, that the accused killed without premeditation and without any intention of doing more harm than was necessary for the purpose of defence.

[4.25] The presence of the term "in good faith" in the Exception has been difficult to reconcile with the Code framers' view that the Exception should apply where the accused honestly believed that killing was necessary in defence.[58] This is because the Code defines the term as connoting the doing of or believing in something with "due care and attention".[59] The Exception will therefore only succeed if the accused honestly and reasonably believed that his or her conduct of killing was necessary. To give effect to the Code framers' intention, the courts have had to dilute considerably the term "in good faith". The following statement by the Rangoon High Court in *Po Mye v R* bears this out:

> The question here must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to inflict regardless of his right. [Exception 2] punishes a criminal act in excess of the right of private defence, and it is impossible to regard "due care and attention" in the sense which is usually ascribed to it as an element in such criminality.[60]

[4.26] The approach taken by the Exception to excessive killing in defence of property or against criminal trespass is to be contrasted with the South Australian formulation. The Exception is broader because it is available to accused persons who may have intentionally caused death. The Code framers supported this position by noting that there may be circumstances where property is so valuable in the eyes of its possessor that he or she may have honestly believed that it was necessary to kill the person threatening it. They gave the example of the theft of savings from a long and laborious life upon which a large family was solely dependent.[61] In such cases, the Code framers thought that for the law to deny any leniency whatsoever to an accused charged with murder, was to ignore the fact that he or she had killed while acting in defence, albeit of property.

Battered women who kill and excessive defence

58 See para **[4.5]**. For a detailed discussion of this problem, see Yeo, above, note 29, pp 123-131.

59 Section 52 which reads: "Nothing is said to be done or believed in 'good faith' which is done without due care and attention."

60 AIR 1940 Rang 129 at 132 per Roberts CJ. Burma has a code which is identical to the Indian Penal Code.

61 Macaulay, Macleod, Anderson and Millett, above, note 14, p 148.

[4.27] The relatively brief and chequered history of excessive defence in Australia and the ensuing dearth of cases prevent any definite observations being made concerning the use of the plea by battered women who kill their violent partners.[62] The general comment is offered that recognising such a defence may work to the detriment of some of these women since the jury might decide to convict them of manslaughter when they ought to have been acquitted altogether of any offence. This outcome presupposes that the definition and application of the general defence of self-defence would produce this result, a presupposition which depends on the particular formulation of the general defence, the interpretation afforded it by the judges, and the moral judgment of the jury. The Northern Territory case of *R v Secretary*[63] is a good illustration of how this is possible. The accused, who had suffered years of abuse from her husband, shot him while he was asleep. Before going to sleep, he had assaulted the accused and said words which might have amounted to a threat to kill her. The Court of Criminal Appeal held that the self-defence provision appearing in the *Criminal Code* 1983 (NT)[64] envisaged people taking pre-emptive action to defend themselves from a threatened assault. The court also held that it was open to the jury to find that the deceased's threat of future injury to the accused could be characterised as an assault even though the threat was of future conduct, it constituted mere words, and the deceased had fallen asleep after making it.

[4.28] Although New Zealand law is outside the scope of this paper, it would nevertheless be helpful to briefly mention certain observations on excessive defence made by the New Zealand Law Commission. In its 2001 report entitled *Some Criminal Defences with Particular Reference to Battered Defendants*,[65] the Commission said:

> The Commission acknowledges the strength of the arguments in support of excessive self-defence as a partial defence. Of all the partial defences considered …. this is the one we would most favour introducing into New Zealand law. In provocation and diminished responsibility, the defendant intends to do something that is unlawful. In excessive self-defence, the defendant intends to do something that is lawful within limits. Being closely aligned with the elements of self-defence, it would not involve completely new concepts. Excessive self-defence would only arise when

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62 The author is not aware of any Indian cases, empirical studies or theoretical discourses which have examined the operation of Exception 2 to s 300 of the Indian Penal Code in relation to battered wives killing their violent husbands.

63 (1996) 86 A Crim R 119 (CCA NT).

64 Section 28(f) reads: "In the circumstances following, the application of force that will or is likely to kill or cause grievous harm is justified provided it is not unnecessary force: … (f) in the case of any person when acting in self-defence or in the defence of another, where the nature of the assault being defended was such as to cause the person using the force reasonable apprehension that death or grievous harm will result." This subsection has since been replaced by another provision on self-defence (s 29) which is basically adopts s 313 of the Code proposed by the Model Criminal Code Officers Committee, *Final Report, Chapter 2. General Principles of Criminal Responsibility* (MCCOC/SCAG, Canberra, 1993).

65 Report 73 (NZLC, Wellington, 2001).

> self-defence is a jury issue and would fit easily and naturally into jury directions on self-defence.[66]

The Commission also observed that a plea of excessive defence more closely reflects the experiences of battered female accused who had killed their violent partners. This was because "the link between self-defence and excessive self-defence means it is more appropriate to the circumstances that are typical of the cases involving battered defendants than provocation or diminished responsibility."[67] Eventually, the Commission did not recommend introducing excessive defence only because its preference was not to retain or introduce partial defences to murder, but to rely on a sentencing discretion for murder to account for the multifarious circumstances when a lesser culpability for intentional homicide should be recognised.[68]

The case for having a defence of excessive defence

[4.29] Whether or not excessive defence should be relegated to a mitigating factor in sentencing is outside the scope of this paper.[69] As to whether or not the law should recognise excessive defence as a partial excuse to murder, the legislators of South Australia and New South Wales have thought so in fairness to the accused. A recent empirical study of Australian community values and expectations confirms the soundness of this position.[70] In this regard, even the majority of the High Court in *Zecevic* who abolished the defence acknowledged the strength of its underlying rationale that a person who had applied excessive force by killing in defence was less culpable than a murderer.[71] The overriding concern of the majority was that recognition of the defence made the law of self-defence unduly complicated and incomprehensible to juries.[72] This concern was recently echoed by the Model Criminal Code Officers Committee.[73] However, the South Australian and New South Wales statutory formulations appear to have largely overcome this concern as they seem to be working well in practice.

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66 *Ibid*, para 67.

67 *Id*.

68 New Zealand Law Commission, above, note 65, paras 68-69.

69 For a discussion of this issue, see Yeo, above, note 29, pp 171-174.

70 Yeo, S, "Revisiting Excessive Self-Defence" (2000) 12 *Current Issues in Criminal Justice* 39 at 43-45.

71 (1987) 162 CLR 645 at 653 per Mason CJ; at 664 per Wilson, Dawson and Toohey JJ.

72 *Contra*, LRCV Report 40, para 219 which noted the reports of experienced criminal trial lawyers that, despite its complexities, juries reached appropriate verdicts in most cases of excessive defence when the defence was still available in that jurisdiction.

73 Model Criminal Code Officers Committee, *Discussion Paper, Chapter 5, Fatal Offences Against the Person* (MCCOC/SCAG, 1998), p 113 where it contended that recognising excessive defence would require trial judges to direct juries on "an unworkably complicated test more apt to confuse than assist." As a result, the Committee recommended against re-introducing the defence.

Appendix I

South Australian provisions on defence of person and property

Criminal Law Consolidation Act 1936 (SA), as amended by the Criminal Law Consolidation (Self Defence) Amendment Act 1997 (SA)

Acts directed at the defence of life, bodily integrity or liberty

15. (1) It is a defence to a charge of an offence if-

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and

(b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for, a defensive purpose; but

(b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(3) For the purposes of this section, a person acts for a defensive purpose if the person acts

(a) in self defence or in defence of another; or

(b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

(4) However, if a person -

(a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or

(b) resists another. who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party, the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.

(5) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution establishes beyond reasonable doubt that the defendant is not entitled to the defence.

Defence of Property, etc.

15A. (1) It is a defence to a charge of an offence if-

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable—

(i) to protect property from unlawful appropriation, destruction, damage or interference; or

(ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or

(iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and

(b) if the conduct resulted in death-the defendant did not intend to cause death nor did the defendant act recklessly realizing that the conduct could result in death; and

(c) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if-

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable-

(i) to protect property from unlawful appropriation, destruction, damage or interference; or

(ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or

(iii) to make or assist in the lawful arrest of an offender or alleged offender a person who is unlawfully at large; and

(b) the defendant did not intend to cause death; but

(c) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(3) For the purposes of this section, a person commits a criminal trespass if the person trespasses on land or premises-

(a) with the intention of committing an offence against a person or property (or both); or

(b) in circumstances where the trespass itself constitutes an offence.

(4) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution establishes beyond reasonable doubt that the defendant is not entitled to the defence.

Appendix II

New South Wales provisions on defence of person and property

Crimes Amendment (Self-defence) Act 2001 (NSW)

418 *Self-defence when available*

(1) A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

(a) to defend himself or herself or another person, or

(b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or

(c) to protect property from unlawful taking, destruction, damage or interference, or

(d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass, and the conduct is a reasonable response in the circumstances as he or she perceives them.

419 *Self-defence onus of proof*

In any criminal proceedings in which the application of this Division is raised, the prosectution has the onus of proving, beyond reasonable doubt, that the person did not carry out the conduct in self-defence.

420 *Self-defence not available if death inflicted to protect property or trespass to property*

This Division does not apply if the person uses force that involves the intentional or reckless infliction of death only:

(a) to protect property, or

(b) to prevent criminal trespass or to remove a person committing criminal trespass.

421 *Self-defence excessive force that inflicts death*

(1) This section applies if:

(a) the person uses force that involves the intentional or reckless infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

422 *Self-defence response to lawful conduct*

This Division is not excluded merely because:

(a) the conduct to which the person responds is lawful, or

(b) the other person carrying out the conduct to which the person responds is not criminally responsible for it.

Appendix III

Indian Provisions on defence of person and property

Indian Penal Code 1860

Right of Private Defence

96. Nothing is an offence which is done in the exercise of the right of private defence.

97. Every person has a right, subject to the restrictions contained in Section 99, to defend:

(1) his own body, and the body of any other person, against any offence affecting the human body;

(2) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Illustrations

(a) Z, under the influence of madness, attempts to kill A. Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b) A enters, by night, a house which he is legally entitled to enter. Z in good faith, taking A for a housebreaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

99. (1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

(2) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

(3) There is no right of private defence in cases in'which there is time to have recourse to the protection of the public authorities.

(4) The right of private defence in no case extends to the infliction of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1. - A person is not deprived of the right of private defence against an act done, or attempted to he done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2. - A person is not deprived of the.right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing unless he produces such authority, if demanded.

100. The right of private defence of the body extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:

(1) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(2) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

(3) an assault with the intention of committing rape;

(4) an assault with the intention of gratifying unnatural lust; (5) an assault with the intention of kidnapping or abducting; (6) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

101. If the offence is not of any of the descriptions enumerated in Section 100, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

103. The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, is an offence of any of the following descriptions:

(1) robbery;

(2) housebreaking by night;

(3) mischief by fire committed on any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or as a place for the custody of property;

(4) theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, is theft, mischief, or criminal trespass, not of any of the descriptions enumerated in Section 103, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrongdoer of any harm other than death.

105. (1) The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

(2) The right of private defence of property against theft continues till the offender has effected his retreat with the property, or till the assistance of the public authorities is obtained, or till the property has been recovered.

(3) The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death, or hurt, or wrongful restraint, or as long as the fear of instant death, or of instant hurt, or of instant personal restraint continues.

(4) The right of private defence of property against criminal trespass or mischief, continues as long as the offender continues in the commission of criminal trespass or mischief

(5) The right of private defence of property against housebreaking by night continues as long as house-trespass which has been begun by such housebreaking.

106. If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender is so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Illustration

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

APPENDIX B

Partial Defences to Murder in Canadian Criminal Law

Provocation, Excessive Force in Self-Defence and Diminished Responsibility

Dale E Ives*

A. Murder in Canada

A person commits murder in Canada if he causes the death of another human being and he either meant to cause death or he meant to cause bodily harm knowing that death was likely and being reckless as to whether it ensued.[1] In cases where the requisite intent for murder is not proved, the person would be convicted of manslaughter.[2] A person who is convicted of murder is subject to a mandatory sentence of life imprisonment with a minimum period of parole ineligibility of twenty-five years in the case of first degree murder and ten years in the case of second degree murder.[3] In contrast, in cases of manslaughter, the judge may impose any sentence up to a maximum period of life imprisonment.[4] He may therefore tailor each individual offender's sentence to the particular facts of the case including taking into account any extenuating circumstances that might mitigate the offender's degree of responsibility.

B. Partial Defences to Murder

The only partial defence to murder that is currently recognized in Canada is the provocation defence. A common law partial defence of the use of excessive force in self-defence was recognized in several Canadian provinces during the 1940s to the early 1980s but it was definitively rejected by the Supreme Court of Canada in 1983. Apart from the recognition of reduced criminal responsibility based on mental disturbance in cases of infanticide, the partial defence of diminished responsibility has never been recognized in Canada. It is accepted, however, that evidence of mental disorder that does not satisfy the legal tests for the mental disorder defence may be used to raised a reasonable doubt as to whether the defendant had the specific intent required for murder or whether the murder was planned and deliberate.

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[1] Criminal Code, ss. 222(1) and 229(a). A person may also be convicted of "unlawful object" murder under s. 229(c) of the Code but this provision is rarely charged.

[2] Criminal Code, s. 234. More fully, it is manslaughter if it is not murder or infanticide.

[3] Criminal Code, ss. 235 and 745. In first degree murder cases, there is the possibility of review of the parole ineligibility period at fifteen years. Criminal Code, s. 745.6.

[4] Criminal Code, s. 236.

I. Provocation

1. *Overview of the Provocation Defence*

The qualified defence of provocation has been explicitly recognized in the Criminal Code since it was first enacted in 1892.[5] It is restricted to cases of murder and operates to reduce what would otherwise be a conviction for murder to manslaughter if the defendant killed the deceased in anger in sudden response to a sudden wrongful act or insult.[6] Now set out is s. 232 of the Code, the Canadian provision has been described as "one of the most complex formulations [of the provocation defence] anywhere."[7] The provision itself is based on the English Draft Criminal Code of 1879 and has been subject to only minor amendments since it was first enacted in 1892. As currently formulated, the provision reads as follows:

> 232.(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
> (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation enough for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.
> (3) For the purposes of this section the questions
> (a) whether a particular wrongful act or insult amounted to provocation, and
> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
> are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
> (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

The provocation defence in Canada thus has four elements: (i) a wrongful act or insult; (ii) an ordinary person would be deprived of the power of self-control by that act or insult; (iii) the defendant was actually provoked by the act or insult; and (iv) the wrongful act or insult and the defendant's response to it were both sudden.[8] There is therefore no proportionality

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[5] SC 1892, c. 29, s. 229.

[6] Provocation can be taken into account as a mitigating factor at the sentencing stage for other offences. Moreover, if the offender is convicted of manslaughter rather than murder on the basis of the provocation defence, he is then able to rely on the fact that he was provoked at the sentencing stage to mitigate his sentence. See *Stone* [1999] 2 SCR 290, 406-407.

[7] D Stuart, CANADIAN CRIMINAL LAW, 4th ed. (Carswell, 2001), 535.

[8] Ibid, 533-544.

requirement associated with the defence.[9] It is sufficient if the ordinary person would have been deprived of his self-control by the act or insult in question; it need not also be shown that the ordinary person would have reacted in the same manner as the defendant.

Judicial interpretation of the first and third elements of the defence has remained fairly constant over the years. Canadian courts have consistently interpreted the phrase "wrongful act or insult" in a broad manner. An act may be wrongful, for example, even if it is not prohibited by law. In particular, although an act cannot constitute provocation if the victim was doing something he had a legal right to do, Canadian courts have interpreted legal right in a narrow manner to mean rights that are expressly conferred by law such as the right to self-defence.[10] It must also be abundantly clear that the victim was entitled on the particular facts of the case to exercise that right at that time. Insult has also been broadly defined so that it effectively includes any form of contemptuous, scornful, offensive or wounding speech.[11] Canadian courts have interpreted the subjective element of the defence in a similarly broad manner, requiring that the trier of fact take into account all subjective factors in deciding whether the defendant was actually provoked by the wrongful act or insult.[12] Accordingly, the judge or jury must consider the defendant's mental condition, his character and temperament, any personal quirks and foibles, and any evidence of intoxication, along with his background and any prior relationship he may have had with the deceased.

Significant changes in interpretation have, however, occurred in respect of the remaining two elements of the defence. First, Canadian courts initially adopted a strict approach to the ordinary person test, holding that subjective factors relating to the particular characteristics and circumstances of the individual defendant were not to be considered in deciding whether the wrongful act or insult would have deprived an ordinary person of the power of self-control.[13] In its 1986 decision in *Hill*[14], however, the Supreme Court of Canada, influenced by recent developments in England, expanded the ordinary person test to take into account "any general characteristics relevant to the provocation in question."[15] The Court emphasized that factors such as intoxication and temper were not to be taken into account: the ordinary person was always a sober person of normal temperament and self-control. A decade later, in *Thibert*[16], the Court expanded on its earlier ruling and held that the ordinary person "must be of the same

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[9] See eg *Squire* (1975) 26 CCC (2d) 219, 234 (Ont. CA); *Carpenter* (1993) 83 CCC (3d) 193, 197 (Ont. CA).

[10] *Galway* (1972) 6 CCC (2d) 539, 553 (Ont. CA); *Thibert* [1996] 1 SCR 37, 54-55.

[11] *Taylor* [1947] SCR 462, 475; *Tripodi* [1955] SCR 438, 445.

[12] *Wright* [1969] SCR 335, 340; *Hill* [1986] 1 SCR 313, 332-333.

[13] *Salamon* [1959] SCR 404, 410, 415; *Wright*, 340.

[14] [1986] 1 SCR 313.

[15] Ibid, 331.

[16] [1996] 1 SCR 37.

age, and sex, and share with the accused such other factors as would give the act or insult in question a special significance and have experienced the same series of acts or insults as those experienced by the accused."[17] It also held that the trier of fact must consider any relevant background circumstances, including the history of any prior relationship between the defendant and the deceased. The test to be applied, therefore, is whether an ordinary person of the same age and sex, and in the same situation or circumstances as the defendant, would have been deprived of the power of self-control by the act or insult.

Second, Canadian courts have traditionally held that the suddenness requirement in relation to the defendant's response to the provocation will not be satisfied if the defendant had prior knowledge of the act or insult that is said to constitute the provocation. To be sudden, the act or insult "must strike upon a mind unprepared for it, ... it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame."[18] It also cannot be a predictable response to the defendant's own conduct. The strictness of this requirement has, however, arguably been relaxed in recent years. Most notably, in *Thibert*, the Supreme Court concluded that the deceased's comment and actions just before the defendant shot him were sufficient to create an air of reality to the defence even though the defendant had instigated the confrontation with the deceased and he already knew that the deceased was having a relationship with his wife.[19]

2. Criticisms of the Defence

The provocation defence is unquestionably one of the most controversial defences in Canadian criminal law. It has been extensively criticized by academics, law reform bodies and advocacy organizations who argue that the defence, at least as currently formulated, is unduly complex and fails to adequately reflect and promote egalitarian principles particularly in the domestic context. Feminist legal scholars and advocacy organizations are especially critical of the defence's continued existence in Canadian law. Although a number of different criticisms have been directed at the provocation defence over the years, there are five principle criticisms that appear to be fuelling the ongoing debate for abolition or reform of the defence.

First, the provocation defence is justified as a concession to human infirmity and frailty on the basis that <u>all</u> persons are susceptible to uncontrollable bursts of anger and passion that may result in violence against another person. It is argued, however, that what the provocation defence really does is condone and legitimize the use of violence by some individuals, notably heterosexual males, to gain and retain control over other persons, particularly women, gay men

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[17] Ibid, 49.

[18] *Tripodi*, 443.

[19] It has been suggested that the Supreme Court's recent decision in *Parent* impliedly signifies the Court's desires to tighten up the provocation defence by returning to a stricter suddenness requirement. See D Stuart, "Annotation – *R. v. Parent*" (2001) 41 CR (5th) 200 and W Gorman, "Comment: *R. v. Parent*" (2002) 45 Crim. LQ 412.

and racialized persons.[20] This point is put even more bluntly by some critics of the defence. In their view, in both its interpretation and application, the defence legitimates and perpetuates patriarchal, sexist, homophobic and racist violence.[21] It therefore fails to deter violence against vulnerable groups including women, gay men and racialized persons.

Second, the provocation defence "blames the victim" for the defendant's inability to exercise self-control by focusing its attention on the conduct of the victim as the cause of the loss of self-control rather than focusing on the defendant's behaviour.[22] It therefore implies that the victim is at least partly responsible for his own death. It also diminishes the lives of the victims of provoked violence by suggesting that some murders are not as serious as other murders.[23]

Third, the defence privileges the emotion of anger over other emotions such as compassion, empathy, fear, or despair.[24] It makes little sense, however, to privilege a destructive emotion like anger or rage by recognizing it as a basis for mitigating sentence while refusing to show similar compassion for defendants motivated by other, arguably more worthwhile emotions. The provocation defence not only privileges anger, however, it privileges a particular conception of anger, namely, sudden rage. This type of anger is tailored to male violence, rather than female violence.[25] In particular, it is argued that when women do kill their partners or spouses, it is usually not an immediate reaction to a single instance of assault or provocation but rather the result of a slow-burning anger that has developed over time. In this respect, given that the defence privileges male anger and is primarily relied upon by men to excuse their violence, it is more properly seen as a concession to male infirmity, not human frailty.

Fourth, the wrongful act or insult requirement in Canada is interpreted in an excessively broad manner and therefore encourages and promotes violence against disadvantaged groups, particularly women, gay men and racialized persons.[26] It is argued the interpretation of

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[20] Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON PROVOCATION IN CRIMINAL LAW: FURTHER STEPS TOWARDS THE IMPLEMENTATION OF EQUALITY RIGHTS IN CRIMINAL LAW, Background Paper and Consultation Report (December 1999), 36.

[21] National Association of Women and the Law, STOP EXCUSING VIOLENCE AGAINST WOMEN, NAWL'S BRIEF ON DEFENCE OF PROVOCATION (2000), Chp. 2.

[22] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, PROVOCATION, SELF-DEFENCE AND DEFENCE OF PROPERTY, A CONSULTATION PAPER (1998), 8.

[23] National Association of Women and the Law, STOP EXCUSING VIOLENCE AGAINST WOMEN, Chp. 3.1; Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON PROVOCATION, 36.

[24] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 9; Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON PROVOCATION, 37-38.

[25] J St Lewis and S Galloway, REFORMING THE DEFENCE OF PROVOCATION (Ontario Women's Directorate, 1994), 22-23.

[26] St Lewis and Galloway, REFORMING THE PROVOCATION DEFENCE, 8; National Association of Women and the Law, STOP EXCUSING VIOLENCE AGAINST WOMEN, Chp. 1.2.

provocation to include conduct such as infidelity, indicating that a relationship is over, and even nagging, supports men's claims to a proprietary interest over their spouses and partners and undermines women's claims to autonomy, independence and self-respect. It therefore subjects women to the whims of unreasonable men who can point to even lawful conduct as the source of their loss of control and thus as an excuse for homicidal rage.

Finally, the subjectivization of the ordinary person requirement in Canada has significantly lowered the threshold of self-control that is demanded of all members of society to the detriment of women, gay men, and racialized persons.[27] This has occurred in part because of the Supreme Court's failure to carefully distinguish between the use of individual characteristics and circumstances to put the gravity of the insult into context and their use to determine the level of self-control required of the defendant.

3. *Proposals for Reform*

There is general agreement in Canada that changes should be made to the law on provocation; however, there is no general consensus on the type of reform that should be pursued. A variety of options have been put forward over the past two decades ranging from abolishing the defence to extending it to other offences. The main options for reform are as follows:

(a) abolish the defence contingent on the simultaneous abolishment of the mandatory minimum life sentence for murder;
(b) abolish the defence in cases of spousal homicide only;
(c) abolish the defence except in excessive force in self-defence cases;
(d) reform the elements of the defence and restrict it to murder cases;
(e) reform the elements of the defence and extend it to other offences.

The two most popular options are to either abolish the provocation defence at the same time as the mandatory minimum life sentence for murder or, alternatively, modernize and reform the elements of the defence while continuing to restrict the defence to murder cases.

(a) *Abolish the defence contingent on the simultaneous abolishment of the mandatory life sentence for murder*

There is considerable support in Canada for abolishing the defence of provocation contingent on the simultaneous abolishment of the mandatory minimum life sentence for murder. This is the preferred option of leading feminist advocacy groups who are extremely sceptical about the possibility of reforming the law to create a truly egalitarian provocation defence.[28] The desire to

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[27] Roach, CRIMINAL LAW, 254

[28] Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON PROVOCATION, 2-3; Canadian Association of Elizabeth Fry Societies, *REFORMING CRIMINAL CODE DEFENCES*, Recommendation 38; National Association of Women and the Law, STOP EXCUSING VIOLENCE AGAINST WOMEN, Chp. 2.5. The Law Reform Commission of Canada recommended a somewhat similar type of approach in its 1984 working paper on homicide. See Law Reform Commission of Canada, HOMICIDE, Working Paper 33 (1984), Recommendation 11.

abolish the defence flows directly from the criticisms outlined in section two, particularly the belief that the defence in both its interpretation and application reflects and perpetuates discriminatory values and attitudes and is used to legitimize deadly violence against vulnerable individuals and groups. A conviction for murder rather than manslaughter is also felt to be appropriate since the offender had the requisite intent for murder.[29]

It is recognized, however, that abolishing the provocation defence outright would expose more defendants to the mandatory life sentence for murder, a penalty which is controversial in its own right and which may in some cases be both disproportionate to the offender's culpability and unnecessary to safeguard society from him or to preclude his commission of future crimes.[30] Feminist advocacy organizations are particularly concerned that merely abolishing the provocation defence might deprive some members of disadvantaged groups, including women and racialized persons, of the opportunity to avoid a mandatory life sentence by removing their only avenue of mitigation and by enhancing the prosecution's bargaining position in plea negotiations.[31] It is therefore felt that abolishment of the provocation defence must be coupled with the elimination of the mandatory minimum sentence for murder.

At the same time, there is considerable concern that abolishing the mandatory sentence for murder and resorting to judicial sentencing discretion may permit discriminatory attitudes and values to resurface in the sentences handed down to provoked murderers.[32] To prevent this from occurring, feminist advocacy organizations propose that judicial discretion in sentencing should be controlled through the use of legislative guidelines to ensure sentencing decisions properly reflect modern egalitarian principles. In particular, the guidelines should mandate that, absent compelling reasons, an offender who killed to assert dominance over his victim or who was motivated by discriminatory beliefs must be given an enhanced sentence. In contrast, an offender who killed in response to a discriminatory act or insult would have his sentence mitigated by the provocation and he would therefore receive a reduced sentence.

(b) *Abolish the defence except in cases of excessive force in self-defence.*

A more limited proposal for reform would abolish the provocation defence except in cases where a defendant's claim to self-defence failed because of the use of excessive force. The intent of this proposal is twofold. It would secure for women the benefits of abolishing the defence and, in particular, it would ensure that a male defendant who killed his current or former spouse or partner in a rage provoked by a non-violent act or insult would be denied access to the provocation defence.[33] At the same time, it would assist battered women who

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[29] Law Reform Commission of Canada, HOMICIDE, Working Paper 33 (1984), 73.

[30] K Roach, CRIMINAL LAW, 2nd ed. (Carswell, 2000), 260.

[31] Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 38.

[32] Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON PROVOCATION, 41.

[33] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 18.

killed their abusive spouses or partners in self-defence by preserving for them an alternative defence if they were found to have used excessive force in defending themselves.[34]

There are significant shortcomings to this proposal. It does not exclude cases where the defendant's claim to self-defence is premised on discriminatory attitudes and beliefs.[35] By linking self-defence and provocation together, it would also create an extremely complex defence. Feminist advocacy groups have criticized the proposal for failing to address the needs of other defendants including battered women who kill in other contexts or racialized persons who kill in response to a racial insult. [36] They have also expressed concern that the proposal might encourage the use of the provocation defence rather than self-defence in cases involving battered women leading to convictions for manslaughter rather than acquittals.

(c) *Abolish the defence in cases of spousal homicide only.*

The most limited abolition proposal would eliminate the provocation defence only in cases of spousal homicide.[37] This proposal was inspired[38], at least in part, by Major J's comment in his dissenting judgment in *Thibert* that "[a]t law, no one has either an emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the appellant exhibited."[39] This option for reform directly addresses the most contentious use of the provocation defence – its use to excuse lethal violence by male defendants against their female spouses or partners – and it would therefore send a clear message that killings that are motivated by jealousy or a desire to assert control over another cannot be justified.[40]

The proposal, however, suffers from some significant flaws. In particular, there would appear to be little justification for limiting reform of the defence to cases of spousal homicide and thereby disregarding the equally objectionable use of the defence to excuse lethal violence that is motivated by homophobia, racism, or religious intolerance.[41] Additionally, in the view of

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[34] The potential use of the provocation defence in this context was identified by Judge Ratushny in the Self-Defence Review. See Hon. L Ratushny, SELF DEFENCE REVIEW, FINAL REPORT (July 1997), Chp. 5, Section 2. Judge Ratushny was appointed by the federal Government after the Supreme Court's landmark decision in *Lavallée* to review the cases of women who were serving sentences for homicide in cases where the offender alleged she had been defending herself from serious bodily harm or death.

[35] Department of Justice, REFORMING THE CRIMINAL CODE DEFENCES, 18.

[36] Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 46.

[37] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 16.

[38] See in particular EM Hyland, "*R. v. Thibert*: Are there any Ordinary People Left?" (1996-97) 28 Ottawa LR 145, 159-164.

[39] *Thibert*, 65.

[40] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 16.

[41] Hyland, "Are There any Ordinary People Left", 161,

feminist advocacy organizations, the proposal's use of gender-neutral language is itself objectionable for two reasons.[42] First, it obscures the fact that the provocation defence is predominantly available to and relied upon by men and, second, it ignores the fact that men and women who do rely on the defence do so in vastly different factual contexts. They would therefore support this type of reform only if it was reformulated in gender-specific terms to preclude the defence in cases of lethal male violence against women and other disadvantaged groups while allowing it in the few cases involving lethal violence by a women against her male spouse or partner. On the whole, however, feminist advocacy organizations would prefer to limit the scope of the defence by incorporating equality principles directly into the defence.

(d) *Reform the elements of the defence and continue to restrict it to murder.*

A number of the critics of the existing provocation defence consider that the defence itself should be retained as a concession to human infirmity.[43] Other critics see reform of the elements of the defence as a secondary option to be pursued only if they are unsuccessful in convincing Parliament to adopt their preferred option of abolishment.[44] It is therefore not surprising that these two groups often have very different ideas of the types of reform that are appropriate. The proposals that have attracted the most attention deal with three aspects of the defence: (i) the wrongful act or insult element; (ii) the ordinary person test; and (iii) the suddenness requirement in relation to the defendant's reaction to the provocation.

(i) wrongful act or insult

The first proposal for reform would narrow the scope of conduct that could constitute provocation by replacing the phrase "wrongful act or insult" in the first element of the test with "unlawful act".[45] This approach has been justified on the basis that neither insults alone nor lawful conduct should ever be sufficient to excuse, even partially, the use of lethal violence. This would dramatically restrict the scope of the defence since much of the conduct that has traditionally been held to constitute provocation consists of only words or lawful conduct.[46]

Feminist legal scholars and advocacy organizations agree with this proposal.[47] They acknowledge that this approach might deny racialized persons access to the defence if they

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[42] Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 44.

[43] See generally Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 12-18; Canadian Bar Association, PRINCIPLES OF CRIMINAL LIABILITY, 121.

[44] See discussion above in section 2(a).

[45] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 13.

[46] I Grant, D Chunn and C Boyle, THE LAW OF HOMICIDE (Carswell, 1994 (looseleaf), 6-8.

[47] St Lewis and Galloway, REFORMING THE DEFENCE OF PROVOCATION, 6-10; Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 41; Grant, Chunn and Boyle, LAW OF HOMICIDE, 6-9.

killed under provocation of a racist insult or taunt. They consider, however, that it is essential to limit the defence to respond to the predominant contexts in which it is raised, namely, spousal homicides in response to a woman's assertion of autonomy and the killing of gay men in response to non-violent sexual advances. They also note that under a proper equality-based analysis, racial insults and taunts will often be seen to be implied threats of violence. Some feminist scholars and organizations have also questioned whether the concern itself withstands careful scrutiny. In their view, "[a]rguments purportedly based on equality principles should not be used to condone and encourage homicidal rage." [48]

This proposal is not, however, the preferred approach of many other critics of the defence. An alternative proposal, for example, would simply replace the "wrongful act or insult" requirement in the Code with more general phraseology such as "act or statement".[49] This approach seeks to clarify the law without imposing any additional limits on the type of words or conduct that can legally constitute provocation. Another approach would amend the requirement to specifically deem that certain acts and insults cannot in law constitute provocation.[50] This would allow for the exclusion of some of the most objectionable forms of provocation such as infidelity, assertions of autonomy, and non-violent homosexual advances, while at the same time recognizing that there is room for disagreement on the types of words and conduct that should be recognized as legally sufficient provocation.

(ii) ordinary person test

The second proposal for reform is to define the ordinary person test to explicitly codify the mixed subjective-objective test that was adopted in *Thibert*.[51] This could include an explicit direction that individual characteristics should be considered only insofar as they relate to the gravity of the provocation; they should not be considered in relation to the degree of self-control demanded of the defendant. Feminist scholars and advocacy organizations have strenuously opposed this reform for fear that it would make the defence even more available since defendants would be able to rely upon an expanded range of personal characteristics,

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[48] Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON CRIMINAL LAW, 37.

[49] Canadian Bar Association, PRINCIPLES OF CRIMINAL LIABILITY: PROPOSALS FOR A NEW GENERAL PART OF THE CRIMINAL CODE, Report of the Canadian Bar Association Criminal Recodification Task Force (1992), 122. The Sub-committee on the Recodification of the General Part of the Criminal Code accepted the Canadian Bar Association's proposals for reforming the provocation defence. See Report of the Sub-committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, FIRST PRINCIPLES: RECODIFYING THE GENERAL PART OF THE CRIMINAL CODE OF CANADA (February 1993), 73.

[50] K Roach, "Provocation and Mandatory Life Imprisonment" (1998) 41 Crim. LQ 273, 274.

[51] Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 14. An alternative approach would be to adopt a purely subjective test. This option was discussed by the Women's Legal Education and Action Fund and rejected on the basis that it ignored the Supreme Court's subjectivization of the object test in *Thibert* and, more importantly, it would make it impossible to hold all individual to a minimum degree of self-control. See Women's Legal Education and Action Fund, A FEMINIST PERSPECTIVE ON PROVOCATION, 17-18.

including culture, to establish that the ordinary person would have been provoked by the act or insult in question.[52] They have also expressed concern that codification of the test could result in a lowering of the threshold of self-control demanded of all defendants, thereby diminishing the level of protection provided to all members of society.

Consequently, in the view of feminist scholars and advocacy organizations, the most appropriate way to reform this element of the defence is to incorporate egalitarian principles directly into the definition of the ordinary person.[53] The ordinary person would therefore be defined to be a person who was not, for example, sexist, homophobic or racist. Under this approach, defendants would no longer be able to assert they were provoked by many of the types of acts and insults that have been accepted by the courts in the past as sufficient to constitute provocation. An ordinary person, for example, would not be provoked by a woman's assertion that she was leaving the relationship or by a non-violent advance by a gay man.

(iii) suddenness requirement

The third proposal for reform would expand the temporal limit on the defence by removing the requirement that the defendant have acted "on the sudden" and "before his passions had time to cool" and replacing it with the requirement that the defendant have acted "while provoked."[54] This has been justified on the basis that the passage of time sometimes heats the passions, rather than cooling them off, and that not everyone reacts in the same way to provocative conduct. Moreover, by expanding the temporal element of the defence, it would make the defence more available to abused persons, particularly women, who may react violently only after being repeatedly abused and provoked.[55]

Feminist scholars and advocacy organizations are opposed to this change.[56] They do not consider that the purported benefit for abused persons is sufficient to justify expanding this element of the defence. In particular, women in such situations should be entitled to an acquittal based on the defence of self-defence; they should not be subject to a conviction for

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[52] National Association of Women and the Law, STOP EXCUSING VIOLENCE AGAINST WOMEN, Chp. 1.6.3; Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 42.

[53] This type of approach was first suggested by St Lewis and Galloway, REFORMING THE DEFENCE OF PROVOCATION, 15-16.

[54] Canadian Bar Association, PRINCIPLES OF CRIMINAL LIABILITY, 122l Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 15.

[55] An alternative way of addressing this issue might be to create a parallel defence to specifically address the situation of abused women by providing that murder would be reduced to manslaughter if the defendant reacted under provocation from "prolonged and severe domestic abuse or oppression." Department of Justice, REFORMING THE GENERAL PART OF THE *CRIMINAL CODE*, 22.

[56] National Association of Women and the Law, STOP EXCUSING VIOLENCE AGAINST WOMEN, Chp. 1.6.2; Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 43.

manslaughter based on the partial provocation defence. It is also objectionable to characterize the actions of these women as being based on a "loss of control" rather than a reasoned and rational response to the violence directed against them. It is therefore more appropriate to address the situation of abused women by reforming the law on self-defence. In any case, the danger associated with this proposal in terms of making the defence more readily available to defendants generally far outweighs the purported benefits. They would therefore retain the requirement that the defendant must have reacted on the sudden.

(e) *Reform the elements of the defence and extend it to a wider number of offences.*

A few proponents of reform, most notably the Canadian Bar Association, would reform the elements of the defence and, at the same time, extend it to a variety of offences other than murder. [57] This would be accomplished by limiting an offender's liability for punishment in respect of one of the enumerated offences to one half of the maximum punishment prescribed for that offence if the offender committed the offence while provoked. The intent of the proposal is to more fully acknowledge and express compassion for human weakness in cases where the violence was motivated by an understandable, albeit not entirely excusable, reason. The proposal to extend the provocation defence to offences other than murder has been strongly opposed by feminist legal scholars who believe it would simply aggravate the position of women and other disadvantaged groups who are regularly subject to male violence that is motivated by discriminatory attitudes and values.[58]

II. Excessive Use of Force in Self-Defence

1. *Overview of the Defence of Self-Defence*

The law on self-defence in Canada is set out in a series of highly technical, complex and internally inconsistent provisions in the Criminal Code.[59] The key provisions, currently ss. 34 to 37, are based on the self-defence provisions in the English Draft Criminal Code of 1879.[60] There have been only minor amendments to these provisions since they were first enacted in 1892. Both historically and today, the Code has therefore distinguished between four types of self-defence: (i) self-defence against an unprovoked assault where the defender does not intend to cause death or grievous bodily harm; (ii) self-defence against an assault where the defender both reasonably apprehends and causes death or grievous bodily harm; (iii) self-defence by the initial aggressor; and (iv) self-defence to prevent an assault or its repetition against oneself or

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[57] Canadian Bar Association, PRINCIPLES OF CRIMINAL LIABILITY, 121. See also Department of Justice, REFORMING THE GENERAL PART OF THE *CRIMINAL CODE*, 21-22.

[58] See eg St Lewis and Galloway, REFORMING THE DEFENCE OF PROVOCATION, 29.

[59] Appellate courts in Canada, including the Supreme Court of Canada, routinely use these types of terms when describing the self-defence provisions. See *eg McIntosh* [1995] 1 SCR 686, 696; *Pintar* (1996) 110 CCC (3d) 402, 412 (Ont. CA).

[60] For the history of the self-defence provisions in Canada, see G Ferguson, "Self-Defence: Selecting the Applicable Provisions" (2000) 5 Can. Crim. LR 179.

another person.[61] Although the statutory provisions on self-defence have remained essentially unchanged over the years, the interpretation and application of the provisions has changed dramatically in the past two decades in three significant ways.

First, Canadian courts initially applied a purely objective standard which did not take into account any of the defendant's personal characteristics or experiences when assessing whether the defendant's perceptions were reasonable. Moreover, courts imposed a strict imminency requirement, holding that the use of force was inherently unreasonable unless the defendant was responding to an actual assault or a threat of imminent harm.[62] In 1990, however, the Supreme Court of Canada in *Lavallée*[63] adopted a more generous modified objective approach that requires triers of fact to take into account the background, experiences and characteristics of this particular defendant when assessing the issue of reasonableness. Under this broader approach, the issue is no longer "what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience."[64] In short, the trier of fact must ascribe to the reasonable person any relevant characteristics of the defendant and take into account the defendant's history in assessing whether the defendant's actions and beliefs were reasonable in the circumstances of the case. The Court also rejected the earlier case law that had read into the self-defence provisions the requirement that the defendant be reacting to an imminent assault, holding that imminency was simply a factor to consider in assessing the reasonableness of the defendant's beliefs.[65]

Second, Canadian courts initially attempted to interpret the self-defence provisions as a coherent whole, carving out for each provision a discrete area of application. To accomplish this objective, appeal courts read into the provisions additional criteria for the various types of self-defence. Most notably in the immediate context, the courts held that s. 34(2) of the Code was not available in cases where the defendant provoked the assault against which he was subsequently forced to defend himself.[66] They also held that s. 37, the most general of the self-defence provisions, was not available if the defendant had intended to kill or cause grievous bodily harm.[67] A defendant who had the requisite intent for murder and who caused death was therefore forced to rely on s. 34(2) of the Code if he had not provoked the assault and, if he had provoked the assault, he had to rely on s. 35, the most restrictive provision in the Code. In

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[61] See generally Stuart, CANADIAN CRIMINAL LAW, 475-491.

[62] See eg *Whynot* (1983) 9 CCC (3d) 449, 464(NSCA).

[63] [1990] 1 SCR 852.

[64] Ibid, 883.

[65] Ibid, 876-877. The Supreme Court confirmed in *Pétel* that imminency is simply a factor to take into account in assessing reasonableness and that the defendant's use of force may be reasonable even if he does not face an imminent assault. See *Pétel* [1994] 1 SCR 3, 13-14.

[66] *Squire*, 233 (Ont. CA); *Bolyantu* (1975) 29 CCC (2d) 174, 176 (Ont. CA).

[67] *Basarabas and Spek* (1981) 62 CCC (2d) 13, 28 (BCCA).

McIntosh[68], however, the Supreme Court of Canada held that the courts should adopt a literal approach to the interpretation of the self-defence provisions. This approach directs judges to interpret each the four provisions on self-defence in a literal manner in a way that is most favourable to the defendant even if such an interpretation leads to absurd or illogical results given the wording of the other three self-defence provisions.[69]

Third, trial judges tended to err on the side of caution when instructing the jury on the issue of self-defence. If there was any doubt as to whether the defendant intended to cause death or grievous bodily harm or whether he had provoked the assault, trial judges would instruct the jury on the full panoply of self-defence provisions. They also tended to rely on boilerplate instructions that were designed more for the purpose of avoiding a ground of appeal than making the relevant law clear to the jury. In *Pintar*[70], however, Moldaver JA for the Ontario Court of Appeal held that trial judges should rely on a functional approach to the application of the self-defence provisions and put before the jury only the most relevant self-defence provisions. In particular, if there is an air of reality to a broader self-defence provision, a narrower provision is only to be put to the jury if counsel can identify a realistic situation that would only be covered by the narrower provision.[71] In *Trombley*[72], the Supreme Court gave its implicit approval to the use of the functional approach to instruct juries on self-defence.

The practical effect of the literal and functional approaches to the self-defence provisions is that in cases where the defendant has the requisite intent for murder and has caused death, it will generally only be necessary to consider the criteria for self-defence set out in s. 34(2) of the Code.[73] As currently formulated, s. 34(2) reads as follows:

> (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
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> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

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[68] [1995] 1 SCR 686.

[69] Ibid, 704-706.

[70] (1996) 110 CCC (3d) 402 (Ont. CA).

[71] Ibid, 416-417.

[72] [1999] 1 SCR 757, aff'g (1998) 126 CCC (3d) 495 (Ont. CA).

[73] Section 34(1) is inapplicable because it is only available if the defendant did not intend to cause death or grievous bodily harm. Section 35 is superfluous because after *McIntosh*, s. 34(2), which is the broader provision since it does not contain an explicit duty to retreat, is available to the defendant even if he provoked the assault against which he was defending himself. Finally, s. 37 is also superfluous since it is a narrower provision that explicitly requires the use of only necessary and proportional force. Section 37 would only be relevant if the defendant was defending another person, rather than himself, against an attack.

> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Section 34(2) therefore has four elements: (i) an unlawful assault or a reasonable belief in an unlawful assault; (ii) causation of death[74]; (iii) a reasonable apprehension of death or grievous bodily harm; and (iv) a reasonable belief that the use of force is necessary in order to preserve one's self from such harm. There is no requirement in s. 34(2) of the Code that the force used by the defendant be proportionate to the assault against which he is defending himself.[75] Put another way, once the elements of the section are satisfied, there is no additional limitation on the amount of force that the defendant may use to preserve himself from harm.[76]

2. *Excessive Force in Self-Defence Defence*

There is no statutory provision in the Criminal Code that provides for a qualified defence of the use of excessive force in self-defence to reduce what would otherwise be a conviction for murder to manslaughter. Beginning in the 1940s, however, Canadian courts began to recognize a qualified common law defence of excessive force in self-defence. The defence was first accepted by the British Columbia Court of Appeal in *Barilla*[77] where the defendant's murder conviction was overturned on the basis that the trial judge had failed to instruct the jury that it could convict of manslaughter if it concluded that the defendant had used excessive force in defending himself.[78] *Barilla* was routinely followed by the British Columbia Court of Appeal in subsequent cases dealing with the use of excessive force in self-defence.[79] Appellate courts in other provinces also began to recognize the defence in the late 1960s and 1970s. By the early 1980s, appellate courts in Quebec,[80] Newfoundland,[81] Saskatchewan,[82] Alberta[83] and,

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[74] Section 34(2) is also available if the defendant caused grievous bodily harm rather than death.

[75] *Hebert* [1996] 2 SCR 272 280.

[76] *Siu* (1992) 71 CCC (3d) 197, 212(BCCA); *Kandola* (1993) 80 CCC (3d) 481, 492 (BCCA).

[77] (1944) 82 CCC 228 (BCCA).

[78] Ibid, 232.

[79] *Ouellette* (1950) 98 CCC 153, 157 (BCCA); *Nelson* (1953) 105 CCC 333, 334 (BCCA); *Stanley* (1977) 32 CCC (2d) 216, 232 (BCCA).

[80] *Pilon* [1966] 2 CCC 53, 59, 73 (Que. CA).

[81] *Clarke* (1973) 4 Nfld. & PEIR 550, 567, 571 (Nfld. CA).

[82] *Crothers* (1978) 43 CCC (2d) 27, 30-31 (Sask. CA).

[83] *Deegan* (1979) 49 CCC (2d) 417, 419-420 (Alta. CA); *Fraser* (1980) 55 CCC (2d) 503, 511, 523-524; *Gee* (1980) 55 CCC (2d) 525, 528-529, 538-539, 542(Alta. CA), aff'd on other grounds [1982] 2 SCR 286; *Faid* (1981) 61 CCC (2d) 28, 35 (Alta. CA), rev'd [1983] 1 SCR 265.

after some hesitation, Ontario,[84] had all accepted the defence. It had been rejected only in Manitoba.[85]

The early case law on the qualified defence of excessive force is however largely conclusory. Appeal courts did not identify the exact elements of the defence or explain either its underlying legal basis or its relationship to the statutory provisions on self-defence. In *Barilla*, for example, the Court of Appeal merely cited some early English cases of questionable relevance and a brief quote from East's Pleas of the Crown to support its recognition of the defence. In subsequent cases, appeal courts simply tended to cite *Barilla* or cases that had followed it. It was not until the late 1970s that appellate judges in Alberta and Ontario, influenced by developments in the case law in Australia and England, began to identify in their reasons for judgment the specific elements of the defence and its underlying legal basis. There was little attempt, however, to relate the defence to the statutory provisions on self-defence.

Provincial appellate judges in Canada never reached a firm conclusion on the legal basis for the defence. Two different justifications were advanced. The minority view was that the defence negated the mental element for murder since a defendant who honestly believed that he was using reasonable force even though the force was not objectively reasonable did not have the type of "intent to kill" that was required to sustain a conviction for murder.[86] The majority view was that the defence was premised on the reduced culpability of an offender who killed another in self-defence in the honest but mistaken belief that the force used was reasonable.[87]

There was also no definite statement of the elements of the offence. The Ontario Court of Appeal had accepted that, at a minimum, three elements would have to be satisfied if the defence were to be available to reduce a murder conviction to manslaughter: (i) the defendant was justified in using some force to defend himself against an attack, real or reasonably apprehended; (ii) the defendant honestly believed that he was justified in using the force that he did; and (iii) the force used was excessive only because it exceeded what the defendant could reasonably have considered necessary.[88] A somewhat similar formulation had been accepted by the Alberta Court of Appeal, namely that: (i) certain serious circumstances must exist which led the defendant to reasonably believe a situation involving danger existed; (ii) the defendant used unreasonable or excessive force; and (iii) the defendant was acting honestly when he used

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[84] *Reilly* (1982) 66 CCC (2d) 146, 160 (Ont. CA), rev'd [1984] 2 SCR 396. The Ontario Court of Appeal had impliedly rejected the defence in *Hay* (1973) 23 CRNS 191 (Ont. CA) and it declined to revisit the issue in *Campbell* (1977) 38 CCC (2d) 6 (Ont. CA) on the basis that the defence did not arise on the facts of the case even if it existed in Canada.

[85] *Appleby* [1979] 1 WWR 664 (Man. CA).

[86] See eg *Deegan*, 424 (Prowse JA); *Gee*, 539-540 (Prowse JA) (Alta. CA).

[87] See eg *Fraser*, 522, 524 (Moir JA); *Gee*, 529 (McDermid JA) (Alta. CA).

[88] *Trecroce*, 203-04; *Reilly*, 160 (Ont. CA).

excessive force in that he mistakenly believed that the degree of force he was using was reasonable.[89]

The growing trend towards the acceptance of the defence was abruptly halted in the early 1980s when the Supreme Court of Canada conclusively held in *Faid*[90] that the partial defence of excessive force in self-defence formed no part of Canadian law. Speaking for a unanimous court, Dickson J emphatically stated:

> The position of the Alberta Court of Appeal that there is a "half-way" house outside s. 34 of the Code is, in my view, inapplicable to the Canadian codified system of criminal law, it lacks any recognizable basis in principle, would require prolix and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown. Where a killing has resulted from the excessive use of force in self-defence the accused loses the justification provided under s. 34. There is no partial justification open under the section. Once the jury reaches the conclusion that excessive force has been used the defence of self-defence has failed.[91]

Dickson J thus offered four justifications for rejecting the defence. First, the law on self-defence was comprehensively set out in the Criminal Code and there was therefore no room to recognize a common law defence of excessive force in self-defence. Second, there was no agreement as to the legal principle underlying the defence. Third, recognition of the defence would unduly complicate trial judge's ability to instruct juries on the law of self-defence. Finally, the defence would encourage juries to render compromise manslaughter verdicts rather than struggling with the difficult decision of whether to acquit entirely or convict of murder. The Court's decision in *Faid* continues to represent the law in Canada on the use of excessive force in self-defence.

3. *Criticisms of the Existing Law*

The Supreme Court's rejection of the defence of excessive force in self-defence was criticized by a number of commentators throughout the 1980s.[92] The absence of the defence has, however, attracted little critical commentary in recent years.[93] The general view appears to be that the issue is better addressed through reform of the self-defence provisions themselves.

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[89] *Fraser*, 523-24.

[90] [1983] 1 SCR 265. Dickson J in *Faid* adopted his earlier reasons in *Brisson* [1982] 2 SCR 227 and *Gee* [1982] 2 SCR 286.

[91] Ibid 271.

[92] See eg A Manson, "Excessive Force in the Supreme Court of Canada: A Comment on *Brisson* and *Gee*" (1982) 29 CR (3d) 364; NC O'Brien, "Excessive Self-defence: A Need for Legislation" (1982-83) 25 Crim. LQ 441; E Colvin, PRINCIPLES OF CRIMINAL LAW (Carswell, 1986), 225-227.

[93] See generally Stuart, CANADIAN CRIMINAL LAW, 549-551.

Those commentators who have favoured incorporating the partial defence of excessive force in self-defence into Canadian law advanced five main justifications in support of their position.[94] First, incorporation of the defence is necessary in order to recognize the reduced moral culpability of the offender in such cases given that the offender's use of force was initially justified. Second, recognizing the defence would eliminate the unfairness that currently exists in Canadian law insofar as it provides for reduced liability for the provoked offender while denying it to those who kill in excessive self-defence even though the former offender is more blameworthy than the latter. Third, the culpability of an offender who honestly but mistakenly believes he is using reasonable force is more akin to the fault level associated with liability for manslaughter than liability for murder. Fourth, recognition of the defence would provide the jury with the necessary flexibility to do justice in the individual case by allowing it to convict of manslaughter in cases where it felt a complete acquittal was not warranted but a conviction for murder would be too harsh. Finally, insofar as it is felt that the traditional jury charge on excessive force in self-defence is too complex, the solution is to simplify the law of self-defence and the charge to the jury rather than rejecting the defence.

4. *Reform Proposals*

There is widespread support in Canada for reforming the law on self-defence usually through the enactment of a single statutory provision that would reflect the general principle that an individual is entitled to use reasonable force to defend himself. There is no common position, however, on whether the current law on the use of excessive force in self-defence should also be altered as part of this reform process. It is possible to identify four approaches to reform:

(a) enact a statutory partial defence of the use of excessive force in self-defence;
(b) maintain the current law on the use of excessive force in self-defence and abolish the mandatory life sentence for murder;
(c) maintain the current law on excessive force in self-defence but include in the self-defence provisions a definition of reasonable and a list of factors to consider;
(d) retain the existing prohibition on the use of excessive force in self-defence.

There is only limited support for the first three options; the most common reform proposal by far is to retain the existing prohibition on the use of excessive force in self-defence.

The first option for reform is to enact a statutory partial defence that would expressly provide that the use of excessive force in self-defence that caused the death of another person would result in a conviction for manslaughter, not murder.[95] It would be for the trier of fact to decide whether the force used was reasonable or excessive. If the trier of fact concluded that the defendant had used reasonable force within the meaning of s. 34(2) of the Code, the defendant would be entitled to the full defence of self-defence and acquitted of the charge. Conversely, if the trier of fact concluded that the force used was excessive, the defendant would be entitled to

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[94] See in particular O'Brien, "Excessive Self-defence", 453-455; Manson, "Excessive Force", 372-373; Canadian Bar Association, PRINCIPLES OF CRIMINAL LIABILITY, 79.

[95] See eg

the partial defence of excessive force and convicted of manslaughter. The main justifications for this approach is that it is necessary to recognize the defence in order to acknowledge the reduced culpability of the defendant in these types of cases and the need to avoid perverse verdicts of any type.

Feminist scholars and advocacy organizations are strongly opposed to the inclusion of a specific provision on the use of excessive force in self-defence, preferring instead that any reform in this area be based on either the second or the third proposal for reform.[96] In their view, the adoption of this partial defence would be a regressive step in relation to women who kill abusive spouses or partners, especially racialized women, because it could very well lead to compromise verdicts of manslaughter in cases where the defendant should properly have been acquitted on the basis of self-defence.[97] They also consider that the very notion of excessive force is conceived of and applied in gendered terms such that men's violence will not normally be found to be excessive whereas women's violence will often be found to surpass the threshold of reasonableness.[98] Formal recognition of the defence would simply exacerbate this situation, with the result that even more women would be unjustly deprived of a full acquittal on the basis of self-defence. Finally, they do not consider that the proposal truly benefits women insofar as it mitigates the mandatory sentence for murder and thereby removes one of the disincentives to going to trial because they do not believe the Crown is justified in charging women who are in this type of situation with murder in the first place.[99]

The second proposal for reform would retain the existing prohibition on the use of excessive force and convict the defendant of murder but abolish the mandatory life sentence for murder.[100] This approach has been justified on the basis that the offender did have the requisite intent for murder. At the same time, by abolishing the mandatory sentence for murder, it allows the sentencing judge to consider the fact that the offender was reacting in self-defence as a mitigating factor in sentencing and adjust his sentence accordingly. It therefore acknowledges that the offender's use of force was initially justified and the offender is therefore less culpable than the offender who lacks entirely any justification for intentionally killing another person.

The third proposal for reform, which is the preferred approach of some of the leading feminist advocacy organizations, would also retain the existing prohibition on the use of excessive force

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[96] See eg E Sheehy, WHAT WOULD A WOMEN'S LAW OF SELF-DEFENCE LOOK LIKE? (Status of Women Canada, 1995), 25-27; Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 21; National Association of Women and the Law, STOP EXCUSING VIOLENCE, Chp. 5.

[97] Sheehy, WOMEN'S LAW OF SELF-DEFENCE, 25-26.

[98] Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendation 21.

[99] Sheehy, WOMEN'S LAW OF SELF-DEFENCE, 27.

[100] Law Reform Commission of Canada, HOMICIDE, Working Paper 33 (1984), 70-71; Sheehy, WOMEN'S LAW OF SELF-DEFENCE, 28; Ratushny, SELF-DEFENCE REVIEW, Chps 5.2, 5.5.

in self-defence but would expressly define reasonableness in the context of self-defence.[101] In particular, in any case where the defendant had been subject to a "pattern ... of coercive control", the trier of fact would be required to consider certain enumerated factors in assessing whether the defendant had acted reasonably.[102] It is felt that this type of approach would result in a more thorough, precise and accurate assessment of whether the defendant's use of force was reasonable in the circumstances. Under this proposal, the defendant's beliefs would be held to be unreasonable only if they constituted a marked departure from the beliefs that would be held by a reasonable person. In considering whether this threshold was reached in a specific case, the trier of fact would be required to consider a wide variety of systemic factors as well as factors particular to the circumstances of the individual defendant and deceased.[103]

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[101] This approach was recommended by the Canadian Association of Elizabeth Fry Societies in 1999 and subsequently adopted by the National Association of Women and the Law in 2000. See Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendations 18, 20, 21; National Association of Women and the Law, STOP EXCUSING VIOLENCE, Chp. 5. The approach to self-defence on which it is based is drawn from the analysis of Judge Ratushny in the Self-Defence Review. See Ratushny, SELF-DEFENCE REVIEW, Chps 3.2, 3.3, 4.

[102] A pattern of coercive control exists if the defendant has experienced a pattern of "past violence, abuse, threats, or tangential abuse (e.g. through deprivation of material necessities, isolation, child neglect or discipline, public humiliation), threats to withdraw immigration sponsorship, etc. whether or not it emanates from the aggressor." Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendations 18.

[103] The Canadian Association of Elizabeth Fry Societies recommended that the trier of fact should be required to make inquiries concerning the following list of issues:

> - the nature, frequency, and degree of coercive control, including threats, violence, and/or abuse experienced by the broader group, of which the accused is a member, as shaped by sex, race, dis/ability, sexual identity, immigrant status, language, and class;
>
> - the social, legal, and political response to this experience, including the access of members of that group to credibility and to justice, the availability of refuge, economic support, child protection, police and legal protection, and long-term security programs, both broadly and, where relevant, locally;
>
> - the risk factors that increase the danger posed by coercive, controlling, violent and/or abusive persons, including jealousy regarding real or imagined friendships or lovers, anxiety about increasing independence or separation originating from the accused, and formal or informal reinforcement of entitlement emanating from family members, the community, or the legal system, among others;
>
> - the nature, frequency, and degree of coercive control, threats, violence, and or abuse from any source, experienced by the accused or the person protected;
>
> - the nature, frequency, and degree of coercive control, threats, violence, and or abuse inflicted by the aggressor against the accused or other persons;

The most common reform proposal in Canada in relation to the use of excessive force in self-defence, however, is not to reform the law at all but rather to retain the existing prohibition on the use of such force.[104] A defendant who had the requisite intent for murder and who caused death as a result of the use of excessive force in self-defence would therefore be convicted of murder and subject to the mandatory minimum life sentence for murder. This approach has been supported on the basis that there is no need to recognize the qualified defence of excessive force in self-defence given the high mental element that must be proved for murder and the flexible and generous interpretation by the courts of the reasonable force requirement.[105]

III. Mental Disorder and Diminished Responsibility

1. *Overview of the Mental Disorder Defence*

The law on the mental disorder defence in Canada, previously known as the insanity defence, is currently set out in s. 16 of the Criminal Code.[106] The mental disorder provisions, like the provocation and self-defence provisions, are based on the English Draft Criminal Code of 1879.[107] There have been only minor amendments to the provisions since they were first enacted in 1892. As currently formulated, s. 16(1) reads as follows:

> 16.(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the

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- the age, health, physical condition, sex, economic status, psychological state, and race of the accused and the aggressor;
- any efforts made by the accused to resist, expose, or minimize the aggressor's coercive control, threats, violence and/or abuse, and the results of such efforts, as well as the accused's experience regarding the efforts of others to seek intervention or assistance;
- the nature of the harm anticipated or threatened, including whether it was avoidable with some degree of certainty, and whether an immediate response was needed.

See Canadian Association of Elizabeth Fry Societies, RESPONSE TO THE DEPARTMENT OF JUSTICE, Recommendations 18.

[104] See eg Law Reform Commission of Canada, THE GENERAL PART, 103; Department of Justice, REFORMING CRIMINAL CODE DEFENCES, 28.

[105] See eg Sub-committee on Recodification, FIRST PRINCIPLES, 71.

[106] See generally Stuart, CANADIAN CRIMINAL LAW, 381-399.

[107] For the history of the insanity defence in Canada, see SN Verdun-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Sage of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country?" (1979) 14 UBCLR 1.

> person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

The insanity defence as initially enacted in Canada differed from the common law rules set down in *M'Naghten's case*[108] in two key respects. First, the Canadian provision used the word "appreciate" rather than "know" in the first branch of the rule. Second, it used the word "and" rather than "or" to join the two branches of the rule, ostensibly making the two tests for insanity conjunctive rather than disjunctive.

The first change to the rules, the use of the word "appreciate" rather than "know", was apparently intended to provide a broader test for insanity. Until the mid-1950s, however, there was no definitive ruling on the meaning of "appreciate" and it was not uncommon for trial judges, influenced by the English jurisprudence, to rely on the *M'Naghten* Rules when instructing juries on the first branch of the test.[109] In 1956, however, the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (the "McRuer Commission") released its Report which, among other things, emphasized the difference between the Canadian and the English tests for insanity.[110] After publication of the Commission's Report, Canadian courts paid much closer attention to the distinct wording in the Canadian provision, resulting in the adoption of a broad definition of the meaning of the word "appreciate".[111]

The second change to the rules, the use of the word "and" to join the two tests, also escaped judicial comment for a number of years. In 1931, however, the Ontario Court of Appeal in *Cracknell*[112] concluded that Parliament should not be taken to have intended to make such a significant change in the common law absent a clearer statement of its intention.[113] It therefore interpreted the word "and" to mean "or" so that the two tests would be applied disjunctively as they were in the *M'Naghten* Rules. Appeal courts in Saskatchewan[114] and Manitoba[115] later reached the same conclusion. In 1954, Parliament formalized this approach when it replaced the word "and" in the provision with the word "or".[116]

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[108] (1843) 10 Cl. & Fin. 200, 8 ER 718 (HL).

[109] See eg *Chupiuk* (1949) 95 CCC 228 (Sask. CA); *Cardinal* (1953-54) 17 CR 373 (Alta. SC, AD).

[110] REPORT OF THE ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES (1954), 11-13 ("MCRUER REPORT"). For a discussion of the early case law on the meaning of "appreciate", see ibid, 51-55, paras 8-16 and Verdun-Jones, "Evolution of the Insanity and Automatism Defences", 26-30.

[111] See eg *O* (1959) 3 Crim. LQ 151 (Ont. SC); *Simpson* (1977) 35 CCC (2d) 337 (Ont. CA).

[112] (1931) 56 CCC 190 (Ont. CA).

[113] Ibid, 194.

[114] *Jeanotte* [1932] 2 WWR 283, 285-286 (Sask. CA).

[115] *Harrop* (1940) 74 CCC 228, 230(Man. CA).

[116] SC 1953-54, c. 51, s. 16.

The only other significant amendment to the insanity provision occurred in 1992 when the term "natural imbecility" was removed from the provision and the term "insanity" was replaced by the term "mental disorder".[117] This was purely a change in terminology, however, for three reasons. First, mental disorder was defined elsewhere in s. 2 of the Code to mean "disease of the mind". Second, although there is little case law on the issue, natural imbecility arguably falls within the definition of mental disorder. Finally, there was no alteration in the substantive legal tests set out in s. 16 for determining the issue of responsibility.

A defendant will therefore be found not guilty on account of mental disorder in Canada if (1) he suffered from a disease of mind at the time of the offence and (2) that disease of the mind rendered him incapable of either (a) appreciating the nature and quality of his act or omission or (b) knowing it was wrong. The Supreme Court of Canada has interpreted the various elements of the provision in a broad manner. In *Cooper*[118], for example, the Court adopted an expansive definition of the phrase "disease of the mind", defining it as "any illness, disorder or abnormal condition which impairs the human mind and its functioning ...".[119] It also confirmed that the word "appreciate" has a wider meaning than the word "know". At the time of the offence, therefore, the defendant must have had the mental capacity to both know the physical character of the act and "to foresee and measure the [physical] consequences of the act."[120] Finally, in *Chaulk*[121], the Court overturned its earlier decision in *Schwartz*[122] that "wrong" means legally wrong[123] and held that it means morally wrong according to society's moral standards.[124] The question under the second test, therefore, is "whether the [defendant] lacks the capacity to rationally decide whether the act is right or wrong [in the view of society] and hence to make a rational choice about whether to do it or not."[125]

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[117] An Act to amend the Criminal Code (Mental Disorder) and to amend the National Defence Act and the Young Offenders Act in consequences thereof, SC 1991, c. 43, s. 4.

[118] *Cooper* [1980] 1 SCR 1149.

[119] Ibid, 1159.

[120] Ibid. The addition of the word "physical" reflects the Supreme Court's decisions in *Kjeldsen* [1981] 2 SCR 617, 626 and *Abbey* [1982] 2 SCR 24, 34-35 which hold that the first branch of the test does not require that the defendant appreciate either the emotional or the penal consequences of his act.

[121] *Chaulk* [1990] 3 SCR 1303.

[122] *Schwartz* [1977] 1 SCR 673 at 701-702.

[123] There was conflicting case law on this issue in the lower courts prior to the Court's decision in *Schwartz*. For a discussion of the early case law, see the MCRUER REPORT, 55-56, para. 17 and Verdun-Jones, "Evolution of the Insanity and Automatism Defences", 30-36.

[124] *Chaulk*, 1352-1357.

[125] *Oommen* [1994] 2 SCR 507, 516.

2. *Diminished Responsibility*

There is no general statutory defence of diminished responsibility in Canada that would operate to reduce what would otherwise be a conviction for murder to manslaughter on the basis that the defendant suffered from some abnormality of the mind that substantially impaired his responsibility for the offence. Canadian courts have also consistently refused to recognize a common law defence of diminished responsibility.[126] The only statutory recognition of reduced criminal responsibility on the basis of mental disturbance in Canada therefore arises in cases of infanticide.[127] The Supreme Court has, however, confirmed that evidence of mental disorder that does not satisfy the legal tests in s. 16 of the Code may be used to raise a reasonable doubt as to whether the defendant had the specific intent required for murder or whether the murder was planned and deliberate.[128]

3. *Criticisms of the Existing Law*

The absence of a partial defence of diminished responsibility in Canadian criminal law attracted some critical commentary in the 1950s through the 1980s.[129] In recent years, however, very little attention has been paid to the issue, either officially or academically. The early commentators who favoured the adoption of the defence offered a variety of justifications for their position, three of which are of continuing relevance today.

First, they argued that the law did not properly reflect the current state of knowledge about mental disorder since it failed to recognize that some defendants who are legally sane nonetheless suffer from some disease or deficiency of the mind such that they are not fully responsible for their crimes.[130] There is therefore a gap in the existing law that could and

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[126] See eg *Bigaouette* (1926) 46 CCC 311, 317 (Que. KB), rev'd on other grounds [1927] SCR 112; *Kasperek* (1951) 101 CCC 375 (Ont. CA); *Chartrand* [1977] 1 SCR 314, 318. The issue was left open in *Hoodley* (1955) 111 CCC 210, 213 (BCCA).

[127] Criminal Code, ss. 233 (infanticide) and 662(3) (murder reduced to infanticide). The offence of infanticide was added to the Criminal Code in 1948. SC 1948, c. 39, s. 7. It is rarely charged in Canada. See generally Stuart, CANADIAN CRIMINAL LAW, 552-554.

[128] See eg *Swain* [1991] 1 SCR 933, 987, approved in *Jacquard* [1997] 1 SCR 314, 333. See generally Stuart, CANADIAN CRIMINAL LAW, 399-403. There is an unfortunate and misleading tendency in Canada to refer to this development as the doctrine of diminished responsibility. See eg RC Topp, "A Concept of Diminished Responsibility for Canadian Criminal Law" (1975) 33 U of T Fac. LR 205; M Gannage, "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19 Osgoode Hall LJ 301. The two doctrines are, however, clearly distinct: the Canadian doctrine is concerned with whether the defendant had the necessary *mens rea* to be convicted of murder; in contrast, the diminished responsibility defence arises only when the essential elements of murder are present to reduce the offence to manslaughter.

[129] MCRUER REPORT, Appendix A, Chp. IV (Opinion of the Dissenting Commissioners); J Cassells, "Diminished Responsibility" (1964) 7 Can. Bar J 1, 22-28, 55; Law Reform Commission of Canada, THE GENERAL PART: LIABILITY AND DEFENCES, Working Paper 29 (1982), 50-54.

[130] MCRUER REPORT, 64, para. 38; Cassells, "Diminished Responsibility", 28, 55.

should be addressed by incorporating the defence of diminished responsibility into Canadian law in order to acknowledge the fact that an offender who is not fully responsible for his crime should not be punished as severely as a sane offender. Second, the defence of diminished responsibility is analogous to the provocation defence since both defences deal with offenders whose capacity for self-control is in some way impaired.[131] It therefore makes no sense to provide for reduced liability based on the loss of control in provocation cases but not provide for reduced liability on the same basis in diminished responsibility cases. Finally, the diminished responsibility defence has been accepted in a number of other jurisdictions.[132]

4. *Reform Proposals*

The early commentators who favoured addressing the issue of diminished responsibility did not offer detailed proposals for reform. Three different types of approach are however discernable:

(a) enact a statutory partial defence of diminished responsibility;
(b) reform the provisions on the mental disorder defence to encompass the concept of diminished responsibility;
(c) retain the existing law which excludes the defence of diminished responsibility.

Most of the proponents of reform have recommended the adoption of a distinct defence of diminished responsibility that would operate to reduce a murder conviction to manslaughter.[133] A defendant who successfully advanced the defence of diminished responsibility would therefore be convicted of the lesser crime of manslaughter and sentenced accordingly. In contrast, one proponent of reform recommended broadening the existing mental disorder provisions to encompass the concept of diminished responsibility.[134] A defendant whose capacity for self-control was substantially impaired by reason of mental disorder would therefore be subject to the special verdict of not criminally responsible on account of mental disorder and his future determined under the disposition provisions for mentally disordered offenders. He could therefore be held in custody in a psychiatric facility rather than in a prison.

On the whole, however, there is little support today for amending the law to include the defence of diminished responsibility. Four main justifications have been advanced in support of this view.[135] First, the legitimacy of the defence has been called into question in England itself. Second, the recognition of the defence in Canada would unduly complicate the law on mental disorder. Third, there is no need for the defence in Canada given the expansive scope of the mental disorder defence in this country. Finally, a defendant who is not fully criminally responsible should be given treatment rather than being punished for his offence.

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[131] Law Reform Commission of Canada, THE GENERAL PART, 52-53.

[132] MCRUER REPORT, 65, para. 41; Cassells, "Diminished Responsibility", 11, 15; Law Reform Commission of Canada, THE GENERAL PART, 52.

[133] See eg MCRUER REPORT, 66, para. 43; Cassells, "Diminished Responsibility", 55.

[134] Law Reform Commission of Canada, THE GENERAL PART, 53.

[135] See generally D Stuart, CANADIAN CRIMINAL LAW, 549.

APPENDIX C

SYNOPSIS OF THE IRISH LAW ON PROVOCATION

A Historical Overview

1 It is not proposed, given the shared history of these islands and the limited space afforded here, to treat the historical development of the defence of provocation in any detail. It is sufficient to note the plea of provocation developed from the same sixteenth-century roots as English law with the division of felonious homicide into murder and manslaughter. From the beginning, the plea was confined to distinct categories of provocation[1] and was governed by normative standards.[2] Whilst this approach was to be radically altered in the wake of the invocation of the concept of the "reasonable man" in the nineteenth-century case of *R v Welsh*,[3] the fundamental principle that provocation should be measured by objective criteria continued to operate well into the twentieth century. However, subsequent judicial developments in Ireland have substantially eroded this position to the extent that a subjective approach is now in the ascendancy.

B The Modern Law in Ireland

2 Irish case law was silent on the subject of provocation until 1978. Prior to that date the English decisions in *R v Duffy*[4] and *Bedder v DPP*[5] represented the law in Ireland. However, within days of the House of Lords delivering its judgment in *DPP v Camplin*,[6] the Court of Criminal Appeal decided *People (DPP) v MacEoin.*[7] The decision in that case was to shape the modern law of provocation in Ireland.

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1 For example, four categories of provocation which operated to reduce murder to manslaughter were set out by Holt LCJ in *R v Mawgridge* (1706) Kel 119:
(i) grossly insulting assault
(ii) seeing a friend attacked
(iii) seeing an Englishman unlawfully deprived of liberty
(iv) catching someone in the act of adultery with one's wife.

2 The normative conception of criminal fault views *mens rea* in terms of culpability in the broad sense- a person has *mens rea* if he or she is to be blame for the conduct in question. This is to be contrasted with the cognitive conception of fault which views *mens rea* in terms of knowledge and foresight of consequences.

3 (1869) 11 Cox CC 336.

4 [1949] 1 All ER 932.

5 [1954] 2 All ER 801.

6 [1978] AC 705.

7 [1978] IR 27.

(1) The Birth of the Subjective Test

3 The *MacEoin*[8] appeal raised several issues. The accused had been convicted of murder in the Central Criminal Court. His evidence was that the deceased had attacked him with a hammer, causing him to "simmer over and lose control", whereupon he killed the deceased with the hammer. Echoing the early modern origins of the defence, the trial judge told the jury that the alleged provocation must have been such as to render the appellant incapable of forming an intention to kill or cause serious injury. At the very least, this direction was inconsistent with the balance of judicial opinion and, on appeal, the Court of Criminal Appeal confirmed that the true position was that provocation does not negate *mens rea* in the form of intention: it actually contributes to it.

4 Although the misdirection on the relationship between provocation and intention was the basis on which the *MacEoin*[9] appeal was decided, the Court of Criminal Appeal took the opportunity to essay a general review of the law of provocation. The Court began its survey by questioning whether the trial judge had been correct in his application of the prevailing objective standard to Irish law. That standard, in its unqualified *Bedder*[10] form, had been trenchantly criticised not least in the speeches of the House of Lords in *Camplin*.[11] As the reader will be aware, *Camplin*[12] marked the formal adoption in England and Wales of a modified objective standard which permitted the Court to take account of some of the accused's personal characteristics in the context of provocation. Given this background, it was, perhaps, to be expected that the Irish courts might likewise depart from the much-criticised *Bedder* test. Possibly because it had been delivered a mere eleven days previously,[13] the decision in *Camplin* was not brought to the attention of the Court of Criminal Appeal in *MacEoin*. Had *Camplin* been cited, the Irish law of provocation might have taken a different course. In the event, Kenny J, who delivered the Court's judgment, followed the English lead[14] in widening the definition of provocation to include insulting words, stating that the jury must consider "acts or words, or both, of provocation",[15] but went beyond the position that had been adopted in *Camplin* when seeking a solution to the problems bequeathed by the objective test as laid down in *Bedder*. The test formulated by Kenny J in *MacEoin* is as follows:

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8 *People (DPP) v MacEoin* [1978] IR 27.

9 *Ibid*.

10 *Bedder v DPP* [1954] 2 All ER 801.

11 *DPP v Camplin* [1978] AC 705.

12 *Ibid.*

13 *DPP v Camplin* [1978] AC 705 was issued on 6 April 1978 and *People (DPP) v MacEoin* [1978] IR 27 on 17 April 1978.

14 Section 3 *Homicide Act 1957* allows the jury to take into account "things done … things said or … both together".

15 *People (DPP) v MacEoin* [1978] IR 27, 34.

> "[T]he trial judge at the close of the evidence should rule on whether there is any evidence of provocation which, having regard to the accused's temperament, character and circumstances, might have caused him to lose control of himself at the time of the wrongful act and whether the provocation bears a reasonable relation to the amount of force used by the accused."[16]

5 In framing the new subjective standard, Kenny J relied heavily on the minority judgement of Murphy J in *Moffa v The Queen*,[17] a then recent decision of the High Court of Australia. Murphy J objected to the reasonable man component of the traditional test of provocation on the grounds that it did not sit with the heterogeneous nature of modern society. Given this heterogeneity, he had argued, "[t]he test cannot withstand critical examination."[18]

6 Murphy J's dissenting judgment in *Moffa*[19] was the only contemporary common law authority which supported the adoption of a subjective standard, purged of any reference to the concept of the reasonable man. Yet the Court of Criminal Appeal saw fit to rely on it in *MacEoin*[20] and its decision in that case quickly established itself as the *locus classicus* on the test of provocation in Irish law. Drawing on Murphy J's judgement in *Moffa*, Kenny J opined that the objective test was "profoundly illogical"[21] and that there were inherent inconsistencies in its basic philosophy as theretofore employed by the courts in England and Wales and elsewhere. According to the Court of Criminal Appeal, the most obvious theoretical difficulty with the test was its explicit assumption that the reasonable man is also capable of losing self-control and killing.[22]

7 To fortify its rejection of the objective test, the Court of Criminal Appeal aligned itself with the Supreme Court's analysis in *People (Attorney General) v Dwyer*[23] on excessive self defence. That analysis, the Court observed, "seems to us to have been a decisive rejection of the objective test in a branch of law closely allied to provocation."[24] The Court also referred to a number of academic criticisms of the

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16 *People (DPP) v MacEoin* [1978] IR 27, 34.

17 *Moffa v The Queen* (1977) 138 CLR 601.

18 *Ibid* at 625.

19 *Moffa v The Queen* (1977) 138 CLR 601.

20 *People (DPP) v MacEoin* [1978] IR 27.

21 *Ibid* at 32.

22 *Ibid*.

23 [1972] IR 416. See discussion of the *Dwyer* decision in the context of excessive self-defence.

24 *People (DPP) v MacEoin* [1978] IR 27, 34.

objective test[25] and concluded that the "test in cases of provocation should be declared to be no longer part of our law."[26] Unfortunately, the Court neither elaborated on, nor discussed the merits of, the newly created **subjective** test. In particular, no consideration would appear to have been given to the possibility that the requirements of reasonableness and loss of self-control are not necessarily mutually exclusive.

8 Significant criticism has been levelled against the Court of Criminal Appeal's decision to retain a proportionality component as part of the new test.[27] The resultant standard has been described as no less illogical than the objective test it sought to replace.[28] The gravamen of this criticism is that this part of the *MacEoin*[29] test requires the jury to consider whether "the provocation bears a **reasonable relation** to the amount of force used by the accused"[30] and that this is inconsistent with the Court of Appeal's stated aim of introducing a radically subjective criterion of provocation.[31] Alternatively, it has been argued that the deliberate inclusion of a proportionality element casts doubt on the depth of the Court of Criminal Appeal's commitment to the wholesale subjectivisation of the provocation standard.[32]

9 Admittedly, subsequent interpretations of *MacEoin*[33] appear to have reduced the proportionality part of the test to the status of a factor to be considered in the context of the evidence as a whole; on this analysis, subjectivity rather than proportionality remains the primary focus of the defence.[34] Be that as it may, the precise role of the proportionality component has not been convincingly resolved. As already indicated, it remains unclear as to precisely what the Court in *MacEoin* hoped to achieve: *viz*, whether its emphasis on proportionality was designed to ensure that some element of objectivity would be preserved as part of the test or whether the Court merely included proportionality as a guide to the type and quantum of evidence that would support a plea of provocation.

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25 Smith and Hogan *Criminal Law* (2nd ed Butterworths 1969) at 213-215; *Russell on Crime* (12th ed Stevens 1964) at Chapter 29; Williams "Provocation and the Reasonable Man" [1954] Crim LR 740.

26 *People (DPP) v MacEoin* [1978] IR 27, 34.

27 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20.

28 *Ibid* at 22.

29 *People (DPP) v MacEoin* [1978] IR 27.

30 *Ibid* at 34 (emphasis added).

31 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20, 22.

32 McAuley "Anticipating the Past" (1987) 50 MLR 133, 153-154.

33 *People (DPP) v MacEoin* [1978] IR 27.

34 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20, 22.

(2) Attempts to Clarify People (DPP) v MacEoin

10 The Court of Criminal Appeal has made several attempts to clarify the *MacEoin*[35] ruling. In *People (DPP) v Mullane*[36] the appeal was based on the allegation that the issue of provocation had not been adequately explained to the jury. The Court of Criminal Appeal admitted the possibility that the jury might have been confused as to the exact nature of the standard to be applied, conceding that the proportionality component of *MacEoin* might suggest that there was, after all, a lingering element of objectivity in the defence.[37] However, the Court held that it had not been part of Kenny J's intention in *MacEoin* to retain any such element. Rather, in the opinion of O'Flaherty J, the reference to proportionality in that case was designed as a vehicle for testing the accused's credibility:

> "[T]he impugned sentence in *MacEoin* really comes down to credibility of testimony rather than to any suggestion that the accused's conduct is to be once more judged by an objective standard. That latter construction would go contrary to everything else that is contained in the judgment."[38]

11 Interestingly, the Court of Appeal's attempt to resolve the contradiction involved in the apparent inclusion of a proportionality requirement in *MacEoin*[39] was carried out without support from the authorities. Nor was the conclusion that proportionality went only to credibility warranted by the reasoning in *MacEoin* itself. On the contrary, the proportionality requirement was clearly part of the *ratio decidendi* in *MacEoin*. Stannard's assessment of *Mullane*[40] thus seems apt: in that case the Court of Criminal Appeal "tries valiantly to make sense of *MacEoin*, but only succeeds in making matters more obscure than they already were."[41]

12 In *People (DPP) v Noonan*,[42] decided six months later, the confusion surrounding the proportionality element in the test was again at issue. The trial judge was found, in effect, to have given a *Camplin*-style direction to the jury rather than one based on *MacEoin*.[43] The Court of Criminal Appeal acknowledged the potential confusion surrounding the *MacEoin* judgment's reference to proportionality in the context of what purported to be a purely subjective test. Nevertheless, the Court went

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35 *People (DPP) v MacEoin* [1978] IR 27.

36 Court of Criminal Appeal 11 March 1997.

37 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997 at 8.

38 *Ibid* at 7.

39 *People (DPP) v MacEoin* [1978] IR 27.

40 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997.

41 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20.

42 [1998] 2 IR 439.

43 *People (DPP) v MacEoin* [1978] IR 27.

on to affirm *Mullane*,[44] holding that any ambiguity in *MacEoin* on this point had been clarified by O'Flaherty J's statement, in *Mullane*, that proportionality went only to the issue of credibility.[45]

13 Next, in *People (DPP) v Bambrick*[46] it was argued on behalf of the defendant that the trial judge had failed to tell the jury that provocation, as mentioned above, does not negate an intention (to kill or cause serious injury). Counsel for the defendant also submitted that the trial judge had misdirected the jury as to the burden of proof. The learned trial judge had stated that the accused should be acquitted if it was "likely" that the alleged provocation could "probably" have triggered an uncontrollable reaction in the accused.[47] In Counsel's opinion, these words tended to place the burden of proof on the accused. The Court of Criminal Appeal allowed the appeal on both grounds but unfortunately, in a relatively brief judgment, neglected to explain how the trial judge should have addressed the jury on the relevant matters.

14 In *People (DPP) v Kelly*,[48] the trial judge, having emphasised that the test of provocation in this jurisdiction was subjective, went on to rely on passages from earlier judgments, including those in *MacEoin*[49] and *Mullane*,[50] which contained traces of the objective test. Counsel for the appellant argued that this left the jury with the impression that the test in Ireland was at least partly objective in nature, notwithstanding reassurances to the contrary from the trial judge. The Court of Criminal Appeal accepted that the *MacEoin* formulation, while setting out the law as to the correct standard to be applied with regard to provocation, was cumbersome and confusing to juries. The Court accordingly allowed the appeal and ordered a retrial.

15 The nub of the appellant's complaint in *Kelly*[51] had been that the concepts of loss of self-control and proportionality are mutually exclusive in the context of provocation: proportionality was said to be irrelevant where a person loses his or her self-control and should only be considered as "anterior and precedent to the loss of self-control."[52] Counsel for the prosecution replied that, from the perspective of the accused, the Irish standard of provocation was the most liberal in the common law world; and made it virtually impossible for the State to discharge the onus of disproving the defence *ie* of establishing beyond all reasonable doubt that the alleged

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44 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997.

45 [1998] 2 IR 439, 442.

46 [1999] 2 ILRM 71.

47 For a fuller citation of the trial judge's charge to the jury see [1999] 2 ILRM 71, 75.

48 [2000] 2 IR 1.

49 *People (DPP) v MacEoin* [1978] IR 27.

50 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997.

51 *People (DPP) v Kelly* [2000] 2 IR 1.

52 *Ibid* at 8.

provocation had **not** caused the accused to lose self-control.[53] Despite this, the Court of Criminal Appeal declined to rule on the appropriateness of the subjective approach in Ireland, relying instead on its previous decisions to the effect that proportionality was relevant only to credibility and was not intended to introduce an objective element into the law of provocation.

(3) The People (DPP) v Davis: A Reappraisal of the Subjective Test

16 In *People (DPP) v Davis*[54] the Court of Criminal Appeal accepted the need for a re-examination of the Irish approach to provocation, albeit in an *obiter dictum*. The Court endeavoured to identify the difficulties involved in applying the *MacEoin*[55] test. Not least of these was the fact that "[i]n Ireland … an extreme form of subjectivity was judicially accepted, to the exclusion of the standards of the reasonable man from the principal question in provocation."[56] In addition, the Court noted that the subjective test had been the subject of some criticism as it placed an exceptionally onerous burden on the prosecution.[57] In that regard, the Court made reference to the above submissions of counsel for the prosecution in *Kelly*[58] as to the extreme difficulty of proving to the standard of beyond a reasonable doubt that the alleged provocation had not made the accused lose self control.

17 Further, the Court noted that the policy considerations on which the defence is based may change over time and that "[t]hese considerations may dictate that the defence should be circumscribed or even denied in cases where it would allow to promote moral outrage."[59] It was observed that factors less common at the time of *MacEoin*,[60] such as the development of "road rage" and cognate types of socially repugnant behaviour, may now have an important bearing on the limits of the defence. In alluding to the classical roots of the plea of provocation (which as noted above, focused on specific, quite extreme acts of provocation), the Court grounded its conclusion on this point on the principle that society has a right to expect minimal self-control from its members; although it was accepted that the elaboration of this principle was beyond the scope of the instant appeal.[61]

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53 *People (DPP) v Kelly* [2000] 2 IR 1, 9.

54 [2001] 1 IR 146.

55 *People (DPP) v MacEoin* [1978] IR 27.

56 [2001] 1 IR 146, 159.

57 *Ibid* at 157.

58 *People (DPP) v Kelly* [2000] 2 IR 1.

59 *People (DPP) v Davis* [2001] 1 IR 146, 159.

60 *People (DPP) v MacEoin* [1978] IR 27.

61 *People (DPP) v Davis* [2001] 1 IR 146, 160. In a more recent decision, a differently constituted Court of Criminal Appeal stated that "the law applies a purely subjective test": *People (DPP) v McDonagh* [2001] 3 IR 201, 207. In the event, the Court concluded that there was insufficient evidence of provocation and it does not appear that *People (DPP) v Davis* [2001] 1 IR 146 was cited.

(4) Other Elements of the Defence

18 While its recent jurisprudence has been dominated by attempts to manage the transition from the objective to the subjective test, the Court of Criminal Appeal has also had occasion to comment on other aspects of the plea of provocation, namely the obligation on the accused to raise the defence by pointing to evidence of provocation; the requirement of immediacy and the meaning of loss of control.

(a) Raising the Defence

19 Thus in *Davis*,[62] the Court noted that the defence "does not arise automatically":[63] the accused must be able to show that provocation is a live issue; "the defence must be raised, and not merely invoked."[64] This may be done either by direct evidence, which might include the accused's testimony, or by inference from the evidence as a whole. The Court acknowledged that the burden on the accused is "not a heavy one",[65] as it involves a "low threshold",[66] but stated that before the issue is put to the jury, the trial judge must determine that there is sufficient evidence "suggesting the presence of **all** elements required for the defence."[67] A similar view was expressed in *People (DPP) v McDonagh*[68] and *People (DPP) v Doyle*.[69]

(b) Loss of Self Control

20 Similarly, there are judicial *dicta* suggesting that other normative features of the defence have been retained within the framework of the subjective test. For example, in *Kelly*[70] the Court of Criminal Appeal has reiterated the point that provocation involves a sudden and complete loss of control before there has been time for passion to cool and untainted by calculation.[71] Similar views had been expressed in *Davis*[72] and *McDonagh.*[73] Loss of control therefore involves more than a mere loss

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62 *People (DPP) v Davis* [2001] 1 IR 146.

63 *Ibid* at 155.

64 *Ibid* at 158.

65 *Ibid* at 156.

66 *Ibid* at 158.

67 *Ibid* at 155 (emphasis added).

68 [2001] 3 IR 201.

69 Court of Criminal Appeal 22 March 2002.

70 *People (DPP) v Kelly* [2000] 2 IR 1.

71 *Ibid* at 11.

72 *People (DPP) v Davis* [2001] 1 IR 146.

73 *People (DPP) v McDonagh* [2001] 3 IR 201, 208.

of temper[74] or the condition of being "vexed".[75] These *dicta* serve as important reminders that, the enervating influence of the subjective test notwithstanding, many of the classic ingredients of provocation still have purchase in Irish law.

(c) The Immediacy Requirement

21 The immediacy requirement assumes particular importance in the context of domestic violence. The essence of the provocation defence is that the killing has been carried out in hot blood. It is sometimes argued that the immediacy requirement is based on a uniquely male view of provoked violence: *viz*, provocative conduct followed by a sudden violent outburst. According to this view, the typical female response to provocation is different:[76] on the whole, a woman who has been subjected to repeated violence by an abusive partner waits until her tormentor is either asleep or drunk before striking the fatal blow. The woman's actions in such cases might be understandable but they are not easily accommodated within the traditional provocation doctrine. First, the absence of a provocative act capable of serving as a triggering condition in its own right forces her to rely on the argument that the deceased's last act was "the straw that broke the camel's back." Secondly, the delay between the deceased's last act and the killing brings her into conflict with the immediacy requirement: indeed it suggests that the killing was deliberate and calculated, that it was cold blooded, not hot blooded.

22 There is evidence that the courts in this jurisdiction are willing to take a lenient approach to this matter and to admit evidence of cumulative provocation in order to place the deceased's final act in context. In *People (DPP) v O'Donoghue*[77] and *People (DPP) v Bell*,[78] the Court, while not specifically recognising the concept of cumulative provocation, allowed evidence of acts of cumulative provocation together with expert testimony of "battered woman syndrome" or post-traumatic stress disorder, to be adduced. This approach, however, is not without its difficulties. While many would agree that defendants of this type deserve to be convicted of manslaughter rather than murder, the burden of the evidence in cases of this kind is that the accused did **not** suffer a sudden loss of self-control. It is therefore arguable that the doctrine of cumulative provocation tears the heart out of the original plea.

23 A better solution might be to categorise these cases under the rubric of diminished responsibility or extreme emotional disturbance, thereby avoiding

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74 *People (DPP) v Kelly* [2000] 2 IR 1, 11.

75 *People (DPP) v Davis* [2001] 1 IR 146, 157.

76 See Donnelly "Battered Women who Kill and the Criminal Law Defences" (1993) 3 ICLJ 161; Horder "Sex, Violence and Sentencing in Domestic Provocation Cases" [1989] Crim LR 546; O'Donovan "Defence for Battered Women who Kill" (1991) J Law & Soc 219; Wells "Battered Woman Syndrome and Defences to Homicide" (1994) 14 LS 266; Baker "Provocation as a Defence for Abused Women Who Kill" (1998) 11 Can JL & Juris 193.

77 *The Irish Times* 16-20 March 1992.

78 *The Irish Times* 14 November 2000.

needless damage to the architecture of existing defences.[79] Alternatively, it might be argued that the more realistic option would be to dispense with the immediacy requirement as a formal component of the plea of provocation. Unlike the diminished responsibility option, this move would cater for the domestic homicide cases without "pathologising" the defendants involved in them. Moreover, unlike the extreme emotional disturbance option, it seems less vulnerable to the criticism that, bearing in mind that homicide is generally the product of powerful emotions, its introduction would make it extremely difficult, if not impossible, to secure a conviction for murder.

(5) Conclusion

24 The foregoing review of case law on provocation illustrates the difficulties surrounding the interpretation and application of the *MacEoin*[80] judgment.[81] The main difficulty is that of establishing the appropriate evidential threshold before provocation can go to the jury and whether a general threshold should be set for future cases. Further, it will be recalled that the prosecution in *Kelly*[82] argued that, once the defence of provocation has been invoked, the subjective test makes it almost impossible to disprove. Perhaps the fact that the courts have recently emphasised that many of the classic ingredients of provocation have survived the introduction of the subjective test will lead to further consideration of other normative features of the plea.

25 Arguably the judgment in *Davis*[83] contains the strongest criticism to date of the application of the *MacEoin*[84] test in Ireland. There, the Court of Criminal Appeal suggested *obiter* that it may be necessary to place limits on the way in which the defence is currently set out, and that this might be done by focusing on the policy considerations that have been eclipsed by the uncompromising nature of the Hibernian version of the subjective test.

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79 The Law Commission of New Zealand rejected the last option: see *Some Criminal Defences with Particular Reference to Battered Defendants* (R 73 – 2001) at paragraphs 84-86. It is also conceivable that the accused could avail of a defence of self-defence: see *R v Lavallee* (1990) 55 CCC (3d) 97.

80 *People (DPP) v MacEoin* [1978] IR 27.

81 See Goldberg "Developments in Criminal Law" [2000] 2(3) P & P 15: "It seems that after more than twenty years of case-law in which provocation has been a defence, the issue of the application of the subjective test remains problematical for both judge and jury."

82 *People (DPP) v Kelly* [2000] 2 IR 1.

83 *People (DPP) v Davis* [2001] 1 IR 146.

84 *People (DPP) v MacEoin* [1978] IR 27.

C Proposals for Reform

26 In its forthcoming *Consultation Paper on Provocation*[85] the Commission is examining the law of provocation and is likely to recommend the retention of the defence, albeit in a modified form.

27 The Commission may provisionally recommend that a justification-based model (which focuses on the wrongful conduct of the deceased), rather than the present excused-based model (which focuses on the accused's loss of self-control) should guide reform of the plea of provocation. In the Commission's opinion, it is vital not to lose sight of the original basis for the defence: that "wrongful" conduct on the part of the deceased triggered the accused's lethal response. If this requirement is ignored or overlooked, the plea is apt to slip its moorings and lose its bearings. As the Irish experience illustrates, the ensuing voyage can be very disorienting for all who "sail" in her.

28 At the same time, the Commission is likely to acknowledge that the adoption of a justification-based defence should be tempered by excuse considerations. Therefore, the Commission will probably recommend that reform of the plea should ensure that courts are in a position to take account of the accused's personal characteristics insofar as they affect the gravity of provocation. However, with the possible exception of age, there is likely to be a recommendation that personal characteristics should not feature in relation to the question of proportionality. This reform would bring Irish law broadly into line with the law in Canada, Australia and New Zealand.

29 The remodelled defence would involve a two-part inquiry. First, the jury would be asked to consider whether the accused was in fact provoked by the conduct of the deceased. In relation to this issue, the accused's characteristics and circumstances would be relevant on the grounds that they help to explain the provocative quality of the deceased's actions. Secondly, the jury would be required to consider whether the accused ought to have responded as he did, as judged by ordinary community standards of self control and proportionality, rather than by a vague, individualised criterion derived from his or her personal characteristics. In some jurisdictions these elements have been referred to as the subjective test and objective test, respectively. This terminology has resulted in confusion and some observers have contended, with justification, that judges are faced with an uphill task when directing juries along the lines of a mixed objective/subjective test. It would be better if the expressions "objective" and "subjective" were avoided in this context. The first element is better seen as involving nothing more than a factual enquiry, namely, whether the accused was provoked. The second element invites an evaluation of the quality of the accused's fatal response, as judged by the application of generally accepted norms of appropriate conduct. Accordingly, the first element may be described as the narrative issue; and the second as the normative issue.

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[85] It is hoped that the Consultation Paper will be published in early autumn 2003.

30 The Commission further observes that the requirements of immediacy and gravity may present difficulties for an accused who has been subjected to cumulative provocation; and that these difficulties may be particularly acute in cases of domestic homicide. Accordingly, it is thought prudent to make express provision for cases of this type, perhaps along the lines of the statutory provisions enacted in New South Wales and the Australian Capital Territory.[86]

31 Incidentally, the Commission felt that it was important to reiterate the point that mental disorder raises issues that properly fall outside the scope of the defence of provocation. The failure to introduce a defence of diminished responsibility has resulted in a situation where, on the one hand, the view in the profession is that the plea has been deployed as a necessarily poor substitute for diminished responsibility; while, on the other, its refashioning for this purpose has diluted its efficiency within its proper sphere of influence. The proposed reforms contained in the *Criminal Law (Insanity) Bill 2002* would alleviate these difficulties and the Commission is therefore strongly of the view that the enactment of that measure should precede or accompany reform of the law relating to provocation.

32 In the light of the earlier discussion and at this early formative stage of deliberations, the Commission is considering a draft statutory provision along the following lines:

> "(1) Unlawful homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.
>
> (2) Anything done or said may be provocation if –
>
> (i) it deprived the accused of the power of self-control and thereby induced him or her to commit the act of homicide; and
>
> (ii) in the circumstances of the case it would have been of sufficient gravity to deprive an ordinary person of the power of self-control.
>
> (3) (i) In determining whether anything done or said would have been of sufficient gravity to deprive an ordinary person of the power of self-control the jury or court, as the case may be, may take account of such characteristics of the accused as it may consider relevant.
>
> (ii) A jury or court, as the case may be, shall not take account of an accused's mental disorder, state of intoxication or temperament for the purposes of determining the power of self-control exhibited by an ordinary person.
>
> (4) Anything done or said is deemed not to be provocation if –
>
> (i) it was incited by the accused; or

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86 The law in New South Wales was amended to deal with the difficulties presented by the immediacy requirement: section 23(2) *Crimes Act 1900* stipulates that the defence is available "whether that conduct of the deceased occurred immediately before the act or omission causing death **or at any previous time**." In the Australian Capital Territory, section 13(3)(b) *Crimes Act 1900* has also diluted the immediacy requirement: "[T]here is no rule of law that provocation is negatived if … the act or omission causing death did not occur suddenly."

(ii) it was done in the lawful exercise of a power conferred by law.

(5) Provocation is negatived if the conduct of the accused is not proportionate to the alleged provocative conduct or words.

(6) There is no rule of law that provocation is negatived if –

(i) the act causing death did not occur immediately; or

(ii) the act causing death was done with intention to kill or cause serious harm.

(7) This section shall apply in any case where the provocation was given by the person killed, and in any case where the offender, under provocation given by one person, by accident or mistake killed another person."

SYNOPSIS OF IRISH LAW RELATING TO THE DEFENCE OF DIMINISHED RESPONSIBLITY

A Introduction

1 There is no defence of diminished responsibility in Ireland. Despite statements from the judiciary,[1] widespread academic approval[2] and numerous attempts by various government ministers, the defence has never been introduced. A Bill was introduced in 2002 which provides for the defence, but the Bill has not yet been enacted. The starting point for the current debate is the 1978 Henchy Report.

B The Henchy Report

2 The *Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons*[3] as far back as 1978 proposed the introduction of a defence of diminished responsibility into Irish law. They recommended that its scope should be restricted to murder, capital murder and treason as these were the only crimes at that time that carried a mandatory sentence, and that its effect should be the reduction of the charge to either manslaughter or "treason reduced by diminished responsibility".[4]

3 The form of the defence as proposed is found in section 18 of the Bill attached to the Henchy Report:

> "(1) Where a person is tried for treason, capital murder or murder and the jury finds –
>
> (a) that he committed the act alleged against him,
>
> (b) that he was suffering at the time from mental disorder, and
>
> (c) that the mental disorder was not such as to justify finding him not guilty by reason of mental disorder, but was such as to diminish substantially his responsibility for the act,
>
> the jury may find him not guilty of the offence…".[5]

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1 See *infra* at paragraph 15.

2 See, McAuley and McCutcheon *Criminal Liability – A Grammar* (Round Hall Sweet and Maxwell 2000) at 729-731.

3 Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons *Treatment and Care of Persons Suffering from Mental Disorder who Appear Before the Courts on Criminal Charges* (The Stationery Office 1978). Colloquially referred to as "the Henchy Report".

4 *Ibid* at paragraph 5.

5 *Ibid* at 36.

4 According to the Henchy Committee, the effect of such a verdict would be to release the Court from the obligation to impose a sentence of death or penal servitude for life, and enable the Court to impose a sentence they deem adequate. Such sentences include a prison sentence, detention for treatment in a designated centre, release with or without conditions for supervision, or out-patient treatment.

C Infanticide

5 Despite the recommendations contained in the Report, up to the present the only statutory form of diminished responsibility is infanticide. Under section 1 of the *Infanticide Act 1949,* if a woman has been charged with the murder of her child, that child being under twelve months, the charge can be altered to one of manslaughter. Section 1(3) of the Act provides:

> "A woman shall be guilty of felony, namely, infanticide if –
>
> > (a) by any wilful act or omission she causes the death of her child, being a child under the age of twelve months, and
> >
> > (b) the circumstances are such that, but for this section, the act or omission would have amounted to murder, and
> >
> > (c) at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child
>
> and may for that offence be tried and punished as for manslaughter."

6 Thus, while not a defence of diminished responsibility in its exact form, the *Infanticide Act 1949* does recognise the medical effect of giving birth as diminishing the woman's capacity to control her actions. The Henchy Report recommended that the charge of infanticide be retained so that it could, when appropriate, work in tandem with the recommended defence of diminished responsibility. However, they did argue that a person convicted of infanticide should be treated in the same way as a person convicted of murder with diminished responsibility *ie* she could be committed to a designated centre or sentenced to a term of imprisonment up to life.[6]

D Orders of the Court

7 At present, if a person is found "guilty but insane", the court is obliged to order the accused to be kept in custody as a criminal lunatic pursuant to section 2 of the *Trial of Lunatics Act 1883.* The Court has then disposed of any jurisdiction over the convicted person, who is held at the pleasure of the Government. The Minister for Justice, Equality and Law Reform then has the authority to release the person from

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[6] Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons *Treatment and Care of Persons Suffering from Mental Disorder who Appear Before the Courts on Criminal Charges* (The Stationery Office 1978) at 36.

detention when the Minister is of the opinion that they no longer pose a danger to society.[7]

8 If the person is not found insane but has a mental disorder, the Court has no jurisdiction to order psychiatric treatment, but can make a recommendation at the sentencing stage that the convicted person receives such treatment. If a convicted person is imprisoned, and either already has, or develops, a mental disorder, the convict can be certified as insane and committed to a psychiatric institution for treatment under section 2 of the *Criminal Lunatics (Ireland) Act 1838.* Alternatively, where the illness falls short of justifying involuntary treatment, yet the treatment required is of a standard that the prisoner cannot be properly treated in prison, the Minister can order that the convict be taken to a hospital or suitable place for the purpose of treatment pursuant to section 17(6) of the *Criminal Justice Administration Act 1914.*

9 Thus, if it is apparent to the Court that a convicted person is suffering from a mental disorder short of the legal definition of insanity, the Court has no jurisdiction to order that the person receive treatment for the condition as part of the sentence.

E Common Law Approach to Diminished Responsibility[8]

10 Against the background of the statutory lacuna just described, in the case of *Doyle v Wicklow County Council*[9], the High Court recognised that the McNaghten rules do not provide the sole or exclusive test for determining the sanity or insanity of an accused. Griffin J approved of the following statement[10] of Henchy J in *The People (Attorney General) v Hayes*[11] where he stated:

> "The rules do not take into account the capacity of a man on the basis of his knowledge to act or to refrain from acting, and I believe it to be correct psychiatric science to accept that certain serious mental diseases, such as paranoia and schizophrenia, in certain cases enable a man to understand the morality or immorality of his act or the legality or illegality of it, or the nature and quality of it, but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act."

11 The case thus introduced what is termed 'volitional insanity'.[12] Due to the extended definition of insanity established by this case, it has been advanced that the defence of diminished responsibility is unnecessary in this jurisdiction.[13]

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7 *On the Application of Gallagher (No 2)* [1996] 3 IR 10.

8 See Boland "Diminished Responsibility as a Defence in Irish Law" (1995) 5 ICLJ 173.

9 [1974] IR 55.

10 *Ibid* at 70-71.

11 Unreported November 30 1967.

12 For an in-depth analysis of the case and its consequences for the insanity defence in Ireland, see McAuley and McCutcheon *Criminal Liability – A Grammar* (Round Hall Sweet and Maxwell 2000) at 729-731.

13 *Ibid* at 730.

12 In *The People (Director of Public Prosecutions) v O'Mahony*[14] the only ground of appeal was that the trial judge had erred in law in refusing to permit the jury to consider what was stated to be a defence of diminished responsibility. Psychiatric evidence showed that the general medical condition of the appellant was that he was "a borderline mental defective or borderline below average intelligence individual [who] … suffered from a condition of psychotic intensity which prevented him from stopping or withdrawing from violent acts …".[15]

The Court considered the decision of *Reg v Byrne*[16] and the English *Homicide Act 1957*. In that case the defendant's defence of diminished responsibility had succeeded on the basis that he was a sexual psychopath. Finlay CJ giving judgment for the Court recounted this background and went on to state:

> "Having regard to the definition of the defence of insanity laid down by this Court in *Doyle v Wicklow County Council* … it is quite clear that the appellant in *Reg v Byrne* … if tried in accordance with the law of this country on the same facts, would have been properly found to be not guilty by reason of insanity.
>
> "In the instant case, if it were established, as a matter of probability, that due to an abnormality of mind consisting of a psychotic condition the appellant had been unable to control himself and to desist from carrying out the acts of violence leading to the death of the deceased, he would have also been entitled to a finding of not guilty by reason of insanity."[17]

13 Finlay CJ went on to address the defence of diminished responsibility and stated:

> "It seems to me impossible that … there could exist side by side with what is now the law in this country concerning a defence of insanity a defence of diminished responsibility such as has been contended for in this case which would, in effect, leave to an accused person and his advisers the choice as to whether to seek to have him branded as a criminal or whether to seek on the same facts the more humane and, in a sense, lenient decision, that he was not guilty of a crime by reason of insanity."[18]

14 Thus, while the defence of diminished responsibility is not part of the common law of this jurisdiction, the broad interpretation of the defence of insanity includes the psychopath. This somewhat ameliorates the absence of a defence of diminished responsibility.

15 The courts have not always accepted this situation, however, and in *In Re Ellis*[19] the Court of Criminal Appeal stated *obiter* that the circumstances of the case

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14 [1985] IR 517.

15 *Ibid* at 520.

16 [1960] 2 QB 396.

17 [1985] IR 517 at 522.

18 *Ibid* at 523.

19 [1990] 2 IR 291.

> "[highlighted] the necessity for [Parliament] to examine as a matter of real urgency whether legislation is now needed to define the nature and scope of the plea of insanity and, possibly, of diminished responsibility, as a defence in criminal trials."[20]

F Diminished Responsibility and Domestic Violence

16 There has been no Irish statement on the application of the defence of diminished responsibility to the very particular circumstances of domestic violence.

G The *Criminal Law (Insanity) Bill 2002*

17 The long-awaited *Criminal Law (Insanity) Bill 2002* proposes to introduce a new defence of diminished responsibility into Irish law. In the explanatory memorandum to the Bill, the drafters justify its introduction by stating, "The availability of the verdict of diminished responsibility should reduce the danger that a jury will return an insanity verdict when faced with a person whom they regard as not being completely sane, even if he or she does not meet the legal criteria for insanity." The defence only applies to murder, including murder under section 3 of the *Criminal Justice Act 1990.*[21]

18 The justification for restricting the defence to murder is found in the explanatory memorandum to the Bill, which states,

> "There is no need to apply the concept [of diminished responsibility] in the case of other crimes where there is no mandatory sentence. In those instances the judge can at present take into account the mental condition of the convicted person when considering what sentence to impose."

It is assumed that the reason treason, piracy with violence and genocide are not included in the ambit of the Bill is that, due to the nature of the offences, it is highly unlikely that the need for the defence would arise in those cases.

19 Section 5(1) of the Bill states:

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20 [1990] 2 IR 291 at 295.

21 Which applies to:

> "(a) murder of a member of the Garda Síochána [the Police Force] acting in the course of his duty,
>
> (b) murder of a prison officer acting in the course of his duty,
>
> (c) murder done in the course or furtherance of an offence under section 6 of the Offences against the State Act, 1939, or in the course or furtherance of the activities of an unlawful organisation within the meaning of section 18 (other than paragraph (f)) of that Act, and
>
> (d) murder, committed within the State for a political motive, of the head of a foreign State or of a member of the government of, or a diplomatic officer of, a foreign State,
>
> and to an attempt to commit any such murder."

Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person-

(d) committed the act alleged,

(e) was at the time suffering from a mental disorder, and

(f) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act

the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility."

20 'Mental disorder' is defined in the Bill as including "mental illness, mental handicap, dementia or any disease of the mind" but expressly does not include intoxication.[22] The scope of the definition is therefore narrower than that of the English *Homicide Act 1957*, and in fact similar to the Scottish approach to diminished responsibility. In order to avail of the defence as proposed in the Bill, an accused would have to be suffering from a mental disorder just short of insanity. Probably therefore, psychopathy will not come within the ambit of the definition, given its close proximity to the Scottish test. However, given the wide application of the defence of insanity post-*Doyle*, this is not thought to be problematic.

[22] Section 1 of the Bill.

SYNOPSIS OF THE IRISH LAW ON EXCESSIVE DEFENCE

A Preliminary Remarks

1 This document must be considered against the backdrop of the general law of legitimate defence in Ireland and abroad. Whilst it is not possible in a document of this length to provide this broader context, these matters will be covered in the Consultation Paper on *Legitimate Defence in Cases of Homicide* which hopefully will be completed in the near future.

B Introduction

2 The law relating to the use of excessive defensive force in this jurisdiction is shrouded in uncertainty. Whilst excessive defence was recognised as a partial defence to murder[1] in the 1972 Supreme Court decision, *The People (Attorney-General) v Dwyer*,[2] the dearth of subsequent case-law has left the concept ill-defined; furthermore, the status of the plea has been further obscured with the enactment of the *Non-Fatal Offences against the Person Act 1997*. In order to gauge the current position, it is necessary to consider *Dwyer* in some depth before assessing the impact of subsequent judicial and legislative developments.

C *The People (Attorney-General) v Dwyer*

(1) The Facts

3 The Supreme Court case arose from the following circumstances. Three young men, including the deceased, had sought out the appellant to exact revenge after the appellant had insulted the mother of one of their group earlier that evening. They located the appellant at a café and called him out onto the street. When the appellant and his companion emerged a fight ensued. The appellant was engaged with two of the opposing group and claimed that he was caught from behind and hit on the head with some instrument. Fearing that he would be killed,[3] the appellant brandished a knife he was carrying and stabbed the deceased.[4]

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1 The application of the plea of excessive defence in relation to non-fatal offences does not appear to have been discussed by the courts.

2 [1972] IR 416.

3 The appellant claimed that he formed this belief when he saw his companion being knocked to the ground and being kicked in the head by the one of the deceased's group.

4 Both of the men with whom the appellant was fighting were fatally stabbed. However, the appellant's trial for murder of the second deceased had not yet taken place at the time of the appeal.

(2) The Certified Question

4 The certified question for the Supreme Court was as follows:

> "Where a person, subjected to a violent and felonious attack, endeavours, by way of self-defence, to prevent the consummation of that attack by force, but, in doing so, exercises more force than is necessary but no more than he honestly believes to be necessary in the circumstances, whether such person is guilty of manslaughter and not murder."

(3) The Judgments

5 The Court was unanimous in answering the certified question in the affirmative and recognising the plea of excessive defence. The two separate judgments of the Court were delivered by Walsh and Butler JJ.[5] The judgments concurred that an accused who believes that he or she is using necessary force but who in fact uses force that is objectively unnecessary is guilty of manslaughter and not murder.[6]

6 In reaching this conclusion, both judgments favoured the approach of the High Court of Australia in *R v Howe*[7] over that of the Privy Council in *Palmer v R*[8] and the English Court of Appeal in *R v McInnes*.[9] Both placed reliance on section 4 *Criminal Justice Act 1964*[10] which sets out the mental element required for murder: "Our statutory provision makes it clear that the intention is personal and that it is not to be measured solely by objective standards" (*per* Walsh J);[11] "[T]he Act of 1964 rather pointed the way to this development by its insistence on the intention to kill or cause serious bodily injury as an essential ingredient in the crime of murder, and by

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5 Ó Dálaigh CJ concurred with the judgment of Walsh J. Budd J concurred with the judgment of Butler J. Fitzgerald J concurred with both judgments.

6 Walsh J held that excessive defence is established when it is shown "that the accused used excessive force, that is to say more than would be regarded as objectively reasonable… [but] the accused honestly believed that the force he did use was necessary…": [1972] IR 416, 424. Butler J, at 429, held that excessive defence was established when an accused "uses more force than may objectively be considered necessary… [but] his intention in doing the unlawful act was primarily to defend himself…." See also Butler J's comments at 432.

7 (1958) 100 CLR 448.

8 [1971] AC 814. However, note Butler J's comments at [1972] IR 416, 430-432.

9 [1971] 3 All ER 295.

10 Section 4 *Criminal Justice Act 1964* provides: "(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person whether the person actually killed or not. (2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted."

11 [1972] IR 416, 424.

providing that the presumption that an accused person intended the natural and probable consequences of his act may be rebutted" (*per* Butler J).[12]

7 However, whilst their ultimate conclusion was the same, there were subtle differences between their reasoning. Walsh J framed the question thus:

> "If an accused person [who acts with an intention to kill or cause serious injury[13]] only does what he honestly believes to be necessary in the circumstances, even though that involves the use of a degree of force greater than a reasonable man would have considered necessary in those circumstances, the accused has been guilty of an error of judgment in a difficult situation which was not caused by himself. Should he then be convicted of murder?"

8 Answering the question in the negative, Walsh J held that "the necessary malice" for murder would be lacking if a defender "honestly believed that the force he did use was necessary".[14]

9 In contrast, Butler J held that an accused who uses objectively unnecessary force but whose "intention … was primarily to defend himself,… should not be held to have the necessary intention to kill or cause serious injury."[15] In other words, whilst Walsh J took the view that such a defender would lack the necessary malice for murder (allowing the plea to operate where it was accepted that the accused intended to kill), Butler J held that a defensive motive would negate any intention to kill or cause serious harm.[16]

10 The Judges agreed, however, that a manslaughter verdict should be returned on the grounds that the objective test of legitimate defence is not satisfied. As Walsh J states: "If [the prosecution] does establish that the force used was more than was reasonably necessary it has established that the killing was unlawful as being without justification and not having been by misadventure."[17]

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12 *Ibid* at 432.

13 Walsh J dealt with the certified question on the basis that it was concerned with cases of voluntary homicide, namely: "it was the intention of the accused to kill or to cause serious injury but that he did so by way of self-defence but went beyond what a reasonable man would consider necessary in the circumstances": *ibid* at 423.

14 *Ibid* at 424. See, for discussion, Charleton, McDermott & Bolger *Criminal Law* (1st ed Butterworths 1999) at 1039.

15 [1972] IR 416, 429; see also 432. Charleton, McDermott & Bolger *Criminal Law* (1st ed Butterworths 1999) at 1040 summarise as follows: "[Butler J's] analysis was similar to that of Walsh J save that it was based on the proposition that where the accused is attacked and uses disproportionate force, his intention in so acting is not primarily to kill or cause serious injury, but to defend himself".

16 However, see also Butler J's reference at [1972] IR 416, 429-430 to a passage from the lower appellate court's decision in *R v Howe* which favoured the approach of Walsh J.

17 [1972] IR 416, 424. Similarly, Butler J states at 429: "If he uses more force than may objectively be considered necessary, his act is unlawful and, if he kills, the killing is unlawful."

(4) Discussion

11 The decision leaves many questions regarding the ambit of the plea. For example, the status of the retreat rule and the castle doctrine, traditional rules of legitimate defence, are uncertain under the law of excessive defence.[18]

12 There is also uncertainty as to the types of attack that will meet the legal threshold for the plea:

> "It would appear – from the wording of the certified question – that the defence is only available to someone who has been subjected to a violent and felonious attack. But what exactly is a violent and felonious attack? Do all felonies that involve an element of battery qualify under this description? Plainly threats of death or serious personal violence do, but what about felonies against the person that contain neither of these elements?... Is the adjective 'felonious' to be interpreted literally, thus removing the defence from someone who miscalculates by using deadly force to repel a violent misdemeanour in the honest belief that his life has been threatened? Or is it merely intended as a synonym for 'serious', in which case the defence may extend to attacks ordinarily regarded as serious, irrespective of whether or not they are technically felonies?"[19]

13 However, it should be recalled that Walsh J did not purport to rule out the possible broadening of the threshold test (whatever that threshold may have been) and left the matter open for resolution in a future case.[20] Unfortunately, no case has arisen in the supervening three decades for this matter to be clarified.

14 Another major area of uncertainty is whether the *Dwyer* plea is intended to apply when an accused uses **unnecessary** force or **disproportionate** force or, indeed, both. The Supreme Court focuses on the distinction between subjective and objective standards; an acquittal is warranted if an accused uses force that, from an objective viewpoint, is "reasonably necessary for his protection"[21] whereas a manslaughter verdict is appropriate where the objective test is not met yet, from a subjective perspective, the accused nevertheless "honestly believed that the force he did use was necessary".[22] The references in both legs of the test to "necessity" would suggest that the issue of "proportionality" is irrelevant.

15 The final major area of uncertainty is the relationship between excessive defence and other categories of manslaughter. In particular, the question has been

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18 McAuley "Excessive Defence in Irish Law" in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 196-7. It might be added that the status of these rules under the Irish law of legitimate defence is itself unclear.

19 *Ibid* at 198.

20 [1972] IR 416, 425.

21 *Ibid* at 420 *per* Walsh J. See also Butler J at 429.

22 [1972] IR 416, 424 *per* Walsh J. See also Butler J at 429.

raised as to the propriety of convicting an excessive defender in the absence of gross negligence manslaughter:

> "Reservations might… be entered about the practice … of characterising the plea of excessive force as a partial defence to murder, since this assumes that someone who successfully raises the plea is necessarily guilty of manslaughter. This assumption is fine if manslaughter can be committed negligently, since a person who makes an unreasonable mistake about the quantum of force necessary to defend himself or herself is, *ex hypothesi*, guilty of negligence. But it is false if manslaughter requires proof of gross negligence, as it has long been held to do in Irish law, since in that case a defendant who mistakenly believed that the force she used was necessary to defend herself would be entitled to a complete acquittal unless her mistake was a grossly unreasonable one."[23]

16 Walsh J alluded to this issue in *Dwyer*, although it would seem that he considered that gross negligence created a separate basis of liability for manslaughter rather than operating as a condition of the plea of excessive defence.[24]

D Subsequent Judicial Developments

17 In the ensuing three decades there has been little appellate discussion of the *Dwyer* plea. The clearest endorsement of the decision has come via the Court of Criminal Appeal's 1994 judgment, *The People (Director of Public Prosecutions) v Clarke*.[25] Whilst overturning the appellant's murder conviction on other grounds, the Court described as "impeccable" the portion of the trial judge's direction to the jury which "dealt fully with what might be termed *The People (Attorney General) v Dwyer* [1972] IR 416 manslaughter option."[26] The Court also quoted at length from Walsh J's judgment in *Dwyer* and summarised the law of excessive defence as follows:

> "[W]here self-defence fails as a ground for acquittal because the force used by the accused went beyond that which was reasonable in the light of the circumstances but was no more than the accused honestly believed to be necessary in the circumstances, he is guilty of manslaughter and not of murder."[27]

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23 McAuley "Excessive Defence in Irish Law" in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 201.

24 [1972] IR 416, 422-423.

25 [1994] 3 IR 289. The Supreme Court had implicitly endorsed the *Dwyer* decision the previous year in *The People (Director of Public Prosecutions) v Davis* [1993] 2 IR 1, albeit that *Dwyer* was mentioned only in passing as an example of a legal direction to be given to juries in cases of self-defence.

26 [1994] 3 IR 289, 300.

27 *Ibid* at 299.

18 Inexplicably, however, the Court then cited a passage from the Privy Council's judgment in *Palmer v The Queen*[28] as "setting out the parameters of how a jury should approach this question of self-defence"[29] notwithstanding that *Palmer* had rejected the approach adopted by *Dwyer*. No explanation was forthcoming from the Court of Criminal Appeal as to how the endorsements of both *Dwyer* and *Palmer* should be reconciled.

19 The dearth of appellate jurisprudence, whilst surprising given the uncertainty surrounding the ambit of the *Dwyer* plea,[30] may be accounted for by the tendency of the prosecution to charge with manslaughter rather than murder those who seem entitled to the defence, "thereby reducing to a trickle the number of cases in which the issue of excessive defence is relevant." Alternatively, "it may simply reflect the heavy procedural bias in Irish criminal law which, since the advent of judicial activism in the 1960s, has led to a virtual eclipse of substantive criminal law appeals."[31]

E Legislative Developments

20 The enactment of the *Non-Fatal Offences against the Person Act 1997* ("1997 Act") codified the law of legitimate defence and abolished "any defence available under common law in respect of the use of force within the meaning of [the legitimate defence provisions]".[32] The impact of this Act on the law of excessive defence is dependent on two factors: whether the defence provisions contained in the Act apply to homicide offences; and, if so, whether the provisions implicitly abolish the *Dwyer* plea. Unfortunately, neither issue appears to have arisen for determination at appellate level, albeit that to date the Court of Criminal Appeal appears to have assumed that the *Dwyer* plea remains undisturbed.[33] Consequently, it is difficult to draw any firm conclusions on this point. Nevertheless, the following arguments may be noted.

21 The first issue – whether the defence provisions of the 1997 Act apply to homicide offences – turns on whether the Act creates **general** defences or whether it

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28 [1971] AC 814, 831.

29 [1994] 3 IR 289, 299-300.

30 It is perhaps even more peculiar considering that Ireland is one of the few common law jurisdictions to adopt the *Dwyer* plea; hence, where ambiguities arise, little assistance can be gained by reference to the experience of foreign courts.

31 McAuley "Excessive Defence in Irish Law" in Yeo *Partial Excuses to Murder* (Federation Press 1990) at 194-5. See also McAuley & McCutcheon *Criminal Liability* (1st ed Round Hall Sweet & Maxwell 2000) at 745-746.

32 Section 22(2) *Non-Fatal Offences against the Person Act 1997* referring to the statutory defence created by sections 18 and 19 of the Act.

33 In *The People (Director of Public Prosecutions) v Kelly* [2000] 2 IR 1, 10, the Court of Criminal Appeal contrasted the partial defence of provocation, with which the case was directly concerned, with the plea of excessive defence, referring with apparent approval to *Dwyer*.

merely codifies the law in relation to **non-fatal** offences. There are compelling arguments in support of both schools of thought.

22 On the one hand, both the Short and Long Titles of the 1997 Act suggest that it is confined to "non-fatal offences".[34] Furthermore, the Commission's 1994 *Report on Non-Fatal Offences Against the Person*,[35] upon which the 1997 Act was based, expressly restricted its ambit to non-fatal offences.[36] Indeed, the Commission was aware of the *Dwyer* plea and showed no inclination to recommend its revocation.[37]

23 On the other hand, the provisions of the 1997 Act do not expressly draw any distinction between fatal and non-fatal uses of defensive force.[38] Furthermore, the draft clause contained in the Commission's 1994 Report drew heavily on a draft *Criminal Law Bill* proposed by the Law Commission of England and Wales; the general part and defences contained in that Bill were intended to apply to both fatal and non-fatal offences alike.[39] However, it should be noted that, unlike the *Criminal Law Bill*, the 1997 Act contains no express provision stating that the defence and general principles apply to all offences.[40]

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34 The Long Title states: "An act to revise the law relating to the main non-fatal offences against the person and to provide for connected matters." However, it might be said that the "non-fatal" reference in the Long Title refers only to the type of **offences** contained in the Act and not to the type of **defences**, which presumably fall under the description of "connected matters". Likewise, the Explanatory Memorandum to the *Non-Fatal Offences against the Person Bill 1997* states that it deals with "the law dealing with the main non-fatal offences against the person" but later indicates ambiguously that the legitimate defence provisions "[govern] the use of force in public and private defence" without clarifying whether or not this is limited to non-fatal force.

35 (LRC 45-1994).

36 The Commission explained in the introduction to its Report: "We decided to divide our study of offences against the person into two reports, one on non-fatal offences, the other on criminal homicide, and to deal first with non-fatal offences": (LRC 45-1994) at 1.

37 The Commission referred to the *Dwyer* plea in its discussion of "Necessity Defence And The Prevention of Crime": (LRC 45-1994) at 28. However, it would appear that the purpose of discussing the case was to highlight the erosion of the proportionality rule in England at common law, as opposed to extending the ambit of the Report to cover cases of homicide.

38 Charleton, McDermott & Bolger *Criminal Law* (1st ed Butterworths 1999) at 1044.

39 Report of the Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (No 218, 1993). The Report emphasises, at 46, that Part II of the proposed *Criminal Law Bill*, which deals with defences and general principles, "goes further than merely applying that part of the general law in the case of offences against the person. Rather, it legislates for the defences and principles to apply throughout the criminal law, in respect of all offences." See, for discussion, McAuley & McCutcheon *Criminal Liability* (1st ed Round Hall Sweet & Maxwell 2000) at 764.

40 Clause 24 of the draft *Criminal Law Bill* states: "The provisions of this Part apply in relation to all offences under the law of England and Wales, including those under Part I": Report of the Law Commission of England and Wales *Legislating the Criminal Code: Offences Against the Person and General Principles* (No 218, 1993) at 104.

24 Assuming for the present purposes that the 1997 Act does codify the law in relation to legitimate defence in cases of homicide, the second issue is whether the Act has implicitly abolished the *Dwyer* plea. On one hand, given that the 1997 Act attempts not merely to restate the existing law but also to bring about significant reform – not least the heralding of a more subjective approach to legitimate defence – one might expect that any vestiges of the previous scheme intended to remain law would have been expressly identified.

25 On the other hand, one might argue that the pertinent aspects of the reformed legitimate defence are compatible with the common law approach under *Dwyer* and, therefore, should be read as retaining the plea. Under *Dwyer*, those who resorted to lethal defensive force were held to the normative standard of conduct of "reasonable necessity"; hence, the use of lethal defensive force had to be necessary as measured by an objective standard. Whilst there is debate as to the actual approach adopted by the 1997 Act, one interpretation is that it also imposes a normative requirement on defenders, albeit the ill-defined standard of "reasonableness". If this is the case then arguably there is room for a *Dwyer*-type plea for those who believe that they are using necessary and proportionate lethal defensive force but who fall short of meeting the reasonableness standard.[41]

APPENDIX D

ENGLISH LAW COMMISSION PROJECT ON PARTIAL DEFENCES TO MURDER

Status in New Zealand of defences of provocation, diminished responsibility and excessive self-defence with regard to domestic violence

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1 INTRODUCTION

[1] I have been invited to prepare a paper on the law in New Zealand governing provocation, diminished responsibility and the partial defence to murder of over-reactive self-defence, with particular regard to the impact of the relevant law in the context of domestic violence. Although New Zealand criminal law has its historic origins in the English common law of crimes, with the passage of time significant differences have emerged in the approaches taken by the two jurisdictions in the development of criminal policy and in the definitions of offences and criminal defences.

[2] New Zealand, like England, has been concerned in recent years to address a range of issues around the problem of domestic violence and abuse. Legislation specifically regulating domestic violence and providing measures of protection for the immediate victims of such conduct has been enacted. This has been supplemented by new victim's rights and sentencing legislation with a more overt focus on the participation of victims within the criminal justice system. Although these measures are generic and clearly do not purport to respond to the problem of domestic violence exclusively, it is nevertheless the case that New Zealand policy makers and legislators have become acutely aware of the broad range of social problems caused by domestic violence and the need to address these problems through a raft of legislative measures.

[3] While new legislation has been instrumental in addressing some of the social difficulties presented by battering relationships, there has been criticism that this area of social distress has not been well understood by the community of the legal profession.[1] In particular, it was claimed that some existing legal defences have been unavailable to some defendants who claim that their offending arose out of their situation as battered women.[2]

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[1] Law Commission, *Preliminary Paper 41, Battered Defendants: Victims of Domestic Violence who Offend,* A Discussion Paper (Wellington: Law Commission, 2000) 1.The paper is cited throughout as NZLC PP41.

[2] These issues, in the context of New Zealand law, are comprehensively addressed by the Hon Justice Bruce Robertson, President of the New Zealand Law Commission, in "Battered Woman Syndrome: Expert Evidence in Action "(1998) 9 Otago LR 277.

[4] The New Zealand Law Commission responded to these concerns by undertaking a project similar to that now being undertaken by the English Law Commission. Its purpose was to look at how the law applies to battered defendants who commit criminal offences as a reaction to domestic violence inflicted on them by their partner. The terms of reference of the project were somewhat broader than the terms of reference to the "Partial Defences to Murder" project, in that they invited consideration of the defences of duress, necessity, and 'self-preservation' in addition to self-defence, provocation and diminished responsibility. The New Zealand Commission did not propose to attempt a comprehensive review of the defences, but was concerned to ask whether they apply equitably to battered defendants. [3]

[5] Throughout the following discussion I have referred to the Commission's Report in relation to its consideration of provocation, diminished responsibility and excessive self-defence respectively.

[6] I will begin my survey with a consideration of the history of the provocation defence in New Zealand, including major law reform proposals. I will then examine provocation jurisprudence dating from the enactment of the *Crimes Act* 1961 and will consider to the implications of the decision of the New Zealand Court of Appeal in *R v Rongonui*[4] and the findings of the new Zealand Law Commission. The paper will then examine the status of diminished responsibility in New Zealand before concluding with a discussion of excessive self-defence.

[7] In the final section I will attempt to draw some broad conclusions and, if appropriate, offer some recommendations concerning the future of the defences surveyed.

2 HISTORICAL REVIEW OF NEW ZEALAND LAW ON PROVOCATION

A *Common law origins*

[8] In 1883 a Criminal Code Bill was introduced for the first time in the New Zealand Parliament. The Bill drew heavily on earlier English codification Bills, in particular the Bill of 1880. Its introduction was also accompanied by a report prepared by New Zealand Commissioners who were charged with assessing the suitability of the Bill to the conditions of the New Zealand. The Code was confined to indictable offences and effected the abolition of the distinction between felonies and misdemeanours. Another principal feature of the Bill was the authoritative definition of offences indictable at common law and of matters of justification and excuse. The Bill was finally enacted as the Criminal Code Act 1893.

(i) *Early statutory definition of provocation*

[9] The indigenous needs of the new jurisdiction do not appear to have impacted the definition of provocation in any particular way. The definition contained in s 165 of

[3] NZLC PP41, para 7.
[4] [2000] 2 NZLR 385; (2000)17 CRNZ 310 (CA).

the Criminal Code Act 1893 is virtually identical in its wording to s 176 of the Draft Code of 1879, although the language and arrangement differ slightly. However, as the Criminal Code Bill Commissioners note[5] both the draft Code and the Bill introduced an alteration "of considerable importance" to the common law. Under then existing law the infliction of a blow or the sight by the husband of adultery committed with his wife might have amounted to provocation sufficient to reduce murder to manslaughter. The Commissioners observed that while the authorities for saying that words can never amount to provocation are weighty, they were of the opinion that cases could be imagined where language would give a provocation greater than any ordinary blow.[6] The inclusion of words as a sufficient source of provocation is thus provided in the expression "any wrongful act *or insult*"[7] occurring in both s 176 of the draft Code and s165 of the Criminal Code Act 1893. Thus an insult without a blow became sufficient to constitute provocation at law.[8]

[10] Another important development in the early statutory definition of provocation in New Zealand was the adoption in s 165 of the 1893 Act of the principle that the provocation must be of such a nature as to be sufficient to deprive a *reasonable* man of the power of self control. This requirement seems to have been driven by the common law requirement that the accused had killed in a state of passion resulting from some serious provocation, usually an act of violence to the accused. By 1869 this requirement was firmly established as part of the common law following the decision in *R v Welsh*[9], which is commonly regarded as having established the objective test. In New Zealand the objective test was incorporated into s 165 of the Criminal Code Act of 1893 and subsequently into s 184 of the Crimes Act 1908, where, the expression "reasonable man" was adopted. With the 1961 Crimes Act the "reasonable man" had become the "ordinary person".

[11] Section 165 of the 1983 Act and sections 184 and 185 of the Crimes Act 1908 retained the essence of the common law regarding provocation. They required that homicide should have been committed "in the heat of passion caused by sudden provocation" and that the offender acted on the provocation "on the sudden" before there had been "time for his passion to cool".

[12] Between 1893, when New Zealand criminal law was first codified, and 1961, there were no significant amendments to either the form or substance of the provocation rules. However, during 1956 and 1957 the then Minister of Justice instructed the preparation of a preliminary draft for a revision of the Crimes Act. A Bill was prepared and introduced in the House of representatives in 1957. In 1958 the Government invited the Hon. Sir George Finlay (then the senior puisne judge of the Supreme Court) to examine the Bill of 1957. His Honour considered the draft provocation provision and noted that the new provocation clause represented a "radical change in the law", substituting as it did a subjective standard for the

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[5] See Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (Criminal Code Bill Commission) C-2345 (1879), at p24.
[6] Ibid, 25.
[77] Emphasis added
[8] *R v McGregor* [1962] NZLR 1069, 1075.
[9] (1869) 11 Cox CC 336.

objective standard that had hitherto prevailed in both New Zealand and the UK.[10] Finlay further noted that the new provision represented an effort to remove the hardship and "obvious injustice" implicit in the *Bedder* decision , but acknowledged the difficulty in devising a formula which would not so enlarge the area of provocation that the whole topic will become " unlimited and uncertain".[11] On this basis the new provision purports to adhere to an objective standard while attempting a "sufficient qualification to meet the difficulty in *Bedder's* case." [12]

[13] Sir George Finlay expressed concern that the adoption of the phrase "having the characteristics of the offender" seemed too wide in that it left undefined what qualifed as characteristics and would, in effect, substitute a subjective test for the then prevailing objective one. However, after reflection his Honour concluded that the language in the new clause could be extended to secure the maintenance of the objective test just with a sufficient modification to cover *Bedder's* case. [13]This approach prevailed. In 1961 a new Crimes Act was enacted which consolidated and amended the Act of 1908. In respect of provocation it effected an alteration in the substance of the law. The relevant provisions state:

> **169. Provocation-**
> (2) Anything done or said may be provocation if-
> (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
> (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

[14] Section 169(2) is the critical provision. It dispensed with the common law requirements for physical violence and the exclusion of words as sufficient provocation[14] and provided for two general tests which have to be satisfied. Paragraph (a) imposes an objective condition that requires an estimation of the effect of the provocation on the self-control of a hypothetical ordinary person, modified to meet the difficulty in *Bedder,* while para (b) requires that the provocation actually deprived the offender of the power of self-control and by that means led to the killing.

[15] It is clear that, notwithstanding the English common law position, the drafters of the new Act did attempt the task of investing a reasonable man with the characteristics of the accused, despite the opinion that to do so would make the objective standard meaningless. The new phrase " but otherwise having the characteristics of the offender" requires, in effect, that the ordinary person be placed in the circumstances with which the accused was confronted and that he or she be

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[10] See Finlay, *Report on the Crimes Bill 1957* (1958), 72. It should be noted, however, that in interpreting the learned Judge's comments it has been necessary to substitute 'objective' for 'subjective' where they appear in the text of the Report, since it is evident in reading the commentary that in using the one expression the Judge means the other.
[11] Ibid.
[12] Ibid, 73.
[13] Ibid, 74.
[14] See *Holmes v DPP* [1946] AC 588 at 600, [1946] 2 All ER 124 at 128 (HL).

invested with the characteristics of the accused. The jury is required to take into account both factors when assessing the reaction of the hypothetical ordinary person to provocation, essentially an amalgamation of both subjective and objective tests and involving, as North J observed in *McGregor* the "fusion of two discordant notions".[15]

[16] The 1961 enactment introduced some other changes to the law on provocation. There is no longer any express reference to "sudden provocation", or " the heat of passion", or " acting on the sudden and before there has been time for his passion to cool". The new requirement is that provocation "did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide." [16] However, it has been suggested that simply because references in the earlier enactment to suddenness, heat of passion and time for passion to cool have been eliminated from s 169, does not mean that they have ceased to be relevant on the question of fact. The authors of *Adams on Criminal Law* refer to the dictum of North J in *R v McGregor* to the effect that provocation can only avail when the homicide has been committed in hot blood and while the accused is still in the throes of passion.[17] However, in New Zealand these are no longer matters of law, or legal tests of provocation, but may be put to the jury for the purpose of determining whether there has been provocation.[18] Provocation may be withheld from the jury in New Zealand if there is insufficient proximity in point of time between the alleged provocation and the homicide, such that there is no ground for holding that the accused acted in the heat of passion and before there was time for the passion to cool.[19]

(ii) *"Sudden and temporary loss of self-control*

[17] In New Zealand a "sudden and temporary loss of self control' remains an essential element of provocation, although the defence will not necessarily be negated by time lapse and delayed reaction.[20] However, the longer the delay and the stronger the evidence of deliberation the more likely it is that the prosecution will negative the defence. New Zealand law does not require that there must have been a complete loss of self-control, to the extent that the accused really did not know what he was doing. Loss of the power of self-control does not mean that the conduct was involuntary.[21]

(iii) *Characteristics*

[18] Undoubtedly the most controversial change effected by the 1961 Act has been the addition of a new standard of self–control, expanding the test of an "ordinary person" to " a person having the power of self-control of an ordinary person, *but*

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[15] *McGregor*, supra, at1081.
[16] Crimes Act 1961, s 196(2) (b).
[17] *Adams*, supra, paraCA169.06B and see *R v McGregor*[1962] NZLR 1069(CA) at p 1078
[18] *Adams*, supra, para CA 169.06B.
[19] SEE *R v Erutoe* [1990] 2 NZLR 28; (1990) 5 CRNZ 538(CA).
[20] See *R v Taaka* [1982] 2 NZLR 198.
[21] *R v Campbell* (1997) 15 CRNZ 138(CA).

otherwise having the characteristics of the offender." The judicial meaning ascribed to this expression will be considered in more detail shortly.

[19] The new expression was first considered in *R v McGregor* [22]. *McGregor* involved a homicide which occurred in the context of ongoing animosity between neighbours concerning the boundary between their two properties. Because the court found that there was no evidence to support provocative conduct which could have triggered a loss of self-control, the judicial statements concerning the test for provocation are obiter. Nevertheless, *McGregor* is still the leading authority on provocation in New Zealand, although its authority has been eroded in some important respects in recent case law.

[20] In *McGregor*[23] North J, delivering the judgment of the Court, noted that until as late as the decision in *Bedder's* case, [24] all attempts to persuade English Courts to modify the full rigour of the "reasonable man" test had failed. The Court referred to the decisions in *R v Lesbini*,[25] *Mancini's* case[26], and *R v Mc Carthy*[27] as illustrating the general proposition that investing the reasonable man with the peculiar characteristics of the accused would be to deprive the reasonable man of his reason and the objective test of its value. This position, as North J observes, was further endorsed by the Royal Commission on Capital Punishment which was also unwilling to recognize that idiosyncrasies of individual temperament or mentality should be allowed to affect a person's liability to conviction, even though it was sympathetic to the view that if the criterion of the reasonable man was strictly applied it would be too harsh in its operation.[28]

(iii) *The interpretative problem*

[21] There can be little doubt that the introduction of the hybrid subjective/objective standard into the statutory definition of provocation has been the single most controversial and complex aspect of New Zealand's provocation defence. While the broad purpose of the amendment has always been reasonably clear, the scope to be given to the expression 'characteristics' has from the outset been a matter of significant controversy.

[22] In *McGregor,* North J noted that if the amending words were to affect the test of the power of self control of an ordinary person, the phrase 'but otherwise' would have to be construed to mean something more than "in other respects". The interpretative problem, as North J saw it, was that if "but otherwise" meant simply "in other respects" the section would constitute as provocation anything which in the circumstances of the case would have led to the loss of control of an ordinary person, being a person who in other respects (ie other than the power of self control) had his

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[22] [1962] NZLR 1069,
[23] [1962] NZLR 1069, 1075 .(CA)
[24] [1954] 1 WLR 1119 ; [1954] 2 All ER 801.
[25] [1914] 3 KB 1116.
[26] [1942] AC 1.
[27] [1954] 2 QB 105; [1954] 2 All ER 262
[28] *R v McGregor,* supra, at 1077.

own personal characteristics. [29]Such a construction would have meant that the characteristics of the offender would be relevant, but not as regards self control and the new words would have had little effect. North J concluded that that could not have been the intention of the Legislature, given that the purpose of adopting the new provision was to give some relief from the rigidity of the purely objective test. He concluded that the Legislature must be regarded as having had in mind a person having the power of self control of an ordinary person, but having nevertheless some personal characteristics of his own, which are proper to be taken into account.

[23] This interpretation was severely criticized by Sir Francis Adams[30]. He contended that the words "but otherwise" dominated the meaning of s 169(2) (a). In his opinion they made it clear that the offender's characteristics were not to be taken into account to the extent that they may affect the person's power of self-control. Adams said[31]:

> " Whatever the offender's characteristics may be, he is to be judged as if he possessed normal self-control; and the hypothetical person contemplated by the subsection is simply the man in the dock, with all his idiosyncrasies, save and except that, whatever his real power of self-control may be, he is to be regarded as possessing the power of self-control of an ordinary person."

[24] This approach was thought to raise no difficulty of construction, and to leave sufficient scope for consideration of the offender's characteristics. According to the Adams' model, a homicide committed under provocation results from a conflict between the offender's :

(a) Sensitivity or susceptibility to the provocation ;and
(b) Power of self-control.

[25] By according s 169(2) (a) a literal construction, the offender's characteristics were said to be relevant to (a) but not to (b). This approach has been adopted in subsequent New Zealand provocation cases, including *R v McCarthy*[32], *R v Campbell*[33] and more recently, *R v Rongonui.* [34] However, it is doubtful whether it was the approach contemplated by Sir George Finlay in his commentary on the 1957 Bill. His Honour was concerned that considering how an ordinary person would have acted, regardless of the particular characteristic of the individual, imported an element of harshness, in that it "applies to provocation the test of how a man without a particular defect would act and applies it as a test to a man who has the defect with which he was taunted and who, in consequence, was alone likely to react positively to the taunt."[35] In the *McCarthy* and *Campbell* decisions there was no significant debate as to the merits of the *Adams* approach as opposed to that adopted in *McGregor's* case and evidently endorsed by Finlay. Indeed, in both cases the court appears to have adopted the *Adams* construction without demur, accepting that the

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[29] Ibid, 1080.
[30] FB Adams (ed), *Criminal Law and Practice in New Zealand*(2nd ed), Wellington, Sweet & Maxwell, 1971, at paras 1264 –1269.
[31] Ibid, para 1266.
[32] [1992] 2 NZLR 550; (1992) 8 CRNZ 58 (CA)
[33] [1997] 1 NZLR 16; (1996) CRNZ 117 (CA).
[34] [2000] 2 NZLR 385; (2000) 17 CRNZ 310 (CA).
[35] *Report on the Crimes Bill 1957*, at p 72.

literal construction of *Adams* "must be correct." The effect is that characteristics can only be taken into account in relation to the offender's sensitivity or susceptibility to provocation. On this view they are wholly irrelevant to the loss of self-control.[36]

[26] This is a paradoxical result. The *McGregor* court sought to give full effect to the implications of characteristics as modifying the rigour of the 'reasonable man' test as regards both susceptibility and loss of self-control, while limiting the scope of purely mental characteristics. In doing so, the court has been criticized for "unduly restricting the ambit" of provocation in New Zealand[37]. The more recent decisions, on the other hand, purport to expand the ambit of provocation by broadening the potential scope of mental characteristics, but at the same time limit their mitigatory effect by excluding them from consideration in relation to the power of self-control.

[27] The theoretical origin of the distinction has been most recently expressed in the work of Professor AJ Ashworth in "The Doctrine of Provocation" (1976) 35 CLJ 292. In an oft-cited passage in the article, Professor Ashworth emphasises the paramount concern of the common law to ascertain whether the accused showed a reasonable amount of self-restraint, noting that the application of the 'reasonable man' test necessarily means that individual deficiencies of temperament and mentality must be left out of account.

[28] With respect, to the extent that successive courts have been influenced in their interpretation of the relevant weighting to be given to both gravity and self-control by this 'hard' objective standard, it seems to me that the currently prevailing consensus in New Zealand is misconceived. If, as seems to be the case, the intention of the New Zealand legislature was to introduce a new 'soft' objective test through the medium of the 'characteristics' paradigm, it is difficult to imagine that they could have intended to exclude individual deficiencies of temperament and mentality from consideration of the question of the reasonableness of the offender's self-control. What is overlooked by the adoption of the Ashworth doctrine is the fact that the New Zealand legislature was determined to depart from the 'hard' objective test advocated for, and to modify it to the extent that it was impacted by a particular offender's relevant particular characteristics. I would strongly argue, as the *McGregor* court seems to have supposed, that the impact of the statutory amendment of 1961 was intended to *globally* affect the reasonable man test, not to confine the impact of characteristics to only one constituent element of the provocation test.

[29] I would also suggest that this approach best makes sense of the psychological realities in any case where mental peculiarities are to the forefront in assessing relevant characteristics. This is also consistent with the approach of the minority in *Rongonui.* In approving the dictum of Wilson J in *R v Hill*[38], to the effect that insulting remarks or gestures must be placed *in context* before the extent of its provocative character can be realistically assessed, Chief Justice Elias observed that the "sting" of provocation may not be intelligible unless the characteristics or history

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[36] See *R v McCarthy*[1992] 2 NZLR 550 at 558 and see *R v Campbell* [1997[1 NZLR16 at 25.

[37] *R v McCarthy* [1992] 2 NZLR 550, 558 (per Cooke P).

[38] (1985) 51 CR (32d) 97 at 126.

of the accused are taken into account.[39] Her Honour noted the difficulty of separating out susceptibility and reaction in the way now widely acknowledged by Australian and Canadian cases, and the majority in *Rongonui* itself.

[30] Elias CJ also noted how suspect the distinction is when a characteristic possessed by the accused affects the mental function in a way which exacerbates the gravity of the provocation in the accused's mind and also affects the power of self-control. In the context of a case of battered woman syndrome, it requires the jury to distinguish between the effect of the syndrome on the accused's powers of self-control and its effect on the gravity of the provocation to her, when both are "inextricably linked".[40] In a case like *Rongonui*, where the accused was said to be suffering from brain damage, post-traumatic stress disorder, dissociative amnesia and major depressive disorder, it is again difficult to imagine that such mental peculiarities would not have been sufficient to deprive her of the power of self-control of an ordinary person *with her special characteristics*, and ought properly to be taken into account in making that determination.

[31] For these reasons I am inclined towards the minority view in *Rongonui* of the applicability of 'characteristics' which seems to me to be more consistent with the likely intention of Parliament in drafting the provision. It must also be said that as far as New Zealand law is concerned, the Ashworth model is fictional in that it postulates a person as having ordinary self- control, who manifestly does not, while nonetheless being especially susceptible to provocation because of an inherent weakness or disability.

B *Criminal Law Reform Committee Proposal*

[32] In July 1976 the New Zealand Criminal Law Reform Committee presented a report on culpable homicide.[41]The report recommended some major changes to New Zealand criminal law, including the abolition of the defence of provocation and the creation of a generic offence of 'unlawful killing'. The specific proposal was that provocation should no longer be a defence to a charge of murder and should be relevant only on sentence.[42]

[33] The principal objections of the Committee to provocation as a defence may be summarised as follows:

(1) Because on charges less than murder Courts regularly take provocation into account when imposing penalty, provocation as a defence to murder has become an anomaly in the law.

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[39] *R v Rongonui* [2000] 2 NZLR385, 420.
[40] Ibid, para [111].
[41] See *Report on Culpable Homicide* Criminal Law reform Committee New Zealand, July 1976. The Criminal law Reform Committee, now disbanded, was an ad hoc law reform body under the auspices of the Department of Justice. Its role is now subsumed by the New Zealand Law Commission.
[42] Ibid, 3.

(2) The limitations upon the meaning of 'characteristics' does not do justice to some accused persons, in particular offenders who are simple-minded but not so mentally defective as to be legally insane and those whose ethnicity distinguishes them from the ordinary person of Anglo-Saxon origins.
(3) Justice is not seen to be done where the mandatory sentence of life imprisonment must be imposed even in cases where there are great differences in culpability between different offenders.
(4) Amending the law on provocation may make it possible to deal justly with cases calling for special treatment but not lying within the bounds of legal insanity.
(5) The law on provocation is unnecessarily complex and directions on the nuances of the statutory provision are often too difficult for jury members to fully comprehend.
(6) While the prescribed punishment for murder is a mandatory sentence of life imprisonment the Judge can make no allowance for provocation unless killing under provocation is excluded from murder.

[34] The Committee concluded that if the sentence of life imprisonment for murder ceased to be mandatory, this would eliminate the need for the legal definition of provocation, which the Committee regarded as unsatisfactory.

(i) *Criticisms of the Committees Proposals*

[35] The Committee's recommendations regarding provocation have never been incorporated into New Zealand law. However, its recommendations did not fall entirely on deaf ears. In 1989 the then Labour Government introduced a new Crimes Bill which would have amounted to a "root and branch re-codification" of New Zealand criminal law.[43] Amongst its many radical proposals was the abolition of the defence of provocation and its substitution with a provision that would have allowed it to be taken into account as a question of penalty.[44] This proposal was contingent upon the proposed abolition the mandatory life sentence for murder, as originally suggested by the Criminal Law Reform Committee, and the establishment of a discretionary life sentence for murder.[45]

[36] These proposals were endorsed by the Crimes Consultative Committee set up by Government to report to the Minister of Justice on the Bill, and appeared to reflect a broad consensus that the mandatory life sentence for murder should be abolished together with the provocation defence.

[37] However, there was not universal support for the proposal. Amongst the more outspoken critics of the Bill's wide-reaching reforms was Lord Cooke, then Sir Robin Cooke. While conceding that there were problems with the *McGregor* court's

[43] See Sir Robin Cooke," The Crimes Bill1989: A Judge's Response" [1989] NZLJ 235, 236.
[44] Crimes Bill 1989, cl 128.
[45] Crimes Bill 1989, cl 123. "…[E]very person is liable to imprisonment for life who commits culpable homicide."

narrow formulation of the meaning of "characteristics",[46] Lord Cooke was not persuaded that it was necessary to do away with provocation altogether. He observed that the designation of evidence of provocation in the New Zealand provision as a question of law[47]was only intended to impose a reasonable check to ensure that claims of provocation without any real weight are not submitted to a jury,[48]but that in other respects courts had been "gradually escaping from the sway of the obiter dicta in *McGregor."*[49] In particular his Lordship noted a "liberal breadth" being given to the characteristics of the offender that may be taken into account, illustrated in decisions stressing that the judge must not usurp the jury's role of deciding how a person with those characteristics might have reacted[50], and in other decisions permitting racial and personal characteristics to be taken into account on sufficient evidence.[51]

[38] Lord Cooke referred to the decision in *R v Aston* ,[52] where the Court of Appeal had not questioned a finding that paranoia was a characteristic entitling a jury to find murder rather than manslaughter. This decision also has an important bearing on the treatment by New Zealand courts of the concept of diminished responsibility and will be considered later in this paper.

[39] Lord Cooke concluded that while there may be a perception that sometimes juries accept provocation defences too lightly, that is their prerogative and is, in any event, consistent with confining the stigma of murder to the worst killings. He considered that the "very gravity of murder justifies singling it out from the generality of offences, where provocation bears on penalty only."[53] His Lordship also dismissed the suggestion that judges find summing up on provocation too hard or that juries may reject the provocation defence unreasonably.

[40] Supporting Lord Cooke's approach to provocation, the late Professor Gerald Orchard also rejected the notion that provocation was anomalous. He considered that the arguments against provocation, while having some force, lacked sufficient weight to justify the removal of the accused's right to have the fact of provocation determined by the jury and reflected in the verdict. He was also not persuaded that the arguments justified the legal abandonment of the notion and name of murder.[54] Orchard held the view that plain murder should be stigmatized as such , but that killings as a result of real provocation should not be.[55]

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[46] See Cooke, supra, at 235 –236.
[47] Crimes Act 1961, s 169(3).
[48] Cooke, supra, 239 and see *R v Anderson* [1965] NZLR 29.
[49] Ibid, 239.
[50] See eg *R v Nepia* [1983] NZLR 754.
[51] Cooke, supra, 239 and see *R v Tai* [1976] 1 NZLR 102; *R v Taaka* [1982] 2 NZLR 198.
[52] (1989) 4 CRNZ241(CA).
[53] Cooke, supra, 239.
[54] G Orchard, "Homicide" in N Cameron and S France (eds), *Essays on Criminal Law in New Zealand; Towards Reform?* Wellington: Victoria University of Wellington Law Review in conjunction with the Victoria University Press, 1990,149.
[55] Ibid.

[41] Professor Orchard noted a number of factors, including strict adherence to the *Woolmington* principle governing burden of proof, judicial reluctance to allow considerations of time lapse and proportionality to justify removing the issue from the jury and a refusal to impose artificial limits on which factors are relevant to the subjective test, as promoting a greater availability of the defence in New Zealand. He considered that there may be some justification for a further expansion of the defence, in order to pick up deserving cases which fall outside it .[56]

[42] Like Lord Cooke, Professor Orchard considered 'speculative' the idea that the defence is too difficult for juries and felt that its fundamental principles were readily understood. In his view the defence also recognized in an appropriate way that in a crime of passion culpability is diminished.

[43] Orchard concluded his commentary with observations that have proven, in the light of recent developments in New Zealand sentencing law, to be somewhat prophetic. An argument in favour of abolition of the provocation defence and the mandatory penalty was said to be that it would encourage more guilty pleas and avoid "unnecessary trials". Orchard's response was to doubt whether such abolition would lead to any great reduction in trials, but that any reduction as may occur would be likely offset by the need for more elaborate sentencing hearings, involving more evidence.[57]

[44] Since these observations were made New Zealand has enacted a new Sentencing Act,[58] one of the effects of which has been to render life imprisonment the *maximum* (rather than the mandatory) penalty for murder with a strong presumption in favour of its imposition in nearly every case ie where there is at least one serious aggravating factor. Anecdotal reports suggest that the new sentencing regime has indeed increased the complexity and length of sentencing hearings, although it is still too early to judge the actual impact of the legislation on the provocation defence. At this point in time there has been no move to abolish the provocation defence in New Zealand.

[45] At the time of writing there appear to be no reported or unreported decisions of the New Zealand courts considering the status of the provocation defence in relation to the Sentencing Act 2002. However, it is clear that in determining whether the statutory presumption of life imprisonment has been displaced, the court must take into account all mitigating and aggravating factors and may decide not to impose life imprisonment where to do so would be clearly and obviously unjust.[59] It is assumed that this approach will extend to cases where evidence of provocation was insufficient at trial to reduce murder to manslaughter but was nevertheless a relevant factor to be considered in mitigation of penalty at sentencing.

3 SUMMARY OF PRESENT NEW ZEALAND LAW ON PROVOCATION

[56] Ibid.
[57] Ibid, 150.
[58] See Sentencing Act 2002.
[59] *R v Law* (2002) 19 CRNZ 500.

A *The Impact of case law since R v McGregor*[60]

[46] The New Zealand law on provocation has undergone some major case law developments since the decision in *McGregor,* although to date the substance of the statutory defence has remained unchanged since 1961. Because the focus of the present project is upon the impact of the relevant law in the context of domestic violence, I shall limit my discussion to the specific ways in which developments in provocation have impacted battered defendants. In this regard it would seem that there are two principal areas where provocation may be relevant to domestic violence, namely, loss of self control and specific characteristics.

(i) *Self –control*

[47] In New Zealand it is generally accepted that although the statute no longer refers expressly to self-control being lost " in the heat of passion caused by sudden provocation", a sudden and temporary loss of self-control remains essential to exclude premeditated acts and confine the defence to acts done in the heat of passion. [61] However, although actual loss of self-control requires that the accused be unable to restrain himself or herself, New Zealand law does not require that there must have been a "complete" loss of self-control, in the sense that the accused really did not know what he was doing, or to the extent that the conduct was involuntary.[62]

[48] New Zealand courts have not fully resolved the question of whether there is a recognizable distinction between the typically mercurial manner in which men react to provocative words and gestures and the "slow burn' of fear, despair and anger, which often characterize the response of battered women who kill their partners.[63] The New Zealand requirement for 'specific provoking conduct' probably means that legal developments in some jurisdictions which might, in the context of homicides by battered women, allow provocation in the absence of a specific triggering incident, are unlikely to influence the development of provocation in New Zealand, at least for the foreseeable future.[64] However, the developing awareness of the incidence and characteristics of post- traumatic stress disorder amongst abused women may force a re-evaluation of the requirements for immediacy between the provocation and the response and the need for specific provoking conduct. Such legitimate diagnostic paradigms may only fit with great difficulty into conventional frameworks for legal provocation.

[49] The New Zealand Law Commission report on Battered Defendants [65]has observed that while anger is the emotion most commonly associated with sudden loss of self-control, women who kill their violent partners tend to do so because of fear and despair rather than anger. [66] The difficulty for battered women who kill is that many battered women act neither out of outrage nor loss of self-control, but often

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[60] [1962] NZLR 1069 (CA).
[61] JB Robertson (ed) *Adams on Criminal Law* (Wellington: Brookers, 1992) para CA169.06B.
[62] See eg *R v Campbell* (1997) 15 CRNZ 138 (CA).
[63] *Adams,* supra, para CA 169.06B
[64] See eg *R v Muy Ky Chhay* (1994) 72 A Crim R 1 (NSW CA).
[65] NZLC PP41
[66] Ibid, para94.

with apparent calmness and deliberation.[67] The appearance of "calm and vengeful deliberation in the killing" suggesting as it does, a desire to be revenged rather than an angry response may, nevertheless be illusory, given that many battered women may be driven over a lengthy period into a state of despair by violent abuse.[68] Yet as Horder notes, despair, which is an exceptional and abnormal emotional state of mind, is not easily accommodated within the provocation defence's focus on anger.[69]It is less likely to lead to a sudden explosive reaction immediately following the provocation.

[50] However, New Zealand courts have held that "smouldering resentment", where in one case provocation given two weeks earlier was "revived" by a subsequent event, may be enough to amount to subjective evidence of loss of self-control. [70] In *Taaka*, the fact that the accused had acted with an apparent degree of deliberation in securing a gun, and re-assembling it after it was removed from his possession in order to shoot the victim, was held not to be inconsistent with a loss of self-control. The Court was influenced by the fact that the accused may have been in a state of "extreme arousal and shock" at the time of the killing.

[51] However, this liberal gloss on the requirement for a killing in "the heat of passion", while it may appear to offer some hope for battered woman defendants who kill their abusers, may be significantly offset by the requirement in New Zealand that between the provocation or final provocation and the killing the accused must have remained " in a continuous state of hot blood" or "remained in a state of uncontrolled anger through out that period". It has been suggested that this requirement may preclude the defence when there has been a substantial time lapse between the last identified provocative act and the killing.[71] Similarly, evidence that at any time between the alleged act of provocation and the killing the defendant regained his composure, will normally be fatal to the defence.[72]

(ii) *Characteristics*

[52] In New Zealand battered wife syndrome has been accepted as a characteristic for the purposes of provocation.[73] In *R v Oakes*[74] the New Zealand Court of Appeal acknowledged the reality of the syndrome and its effects. It explained that the heightened awareness of or sensitivity to threats or threatening behaviour, which is a feature of the syndrome, may be a relevant "characteristic" in light of which the accused's response is to be judged.

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[67] J Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) 190.
[68] Ibid, 191
[69] Ibid.
[70] See *R v Taaka* [1982] 2 NZLR 198.
[71] " Something which may have initially caused an uncontrollable passion in the accused could not qualify if enough time then passed for the passion to be replaced with a considered hatred, general resentment, or jealousy by the time the homicide occurred. By that point there would no longer be any operative provocation for legal purposes." *R v Mita* [1996] 1 NZLR 95, 101 per Fisher J.
[72] *R v Erutoe* [1990] 2 NZLR 28, 35
[73] *R v Gordon* (1993) 10 CRNZ 430, 439.
[74] [1995] 2 NZLR 673 (CA)

[53] In *R v Campbell* [75] expert evidence was given that the lasting effects of sexual abuse as a child may have had the result that, when the victim placed his hand on the accused's thigh, the accused had a "flashback" in which he interpreted the act as a homosexual advance by the abuse of his childhood. This was held to be a "characteristic" to be attributed to the hypothetical person with ordinary self-control.

[54] Post traumatic stress disorder has also been held to qualify as a "characteristic" for the purposes of provocation in New Zealand[76], as has expert evidence that the accused suffered from rape trauma syndrome.[77] However, in each case the particular characteristic has been held to be relevant only to the question of the gravity of the provocation and not to the question of loss of self-control.

[55] As noted above, this remains a problem in New Zealand jurisprudence on provocation. Yet it is clear enough that the mechanism through which the response to the gravity of provocation is measured is the capacity of the offender to control himself. If the provocation is perceived to be grave, the offender is likely to loose his self –control because the gravity of the provocative words or acts is too imperious *for him* to resist. Whether we characterize the operative dynamic as a loss of self-control or an aggravated response to grave provocation, it is surely the same thing. On this basis it may be argued that the distinction currently recognized between the gravity of provocation and loss of self-control is arbitrary and ultimately meaningless.

B *R v Rongonui* [78]

[56] *R v Rongonui* represents the most recent comprehensive treatment of New Zealand provocation law by the Court of Appeal. The case involved a woman who had suffered historical and recent violence and sexual abuse. She was brain-damaged from long-term physical and chemical abuse. Evidence was given that she suffered from post-traumatic stress disorder and as a result of the hardships she had experienced she also suffered from a major depressive episode. Her fragile self-esteem was barely kept intact by her belief that she was successfully mothering her 4 children. On the morning of the killing she had sought the female victim's help in looking after her children while she attended to a letter from social welfare authorities whom she believed were poised to remove her children from her. When the victim, her neighbour, refused to help and presented a knife, the accused responded by seizing the knife and killing the victim in a frenzied attack, inflicting more than 150 knife wounds.

[57] Rongonui was convicted of murder, but the Court of Appeal unanimously held that a retrial was required because the trial judge had erred in ruling that the evidence of the defence witnesses could not be called unless R herself gave evidence. The Court was divided on the proper interpretation of s 169(2) (a). The majority, adopting the interpretative approach of FB Adams alluded to earlier, held that the "but

[75] (1996) 14 CRNZ 117 (CA)
[76] See *R v Leilua* 20/9/85, CA 18/85 .
[77] *R v Marsters* 25/5/94, HC Auckland, T323/93 per Anderson J.
[78] [2000] 2 NZLR 385; (2000) 17 CRNZ 310 (CA).

otherwise" qualification is "intractable and controlling"[79]. This meant that the accused's personal characteristics were to be taken into account in assessing the gravity of the provocation but could not be considered for the purpose of reducing the power of self-control of the hypothetical ordinary person. If what was done or said was more wounding or disturbing for R than it would have been for an ordinary person then the jury had to imagine an ordinary person wounded or disturbed to that greater degree. A connection was therefore required between the provocation and the characteristic. A characteristic that produced only a general lowering of self-control was not enough unless there was a more specific connection between the characteristic and the provocation.

[58] In powerful dissenting judgments Thomas and Elias JJ re-affirmed the substantive construction of s 169(2) (a) adopted in *McGregor*. Their Honours held that if the accused had a characteristic which diminished the power of self-control, it should be taken into account in assessing whether the provocation was "sufficient" to cause loss of control. Such an approach would not dispense entirely with the objective test because characteristics that were normal to human personality (ill-temper, irascibility, impulsiveness, violence etc) would be excluded as having no bearing on the control expected of an ordinary person.

[59] *Rongonui* has since been considered by the Court of Appeal. In *R v Makoare*[80] , which involved a stabbing murder committed by a 15 year old offender, the Court was invited by the appellant to revisit the *Rongonui* decision and follow the House of Lords majority decision in *R v Smith (Morgan)*[81]. The Court of Appeal declined the invitation on the basis that *Rongonui* was a considered, very recent interpretation of s 169, a statutory provision that is differently worded from that applied in *Smith.* In addition, the Court cited the fact that the provocation defence was then under consideration by the Law Commission and that Parliament had before it the Degrees of Murder Bill.[82] Because the Court was unanimous in calling for statutory reform, it concluded that that process would not be assisted by a further change of course by the courts, even if a different majority view were to emerge.[83]

[60] As to whether an argument favouring the desirability of harmonization with the English approach as represented by *Smith* should be allowed to prevail, their Honours held the provocation defence in England sits alongside a specific defence of diminished responsibility which is not recognized in New Zealand law and, furthermore, that if harmony is desirable, the natural tendency might be to look to the position in Australia which is quite different to that in *Smith.*[84]

C *The New Zealand Law Commission's approach*

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[79] *Adams on Criminal Law* (JB Robertson ed) (Wellington: Brookers', 1993) para CA169.10A.
[80] [2001] 1 NZLR 318; (2000) 18 CRNZ 511 (CA).
[81] [2000] 3 WLR 654; [2000] 4 All ER 289.
[82] The Private Members Bill has since been withdrawn.
[83] *R v Makoare*, supra, at para [14].
[84] Ibid, para [15].

[61] The Law Commission's final report on battered defendants was published in May 200, some 6 months after the decision in *Makoare* , although *Makoare* is not mentioned in the Report. After briefly surveying the development of the provocation defence in New Zealand the Commission noted that the defence has been difficult for battered defendants because of the requirement for loss of self-control. It noted the irony that while victims of domestic violence have found the defence of provocation beyond their reach, it has been successfully used by perpetrators of domestic violence.[85]

[62] The Commission found that the weight of opinion, represented by those who had made submissions on the preliminary paper, was marginally in favour of abolition of the partial defence of provocation. Most submitters agreed that if the mandatory sentence for murder was to be retained, the defence of provocation should be reformed. Arguments favouring *retention* of the defence were summarized as being:

- a killing under provocation is less culpable than other intentional killing and should not bear the stigma of murder.
- The defence permits jury participation in determining the level of culpability where there is evidence of provocation.

[63] However, arguments favouring abolition were more comprehensive and included the following :

*Provocation is an 'historical anomoly' that is unnecessary once the mandatory life sentence for murder is abolished.
*Reducing an intentional killing to manslaughter is confusing to lay people, particularly those close to the victim.
*Both District Court and High Court judges have criticized provocation as " all but impenetrable and incomprehensible" and as involving a definition that is " a blot on the criminal law".
*There is a risk of uneven application of the defence as between trials because of the difficulties associated with it for judges and juries.
*Provocation is gender biased.
*Provocation as a sentencing matter can be considered in a broad, non-technical way avoiding technical defence difficulties.
*The stigma argument advanced by supporters of the defence is overstated.

[64] The Commission appeared to reject the proposal of the New South Wales Law Commission for a subjective test qualified by the application of community standards of blameworthiness [86] It noted that the "lesser culpability " argument is infinitely generalisable to other circumstances of intentional killing and had been unfairly and illogically singled out to accommodate provocation. For these and other reasons the Commission favoured abolition of the defence. In particular it considered that the

[85] See Law Commission *Report 73, Some Criminal Defences with Particular reference to Battered Defendants* (Wellington: Law Commission, May 2001) para105, referred to as NZLC R 73.
[86] See New South Wales Law Commission *Partial Defences to Murder; Provocation and Infanticide, R 83* (Sydney, 1997), cited in NZLC R 73 at paras 112 – 113.

conflict between the two fundamental public interest values of the preservation of human life and allowing compassion a role in the criminal justice system, is best resolved by abolishing the partial defence of provocation and replacing it with a sentencing discretion for murder.

4 DIMINISHED RESPONSIBILITY

A *Status of the doctrine in New Zealand*

[65] Diminished responsibility has never been officially part of New Zealand law, despite its adoption in a number of Commonwealth countries. There was a proposal to introduce the defence into New Zealand in the Crimes Bill 1960. Clause 180 of the Bill provided for the reduction of murder to manslaughter where the jury was "satisfied that at the time of the offence the person charged, though not insane, was suffering from a defect, disorder, or infirmity of mind to such an extent that he should not be held fully responsible." A successful plea of diminished responsibility would have resulted in an order for detention during Her Majesty's Pleasure.[87] However, with the abolition of the death penalty for murder in clause 182 of the Bill there was little enthusiasm to retain the defence and the clause was dropped from the Bill. A major factor in the lack of support for diminished responsibility appears to be the Legislature's decision to define the consequences of a verdict of diminished responsibility manslaughter as detention during pleasure, rather than a definitive sentence of imprisonment.

[66] The defence was later considered by the Crimes Consultative Committee set up by the then Labour Government following its unsuccessful attempt to introduce a new Crimes Bill in 1989. However, because of its preference to deal with matters of impaired criminal responsibility as mitigating factors in sentencing, rather than as partial defences, the Committee did not favour the adoption of a separate diminished responsibility defence. It considered that the difficulties involved in establishing a discrete diminished responsibility provision were likely to be exacerbated by complexities in achieving sufficiently precise wording for the statutory defence.[88]

(i) Case law developments

[67] In the passage noted earlier in *R v McGregor*[89] North P purported to deliberately limit the scope of available 'mental' characteristics in order to avoid giving any legitimacy to the concept of diminished responsibility which, as his Honour noted, has never been given a statutory mandate in New Zealand. More recently, its non-availability as a defence was reaffirmed in a case in which psychological evidence had been admitted in support of a defence claim that that the accused had arranged for her husband's murder while suffering from post- traumatic stress disorder, battered wife syndrome and depression.[90] In *R v Gordon* the New Zealand Court of Appeal held that sympathy for the defendant could not prevail over the current statutory

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[87] Crimes Bill 1960, clause 187(2).
[88] Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (Wellington, 1991) 45 –46.
[89] [1962] NZLR 1069, 1081.
[90] See *R v Gordon* (1993) 10 CRNZ 430 (CA).

provisions and that it was unable to accept expert testimony that the accused " had diminished responsibility because of her mental state at the time [of the offence]".[91] The Court did find, however, that where an accused person is suffering from an illness that might affect her responses or judgment, its consequences may be beyond the experience and knowledge of a jury, and so expert evidence may be adduced to show that those consequences may be such as to weaken or negate the inference of intent that could properly be drawn in the case of a 'normal' person.[92] In such circumstances a court might acquit, not on the grounds of diminished responsibility, but simply because it is not satisfied beyond a reasonable doubt that the accused possessed mens rea at the relevant time.

[68] However, despite these court–imposed strictures, which evidently sought to prevent the development of a common law doctrine of diminished responsibility in New Zealand, another line of appellate authority seems to point in a different direction. It is arguable that as a result of these authorities a de facto form of diminished responsibility has already insinuated itself into New Zealand law via the 'back door' of provocation.

[69] *R v Ashton*[93] concerned a respondent who had been convicted of arson and manslaughter following an incident in which he had shot and killed the proprietor of a service station then set fire to the service station, a museum and a private home. Using the provocation defence as a legal conduit, psychiatric evidence was led at the trial that the respondent was suffering from paranoia at the time and had been provoked into losing his self-control by suggestions from the deceased that he was homosexual. It was accepted by the trial Judge that the respondent's mental illness played a significant part in the crimes.

[70] In addressing the sentencing issues the Court considered three Australian cases of manslaughter on the ground of diminished responsibility, noting that this was "in substance" the present case[94]. The Court did not, however, proceed to suggest how the concept might be expected to operate in New Zealand or whether it constituted a palliative defence or a mitigatory device relevant to sentencing only.

[71] In *R v McCarthy*[95], another case involving a homicidal response to an alleged homosexual advance, the Court of Appeal reviewed the narrow formulation of 'characteristics' in *R v McGregor*. The Court suggested that the availability of diminished responsibility, while it had never been expressly accepted by a New Zealand Parliament, may nevertheless, within the limited field of the provocation defence, be seen as the "inevitable and deliberate effect of the statutory changes embodied in s 169 of the Crimes Act 1961."[96] The wider implications of this concession have not yet been explored by the New Zealand courts. Nonetheless, it would be safe to suggest that the judicial expansion of the scope of relevant "characteristics" that occurred in *McCarthy* to include such matters as mental

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[91] Ibid at 439.
[92] Ibid at 437.
[93] [1989] 2 NZLR 166, "1989) 4 CRNZ 241(CA).
[94] Ibid at 245.
[95] [1992] 2 NZLR 550, (1992) 8 CRNZ 58 (CA).
[96] Ibid at 558, at 66. Per Cooke P.

deficiency, or a tendency to excessive emotionalism as a result of brain injury, and in *Rongonui* to include brain damage caused by substance abuse[97], suggests the emergence of a type of diminished responsibility defence in New Zealand, albeit, for the meantime, under the banner of provocation.[98]

B *Law Commission's suggestions concerning Diminished Responsibility.*

[72] Diminished responsibility was also considered by the New Zealand Law Commission in its investigation into criminal defences available to battered partners who kill their abusers. The Commission briefly surveyed a range of models for diminished responsibility in other jurisdictions and considered arguments in favor and against the adoption of the defence.[99] Its arguments favouring introduction may be summarized as follows:

(1) The defence would recognize a reduced culpability for a range of mental disorders that do not amount to insanity.
(2) The defence, like provocation, allows the culpable killer to avoid the label of "murderer'.
(3) The availability of cross-examination of psychiatric evidence allows a more full examination of the issue than where psychiatric evidence is presented in a sentencing report.
(4) The widespread judicial acceptance of guilty pleas to diminished responsibility manslaughter in England suggests that the availability of diminished responsibility may save time and money.
(5) A contested defence leads to community involvement, enhancing community acceptance of a reduced sentence for intentional killing.

[73] In addressing arguments against introducing diminished responsibility the Law Commission emphasised the ongoing criticism of the defence at English law and the problems associated with giving clinical meaning to the definitional elements of the defence. Furthermore it was noted that "abnormality of mind" had been given a very broad definition, extending to personality disorders and sexual psychopathology.

[74] The Commission also noted the research finding that 38 % of diminished responsibility pleas in England were wife killings, arising predominantly from "amorous jealousy or possessiveness" rather than psychosis.[100]

(i) *The Commission's view*

[75] The Commission recommended against adopting diminished responsibility. It was influenced by the fact that it is a concept which is difficult to clearly define. It was not persuaded that these difficulties had been satisfactorily resolved with the English version of the defence. It concluded that the factors giving rise to diminished responsibility were better considered at sentencing.

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[97] *R v Rongonui* [2000] 2 NZLR389, 425 per Elias J.
[98] See BJ Brown, "Provocation: Characteristics, Diminished Responsibility and Reform" in *Movements and Markers in Criminal Policy*, LRF, 1984, 40.
[99] See NZLC PP41 at p39 et seq.
[100] NZLC PP41 at p40.

[76] As regards the particular focus of the discussion, the Law Commission was of the opinion that diminished responsibility is not of particular relevance for the majority of battered defendants. It referred to the opinion of some forensic psychiatrists that while domestic violence may lead to a range of psychological responses in the victim, it does not generally cause the victim to develop abnormality of mind to the degree required by the defence of diminished responsibility.

[77] However, the Commission's conclusions in this regard lack substance. Although both the discussion paper and the final report provide a broad overview of the use of and criticisms of diminished responsibility in other jurisdictions, its analysis of the defence is supported by a minimal amount of empirical and statistical information, so that its conclusions on the relevance of the defence for New Zealand are largely impressionistic.

5 EXCESSIVE SELF DEFENCE IN NEW ZEALAND

A *Current status of the doctrine*

[78] In New Zealand the present test for self-defence is defined in s 48 of the Crimes Act 1961. The new section, was substituted by an amendment in 1980[101] which provides:

> Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[79] The amendment removed the requirement for a belief that force was necessary to have been an objectively reasonable belief, a requirement that has now been departed from at common law. However, because the moral right to use self-defence is not unlimited, the statute requires that the defence is confined to the use of reasonably necessary force. For this reason New Zealand law has never provided for the doctrine which allows for manslaughter by excessive defence. The statutory authority for this limitation in New Zealand is provided by s 62 Crimes Act 1961 which provides that " everyone authorized by law to use force is criminally liable for any excess according to the nature and quality of the act that constitutes the excess."

[80] Although the actual effect of the section is uncertain, it clearly has an important application in cases where an accused kills another by using excessive force in self–defence. The question that arises, but has never been directly judicially considered in New Zealand, is whether, if excessive force is used in self-defence, the excess is necessarily fatal to the operation of the defence in any degree.

[81] In *R v Godbaz*[102] the New Zealand Court of Appeal held that excessive force used in repelling an assault was not protected by self-defence and itself constituted an assault. The view of Adams, the leading practitioners' criminal law text in New Zealand, is that if the defence fails on the ground that excessive force was used then s

[101] See Crimes Amendment Act 1980 No 63, s 2(1) as from I January 1981.
[102] (1909) 28 NZLR 977.

62 applies, and the accused is guilty of whatever offence was involved in the act of excessive force, be it murder or any other.[103]

[82] In this regard New Zealand law aligns with that of Australia, where the qualified defence of "excessive force" in self –defence has now been abandoned. In *Zecevic v DPP*[104] a majority of the High Court of Australia held that there should no longer be any rule, whereby, if a plea of self-defence to murder fails by reason only that disproportionate force was used by the accused person , the verdict should be not guilty of murder but guilty of manslaughter.[105] This development is consistent with the approach taken by the Privy Council in *Palmer v The Queen*[106]. Their Lordships, while allowing for a generous degree of latitude in determining the necessary measure of self-defensive force to repel a grave assault, concluded that if ultimately the prosecution have shown that what was done was not done in self-defence then the issue is eliminated from the case. In such an event the issue of manslaughter does not arise unless there is also a question as to whether there was provocation which may reduce murder to manslaughter.

[83] This also reflects the position in Canada where the rule is that where an accused , acting in self–defence in terms of s 34 of the *Criminal Code,* causes death by the use of an excess of force, then a verdict of manslaughter is not available, unless he lacks the requisite intent for murder. In *Reilly* v The Queen[107] Ritchie J, delivering the judgment of the Supreme Court, cited with approval the unanimous judgment in *Faid*[108] in which Dickson J said:

> The position of the Alberta Court of Appeal that there is a "half –way' house outside section 34 of the Code is, in my view inapplicable to the Canadian codified system of criminal law. It lacks any recognizable basis in principle, would require prolox and complicated jury charges and would encourage juries to reach compromise verdicts to the prejudice of either the accused or the Crown. Where a killing has resulted from the excessive use of force in self-defence the accused losses the justification provided under s 34. There is no partial justification open under the section. Once the jury reaches the conclusion that excessive force has been used the defence of self-defence has failed.

[84] However, there is a sense in which the current New Zealand law gives conflicting signals concerning the degree of force which is permissible in self-defence. On the one hand the law is clear that the defence must fail if the force used by the accused is excessive. On the other hand, the courts will not "weigh to a nicety" what is reasonable defensive force.[109] This has generally meant that the courts have been generous in allowing a degree of latitude to defendants who, faced with a grave

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[103] Adams, *Criminal Law and Practice in New Zealand* (2nd edn), Wellington, Sweet & Maxwell, 1971 at para 548.
[104] (1987) 61 ALJR 375.
[105] In this respect the legal position in Australia is now the same for both Code and Common law states.
[106] [1971] AC 814.
[107] (1984) 15 CCC (3d) 1 (SCC).
[108] (1983) 2 CCC (3d) 513, 517 ff (SCC).
[109] See *Palmer v R* [1971] AC 814 at 832.

threat, are forced to determine for themselves the measure of force necessary to repel the threatened attack.[110]

[85] However, it is also clear that lawful self-defence is a threshhold question and that once the threshold of acceptable (reasonable) force has been passed, the offender is at risk of being branded as an aggressor and disentitled to claim self-defence at all. The difficulty with having such an open-ended and ill-defined threshold is that an offender can never be sure whether he or she has exceeded what is reasonable self-defensive force. This problem has not been considered directly by New Zealand courts.

B *Self defence and battered defendants*

[86] New Zealand courts have been mindful of the fact that the imposition of an objective standard, such as that attaching to self-defence, has the potential to apply unfairly, at least without some modification. This issue has arisen most acutely in relation to victims of repeated domestic violence who have killed or attempted to kill their partners.[111] In particular it has been argued that the immediacy of particular danger and the possibility of alternative evasive action may not provide appropriate guides to whether force was reasonable defence.[112]

[87] The approach of New Zealand courts has been to allow evidence of the history of violence and related abuse and to allow expert evidence of common behaviour of victims of domestic violence, and that D suffered from battered woman syndrome. In relation to self-defence such evidence may be used to support the credibility of D's claim of repeated abuse, by explaining that her remaining with her partner was not inconsistent with the nature and extent of the violence described.[113]

[88] Furthermore, evidence of battered woman syndrome may be relevant because of its effects "on mind and will" and that a woman suffering from it "may genuinely perceive danger earlier than others would, and a threat of more serious harm than others might see."[114] Such perceptions might justify a pre-emptive strike and a more violent response than might otherwise be reasonable.

C *The Law Commission 's Proposals on Excessive Self-defence*

[89] The New Zealand Law Commission has considered the claims of excessive self-defence but has recommended against the creation of a new partial defence for New Zealand.

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[110] Simester, A & Brookbanks, WJ, *Principles of Criminal Law,* Wellington: Brookers', 1998, at 420.
[111] New Zealand Law Society Seminar, *Crimes Update*. Presenter Professor Gerald Orchard, July, 2001.
[112] Ibid, 31.
[113] See eg *R v Zhou* (Unrep, HC Auckland, T7/93, 8 October 1993; *R v Guthrie* (1997) 15 CRNZ 67 (CA).
[114] *R v Oakes* [1995] 2 NZLR 673, 675-676 (CA).

[90] In a discussion paper published in 2000[115] and a report published in 2001[116] the Commission investigated excessive self-defence in the context of a broad review of the legal defences available to those who commit criminal offences as a reaction to domestic violence.

[91] At the time of publication of NZLC PP41 the Commission identified 4 jurisdictions where a partial defence of excessive self-defence is available. They are South Australia, India, Sudan and Ireland. It also noted that codification of excessive self-defence has also been recommended by the Criminal Law Revision Committee of England and Wales and supported by the House of Lords Select Committee on Murder and Life Imprisonment.

[92] In the earlier discussion paper the Commission suggested a form of words for a possible excessive self-defence provision, modeled around the words of the statutory self-defence rule in s 48 Crimes Act 1961(NZ). The rule would have provided:

> It is a partial defence to a charge of murder (reducing the offence to manslaughter if, in the defence of himself or herself or another, a person uses more force than it is reasonable to use in the circumstances as he or she believes them to be.

[93] However, the Commission did not pursue this model further, but outlined arguments for and against the defence before posing the question: is the defence necessary ?

For:

(1) It (excessive self- defence) recognises that a person who kills, believing wrongly that this is necessary in self-defence, is less culpable than a person who kills with no such belief.
(2) It would take into account the subjective perception that prompted the defendant's action, without abandoning the boundaries of acceptable conduct that society has a right to expect from all citizens.
(3) The defence is supported by strong reasons of principle , in that it is said to fit logically with the treatment of gross negligence as the basis for involuntary manslaughter.
(4) The claimed complexity of the defence is overstated.
(5) The qualified defence may prevent a jury giving a complete acquittal out of sympathy in a case where it considers the defendant acted honestly but unreasonably.

Against:

(1) The tests proposed for excessive self-defence offered little guidance to juries.
(2) Attempts to develop judicial guidelines for directing juries on the issue had resulted in complicated formulae that were more apt to confuse than assist.

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[115] See Law Commission, Preliminary Paper 41, *Battered Defendants Victims of Domestic Violence who Offend* –A discussion paper, Wellington, 2000. (Hereafter referred to as NZLCPP41.

[116] Law Commission, Report 73, *Some Criminal Defences with Particular Reference to Battered Defendants,* Wellington, 2000. (Hereafter referred to as NZLC R73).

(3) A principal factor in the abolition of the doctrine in Australia was that the instruction devised in *Viro v R*[117] was too difficult for juries to understand.

[94] However, although the Commission conceded what it considered the strength of arguments in support of excessive self-defence as a partial defence, and nominated it as the partial defence it would be most in favour of introducing into New Zealand law, it was, in the final analysis, disinclined to recommend its adoption.[118] The Commission recognized that such a defence was more morally favourable than either provocation or diminished responsibility, in that with excessive self-defence the defendant intends to do something that is lawful within limits.[119]It also considered that the link between excessive self –defence and self-defence meant that it was more appropriate to the circumstances typical of cases involving battered defendants than the other aforementioned defences. However, the Commission ultimately rejected the defence because its adoption would have been inconsistent with its preference not to retain or introduce partial defences, but rather to rely on a sentencing discretion for murder to accommodate the diverse situations when lesser degrees of culpability should be recognized in intentional homicide.[120]

6 CONCLUSION

[95] New Zealand law is currently in a state of some uncertainty as regards the status of the defences of provocation, diminished responsibility and excessive self-defence. There is a widespread view that provocation has become inordinately complicated and for this reason its general usefulness as a partial defence is increasingly being questioned. Because of the long-standing differences of judicial opinion over the meaning and application of s 169 of the Crimes Act 1961, there is a widespread perception that statutory reform is overdue. At this stage it is unclear what impact the Sentencing Act 2002 will have on the utilization of the defence, given that life imprisonment is no longer mandatory for murder in New Zealand. However, the recognition of the need for reform does not alter that fact that the defence continues to present difficulties for trial judges and juries, which are compounded when juries are also required to consider the relevance of particular characteristics.

[96] Although the defence has been applied in cases involving battered defendants, its application has been inconsistent, due in large measure to uncertainty surrounding the scope of mental characteristics, the ongoing requirement for 'heat of passion', the bifurcation of susceptibility and loss of control in assessing the relevance of characteristics and confusion concerning the true status of diminished responsibility. In these circumstances its accessibility to battered defendants is very limited and is likely to remain so until reform of the statutory defence is undertaken.

[97] The defence of diminished responsibility is still officially not part of New Zealand law. However, dicta in recent case law suggests that the concept is alive as a paradigm for construing mental characteristics in provocation law. But what this means in practical terms is less than clear. Although New Zealand courts have

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[117] (1978) 141 CLR 88.
[118] See NZLC R 73 at 25 –26.
[119] Ibid, 25.
[120] Ibid, 26.

inclined towards accepting the reality of diminished responsibility as a descriptive paradigm for mental characteristics, it has never been available as a palliative defence. Furthermore, while New Zealand courts continue to distinguish between susceptibility and self-control as a basis for limiting the scope of 'characteristics,' any nascent notion of diminished responsibility will always be denied the power to affect a central ground of inquiry in the defence, namely, whether the accused possessed the capacity to exercise will-power to control physical acts with rational judgment.[121] To this extent it is my judgment that it will continue to be of very limited usefulness in the context of battering relationships.

[98] Finally, the 'defence' of excessive self-defence has never been part of New Zealand law. Although there seems to be some theoretical support for the concept, the prevailing preference for a broader sentencing discretion in murder over the availability of partial defences would suggest that it is unlikely to be further pursued, at least for the foreseeable future.

[121] See *R v Byrne* [1960] 2 QB 396 at 403 per Lord Parker CJ.

APPENDIX E

Partial Defences to Homicide in the Law of Scotland:

A Report to the Law Commission for England and Wales

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Introduction

There are only two partial defences to homicide recognised by Scots law: diminished responsibility and provocation. There is no equivalent of the Infanticide Act 1938 in Scots law, although cases which would be dealt with under that statute in English law are likely to be treated as falling within diminished responsibility in Scotland.[1] Excessive force in self-defence does not operate as a partial defence in Scots law, despite some earlier authority which might be taken to support the existence of such a plea.

Under Scots law, a successful plea of diminished responsibility or provocation will render the accused guilty of culpable homicide rather than murder.[2] However, the pleas are also applicable to attempted murder.[3] In such cases, it appears that the appropriate verdict is one of guilty of assault.[4] This approach appears to be based on the view that there is no such crime as "attempted culpable homicide".[5] This is theoretically problematic, as not all attempts to kill need involve an assault, but does not appear to have presented any difficulty in practice.[6]

The remainder of this paper is divided into four sections. The first two sections deal with diminished responsibility and provocation. The third discusses the case law which rejects the existence of a partial defence of excessive force, and the fourth discusses the circumstances in which the Crown has been prepared to exercise prosecutorial discretion to reduce charges to culpable homicide where mitigating circumstances are present.

By way of explanation, it will be observed that sections of this report make particular reference to a number of legal writers, notably (Baron David) Hume. It should be understood that Scots law attaches particular significance to the works of certain writers, which are commonly referred to as "institutional". Although the Scottish courts are by no means bound to accept the views of these authors, they are accorded particular respect, and perhaps more so than would be the case in most other legal systems.

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[1] *HM Advocate v Abercrombie* (1896) 2 Adam 163 is a case of infanticide in which the defence was insanity. Lord McLaren left the plea of diminished responsibility to the jury, who returned a verdict of not guilty on the ground of insanity.

[2] It is commonly said that these pleas "reduce" murder to culpable homicide where successful. This terminology was disapproved by the High Court in *Drury v HM Advocate* 2001 SLT 1013, but the court reverted to it in the later case of *Galbraith v HM Advocate (No. 2)* 2002 JC 1.

[3] There is no authority on the applicability of the pleas to other inchoate forms of the offence.

[4] *HM Advocate v Blake* 1986 SLT 1986 SLT 661 (diminished responsibility); *Brady v HM Advocate* 1986 JC 68; *Salmond v HM Advocate* 1992 SLT 156 (provocation).

[5] TH Jones and MGA Christie, *Criminal Law* (3rd ed. 2002), para 9-65. It is not clear why this should be the case, particularly as Scots law recognises reckless attempts (*Cawthorne v HM Advocate* 1968 JC 32).

[6] For discussion, see J Chalmers, "Reforming the pleas of insanity and diminished responsibility: some aspects of the Scottish Law Commission's discussion paper" (2003) 8 SLPQ 79, at 86-87.

The one clearly "institutional" work in the field of Scottish criminal law is Hume's *Commentaries*.[7] Mackenzie's *Matters Criminal*[8] and Alison's *Principles*[9] are sometimes regarded as being of "semi-institutional" status. Macdonald's short *Practical Treatise on the Criminal Law of Scotland*[10] has often been regularly referred to by the courts. Although a relatively short and unscholarly work, it has nevertheless been influential, largely because it was the only significant textbook on Scottish criminal law for most of the twentieth century. The most authoritative modern work is Sir Gerald Gordon's magisterial *Criminal Law*.[11]

1. DIMINISHED RESPONSIBILITY

Introduction

The plea of diminished responsibility in Scotland is entirely a judicial creation. It was developed by the courts in a sequence of decisions beginning with the case of *Alexander Dingwall*[12] in 1867 and culminating (at least for the time being) in *Galbraith v HM Advocate (No. 2)*[13] in 2001. That decision provides the first authoritative definition of the plea of diminished responsibility, and in most respects supersedes the previous law. It is, therefore, the appropriate starting point for a consideration of the present law. However, a short account of the development of diminished responsibility in Scotland is useful in order fully to appreciate the significance of *Galbraith*.[14]

1. Development of the law prior to *Galbraith*

The modern doctrine of diminished responsibility can be traced to Lord Deas' charge to the jury in the case of *Alexander Dingwall*.[15] In that case Lord Deas told the jury that in a case of murder the state of mind of the accused, although not amounting to insanity, could be an extenuating circumstance which would allow them to return a verdict of guilty of culpable homicide. In fact for some time before this case it had been accepted that mental

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[7] D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* (4th ed. in 2 vols with notes by BR Bell, 1844) (henceforth "Hume").

[8] Sir George Mackenzie, *The Laws and Customes of Scotland in Matters Criminal*, Edinburgh, 1678 (henceforth "Mackenzie, *Matters Criminal*").

[9] A Alison, *Principles of the Criminal Law of Scotland* (1832) (henceforth "Alison, *Principles*").

[10] JHA Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (5th ed. 1948 by J Walker and DJ Stevenson) (henceforth "Macdonald").

[11] GH Gordon, *The Criminal Law of Scotland* (3rd ed. by MGA Christie, in 2 vols, 2000 and 2001) (henceforth "Gordon").

[12] (1867) 5 Irvine 466.

[13] 2002 JC 1.

[14] Detailed accounts of the law may be found in *Gordon*, Volume 1, pp 451-467; Lord Keith of Avonholm, "Some Observations on Diminished Responsibility" 1959 Juridical Review 109; T B Smith, "Diminished Responsibility", [1957] Crim LR 354.

[15] (1867) 5 Irvine 466.

abnormality which, though was not serious enough to warrant acquittal on the ground of insanity, could nevertheless be taken into account in mitigation of punishment.[16] But where the penalty was fixed by law – as in the case of murder - the only route by which leniency could be achieved on conviction was by the jury making a recommendation to mercy.[17] The innovative feature of *Dingwall* was that the jury were given the power to mitigate punishment by re-classifying the case as one of culpable homicide rather than murder, on the basis of the accused's mental condition. Although doubts and reservations were expressed by some judges,[18] the doctrine espoused by Lord Deas was broadly accepted by the first quarter of the last century.[19]

The courts did not, however, develop any clear or settled definition of the plea, but contented themselves with telling juries that a weak or diseased state of mind could reduce a charge of murder to culpable homicide. However, from the middle of the last century the courts began to adopt a passage from Lord Alness's charge to the jury in *HM Advocate v Savage*[20] as the standard jury direction in cases of diminished responsibility. In that case Lord Alness described the plea in the following terms:[21]

> "It is very difficult to put it in a phrase, but it has been put this way: that there must be some aberration or weakness of mind; that

[16] As early as 1678, in discussing "furious persons", Sir George Mackenzie suggests that just as the law "grants a total impunity to such as are absolutely furious" so it should "lessen and moderat the Punishments of such, as though they are not absolutely mad, yet are hypocondrick and melancholy to such a degree, that it clouds their reason". (Mackenzie, *Matters Criminal*, I, i, 8.)

[17] See, for example, *Robert Bonthorn*, November 29 and December 12 1763, Hume, i, 38, *Alexander Campbell*, 18 December 1809, Hume, i, 38, n. 2, *Scott (James Denny)* (1853) 1 Irvine 132, *Thomas Wild and Ors.* (1854) 1 Irvine 552. By the middle of the nineteenth century, although many offences remained, technically, capital, in practice the death penalty was avoided by the Crown "restricting the pains of law". For murder, however, the sentence of death was mandatory. In such cases mental abnormality falling short of insanity could only be recognised by the jury recommending mercy.

[18] The most extreme example of this is the outright rejection of the views of Lord Deas, and those judges who had followed his example, by Lord Johnston in *HM Advocate v Higgins* (1913) 7 Adam 229: "While I am bound to regard their views with the utmost respect, I desire very humbly to enter my protest against this doctrine being accepted as part of the criminal law and practice of Scotland until the matter is more deliberately dealt with by a larger Court than usually nowadays sits for the trial of criminal cases, and is authoritatively defined and explained." (at p. 233).

[19] Lord Deas applied his new doctrine in a number of subsequent murder cases, and, significantly, in a case of theft (*John McLean* (1876) 3 Couper 334) where it was accepted the appropriate penalty would not have been death but a substantial period of penal servitude. The difficulty, however, of applying the doctrine to other crimes was the difficulty of identifying examples of offences which stood in the dame relationship to each other as murder and culpable homicide.

[20] 1923 JC 49. This passage was described by Lord Cooper in *HM Advocate v Braithwaite* 1945 JC 55 as "as explicit and clear statement of the sort of thing [the jury] have to look for as I can find". Subsequently, it was accepted as an accurate statement of the law by a Full Bench in *Carraher v HM Advocate* 1946 JC 108, and by the Criminal Appeal Court in *Connelly v HM Advocate* 1990 JC 349, *Williamson v HM Advocate* 1994 SLT 1000, *Martindale v HM Advocate* 1994 SLT 1093 and *Lindsay v HM Advocate* 1997 JC 19.

[21] 1923 JC 49, at p 50.

> there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility – in other words, the prisoner in question must be only partially accountable for his actions. And I think one can see running through the cases that there is implied … that there must be some form of mental disease."

This passage is the closest that Scots law came to developing a definition of diminished responsibility prior to *Galbraith*, although it is clear that, as a direction to a jury, it was never formally offered as such.

Although Lord Alness's words reflected the earlier, relatively flexible, practice of the courts, subsequent decisions interpreted this passage so as to severely restrict the operation of the plea of diminished responsibility. In the first place, it was held in *Connelly v HM Advocate*[22] that the four "criteria" mentioned by Lord Alness were to be read cumulatively, rather than disjunctively as alternative mental states which would found a plea of diminished responsibility. If an accused's mental state could not satisfy all four criteria, the plea would fail. Secondly, the courts construed Lord Alness's observation that "running through the cases there is implied … that there must be some form of mental disease" as a requirement that there must be a mental illness.[23] The most significant consequence of this was to exclude from the scope of diminished responsibility those persons who were diagnosed as having a personality disorder, rather than a mental illness.[24]

Two further restrictions were placed on the plea, independently of any gloss on Lord Alness's summation of the law. The first of these emerged from the decision of the appeal court in *Carraher v HM Advocate*[25] which effectively excluded persons identified as having a "psychopathic personality" from relying on that condition in order to plead diminished responsibility. The second was that a person could not plead diminished responsibility on the basis of voluntary intoxication at the time of the offence. Both of these restrictions are maintained by the appeal court in *Galbraith*, and are discussed more fully below.

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[22] *Connelly v. HM Advocate* 1990 JC 349. In that case Lord Hope stated: ""…it would be quite wrong … to isolate one part of Lord Alness's description in *Savage* as expressing the concept and to discard others, or to treat his description as listing four criteria which can be regarded as alternatives so that if one only – and particularly the last – is met that is enough." See also *Williamson v. HM Advocate*, 1994 SLT 1000.

[23] *Connelly v HM Advocate, above; Williamson v HM Advocate*, above.

[24] At one point in his opinion in *Connelly v HM Advocate* Lord Hope appeared to draw a distinction between "mental disorder" and "mental illness or disease" thus apparently opening up the possibility that diminished responsibility could be applied to the case of personality disorder. But this argument was firmly rejected in *Williamson v HM Advocate*.

[25] 1946 JC 108.

2. *Galbraith v HM Advocate (No 2)*

It is against this background that the decision of the appeal court in *Galbraith v HM Advocate (No. 2)*[26]should be read. The appellant in that case was charged with the murder of her husband by shooting him. She accepted that she had killed him, but submitted that this was not a case of murder but one of culpable homicide on the grounds of diminished responsibility. She gave evidence that over a number of years she had been subjected to serious abuse by her husband, including sexual abuse, that he had threatened to kill her, and that she could see no other way out than to kill him.

In support of the plea of diminished responsibility, the defence led evidence from two psychologists. The first concluded that the appellant had been the victim of "horrifying sexual and psychological trauma", that she was suffering from a form of post-traumatic stress disorder, and that this had "effectively overwhelmed and fragmented her ability to think clearly or rationally at the time when she killed the deceased."[27] The second expressed the view that the appellant's responses "were wholly consistent with her having been the victim of abuse of the kind that she had described" and that she had been "in a state of learned helplessness". The same witness also testified that victims of prolonged abuse "were frequently unable to consider fully all the alternatives to remaining in the violent situation" and that for such reasons "the appellant had come to believe that the only possible way for her to leave her husband was to kill him."[28] Medical evidence was also led to the effect that shortly before the time when she killed her husband the appellant was suffering from a clinical depression.

The Crown's case was that the appellant was not suffering from diminished responsibility, and that the accused had carefully planned and prepared the killing of her husband. This preparation included taking steps to "suggest that the killing had been committed by two intruders in the course of an attack in which she had been raped and her handbag rifled."[29] The judge directed the jury on diminished responsibility in accordance with Lord Alness's charge in *Savage*, as interpreted by the appeal court in *Connelly*, and by a majority the jury convicted the appellant of murder.

On appeal it was argued, first that the court in Connelly had been wrong to interpret Lord Alness's charge as requiring to be read "as a whole with all its elements", and secondly that Lord Alness himself had been wrong to insist upon "some form of mental disease". The appeal court accepted both these arguments.

So far as concerns the first, the court concluded that Lord Alness had not intended to set out four conditions all of which would have to be met before the plea of diminished responsibility could be successful. Rather "he was simply explaining to the jury 'the kind of thing that is necessary', 'the sort

[26] 2001 SLT 953.

[27] *Galbraith v HM Advocate(No 2)*, at para. 7.

[28] *Galbraith v HM Advocate(No 2)*, at para. 7.

[29] *Galbraith v HM Advocate(No 2)*, at para. 6.

of thing that must be proved'"[30] for the plea to be successful. The criteria referred to by Lord Alness were in fact illustrative phrases drawn from earlier cases and, "[m]ost notably" the "operative direction" given by Lord Alness in Savage did not include the third alleged criterion – that of borderline insanity – thus illustrating that Lord Alness himself did not regard the criteria as cumulative requirements.[31]

So far as concerns the "mental disease" requirement, the appeal court concluded that cases subsequent to *Savage* had "interpreted this requirement more strictly than Lord Alness would have intended".[32] This conclusion was reached after a detailed considerations of the facts of *Savage* which revealed that at the time of the offence the accused was intoxicated as a consequence of consuming methylated spirits, an intoxicant which he frequently consumed. Although a defence of this nature would clearly not be plausible in modern practice – whether as a defence in its own right or as foundation for the plea of diminished responsibility[33] - Lord Alness's directions were given at a time when the Scottish courts were prepared to accept that voluntary intoxication could reduce murder to culpable homicide.[34]

From this background the appeal court argued that if Lord Alness had really meant that "mental disease" was a *sine qua non* for a successful plea of diminished responsibility, there would have been no question whatsoever of Lord Alness leaving the plea to the jury in that case. This argument is not entirely convincing. It is equally plausible that Lord Alness did intend to confine the plea to cases where there was an identifiable mental disorder, and that he was indicating as much to the jury. It might, of course, be asked, if his Lordship did not think that the accused's mental condition at the time of the offence was such as to permit the jury to return a verdict of culpable homicide, why he did not withdraw that possibility from the jury. Indeed, the appeal court in *Galbraith* observes that he did not take this course.[35] But too much should not be read into this apparent omission. It appears that at the time *Savage* was decided it was simply not the practice of the courts to withdraw that option from the jury, and, indeed, since "diminished responsibility" was not in any sense a "defence", it is difficult to see how, at that stage of the development of the plea, this could have been done.

However that may be, the appeal court concluded that in both respects outlined above the judge had misdirected the jury, quashed the conviction, and granted authority to the Crown to re-indict the accused.

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[30] *Galbraith v HM Advocate(No 2)*, at para. 30.

[31] *Galbraith v HM Advocate(No 2)*, at para. 31. The Court also noted Lord Cooper's reference to *Savage* as providing a clear and explicit statement "of the sort of thing which [the jury] have to look for" in the case of *HM Advocate v Braithwaite*, 1945 JC 55, at p. 57.

[32] *Galbraith v HM Advocate(No 2)*, at para. 39.

[33] See *Brennan v HM Advocate* 1977 JC 38.

[34] See *HM Advocate v Campbell* 1921 JC 1. This decision was later confirmed by the Criminal Appeal Court in *Kennedy v HM Advocate* 1944 JC 171, but both were later overruled by the Criminal Appeal Court in *Brennan v HM Advocate,* above.

[35] *Galbraith v HM Advocate(No 2)*, at para.39.

3. Diminished responsibility defined

Having concluded that the long-standing formulation of the law was incorrect, the appeal court could have limited its decision to correcting the errors of interpretation of the earlier law which it had identified. The court, however, chose to engage in a more radical reformulation of the plea of diminished responsibility. Accordingly, for a successful plea of diminished responsibility, it must be proved that "at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts."[36] The court offers no explanation as to the source of key elements of this re-cast defence, but as has been pointed out[37] the references to "abnormality of mind" and "substantial impairment" may be traceable to section 2 of the Homicide Act 1957. If this is so, then the doctrine of diminished responsibility, which had its origins in nineteenth century Scots common law, and which was influential in the introduction of that defence into English law in 1957 has, "in a remarkable process of circularity"[38] been reformulated for Scots law in terms based on the English statutory definition.

4. The elements of the plea

A Abnormality of mind

In language which closely reflects that of Lord Parker CJ in *Byrne*[39] the court in *Galbraith* said:[40]

> "The abnormality may take various forms. It may mean that the individual perceives physical acts and matters differently from a normal person. Or else it may affect his ability to form a rational judgment as to whether a particular act is right or wrong or to decide whether to perform it. In a given case all of these effects may be operating."

It is likely that any abnormality previously accepted as constituting diminished responsibility will for the future be regarded as satisfying this requirement. As the court points out in *Galbraith*, "cases of diminished responsibility recognised by the law in the past do indeed involve abnormality of this kind and, therefore, fall within this general description."[41] However, the term "abnormality of mind" substantially broadens the scope of the defence which latterly had become really quite restricted, as, indeed, the decision in *Galbraith* itself illustrates.

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[36] *Galbraith v HM Advocate (No. 2)*, para. 54. See also, para. 51.

[37] James Chalmers, "Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate (No 2)*" 6 Edinburgh Law Review 108 (2002)

[38] Chalmers, *loc cit*, at p 114.

[39] [1960] 2 QB 396, at 403.

[40] *Galbraith v HM Advocate(No 2)* at para. 53.

[41] *Galbraith v HM Advocate(No 2)* at para. 51.

At the same time, however, the court in *Galbraith* is careful to draw a distinction between mental states which call for compassion and "failings and emotions, such as anger and jealousy" which do not call for compassion. "Rather, we must master them or else face the consequences".[42] It is important, however, to appreciate that while anger and jealousy by themselves do not provide a sufficient foundation for a plea of diminished responsibility, the fact that a person acted under the impulse of such emotions should not exclude the defence if, otherwise, the conditions for diminished responsibility are satisfied.[43]

B The "aetiology" of the abnormality[44]

As has already been noted, the previous law confined diminished responsibility to cases where the accused's mental abnormality could be attributed to a mental illness. In this regard also the decision in *Galbraith* has brought about a substantial relaxation of the law in favour of the accused. Provided that the abnormality is one that "is recognised by the appropriate science"[45] it arise from "a variety of causes",[46] whether inherent or external.[47] The abnormality may be "congenital or derive from an organic condition, from some psychotic illness, such as schizophrenia or severe depression, or from the psychological effects of severe trauma". "[I]n colloquial terms, there must … have been something far wrong with the accused, which affected the way he acted."[48]

C Substantial impairment

This element of the revised plea also effects a relaxation of previous restrictions. While the accused's ability to determine or control his conduct must be "substantially impaired", it is not necessary to show that the accused's mental condition bordered on insanity.[49]

It remains to be seen just how the courts will understand and develop the notion of "substantial impairment". The courts may, given the similarity between section 2 of the Homicide Act and the language used in *Galbraith*, consider seeking guidance from English authority – although whether that guidance will be of any great help is questionable.[50]

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[42] *Galbraith v HM Advocate(No 2)* at para. 51.

[43] *Cf HM Advocate v Aitken* (1902) 4 Adam 88. And see also the discussion, below, of provocation and diminished responsibility.

[44] *Galbraith v HM Advocate (No 2)*, p. 965.

[45] *Galbraith v HM Advocate (No 2)* at para. 54.

[46] *Galbraith v HM Advocate (No 2)* at para. 52

[47] *Galbraith v HM Advocate (No 2)* at para. 53.

[48] *Galbraith v HM Advocate (No 2)*, para. 54.

[49] *Galbraith v HM Advocate (No 2)*, para. 54.

[50] See, in this regard, *Simcox*, the Times, February 25 1964 and *Lloyd* [1967] 1 QB 175.

5. The effect of the plea

Whatever may have been the uncertainties surrounding the definition of diminished responsibility, there has never been any doubt about its primary effect: a successful plea of diminished responsibility reduces the crime of murder to culpable homicide.

Where there has been a successful plea of diminished responsibility, the court is obliged to consider whether the accused's mental condition should have further weight in determining sentence. In other words, the judge is not entitled to treat the mitigatory effect of the diminished responsibility as having been exhausted by reducing the crime from murder to culpable homicide.[51]

6. The basis of the plea – how diminished responsibility works

A problem which has permeated the discussion of diminished responsibility in Scots law is the failure of the courts to set out the theoretical underpinning of the plea. While it is accepted that the effect of the plea is to permit a verdict of culpable homicide to be returned in a case of murder, there are conflicting explanations as to why that conclusion may be reached.

The early case-law treats mental abnormality short of insanity as a factor affecting sentence. But the development which took place in *Dingwall* was more radical: diminished responsibility was capable not only of affecting sentence, but also the category of the offence. That was certainly the view of Lord Deas, who argued this position not only in relation to the distinction between murder and culpable homicide, but in relation to other offences as well.[52] Unfortunately, Lord Deas does not offer any explanation as how this category-shift is effected, although the language he uses is suggests that he simply regarded this as a matter of mitigation.

There is one early case where a rather different approach is suggested. In *John Tierney*[53] the accused was charged with murder, to which a defence of insanity was lodged. There was some evidence that the accused had at an earlier time been insane, and that the death of a child had profoundly affected his personality. There was, however, little evidence to support the defence of insanity at the time of the offence. The advocate-depute had, however, suggested to the Jury that they "might be of opinion that the man's control over his own mind might have been so weak as to deprive the act of that wilfulness which would make it murder." Lord Ardmillan is reported as not wishing "to exclude that view from consideration"[54] but it is not clear whether this was intended as an endorsement of the specific justification for a verdict of culpable homicide, or merely an indication that that conclusion was possible in the circumstances of the case. The case does, however, suggest that diminished responsibility operates by excluding the mental state required for murder.

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[51] *Kirkwood v HM Advocate* 1939 JC 36; *Strathearn v HM Advocate* 1996 SLT 1171

[52] See *John McLean* (1876) 3 Couper 334 at p. 337 (a case of theft aggravated by housebreaking and previous conviction for theft)

[53] (1875) 3 Couper 152.

[54] (1875) 3 Couper at p. 166.

That view is supported by the obiter statements of some members of the court of appeal in *Drury v HM Advocate*.[55] In that case it was held that in a case of murder, provocation can alter the category of the offence by excluding element of "wickedness" required in order to establish the mens rea for murder. It is suggested by some members of the court that diminished responsibility operates in the same way.[56]

On the other hand, there is no suggestion in *Galbraith* that that is how diminished responsibility operates in Scots law, and the better view appears to be that diminished responsibility operates simply as an extenuating factor which provides a partial excuse for the killing of another person. That, moreover, is consistent with the approach adopted towards the onus of proof in cases of diminished responsibility which rests upon the party seeking to establish that plea.[57] If diminished responsibility is a factor which affects the presence or absence of a definitional element of the crime of murder, then it ought, logically, to be a matter to be excluded by the Crown, rather than established by the accused.

7. Exclusions and limitations

A Intoxication

The decision in *Galbraith* makes no change to the previous law in this regard. Since "no mental abnormality, short of actual insanity, which is brought on by the accused himself taking drink or drugs or sniffing glue, will lessen his responsibility for his acts or omissions or for their results"[58], diminished responsibility cannot be based on voluntary intoxication. This issue is discussed below in relation to the defence of intoxication.

B Psychopathy

As we have already noted, the decision of the court in *Carraher v HM Advocate* meant that "for all practical purposes … our law does not regard such a disorder as a basis for holding that the accused's responsibility for his acts is diminished".[59] Since this is a matter of legal policy, independent of medical opinion on the nature of this disorder,[60] the issue here is not whether psychopathy "exists" in a form recognised by psychiatrists or psychologists, but whether the court is able to offer any clear policy justifications for this exclusion. The court, unfortunately, provides no such justification beyond a reference to Carraher, which in relation to psychopathic personality disorder is largely motivated by a mistrust of psychiatric opinion – an attitude which is

[55] 2001 SLT 1013.

[56] See the Lord Justice-General at para. 13; Lord Nimmo Smith at paras. 2 and 4.

[57] See below.

[58] *Galbraith v HM Advocate (No 2)*, para. 43.

[59] *Galbraith v HM Advocate (No 2)*, para. 43.

[60] *Galbraith v HM Advocate (No 2)*, para. 43.

oddly inconsistent with much of what lies behind the decision in *Galbraith*. Somewhat ironically, it would be possible to find within modern psychiatric and psychological opinion some considerable support for a policy of not extending the defence of diminished responsibility to persons identified as having psychopathic personality.[61]

C Other disorders

In addition to the exclusion of psychopathy from diminished responsibility, the court in *Galbraith* makes it clear that there may be other disorders, recognised by psychiatry and psychology, which, "for sound policy reasons" may come to be excluded from diminished responsibility, whether by the courts or by the legislature.[62]

8. Relationship to other defences

A Insanity

It was customary, for many years, for Scottish judges to direct juries, in line with *Savage*, that diminished responsibility required a "state of mind which is bordering on, though not amounting to, insanity". This was understandable, given the historical context in which the plea emerged. Most (although not all) of the early cases of diminished responsibility were cases in which the accused had lodged a defence of insanity but where the evidence did not sustain the defence. In such cases the jury were invited to consider the accused's mental state as a mitigating factor, in the event that they did not find the defence of insanity established.

However, it was recognised that this was not a particularly helpful direction, if for no other reason than it was meaningless to the jury in the absence of any guidance as to the meaning of "insanity". While in many cases diminished responsibility would be pleaded as an alternative to insanity, so that the jury would be aware of the meaning of that term, it was not invariably so. In *Lindsay v HM Advocate*[63] the court addressed this problem by providing the jury with a definition of insanity, but the risk in adopting this approach where insanity was not pleaded was clearly one of confusing the jury. *Galbraith* removes this difficulty by distancing diminished responsibility from the defence of insanity.

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[61] "It is clear from the literature that psychopaths are more likely than others, including other offenders, to be violent, to recidivate violently, and to cause problems not only in society, but in the institutions in which they are incarcerated. Indeed, they may appropriately be called — as Hare has termed them — *'intraspecies predators who use charm, manipulation, intimidation, and violence to control others and to satisfy their own selfish needs'* . (Ogloff, J. R. P., & Lyon, D. (1998), "Legal issues associated with the concept of psychopathy" in D. J. Cooke, A. E. Forth, & R. D. Hare (Eds.), *Psychopathy: Theory, Research, and Implications for Society* (pp. 401-422). Dordrecht, The Netherlands, 1998, referring to Hare, R. D., "Psychopathy: A clinical construct whose time has come." *Criminal Justice and Behavior*, *23(1)*, 25-54. 1996, p. 26.

[62] *Galbraith v HM Advocate (No 2), para.* 43.

[63] 1997 JC 19.

There is no doubt that the role that diminished responsibility has played in English law has been influenced by the narrowness of the McNaghten Rules on insanity. There is some evidence that diminished responsibility emerged in Scots law at a time when those rules were influential on the defence of insanity,[64] so that in its early stages the Scottish doctrine may have performed a similar function. But given the restrictions imposed by the Scottish courts on the plea of diminished responsibility, and the somewhat less restrictive interpretation placed on insanity in Scots law, it cannot really be said that diminished responsibility continued to perform that function in Scotland.

B Intoxication

a Voluntary intoxication

The attitude of Scots law towards voluntary intoxication and criminal responsibility changed twice during the period between *Alexander Dingwall* and *Galbraith*. At the time when the plea of diminished responsibility was emerging the accepted rule appears to have been that voluntary intoxication did not provide a defence to a criminal charge. However, the courts appear to have accepted that chronic intoxication was relevant in considering whether the accused's crime was properly murder or diminished responsibility.[65] More importantly, the courts also seem to have accepted that diminished responsibility could be based on acute intoxication at the time of the offence.[66]

Between the decision of the High Court in *HM Advocate v Cambell*[67] and the decision of the criminal appeal court in *Brennan v HM Advocate*[68] it was accepted in Scotland that voluntary intoxication resulting in incapacity to form the intent required for murder was a defence to a charge of murder, in the sense that it reduced the crime to culpable homicide. However, in *Brennan v HM Advocate* the court held that voluntary intoxication could not be pleaded as a defence to any criminal charge.

The decision in *Galbraith* confirms that, as a matter of policy, an accused cannot plead diminished responsibility merely on the basis of voluntary intoxication at the time of the offence.[69] The issue had already been addressed on a number of occasions, most clearly in *HM Advocate v*

[64] Interestingly, Lord Deas himself adopted a particularly narrow definition of insanity, ruling on several occasions that if the accused knew that his actions were contrary to law the defence of insanity was excluded. See, *inter alia*, *Alexander Dingwall*, above, at pp. 475-476, *Andrew Granger* (1878) 4 Couper 86, at p.101.

[65] As, for example, in the case of *Alexander Dingwall,* who was a chronic alcoholic, in addition to manifesting mental abnormalities associated with other causes including physical injury.

[66] See, for example, *Andrew Granger* (1878) 4 Couper 86; *HM Advocate v Savage* 1923 JC 49.

[67] 1921 JC 1.

[68] 1977 JC 38.

[69] *Galbraith v HM Advocate (No 2)*, at para. 43.

Macleod.[70] In that case an accused, charged with the murder of his wife, contended that he committed the crime while intoxicated and suffering from diminished responsibility. In charging the jury, Lord Hill Watson stated:

> "if a man is not shown by the evidence to be within the category of one with a diminished responsibility when sober he cannot place himself within the category of diminished responsibility by taking drink. … If you found upon the evidence that this man suffered from diminished responsibility without any question of drink at all then that would be a good defence, but if on the evidence you came to the conclusion that this diminished responsibility … only arises when the man takes drink then it is not diminished responsibility."

In *Brennan v HM Advocate*[71] the appeal court, confirming *MacLeod*, stated (obiter) that "the defence of diminished responsibility cannot … be established upon mere proof of the transitory effects upon the mind of self-induced intoxication."[72]

That said, it is important to recall that a "mental abnormality" (other than acute intoxication) brought on by, or aggravated by, the abuse of alcohol or other drugs – even voluntarily consumed – will not preclude a defence of diminished responsibility (as *Dingwall* itself makes clear[73]).

b Involuntary intoxication

Since the case of *Ross v HM Advocate*[74] it has been accepted that involuntary intoxication resulting in total alienation of reason in relation to the offence charged excludes criminal responsibility. The question which arises is whether the exclusion of voluntary intoxication from diminished responsibility implies that involuntary intoxication could provide a foundation for a plea of diminished responsibility. That this is now possible is clearly implied by the *Galbraith* court's discussion of drugs administered for therapeutic purposes in the context of "the aetiology of the abnormality". Where the accused's mental abnormality results from taking drugs in accordance with medical advice, and the other requirements for diminished responsibility are satisfied, the defence should be open to the accused.

C Provocation

As we note below, provocation in Scots law is limited to cases where the accused's loss of self-control is brought about by violence, or by sexual infidelity so that it is, at least when compared with English law, a relatively restricted plea.

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[70] 1956 JC 20.

[71] 1977 JC 38

[72] 1977 JC 38, at pp. 45-46.

[73] See also, *Andrew Granger* (1878) 4 Couper 86.

[74] 1991 JC 210.

The question arises as to the impact of *Galbraith* on cases where the accused has responded with violence to provocative conduct which would not provide a foundation for the plea of provocation.

Several of the early cases on diminished responsibility appear to have been of this sort. Indeed, *Dingwall* itself is a case where the accused appears to have killed shortly after a quarrel, and while he was upset and angry with his wife because she had hidden his whisky bottle and his money. In *HM Advocate v Aitken*[75] there was evidence that there had been "an altercation" between the accused and his wife at the time he killed her. In *Robert Smith*[76] the accused, following a prolonged period of verbal taunting the accused killed one of his tormentors in circumstances which are strongly suggestive of "cumulative provocation", but which did not involve any physical attack on the accused. In all of these cases there was sufficient evidence of mental abnormality to permit the jury to return a verdict of culpable homicide.

During the period when the courts insisted that diminished responsibility required proof of mental illness, the opportunities for this kind of extension of non-violent provocation were to some degree limited. With the removal of that limitation by *Galbraith*, it is the clear potential for certain types of non-violent, and particularly, cumulative, provocation cases to be brought within the ambit of diminished responsibility – as, indeed, the circumstances of the killing in *Galbraith* confirm.

Cases of intentional or reckless killing which do not come within the parameters of the plea of provocation, and which do not meet the criteria for diminished responsibility will continue to be treated as cases of murder.

9. Evidential and Procedural Issues

A Burden and standard of proof

The burden of establishing diminished responsibility rests upon the party seeking to establish it.[77] While this will normally be the accused, it is open to the Crown to seek to establish that the accused is suffering from diminished responsibility.[78] Where the accused relies on the plea, it must be established on a balance of probabilities.[79]

The Scottish Law Commission has recently proposed that the burden on the accused in relation to establishing diminished responsibility should only be an "evidential" burden, as opposed to the present legal burden.[80] This proposal is based on an analogy which the Commission draws with the defence burden in respect of the defence of insanity (which, in the view of the

[75] (1902) 4 Adam 88.

[76] (1893) 1 Adam 34.

[77] *Lindsay v HM Advocate* 1997 JC 19.

[78] *Gemmill v HM Advocate* 1979 SLT 217.

[79] *Lindsay v HM Advocate* 1997 JC 19.

[80] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122), para. 5.35.

Commission should also be an evidential burden in the light of the decision of the House of Lords in *Lambert*.[81] The analogy is, however, only a loose one. The argument in favour of imposing only an evidential burden in the case of insanity is based on the presumption of innocence enshrined in article 6(2) of the European Convention on Human Rights. But, as the Commission indeed recognises, that presumption "has no direct role to play" in the case of diminished responsibility which, unlike insanity, is not an exculpatory plea.[82]

B Judge, jury and (expert) evidence

Whether or not a person is suffering from diminished responsibility is, in the end, a question of fact to be determined by the jury, on the basis of all the evidence presented. As in England, the courts in Scotland have been anxious to ensure that the question of whether or not a person's mental state is sufficient to warrant a finding of diminished responsibility does not become a matter to be determined by expert witnesses.

It is for the court to determine whether or not there is evidence sufficient in law to permit the jury to conclude that the accused was suffering from diminished responsibility.[83] And where the court concludes that the evidence is not, as a matter of law, capable of supporting a defence of diminished responsibility, that defence should be withdrawn from the jury.[84]

10. Proposals for Reform

The Scottish Law Commission has recently published a discussion paper on insanity and diminished responsibility.[85] That paper broadly accepts the law as reformed by the court in *Galbraith*, and the Commission's proposals are therefore relatively limited. The Commission proposes that the plea should be retained "as a special instance of a plea in mitigation in cases of murder" and that its effect, if successful, should be "that the accused is liable to be convicted of culpable homicide rather than murder."[86] The Commission proposes a statutory definition of diminished responsibility, according to which an accused charged with murder would be convicted of culpable homicide rather than murder if it is established "on medical or other evidence" that at the time of the commission of the offence his or her condition "amounted to such extenuating circumstances as to justify a conviction for culpable homicide instead of a conviction for murder."[87] The

[81] [2002] 2 AC 545.

[82] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122), para. 5.35.

[83] *Galbraith v HM Advocate (No 2)*, at para. 54.

[84] *Galbraith v HM Advocate (No 2)*, at para. 54.

[85] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122).

[86] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122), *Recommendation* 12 and para. 3.14.

[87] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122), *Recommendation* 17 and para. 3.38.

"condition" referred to is "an unsoundness of mind which substantially impaired his or her ability to understand events, or to determine or control his or her acts".[88]

The Commission also proposes that "the fact that a person was intoxicated at the time of the commission of the offence does not by itself constitute, or prove that he or she was suffering from" diminished responsibility. But it is also proposed that the fact that the accused was intoxicated at the time of the offence should not, by itself, prevent the the defence being established.[89]

In one important respect the Commission departs from the law set out in *Galbraith*, and that is in regard to the exclusion of psychopathic personality disorder from the plea of diminished responsibility. The Commission, rightly it is suggested, questions the policy which lies behind this exclusion, and asks whether there are good reasons for continuing to exclude this type of disorder from the plea.[90]

2. PROVOCATION

1. The origins of the plea

Hume explains that the plea of provocation in Scots law has its origins in the ancient distinction between murder and "slaughter on suddenty, or *chaude melle*".[91] Under that distinction, the "manslayer on suddenty"[92] was entitled to sanctuary in a church or other holy place. While he could be taken for trial, he was to be returned if *chaude melle* were proved. Although the privilege of sanctuary was abolished at the Reformation, the distinction persisted,[93] and homicide on "gross and excessive provocation" was recognised as amounting to culpable homicide rather than murder.[94]

Historically – and this remains the case today – the scope of the plea was framed more narrowly than English law:

"To have a good plea of extenuation, the pannel must have been, at the time of the killing, in the situation of an assaulted and a grossly injured

[88] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122), *Recommendation* 17 and para. 3.38.

[89] Scottish Law Commission, *Discussion Paper on Insanity and Diminished Responsibility*, The Stationery Office, 2003 (Discussion Paper No. 122), *Recommendation* 17.

[90] Unfortunately, the Commission's discussion of this issue is confused by an apparent assumption that "psychopathic personality disorder" is the same thing as "anti-social personality disorder", which leads them to ask whether the latter should continue to be excluded from diminished responsibility, when, at least for the moment, it is not.s

[91] Hume, i, 241.

[92] Hume, i, 241.

[93] Hume, i, 240-244; Alison, *Principles*, 16-18.

[94] Alison, *Principles*, 18.

person; one who was in a manner constrained to strike, by the violence he was suffering at the moment."[95]

Hume expressly rejected what he perceived to be the position in English law: that "*any* assault on the person of the killer materially extenuates his guilt, and brings his case within the privilege of manslaughter".[96] Instead, Hume appears to have viewed the plea as a doctrine addressing the use of excessive force on a justified occasion:[97] it was the "excess of the just measure of retaliation"[98] which left the killer open to criminal liability.

While a number of early nineteenth-century decisions, shortly after the first edition of Hume's *Commentaries* (published in 1797) appear to have adopted a more liberal approach to the scope of the plea,[99] subsequent decisions and writings suggest that this was – if anything – merely a temporary relaxation of attitudes. In particular, it became clear in later cases that the plea would not be open where the accused had responded to blows alone with the use of a weapon.[100]

It follows from this approach that there was no question of recognising provocation by words alone or by interference with property.[101] An exception was made for the "peculiar case of a husband killing the adulterer caught in the act",[102] although there appears to be only one such reported case prior to the twentieth century.[103] The exception clearly sat uneasily with the restrictive

[95] Hume, i, 247. "Pannel" (sometimes "panel") is a somewhat archaic Scots term for "accused" (in English law, "defendant").

[96] Hume, i, 247.

[97] Hume considered that provocation, as a separate plea from self-defence, could itself operate as a justification in cases of assault. See Hume, i, 334-335. This is no longer the law. The point is addressed briefly later in this paper.

[98] Hume, i, 248. See also Alison, *Principles*, 93 ("it generally turns out, that both parties were at first to blame, although the sufferer has received more than his due chastisement from the intemperate revenge of the survivor").

[99] See *Andrew Burt* (1804) Hume, i, 258; *William Goldie* (1804) Hume, i, 249; *Walter Redpath* (1810) Hume, i, 252; *James Macara* (1811) Hume i, 252. Each of these cases involved provocation by minor assaults. In noting these decisions by way of footnotes in later editions of his *Commentaries*, Hume took the opportunity to express doubts about the soundness of the verdicts.

[100] See Alison, *Principles*, 12; *Mrs Mackinnon* (1823) Alison, i, 14; *Peter Scott* (1823) Alison, i, 15; *Edward Armstrong* (1826) Alison, i, 15 (although the jury acquitted in the face of directions from the presiding judge in that case). See also *James Craw* (1826) Syme 188, *per* Lord Gillies at 211. *Cf. William Wright* (1835) 1 Swin 6, where the presiding judge charged the jury in such circumstances by "expressing a clear opinion that a case of murder was established, but informing the jury that they might competently return a verdict of culpable homicide", which they did.

[101] Hume, i, 246-247. See also *William Aird* (1693) Hume, i, 248, where a defence of provocation based on the deceased's having tossed the contents of a chamber-pot in the accused's face was rejected; *HM Advocate v Robert Smith* (1893) 1 Adam 34, *per* Lord McLaren at 49. *Cf.,* however, *Andrew Burt* (1804) Hume, i, 258.

[102] Hume, i, 248.

[103] *James Christie* (1731) Maclaurin 625. Hume notes an earlier (1510) case where the killer was given a free remission: Hume, i, 245.

general approach to provocation, as Hume acknowledged,[104] but its validity does not appear to have been doubted.

Although the plea has gradually developed since Hume wrote – and in particular, the infidelity exception has been significantly expanded – its restriction to cases where the accused has been provoked by violence or infidelity remains to this date.

2. Developing the modern doctrine: the position prior to *Drury v HM Advocate*

A The effect of a successful plea

a Provocation and murder

For a period in the twentieth century, it appears to have been thought that a successful plea of provocation might go further than reducing murder to culpable homicide, and might render the accused guilty merely of assault. While directions to this effect were given by trial judges in at least two cases,[105] the correctness of such directions was doubted elsewhere,[106] and the Appeal Court later ruled that the plea could not have this effect.[107] It remains clear that the effect of a successful plea of provocation will be to render the accused guilty of culpable homicide rather than murder.

b Provocation and assault

In *Hillan v HM Advocate,*[108] it was held that provocation could be a complete defence to a charge of assault, rather than merely a factor in mitigation. Although there is historical support for the proposition that provocation may operate as a complete defence to assault in some cases,[109] there does not seem to be any reported case subsequent to *Hillan* where provocation has been regarded as a complete defence to assault. The modern position appears to be that it is relevant only as a mitigating factor.[110]

B Expanding the infidelity exception

The most significant twentieth-century development in the Scots law of provocation has been the gradual expansion of the infidelity "exception".

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[104] Hume, i, 246.

[105] *HM Advocate v Gilmour* 1938 JC 1; *McCluskey v HM Advocate* 1959 JC 39.

[106] *HM Advocate v Sheppard* 1941 JC 67; *HM Advocate v Delaney* 1945 JC 138.

[107] *McDermott v HM Advocate* 1973 JC 8. This is consistent with the rule of law that assault which causes death is necessarily at least culpable homicide (see *McDermott* itself and also *Bird v HM Advocate* 1952 JC 23).

[108] 1937 JC 53.

[109] See Hume, i, 334-335.

[110] See *Drury v HM Advocate* 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [16].

As noted earlier, this form of the plea was formerly believed to be confined to cases where the spouse and paramour were caught in the act of adultery.[111] In *HM Advocate v Hill*,[112] however, it was held that the plea could also be available where the accused's wife and paramour had confessed to adultery in his presence.[113] Additionally, it was later held that the plea was not restricted to marital relationships, but was also applicable where the relationship between the parties was "of such a character that fidelity, as in marriage, [was] expected on both sides".[114] It appears that the plea is, therefore, not restricted to heterosexual relationships.[115]

At the same time, however, the appeal court took a restrictive approach to the type of confession which could form the basis for a plea of provocation. In *McKay v HM Advocate*,[116] while recognising that the plea was not restricted to marital relationships, the court held that the deceased's statement that "it's not as if she's yours anyway" – a reference to the child of the relationship – could not form a basis for the plea, because the accused was already aware that the deceased had been seeing other men around the time when the child was conceived. Her statement "did not disclose in clear and unequivocal terms that the deceased had been committing adultery or that she had been having intercourse with another man during a period when she and the appellant were living together as man and wife",[117] and the plea was therefore unavailable.

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[111] In *HM Advocate v Callander* 1958 SLT 24, the accused claimed that he had been provoked to assault his wife and another woman after discovering the parties "indulging in the unnatural practices known as Lesbianism". The trial judge ruled that such actions were equivalent to adultery for the purposes of the plea. Although the case was one of assault rather than homicide, the trial judge seems to have considered that the same rules were applicable to the question of whether the jury were entitled to return a verdict of "assault under provocation" as would have been applicable in a homicide case.

[112] 1941 JC 59.

[113] See also *HM Advocate v McWilliam*, High Court at Edinburgh, 5 November 1940, *unreported* (see *The Times*, 6th November 1940, p9), where a similar plea appears to have been successful. The accused in that case had found letters from another man in his wife's handbag.

[114] *McKay v HM Advocate* 1991 JC 91, *per* the Lord Justice-General (Hope) at 95. This appeal court decision confirmed the decision taken by the trial judge in *McDermott v HM Advocate* 1973 JC 8 to allow such a case to go to the jury.

[115] *HM Advocate v McKean* 1997 JC 32, where the trial judge allowed a plea in such circumstances to go to the jury, who convicted the accused of culpable homicide. The accused in this case was female and the deceased male, which is perhaps significant given that the infidelity exception is generally considered to have a "gendered tenor" (the term is taken from C Wells, "Provocation: the case for abolition" in A Ashworth and B Mitchell, *Rethinking English Homicide Law* (2000), 85, at 87). Nevertheless, the other reported Scottish cases of provocation by infidelity almost invariably involve male accused, although there is one other case involving a female accused and a male victim: *Houghton v HM Advocate* 1999 GWD 17-789 (where the Crown accepted a plea of provocation based on both infidelity and violence).

[116] 1991 JC 91.

[117] 1991 JC 91, *per* the Lord Justice-General (Hope) at 96.

In *McCormack v HM Advocate*,[118] a further caveat was introduced. It was held in that case the confession of infidelity must be not only "a clear and unequivocal admission", but that it must be "accepted as such by the appellant".[119] In that case, the accused claimed that he had been provoked into killing his wife by her repeated statements that he was not the father of their child. He had, he said, not believed the claim, but had been provoked into strangling her because he "just wanted [her] to shut up". The court held that because he had been provoked into the killing because he "did not wish to continue to hear these allegations, and not because he actually believed them",[120] the plea was unavailable.[121]

The appeal court did, however, take a less restrictive approach in the subsequent case of *Rutherford v HM Advocate*,[122] where the accused had been aware of his partner's infidelity for two days prior to the killing. His plea of provocation was based on the claim that she had made a second confession of adultery immediately before the killing which indicated that her infidelity had been of a greater extent than the accused had previously been aware of. It was held that this was a valid basis for the plea:

> "…there was evidence which the jury could have accepted to the effect that, on the occasion when he killed her, the deceased gave the appellant fresh information which cast a new light on her infidelity. On the Friday she had indicated that she had had intercourse on two occasions only and that the affair was in effect at an end. On the Sunday by contrast she indicated that the relationship with the lorry driver had been going on for months, that intercourse had occurred repeatedly over that period and that the relationship was continuing. This was a substantially different account which suggested that the affair had been much more extensive and that it was indeed continuing. This fresh account of the nature and extent of the deceased's infidelity was one which could in itself have caused a reaction of sudden and overwhelming indignation which was separate from any reaction to the original account. For that reason we are satisfied that what the appellant had been told on the earlier occasion did not preclude the view that what he was told on the subsequent occasion could amount to provocation."[123]

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[118] 1993 SLT 1158.

[119] 1993 SLT 1158, *per* the Lord Justice-General (Hope) at 1163.

[120] 1993 SLT 1158, *per* the Lord Justice-General (Hope) at 1164.

[121] McCormack's case was later referred back to the appeal court by the Scottish Criminal Cases Review Commission: *McCormack v HM Advocate* 2002 SCCR 765. In those proceedings, it was argued that the earlier decision of the appeal court was overly restrictive. The court, in continuing the appeal to allow fresh evidence to be led, declined to express any opinion on the point.

[122] 1998 JC 34.

[123] 1998 JC 34, *per* the Lord Justice-General (Rodger) at 45.

C Provocation by words alone

It appears that consideration was given to applying section 3 of the Homicide Act 1957 to Scotland when the Bill was passing through Parliament.[124] Because section 3 refers to "things done or said", this would have opened the door to the recognition of verbal provocation in Scots law. However, the Lord Advocate of the time rejected such an extension, on the remarkable basis that this was (he claimed) already the law of Scotland:

> "…the common law of Scotland is extremely flexible. There is nothing that I have been able to find which would indicate that a judge in Scotland would be precluded from leaving provocation by words to a jury."[125]

It is not easy to understand why the Lord Advocate took this view – which, as Gordon observes, is at odds with every textbook in use at that time.[126] Although there are three cases in the period leading up to 1957 where provocation appears to have been left to the jury in the absence of any assault by the deceased,[127] none of these is conclusive, nor was there any support in the decisions of the appeal court for such a position.[128]

Two further cases subsequent to the 1957 Act did, however, suggest that Scots law might be prepared to adopt a more relaxed approach to the issue of verbal provocation. In *Berry v HM Advocate*,[129] the accused's plea of provocation was based on a claim that in the course of a sexual encounter, the deceased had "taunted [him] with his inadequate prowess, compared him unfavourably to his uncle in that regard and made some critical observations about whether or not he might be the father of his children."[130] The trial judge left the plea to the jury (who rejected it). The appeal court, however, expressed "great doubt" about whether the judge had been right to do so. In *Stobbs v HM Advocate*,[131] the accused claimed that he had been having a

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[124] See HC Deb 28 Jan 1957, cols 769-788.

[125] HC Deb 28 Jan 1957, col 784.

[126] Gordon, para 25.26. It may, perhaps, be that there was some confusion as to the distinction between (a) the test for provocation and (b) the circumstances in which the matter could be left to the jury. Although it is now accepted that a judge may withdraw provocation from the jury's consideration, this does not appear to have actually happened in any reported case prior to *Thomson v HM Advocate* 1986 SLT 281. It may have been that the Lord Advocate considered that the trial judge would have been unable to withdraw a plea of provocation by words from the jury's consideration, but even so, it must have been clear at the time that the authorities would require him to direct the jury that words alone would be insufficient for the plea to succeed.

[127] *HM Advocate v McGuinness* 1937 JC 37; *Crawford v HM Advocate* 1950 JC 67. The third is an unreported case referred to by TB Smith, "Capital punishment" 1953 SLT (News) 197, at 199, although the decision of the jury in that case may have been at odds with the directions given by the trial judge. As noted in the previous footnote, it is not clear that a trial judge at the time of these cases would have considered himself entitled to withdraw a plea of provocation from the jury, and these cases should be read with that caveat in mind.

[128] For an analysis of the cases, see Gordon, paras 25.27-25.28.

[129] (1976) SCCR (Supp.) 156.

[130] (1976) SCCR (Supp.) 156, at 158.

[131] 1983 SCCR 190.

sexual relationship with the deceased, and that she had provoked him by threatening to tell his wife of the relationship unless he changed his mind about ending it. Again, the trial judge left the defence to the jury, who rejected it.

It will be noted that none of these authorities are decisions of the appeal court, and subsequent appellate decisions appear to have ruled out the possibility of verbal provocation. Firstly, in *Thomson v HM Advocate*,[132] the appeal court expressed doubts about these cases, taking the view that they were difficult to reconcile with the established authorities. In the later case of *Cosgrove v HM Advocate,*[133] the appeal court quoted the following statement from Macdonald's *Criminal Law* with approval:

> "Words of insult, however strong, or any mere insulting or disgusting conduct, such as jostling, or tossing filth in the case, do not serve to reduce the crime from murder to culpable homicide."[134]

Taken together, *Thomson* and *Cosgrove* appear to firmly reject the possibility of verbal provocation in Scots law, and such cases should, therefore, not be left to the jury. It was also accepted in the later case of *Robertson v HM Advocate*[135] that a homosexual advance, unaccompanied by violence, could not form a basis for the plea – which is of significance given the concern which has been expressed about this aspect of the plea in other jurisdictions.[136] The alleged advance in *Robertson* was in fact accompanied by the use of a knife, but it was held that the plea was nevertheless excluded because of the accused's "grossly disproportionate" response to the deceased's actions (he had stabbed the deceased repeatedly in a frenzied attack).

D Formulating a definition of provocation

Violence and infidelity, therefore, represent the only recognised bases for a plea of provocation in Scots law. It does not, of course, follow that any killing which follows on from either of these provoking factors was necessarily culpable homicide. Two other requirements were gradually refined through the twentieth-century case law.

a Immediate loss of self-control

It is clear from the case law that, for provocation to apply, the accused must have lost his self-control and have been provoked into the killing as an

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[132] 1986 SLT 281.

[133] 1990 JC 333.

[134] 1990 JC 333, *per* Lord Cowie at 340 (quoting Macdonald, 93).

[135] 1994 SLT 1004.

[136] See, e.g., RB Mison, "Homophobia in manslaughter: the homosexual advance as insufficient provocation" (1992) 80 Cal L Rev 133. For a response to that article, see J Dressler, "When 'heterosexual' men kill 'homosexual' men: reflections on provocation law, sexual advances and the 'reasonable man' standard" (1995) 85 J Crim L & Criminology 726. See also Wells, *supra* note 100, who argues that the provocation defence is bound to "encourage and exaggerate a view of human behaviour" which is homophobic (as well as sexist and racist).

immediate response to the provocation. Most significantly, this appears to exclude the possibility of cumulative provocation. In *Thomson v HM Advocate,*[137] where the accused had killed his business partner after a minor struggle, a history of acrimonious business dealings (the accused essentially claimed that the deceased had been cheating him) was noted. The appeal court took the view that:

> "far from supporting a plea of provocation, the evidence of the breakdown in the business relations, and the appellant's belief that he was being cheated, would provide a clear motive for murder. In all the reported cases, where provocation has been allowed to be considered by the jury, there has been some element of immediate retaliation to provocative acts. In the present case, that element is absent."[138]

This insistence on immediacy has obvious consequences for domestic killings. In *HM Advocate v Greig*,[139] the accused was charged with murdering her husband by stabbing him while he was asleep. Evidence was led to the effect that he was a heavy drinker and had been violent towards her in the past after drinking. The trial judge left provocation to the jury, while expressing a view that there was no evidence to support it.[140] The jury did in fact return a verdict of culpable homicide, but the trial judge's decision to leave the plea to the jury is probably irreconcilable with the authorities which lay down a clear requirement of immediacy. In modern practice, cases where the accused has killed a violent partner after a period of "cumulative provocation" appear to be dealt with by way of prosecutorial discretion, with the Crown being prepared to accept pleas of guilty to culpable homicide in such cases.[141]

b Proportionality

As noted earlier, a requirement of proportionality between the provocation and response was clear from the earliest authorities. This requirement was reiterated without significant change through the twentieth century authorities, although the language which was used evolved through the cases.

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[137] 1986 SLT 281.

[138] 1986 SLT 281, *per* the Lord Justice-Clerk (Ross) at 284. It seems, however, that it is nevertheless still appropriate to leave evidence of earlier provocative acts to the jury as explanations of the background to a final provocative act. See, for example, *HM Advocate v Green*, High Court at Jedburgh, 26-27 February 1924, *unreported* (see *The Scotsman*, 28 February 1924, 5), where the earlier actions of the deceased (Green's father) in conducting an incestuous affair with Green's wife were left to the jury along with Green's claim that his father had assaulted him immediately before the killing. The problem for the accused in *Thomson* was that the deceased's final action was too minor to be considered a basis for the plea in itself.

[139] High Court, May 1979, *unreported*. See CHW Gane and CN Stoddart, *A Casebook on Scottish Criminal Law* (3rd ed. by CHW Gane, CN Stoddart and J Chalmers, 2001), para 10.42. See also *Crawford v HM Advocate* 1950 JC 67, which was doubted in *Thomson*.

[140] "If, on the other hand, you can find some evidence, which I frankly cannot, that the accused was provoked in the sense in which I have defined it, you could return a verdict of culpable homicide…"

[141] These cases are discussed later in this report.

In *HM Advocate v Smith*,[142] it was said that "Provocation… must bear a reasonable retaliation [relation] to the resentment which it excites."[143] The appeal court subsequently interpreted this as meaning that "cruel excess" in retaliation would bar the plea.[144] In subsequent decisions, the appeal court disapproved this terminology (as it was already used in the law of self-defence, and thus might lead to confusion in the context of provocation), preferring instead to say that "the retaliation used by the accused must not be grossly disproportionate to the violence which has constituted the provocation".[145]

It is, clearly, difficult (if not impossible) to impose a requirement of proportionality in cases where the provocation has arisen by infidelity rather than violence. For that reason, juries in infidelity cases were generally directed only to consider whether the accused had lost his or her self-control as a result of the provocation, with no mention of any proportionality requirement.[146] However, in *Drury v HM Advocate*,[147] where provocation by infidelity was claimed, the trial judge did direct the jury that "the retaliation or violence used by the accused must not have been grossly disproportionate to the provocation." On appeal, it was held that this was a misdirection. However, the appeal court did not stop at this point, but engaged in a more detailed rethinking of the plea. The decision in *Drury* therefore forms the basis of the modern law, and the prior case law must be read through the lens of that decision.

3. The test for provocation after *Drury*

Prior to *Drury*, the accepted definition of murder in Scots law was as follows:

> "Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."[148]

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[142] High Court at Glasgow, February 1952, *unreported* (reported on another point 1952 JC 66). See *Drury v HM Advocate* 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [33].

[143] This is quoted as "reasonable relation" by the Lord Justice-General (Rodger) in *Drury*. Lord Justice-General Cooper had previously been quoted as using the phrase "reasonable retaliation" (see Gordon, para 25.19 and previous editions), although the appeal court had earlier noted that the word "relation" should probably be substituted for "retaliation": see *Robertson v HM Advocate* 1994 SLT 1004. It is not clear whether Lord Rodger is correcting an error in the text as quoted in Gordon's *Criminal Law* or emending Lord Cooper's original charge.

[144] *Lennon v HM Advocate* 1991 SCCR 611.

[145] *Robertson v HM Advocate* 1994 SLT 1004, *per* the Lord Justice-Clerk (Ross) at 1006. See also *Low v HM Advocate* 1994 SLT 277.

[146] See *HM Advocate v Hill* 1941 JC 59; *HM Advocate v McKean* 1997 JC 32.

[147] 2001 SLT 1013.

[148] Macdonald, 89. This definition had been repeatedly approved by the courts: see, e.g., *Brennan v HM Advocate* 1977 JC 38; *Scott v HM Advocate* 1996 SLT 519.

As this definition indicates, there were two recognised forms of *mens rea* for murder: intention and wicked recklessness. According to the *Drury* court, this view is incorrect, and "wickedness" is required for both forms of *mens rea*. In other words, an intention to kill must be a "wicked" intention in order to be sufficient for the crime.

Provocation and other defences to murder (whether full or partial), according to *Drury*, operate by negating wickedness.[149] This aspect of the court's reasoning has been heavily criticised, particularly because it seems to have the logical (but unintended) consequence that mistakes in defence need no longer be based on reasonable grounds, which is contrary to the traditional position in Scots law.[150] That is, however, somewhat incidental to the consequences of *Drury* for the plea of provocation in general.

According to *Drury*, a jury faced with a plea of provocation should first "consider whether, at the time when he killed the deceased, the accused had in fact lost his self control as a result of the preceding provocation."[151] If they are satisfied that he had (or have a reasonable doubt on the point), they should then consider "whether an ordinary man, having been thus provoked, would have been liable to react as he did."[152] The appeal court expresses a conscious preference for the "ordinary" rather than the "reasonable" person as part of this formulation.[153]

The plea of provocation in Scots law, post-*Drury*, therefore demonstrates the tripartite structure which is commonplace in most common-law jurisdictions. There must be:

provocative conduct. This must consist of violence or infidelity.[154] It is probably not necessary that the deceased should have been at fault, although there is scant authority on the point.[155]

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[149] This approach, was not, however taken up in the appeal court's subsequent analysis of diminished responsibility in *Galbraith v HM Advocate (No. 2)* 2002 JC 1.

[150] See J Chalmers, "Collapsing the structure of criminal law" 2001 SLT (News) 241; F Leverick, "Mistake in self-defence after *Drury*" 2002 *Juridical Review* 35. See also MGA Christie, "The coherence of Scots criminal law: some aspects of *Drury v HM Advocate*" 2002 *Juridical Review* 273. There are some dicta in earlier cases (not referred to in *Drury*) which suggest that provocation negates *mens rea*, but it does not appear that the point had actually been argued in any of those cases. See *Hillan v HM Advocate* 1937 JC 53; *Berry v HM Advocate* (1976) SCCR (Supp.) 156, *per* Lord Keith at 157; *Gray v HM Advocate* 1994 SLT 1237, *per* the Lord Justice-Clerk (Ross) at 1243.

[151] 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [34].

[152] 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [34].

[153] 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [24], under reference to *R v Smith (Morgan)* [2001] 1 AC 346. Neither the "reasonable" nor the "ordinary" person had featured significantly in the earlier Scottish cases, the objective limb of the test being expressed by reference to proportionality. It appears that the only case in which such a comparator was invoked is *Berry v HM Advocate* (1976) SCCR (Supp.) 156, where the trial judge referred to the "ordinary average sort of person" in his charge to the jury.

[154] There is nothing in *Drury* which directly calls this restriction into question, although the general tenor of the court's decision might be thought to lend some tacit support to a less restrictive approach. *Cf. McCormack v HM Advocate* 2002 SCCR 765, where the question was raised but not addressed by the court.

a loss of self-control [the subjective limb of the test]. This loss of self-control must have followed immediately on from the provocation;[156] and

the accused's reaction to the provocation must be such as might have been expected from an ordinary person [the objective limb]. In applying the objective limb, the jury may take into account the accused's age and sex, but it is not clear whether the ordinary person may be subjectivized any further. The issue is discussed further below.

This is not particularly dissimilar to the pre-*Drury* test, although the way in which the objective limb of the test is framed has changed significantly (and may still be in a state of flux). It was noted earlier that the Scottish courts had previously required that the accused's reaction was not "grossly disproportionate" to the provocation. Effectively, this meant that there was no objective limb to the test in cases of provocation by infidelity, and the test was purely subjective – had the accused lost his self-control?

The use of the "ordinary man" test removes this lacuna, and it might be assumed that it therefore supplants the older requirement of proportionality. The *Drury* court, however, suggests that the proportionality requirement might continue to exist as a separate, fourth element of the plea in cases of provocation by assault:

> "…we did not in the event hear any substantial argument as to the validity of the requirement, as a matter of law, that in the case of provocation by assault the retaliation should not be grossly disproportionate to the assault constituting the provocation. I accordingly express no view on the point, except to note that, even in England and New Zealand, where there is no requirement that, as a matter of law, the response should be proportionate to the provocation, the nature and degree of the accused's response are nonetheless aspects of the evidence to which the jury can have regard when deciding whether the accused reacted in the way in which an ordinary man would have been liable to react."[157]

The matter is therefore left in some doubt, although as a matter of logic it would seem that, because the earlier authorities laying down a requirement of proportionality have not been overruled, they must remain binding on trial judges.[158] This might be important in a case such as *Robertson v HM Advocate*,[159] where the accused had responded to the deceased's (relatively

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[155] *John Christie* (1733) Hume i, 245 may support this proposition. See also Gordon, para 25.30. *Cf*, however, Hume i, 240, who appears to have found it of significance that the deceased was "guilty of a wrong [and] justly deserved to receive, upon the spot, a severe chastisement of his person".

[156] Hume, i, 247; Alison, *Principles,* 9; *David Peter* (1807) Hume i, 253; *HM Advocate v Hill* 1941 JC 53; *Thomson v HM Advocate* 1986 SLT 281.

[157] 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [35], under reference to *Phillips v The Queen* [1969] 2 AC 130, *per* Lord Diplock at 138C-D; *R v Campbell*, *per* Eichelbaum CJ [1997] 1 NZLR, p26, lines 10-15; *R v Rongonui, per* Elias CJ at [2000] 2 NZLR, pp426, line 24 to 427, line 9, paras 136-138.

[158] J Chalmers, "Collapsing the structure of criminal law", 2001 SLT (News) 241, at 244.

[159] 1994 SLT 1004.

minor) provocation[160] by repeatedly stabbing the accused in a manner which the Crown pathologist considered to indicate "an assailant who had completely lost control of his temper". Because of the requirement of proportionality, the plea could not succeed – but if no such requirement exists, a jury might, at least theoretically, conclude that the ordinary person could have been liable to react in a disproportionate fashion, and thereby accept the plea.

4. Subjectivization of the Ordinary Person

There is very little authority on this point in Scots law, beyond some *dicta* to the effect that a jury may not take into account the fact that an accused's capacity for self-control may have been affected by drink or drugs.[161] This may be because the "ordinary man" did not properly emerge as the objective limb of the provocation test until *Drury*, and a test of proportionality which requires the jury to consider the relationship between the provocation and the response does not obviously lend itself to subjectivization. In *Drury*, it was observed that:

> "Since in the present case it is not said that the appellant had any special characteristics which would have affected the way in which he acted, I do not need to consider how such a test is to be applied in the case of an accused who comes, for instance, from a particular minority ethnic background or who suffers from a particular physical handicap or defect in personality which might have affected his reaction. In other jurisdictions, where matters are regulated by statute, these questions have been hotly debated and they have recently divided the Privy Council, the New Zealand Court of Appeal and the House of Lords. I therefore prefer to express no view on the point, unless and until it arises for discussion."[162]

In the more recent case of *Cochrane v HM Advocate*,[163] it was held that, in considering a plea of coercion (duress), the jury should consider whether the threats made to the accused were such as "would have overcome the resolution of an ordinarily constituted person of the same age and sex" as the accused. The jury could not, therefore, take into account

[160] The provocation was alleged to have arisen "partly by the act of the deceased in laying his hand on the appellant's upper thigh and requesting a kiss, and partly by the assault both by presenting a knife at the appellant with a similar demand for a kiss." See 1994 SLT 1004, at 1006.

[161] *Berry v HM Advocate* (1976) SCCR (Supp.) 156, *per* Lord Keith at 157. See also *HM Advocate v McKean* 1997 JC 32. The jury in the latter case was also directed to take the accused's "general psychological state" into account, but this may have been a reference to her distress at learning of her partner's infidelity rather than to any abnormality of mind. See also *HM Advocate v Robert Smith* (1893) 1 Adam 34, where the accused was found to be suffering from diminished responsibility brought on by cumulative provocation – but because the case could be dealt with as one of diminished responsibility, no question of subjectivization arose.

[162] 2001 SLT 1013, *per* the Lord Justice-General (Rodger) at [29].

[163] 2001 SCCR 655.

evidence from a psychologist that the accused was "on the borderline mentally handicapped range" and a "highly compliant individual". The appeal court upheld the correctness of this decision, but observed (without reaching any conclusive view) that different considerations might apply to the plea of provocation, given that provocation is mitigatory rather than exculpatory in effect.[164]

3. EXCESSIVE FORCE IN SELF-DEFENCE

It is well established that excessive force in self-defence does not operate as a partial defence to murder in Scots law.[165] There is some suggestion in Hume and in the cases of *Hillan v HM Advocate*[166] and *HM Advocate v Kizileviczius*[167] that this might once have been the case but the issue has long since been clarified, initially in *Crawford v HM Advocate*[168] and, later, in *Fenning v HM Advocate*.[169]

There are a number of passages in Hume that suggest that excessive force in self-defence might once have operated as a partial defence or as a factor in mitigation of punishment[170] and the proposition that excessive force in self-defence can reduce what would otherwise have been murder to culpable homicide is explicitly stated in both Alison[171] and Macdonald.[172] The issue was addressed directly in *Hillan*, an appeal against conviction for assault on the ground, among others, that the trial judge misdirected the jury on the issue of excessive force in self-defence. In the course of his judgement, the Lord Justice-Clerk stated of self-defence that the plea:

> " … is subject to the same qualifications as the plea of provocation, with which it often coincides. Thus the attack may afford a complete justification for what the panel has done, or it may reduce the quality of the crime, as, for example, from murder to culpable homicide, where the panel has struck in his own defence but with a measure of violence that cannot be justified".[173]

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[164] See 2001 SCCR 655, *per* the Lord Justice-General (Rodger) at [25].

[165] This is contrary to the view expressed in the House of Lords Select Committee *Report on Murder, Manslaughter and Life Imprisonment* (H.L. Paper (1988-89) No. 78-I). Here, the Committee recommended the establishment of a partial defence of excessive force in self-defence and noted that this would bring the law of England and Wales into line with that of Scotland (paragraph 89). It is difficult to understand why they took this view of Scots law, given that it is contrary to all existing authority.

[166] 1937 JC 53.

[167] 1938 JC 60.

[168] 1950 JC 67.

[169] 1985 JC 76.

[170] See for example, Hume, i, 223, 227. See also the cases of *John Govan* (1710) Hume, i, 227; *John Macmillan* (1690) Hume, i, 227; *Urquhart and Webster* (1685) Hume, i, 228.

[171] Alison, *Principles*, 102.

[172] Macdonald, 131.

[173] At 58.

The notion that excessive force in self-defence can ground a verdict of culpable homicide was followed in *Kizileviczius*, where Lord Jamieson charged the jury on self-defence in the following terms:

> " … if you think the accused, having been put in a position of real danger – danger to his life, that is – used unnecessary violence or continued to use violence after the danger had passed which he was not justified in using, but that he did so in the heat of the moment, with no intention to kill and without thinking of the consequences of what he was doing – if you find that, you would be entitled to find him guilty of the lesser crime of culpable homicide".[174]

If excessive force in self-defence ever was a partial defence in Scots law, however, it was conclusively ruled out in *Crawford*. Here, the Lord Justice-General (Cooper) attributed the idea that self-defence can operate as a partial defence to confusion between the pleas of self-defence and provocation and stated that:

> "Exculpation is always the sole function of the special defence of self-defence. Provocation and self-defence are often coupled in a special defence, and often I fear confused; but provocation is not a special defence and is always available to an accused person without a special plea. The facts relied upon to support a plea of self-defence usually contain a strong element of provocation and the lesser plea may succeed where the greater fails; but when in such a case murder is reduced to culpable homicide, or a person accused of assault is found guilt subject to provocation, it is not the special defence of self-defence which is sustained but the plea of provocation".[175]

Further confirmation came in *Fenning* where, despite *Crawford*, the accused appealed against his conviction for murder on the ground, among others, that the trial judge misdirected the jury by failing to mention the possibility of a verdict of culpable homicide if excessive force was used in self-defence. Lord Cameron once again conclusively ruled out such a possibility, stating that:

> "In so far as Lord Jamieson [the trial judge in *Kizileviczius*] is to be held to have given a direction in law that a plea of self-defence 'might result in a verdict of culpable homicide', that in my opinion was a wrong direction in law and confused two entirely separate matters … If a special defence of self-defence fails, the only proper and competent verdict is one of murder, unless [provocation is established]".[176]

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[174] At 63.

[175] At 69. See also later in his judgement, where the Lord Justice-General comments that the pleas of provocation and self-defence are "not identical but entirely separate and distinct, and that the special defence of self-defence must either result in complete exculpation or be rejected outright" (at 281).

[176] At 80.

The position that excessive force in self-defence cannot ground a verdict of culpable homicide was re-stated more recently in *Low v HM Advocate*.[177]

As a final point, it is worth mentioning that the comments made by the Appeal Court on the definition of murder in *Drury v HM Advocate*[178] do have at least the potential to change Scots law in relation to excessive force in self-defence. In *Drury*, which was a case concerned with the partial defence of provocation,[179] the *mens rea* for murder was defined not simply as an intention to kill but a *wicked* intention to do so, where the term 'wickedness' referred to the absence of any applicable justification or excuse defence, such as self-defence.[180] If murder requires a wicked intention (that is, one which excludes action taken in self-defence), then it is arguable that the accused who honestly believes that he is acting in self-defence, albeit using excessive force, is not acting with wicked intent and will therefore not have the requisite *mens rea* for murder.[181] At worst, this would leave him facing the possibility of a conviction for culpable homicide.

Until a case involving mistaken belief in self-defence arises for decision by the Appeal Court in Scotland, the possibility that *Drury* might have an impact on the law relating to excessive force in self-defence cannot be ruled out conclusively. This does, though, appear to be an unlikely outcome. In the time since it was decided, *Drury* has not proved influential. It was not mentioned at all in two subsequent High Court cases on defences: the *Lord Advocate's Reference (No.1 of 2000)*,[182] which was concerned with necessity, or *Galbraith v HM Advocate (No. 2)*,[183] which was concerned with diminished responsibility. Likewise, it was referred to only in passing by the High Court in *Cochrane v HM Advocate,*[184] which dealt with coercion.

4. PROSECUTORIAL DISCRETION

A final issue that is worth mentioning is the use of prosecutorial discretion in relation to victims of domestic violence who have killed their partners. What is apparent from Scottish case law is that there are remarkably

[177] 1994 SLT 277 at 286. In *Whyte v HM Advocate* 1996 JC 187, however, it was stressed that what constitutes excessive force in self-defence "should not be judged in too fine a balance, having regard to the situation with which the accused was faced at the time" (at 188).

[178] 2001 SLT 1013.

[179] See the earlier section on provocation for detailed discussion of the case.

[180] Per Lord Justice-General (Rodger) at 1016. See also Lord MacKay at 1033; Lord Johnston at 1029 and Lord Nimmo-Smith at 1030.

[181] On this, see Leverick, F., 'Mistake in self-defence after *Drury*' (2002) *Juridical Review* 35 at 40-42 and Chalmers, J., 'Collapsing the structure of criminal law: *Drury v HM Advocate*' 2001 SLT 241.

[182] 2001 JC 143.

[183] 2002 JC 1. *Galbraith* is discussed earlier in this report in the section on diminished responsibility.

[184] 2001 SCCR 655.

few reported Scottish cases of homicide committed by victims of sustained domestic violence. It might be expected that there would be fewer instances of this type of homicide than in England, simply because of the comparative size of the two jurisdictions, but not that there would be an almost complete absence of such cases in the Scottish case reports.

It is suggested here that one reason for this is that such cases are likely to be settled in Scotland by way of plea-bargaining. There is evidence to suggest that, where women have killed their partners against a backdrop of sustained domestic violence, Crown Office is willing to accept a plea of culpable homicide in circumstances that would otherwise amount to murder.[185] In this way, although by no means formally recognised in law, killing in response to sustained domestic violence sometimes operates as an unofficial partial defence to murder in Scotland.[186]

Connelly, writing in 1996, provides several illustrations of this practice, all of which attracted non-custodial sentences.[187] To these might be added some more recent examples. In all of the following cases, the accused had been subjected to a sustained period of domestic violence and had killed in circumstances that, in law, appear to be capable of sustaining a murder conviction.[188] All were initially charged with murder but had pleas of guilty to culpable homicide accepted by the Crown.

In *HM Advocate v Alexander*,[189] the accused stabbed her partner in the heart with a steak knife as he threatened to kill himself. In *Cassidy v HM Advocate*,[190] the accused stabbed her partner in the back as he was running away from her after an argument. In *HM Advocate v Clarke*,[191] the accused struck her partner on the head with a candlestick as he lay sleeping in bed. He had assaulted her earlier in the evening during an argument. In *Houghton v HM Advocate*,[192] the accused stabbed her husband with a fish knife as he pinned her to a wall. She had fetched the knife from the kitchen after an earlier argument. In *HM Advocate v Murray*,[193] the accused stabbed her husband in the chest with a knife she had fetched from the kitchen during an

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[185] See Connelly, C., 'Women who kill violent men' (1996) Juridical Review 215; Forsyth, J., 'When battering has to stop' (1996) *The Scotsman*, June 10th, p.13.

[186] The practice is not confined to cases of domestic violence. Gerald Gordon, writing in the context of the survivors of suicide pacts, notes a tendency in Scotland to reduce murder to culpable homicide whenever there are any mitigating circumstances. See Gordon, G.H., 'Suicide pacts' 1958 SLT (News) 209.

[187] See Connelly, above, at 216.

[188] It should perhaps be said at this point that in at least some of these cases, the facts are taken from newspaper accounts of the case so cannot be relied upon to be entirely accurate.

[189] Unreported, but see The Herald, 'Five years for teenage killer' (1999) *The Herald*, September 15th, p.5.

[190] 1999 GWD 6-301.

[191] Unreported, but see Robertson, J., 'Why there may be a case for compassion after taking a life' (1997) *The Scotsman*, May 26th, p.12.

[192] 1999 GWD 17-789.

[193] Unreported, but see The Herald, 'Disabled woman jailed for killing husband' (2001) *The Herald*, September 29th, p.10.

earlier argument. She stabbed him as he was sitting in a chair. In *HM Advocate v Neil*,[194] the accused stabbed her partner in the chest. He had handed her the knife and said "if you want to stop it [the violence] use this". In *HM Advocate v Wright*,[195] the accused stabbed her husband as he lay in bed. They had argued earlier in the evening, when he had grabbed her by the neck and thrown her to the floor. The sentences imposed ranged from two years' probation in *Wright* to seven years' imprisonment in *Cassidy*.[196]

While undoubtedly beneficial to the individual accused, the practice of dealing with domestic violence related homicides in this way has been criticised as it means such cases rarely reach the courts and thus there is no opportunity for the legal issues involved to be addressed.[197] It also means that the accused is entirely reliant on prosecutorial discretion.

[194] Unreported, but see McWhinnie, A., 'Two years for girl who killed' (2000) *Evening Times*, August 24th, p.1.

[195] Unreported, but see Finlay, D., 'Freedom for woman who stabbed violent boyfriend' (2000) *Daily Mail*, January 7th, p.43.

[196] For further examples, see *HM Advocate v Jean Digney*, unreported, but see Daily Record, 'Judge lets killer wife go home for Christmas' (1994) December 21st, p.5; *HM Advocate v Margaret Lochrie*, unreported but see Forsyth, J., 'When battering has to stop' (1996) *The Scotsman*, June 10th, p.13; *HM Advocate v Davina McAuley*, unreported but see Robertson, J., 'Why there may be a case for compassion after taking a life' (1997) *The Scotsman*, May 26th, p.12; *HM Advocate v Mary Ross*, unreported but see Robertson, above; *HM Advocate v Mary Sim*, unreported but see Robertson, J., 'Abused woman jailed for one year after killing lover' (1996) *The Scotsman*, September 26th, p.9; *HM Advocate v Jacqueline Walker*, unreported, but see Daily Record, 'Fury after killer wife walks free' (1997) September 18th, p.19.

[197] See, for example, Connelly, above, at 216.

APPENDIX F

Paper on Provocation, Diminished Responsibility and the use of Excessive Force in Self-Defence in South African Law

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For the Law Commission of England and Wales Project on 'Partial Defences to Murder'2003

I THE OPTIONS

A number of different approaches to provocation in the criminal law can be detected:

(i) Provocation is not a defence to criminal liability at all, but could be recognised as a factor mitigating the severity of sentence (the attitude of the Roman and Roman-Dutch writers);

(ii) A middle course acknowledging some limited, hybrid form of defence of provocation, confined to murder. An intentional, but provoked, killing can be reduced to manslaughter or culpable homicide (the current English and Canadian approach, now rejected in South African law). The essence of this approach is that provocation is at most a *partial* defence, the reduction from murder to manslaughter or culpable homicide results *despite the existence of intent* and the availability of the partial defence depends upon a subjective inquiry into loss of control and an objective inquiry into whether a reasonable person would also have lost control.
This middle course often exists alongside provision for a finding of diminished responsibility (or diminished capacity), proved on a balance of probabilities by the accused in homicide cases. The plea of diminished responsibility has the dual nature of both a plea in mitigation (hence the onus on the accused) *and* a partial defence. The diminished responsibility inquiry, which includes an investigation into both the accused's ability to appreciate the wrongfulness of his conduct and ability to exercise control over such conduct (and so is wider than the English inquiry into mental illness) allows for a verdict of manslaughter or culpable homicide in cases of abnormality, short of insanity, affecting the accused's mind to a substantial degree.
In England, the concept of diminished responsibility is derived from s 2 of the Homicide Act 1957 and does not include circumstances resulting from hate, anger, jealousy or voluntary intoxication. The successful plea of diminished responsibility in England may be combined with a hospital order or guardianship order under s 37(1) of the Mental Health Act 1983.[1]

[1] See *Card, Cross and Jones Criminal Law* 13ed (1995) by Richard Card 9.32.

The concept of diminished responsibility in Scotland predates the English[2] and has recently been broadened in *Galbraith v Her Majesty's Advocate*[3] to cover mental abnormalities[4] wider than those related to insanity but recognised by the appropriate science and resulting in some recognised abnormality (for instance, depression, sunstroke, epilepsy, brain tumours, head injuries, strokes, hypoglycaemia, or even post-traumatic stress disorder resulting from sexual abuse, as in *Galbraith*). The plea does not cover hate, anger, jealousy, psychopathic personality disorder or voluntary intoxication (as opposed to alcoholism).[5]
Both the existence of partial excuse and the diminished responsibility rules emerged predominantly in response to mandatory sentences;

(iii) A variation of (ii), which acknowledges that provocation is only a partial defence, but nevertheless sees the defence as dependent on absence of proof of an element of intent, has recently emerged in Scots law. In terms of *Her Majesty's Advocate v Drury*,[6] it appears that a conviction of culpable homicide will result on the basis that the 'wicked' element of the intent may be excluded by provocation.[7] The Scots law, however, limits the scope of the availability of provocation as a partial defence to certain circumstances.[8] In English, Scots and South Africa law the classic examples of the successful invocation of the partial excuse rule for killing under provocation have involved antiquated approaches to responses to sexual infidelity, which are in need of reform[9];

(iv) Provocation of sufficient degree can affect criminal liability so leading to a potential complete defence to all types of criminal conduct. It can be a complete defence, in terms of the current South African approach, by (*a*) excluding the voluntariness of conduct, leading to automatism (very rare situation); or (*b*) excluding criminal capacity; or (*c*) excluding intention.[10] The South African law, using the subjectively-assessed capacity inquiry (capacity to appreciate the wrongfulness of conduct and capacity to act in accordance with such appreciation) for both insanity and provocation/emotional stress cases, is presently grappling with the issue of whether the test of capacity is entirely subjective or includes an objective evaluation in provocation/ emotional stress cases. The South African law treats provocation and other forms of emotional stress (non-pathological incapacity) in terms of the same capacity inquiry that pertains to insanity cases but does not cast the onus of proof in non-pathological cases onto the accused.

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[2] *Galbraith v Her Majesty's Advocate* 2001 SCCR 551 from para 22.
[3] Supra.
[4] Although some of the Scottish authorities (the editors of *MacDonald's Criminal Law*) extended the concept of diminished responsibility to include provocation (see *Galbraith* at para 26), the High Court of Justiciary in *Galbraith* did not discuss provocation.
[5] *Galbraith* supra n 2.
[6] *Drury v Her Majesty's Advocate* 2001 SCCR 583.
[7] At paras 17 and 20.
[8] Killing a sexually unfaithful partner or where the accused has been assaulted.
[9] See Lord Hoffmann in *Smith (Morgan)* [2000] 3 WLR 654 at 674F-G and Lord Justice-General Rodger in *Drury* supra (n 6) at para 31. .
[10] In terms of the Canadian case of *R v Campbell* (1977) 38 CCC (2d) 6 at 16 it would appear that provocation might, in principle, serve to exclude intention in crimes other than murder but, in practice, because recklessness may be sufficient fault element for some of these other crimes, there will seldom be a complete acquittal: see Kent Roach *Criminal Law* 2ed (2000) 261.

The concept of ‘diminished responsibility’ in South African law is derived from English law but is in practice restricted to the issue of mitigation of sentence and does not affect verdict.

At some stage or other in the development of the South African rules relating to provocation, the courts have in fact flirted with virtually the full spectrum of apparent solutions to the dilemma.

One solution regarding the defence of provocation, which understandably has not openly been countenanced, at least in the context of the defence of provocation as opposed to diminished responsibility, is tampering with the sacrosanct presumption of innocence by shifting the onus onto the accused.[11]

II THE SOUTH AFRICAN BACKGROUND

Roman and Roman-Dutch law did not regard anger, jealousy or other emotions as an excuse for any criminal conduct but only as factors, which might mitigate sentence if these emotions were justified by provocation.

The Rumpff Commission of Inquiry into Responsibility of Mentally Deranged Persons and Related Matters in 1967, although it recommended that an examination of the cognitive (perception) and conative (self-control) functions of the mind be accommodated within the legal test of criminal capacity, did not consider that the affective functions of the mind, which regulate emotions such as hatred, love, and jealousy, should be relevant to criminal liability,[12] as opposed to punishment.

This approach of the Roman and Roman-Dutch law and the advice of the Rumpff Commission were, however, not heeded by the courts, which initially inclined towards

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[11] As an exception to the general rule that the prosecution bears the overall burden to prove the existence of all elements of criminal conduct beyond reasonable doubt, the accused in South Africa is held to bear the burden of proving, on a balance of probabilities, insanity. This exception is of dubious constitutional validity (impairing the presumption of innocence) but has been endorsed by both the courts and the legislature (s 78(1A) of the Criminal Procedure Act 51 of 1977, inserted by s 5(*b*) of Act 68 of 1998). Section 78(1B) of the Criminal Procedure Act, also inserted by the same section of Act 68 of 1998 and which came into operation on 28 February 2002, states that '[w]henever the criminal responsibility of an accused with reference to the commission of an act or omission which constitutes an offence is in issue, the burden of proof with reference to criminal responsibility of the accused shall be on the party who raises the issue'. If taken out of context, this loosely-worded section could be invoked to argue that the legislature has, in fact, shifted the onus of proving lack of criminal responsibility (ie incapacity) onto the accused, not only in cases where *insanity* is raised by the accused as a defence but also in cases where *non-pathological* incapacity is raised as a defence. This conclusion, it is submitted, is not justified. The amending legislation is clearly designed to regulate matters relating to *pathological* mental conditions not *non-pathological* conditions, and, furthermore, the original portion of s 78(1), which still stands, patently uses the phrase 'criminally responsible' in the context of *insanity*. It would be extravagant, and involve an infringement of the fundamental presumption of innocence to contend that the legislature intended to override, impliedly and in one loosely-worded phrase, decades of judicial precedent supporting placing no more than an evidential burden on an accused who raises non-pathological incapacity as a defence.

[12] Similar sentiments seem to be echoed by the words of Lord Justice-General (Rodger) in *Galbraith* supra (n 2): '…the law makes no such allowance for failings and emotions, such as anger and jealousy, to which any normal person may well be subject from time to time. They do not call for the law's compassion. Rather, we must master them or face the consequences' (para 51).

the policy-based partial excuse rule for provoked killings (leading to a middle verdict of culpable homicide).

South African law might well have followed the Roman and Roman-Dutch law had it not been for the introduction of the mandatory death penalty for murder in 1917. Instead, the South African courts initially, under the influence of s 141 of the Transkeian Penal Code of 1886,[13] adopted a position that provocation could never be a complete defence to killing, at most it could be a partial defence: homicide that would otherwise be murder could be reduced to culpable homicide if the person who caused death did so in the heat of passion occasioned by sudden provocation. The decision to reduce murder to culpable homicide depended on an application of the criterion of the ordinary person's power of self-control.

III. PROVOCATION IN A NEW LIGHT

However, the partial excuse rule was ultimately rejected[14] in favour of a new approach which emerged in the last three decades of the 20th Century, when the South African courts acknowledged that evidence of provocation was relevant not only to the existence of intention,[15] but also to a finding of criminal capacity.[16] Under the influence of the nascent, overarching concept of capacity, the courts ultimately accepted that any factor, whether intoxication, provocation or emotional stress, could serve to impair this criminal capacity (assessed essentially subjectively) and lead to an acquittal.

The courts also broadened the concept of provocation to include emotional stress and began to distinguish between the concept of 'non-pathological incapacity' and that of insanity or 'pathological incapacity'.

In three High Court decisions[17] and one Supreme Court of Appeal ruling[18] accused persons charged with murder, who raised defences of non-pathological incapacity, were *completely acquitted*. The acquittal was on the basis that evidence of provocation/emotional stress experienced by the accused persons, at the time of, or before, the killing, led to a conclusion that criminal capacity had not been proved beyond reasonable doubt.

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[13] The Transkeian Penal Code was strongly influenced by the Indictable Offences Bill of Sir James Stephen, which was drafted as a code of English criminal law and the draft code of June 1879 differed little from Stephen's original code. However, neither code was passed into law.

[14] *S v Bailey* 1982 (3) SA 772 (A) at 796 and *S v Mokonto* 1971 (2) SA 319 (A) where Holmes JA stated (obiter) that the Transkeian Penal Code should be confined to the area for which it was passed.

[15] *S v Mokonto* (n 14) at 325 and *R v Thibani* 1949 (4) SA 720 (A) at 731. See also the statement of Lord Justice-General Rodger in the Scottish case of *Drury* supra (n 6) that 'evidence relating to provocation is simply one of the factors which the jury should take into account in performing their general task of determining the accused's state of mind at the time he killed his victim' (at para 17). Scots law, however, does not regard provocation as a complete defence to murder, but rather as at most justifying a conviction of culpable homicide, and confines the defence to provocation to particular instances: provocation by assault and by infidelity.

[16] Criminal capacity is defined in South African law as the capacity to appreciate the wrongfulness of conduct (the cognitive inquiry) and the capacity to act in accordance with that appreciation (the conative inquiry).

[17] *S v Arnold* 1985 (3) SA 256 (C); *S v Nursingh* 1995 (2) SACR 331 (D); and *S v Moses* 1996 (1) SACR 701 (C).

[18] *S v Wiid* 1990 (1) SACR 561 (A).

The courts in these cases did not even consider whether a conviction of culpable homicide,[19] based on a deviation from the standard of the reasonable person, would be appropriate because a preliminary finding of subjective capacity would have been required for such a conviction as well.

Under the rejected partial excuse rule a provoked killing could have been *reduced* to culpable homicide. Prior to the development of the subjective capacity concept, a court might also have been able to convict such an accused of culpable homicide, *on the general principles of the common law*, if death although not foreseen was reasonably foreseeable to a person of reasonable fortitude and the accused failed to take reasonable steps to guard against this consequence.

The new attitude to provocation or emotional stress in South Africa was a revolutionary one that afforded the accused a possibility of a complete acquittal if sufficient, compelling evidence adduced in his or her favour could create a reasonable doubt regarding criminal capacity. This approach, whereby a complete acquittal could result from provocation-induced behaviour, has little resonance in Anglo-American jurisprudence and even the South Africa courts were, understandably, not entirely happy with the new direction taken. Some judges cautioned that, if the accused's version of events was unreliable, then the psychiatric or psychological evidence adduced in favour of the defence of non-pathological incapacity, which was inevitably based on the accused's version of events, would also fall to the ground.[20]

Disquiet with the practical effect of providing an accused, who killed his or her provoker, with the possibility of a complete acquittal has lead to two major proposals: Either openly embrace an objective (or normative) assessment of capacity and intention[21] or, at least, resort to the initially objective inquiry implicit in the established, but mercurial, domain of legal inference used to establish proof of subjective capacity.[22] There is a third possible approach (a middle position) that will be pursued later in this paper.

The focal point for revisiting the provocation debate is undoubtedly the influential judgment of Navsa JA in *S v Eadie*,[23] where the Supreme Court of Appeal comprehensively reviewed the jurisprudence on provocation and emotional stress, and indicated that, although the test of capacity might still remain essentially, in principle, subjective the test had to be approached with caution. The Supreme Court of Appeal affirmed the decision of the High Court that the accused could not successfully raise the defence of non-pathological incapacity where he had battered another to death in purported road rage. Both the High Court and the Supreme Court of Appeal in *Eadie* drew a pragmatic distinction between loss of control and loss of temper.

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[19] In South African law the unlawful, negligent killing of another person constitutes culpable homicide. The negligence does not have to reach the standard of gross negligence. Culpable homicide is a substantive crime on its own rather than being a partial excuse on a charge of murder

[20] *S v Potgieter* 1994 (1) SACR 61 (A).

[21] See C R Snyman *Criminal Justice in a New Society* (2003 *Acta Juridica* 1) 1 and below 12 for interpretation (*b*) of *Eadie* infra n23.

[22] See below 7 for interpretation (*a*) of Navsa JA's judgment in *Eadie* infra n23.

[23] *S v Eadie* 2002 (3) SA 719 (SCA).

There can be no doubt that the High Court and the Supreme Court of Appeal in *Eadie* reached the correct conclusion on the facts (finding the accused guilty of murder). However, the central issue is the extent to which the judgment of Navsa JA goes in revising the approach of the courts to provocation as a defence to criminal liability.

IV INTERPRETATIONS OF *EADIE*

It is submitted that there are, in fact, three possible interpretations of the import of this landmark judgment of the Supreme Court of Appeal in *Eadie*:

(*a*) The first interpretation, which it is submitted is the most likely to find resonance in future courts, is entirely compatible with existing precedent on the subjective assessment of capacity, because it focuses only on the accepted process of judicial *inference* of the presence or absence of subjective capacity from an examination of objective facts and circumstances;
(*b)* The second interpretation is more radical and implies a possible restriction of the ambit of the defence of lack of capacity (in particular, in the context of lack of conative capacity) to a situation where automatism is present and, further, involves a *dramatic redefining of the actual subjective criterion of capacity*, shifting the entire test of capacity from a subjective into an objective domain;
(*c*) The third possible interpretation, less radical than (*b*), is that Navsa JA did not replace the entire existing subjective test of capacity with an objective one, in provocation cases, but rather, in fact, succeeded in identifying an essential, qualified objective aspect in an otherwise subjective test of capacity *that had always been lurking there, but had hitherto not been fully recognised by the courts*. This third interpretation of the scope of Navsa JA's judgment would constitute an intermediate position between interpretations (*a*) and (*b*) above and one which could develop the common law without infringing the principle of legality or having to resort to lengthy and unpredictable legislative reform. Although it could co-exist alongside interpretation (*a*), this third interpretation (despite being a plausible one) might not, on its own, evoke the same degree of instant judicial resonance as interpretation (*a*).

(1) *Interpretation (a): Is reasoning by inference the most likely interpretation of Eadie?*

Support for the first interpretation of *Eadie* is based on the following passage, towards the end of Navsa JA's judgment:

> 'I agree that the greater part of the problem lies in the *misapplication of the test* [of capacity]. Part of the problem appears to me to be *a too-ready acceptance of the accused's ipse dixit concerning his state of mind*. It appears to me to be justified *to test the accused's evidence about his state of mind*, not only against his prior and subsequent conduct but also against the court's experience of human behaviour and social interaction. Critics may describe this as principle yielding to policy.[24] In my view it is an acceptable *method for testing the veracity of an accused's evidence about his state of mind* and as a necessary brake to prevent unwarranted extensions of the

[24] This is the corrected wording of judgment in the South African Criminal Law Reports, effected by the corrigenda in (2002) (2) (September) SACR, xiii.

defence'[25][italics supplied].

Later in the judgment, Navsa JA states that, although accused persons will continue to raise the defence of provocation, the 'law, *if properly and consistently applied*, will determine whether that claim is justified'.[26] Quite clearly the judge of appeal was not talking about revising the test of capacity but rather applying it correctly, using permissible inferences from objective facts and circumstances.[27]

As he acknowledged, courts must not too readily accept the accused's own evidence regarding provocation or emotional stress and a court is entitled to draw a legitimate inference, from what 'hundred's of thousands'[28] of other people would have done under the same circumstances (ie looking at objective circumstances). This inference could lead to the court disbelieving the accused when he or she simply says that he or she lacked capacity or acted involuntarily under provocation or emotional stress.[29]

Navsa JA's comprehensive examination of the judicial precedent on provocation also supports the view that the essence of the *Eadie* judgment challenges only those few judgments of the courts in the past where too much deference has been paid to the accused's version of the facts and not enough weight is given to a broader evaluation of this evidence in the light of surrounding circumstances.[30]

The *Eadie* judgment signals a warning that in future the defence of non-pathological incapacity will be scrutinized most carefully. Persons who may in the past have been fortunate enough to be acquitted, in circumstances where they killed someone who had insulted them, will now find the courts ready to evaluate, against objective standards of acceptable behaviour, the evidence adduced by them to support their defence of provocation/emotional stress.

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[25] *S v Eadie* (n 23) at para 64.
[26] *S v Eadie* (n 23) at para 65 (italics supplied).
[27] R Louw (2003) 16 *SACJ* 200-6 acknowledges the possibility that the focal point of the *Eadie* judgment is on inferential reasoning but dismisses this possibility in favour of the view that the judgment is far more radical by introducing objective elements into the test of capacity and equating the second leg of the capacity test with the inquiry into automatism. C R Snyman *Criminal Justice in a New Society* op cit (n 21) does not even consider the possibility that Navsa JA had the process of inferential reasoning in mind in *Eadie*.
[28] *S v Eadie* (n 23) at para 23.
[29] A similar inference could lead to a court disbelieving an accused who, say, alleges that he should be acquitted of raping a woman while he was intoxicated: see *S v Chretien* 1981 (1) SA 1097 (A) at 1104 (where the facts of *R v Bourke* 1916 TPD 303 are re-examined). The issue is essentially one of credibility of the accused's evidence.
[30] For instance, Navsa JA is critical of the fact that, in one of the first instances where a South African court completely acquitted an accused who raised the defence of provocation (*S v Arnold* (n 17)), the judge 'readily accepted' the accused's ipse dixit, and did not give enough weight to his 'focused and goal-directed behaviour before, during and after the event' (at para 46). Although Navsa JA found that the case of *S v Nursingh* (n 17) (a High Court judgment acquitting an accused who had alleged that he had fatally shot his mother and grandparents as a consequence of severe, ongoing emotional stress resulting from sexual abuse) left him with a 'sense of disquiet', he could nevertheless explain the decision in terms of a combination of factors that were 'extreme and unusual' (at para 48). *S v Moses* (n 17) (where an accused was acquitted of killing a gay partner who, after engaging in unprotected anal intercourse with the accused, had announced that he had AIDS) was '[l]ess easy to explain', so Navsa JA stated (at para 49).

Implicit in the judgment of Navsa JA is a distinction between instances of provocation (or, more correctly, emotional stress) that have built up over a period of some time and those instances where a sudden flare-up results from insulting conduct. Naturally, gradual disintegration of powers of self-control is more condonable than a sudden loss of temper. The evidence, adduced by an accused who, as a result of a sudden flare up of temper kills someone, would have to be *sufficiently cogent* to create a reasonable doubt in his favour, before a court would consider acquitting him. Furthermore, the court would be entitled to factor into the sequence of inferential reasoning, leading to its conclusion on the credibility of the accused's evidence, an evaluation of the accused's version against judicial expectations of behaviour.

In terms of *Eadie*, capacity would seem to remain, in principle, subjectively tested but the practical implementation of this test would accommodate the reality that the policy of the law, at least in regard to provoked killings, must be one of reasonable restraint. Navsa JA states explicitly that it is not the test of capacity that is at fault, it is the misapplication of the test that is at fault. It is the 'too-ready acceptance of the accused's *ipse dixit* concerning his state of mind' that is the problem.[31]

It is in the actual process of the *application* of the legal criteria to the facts of the *Eadie* case that we gain the best insight into how objective factors will infiltrate the process. Persons will continue to claim that they lacked capacity as a result of provocation but, so Navsa JA states, the courts will still have to determine whether this claim is justified.[32]

In *Eadie*, and previous cases such as *Henry*[33], *Kensley*[34] and *Kok*[35] the Supreme Court of Appeal has '*in assessing an accused person's evidence about his state of mind*, weighed it against his actions and the surrounding circumstances and considered it against human experience, societal interaction and societal norms'.[36] It is all too easy to focus on the objective norms referred to in this passage and simply conclude that the test of capacity has now been changed from subjective to objective. This would be reading too much into this passage and missing the emphasis in the other passage from the judgment highlighted in italics above. The emphasis of this earlier passage clearly indicates what is in issue. It is the *process of inference*, from what the accused's mental processes ought to have been, to what they in fact were, that is crucial.

Navsa JA explains why he thinks the accused in *Eadie* 'should be held responsible': On the facts, the accused's 'goal-directed and focused behaviour, before, during and after the incident in question as indicating presence of mind' and his intention to be 'violent and destructive'.[37] The judge of appeal's conclusion indicates clearly that the objective

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[31] *S v Eadie* (n 23) at para 64. Rumpff CJ in *S v Chretien* (n 29) at 1105H echoed the same sentiments: 'The problem does not lie so much in the principle to be applied as in the manner in which it is to be applied. If a court should readily accept that an intoxicated person who, for instance, rapes or attempts to rape a woman is not conscious of what he is doing and therefore lacks criminal capacity, and ought to be acquitted, the law would very soon be brought into disrepute'. (in translation) [see above n 27 for the reference to Rumpff CJ's re-analysis of the facts of *R v Bourke*].

[32] *S v Eadie* (n 23) at para 65.

[33] 1999 (1) SACR 13 (SCA).

[34] 1995 (1) SACR 646 (A).

[35] 2001 (2) SACR 106 (SCA).

[36] *S v Eadie* (n 23) at para 45 (Italics supplied).

[37] *S v Eadie* (n 23) at para 66.

standards or societal norms that he invoked throughout his judgment come into play in determining whether the accused's *ipse dixit* is to be believed:

> 'How can we believe him when he says that his directed and planned behaviour was suddenly interrupted by a loss of control over his physical actions when those actions are consistent with the destructive path he set out on when he was admittedly conscious?'[38]

The test of capacity remains subjective, otherwise Navsa JA would have had to specifically over-rule all of the provocation cases since the early 1980s, including not only those cases where the defence of non-pathological incapacity (tested subjectively) succeeded but also those where the defence failed, but the court accepted that, in principle, the defence could, on other facts, have been available. Navsa JA did not specifically over-rule the subjective approach to capacity. In fact, he acknowledged that it was not the principle that was at fault, merely its application. His criticism of *Arnold* and *Moses* was based on the courts' misapplication, in those cases, of the subjective principle of capacity, by placing too much reliance on the *ipse dixit* of the accused. Hence, in Navsa JA's view, the *conclusion* in those cases was suspect, not necessarily the *legal principle* that was applied.

Navsa JA in *Eadie* could not really have been expected to overrule recent, fairly wide-spread judicial authority, including erstwhile Appellate Division precedent, to the effect that criminal capacity is assessed subjectively and that any factor that affects such capacity, whether it be intoxication, provocation or emotional stress, can serve to impair such criminal capacity.[39] The route that the judge of appeal took was entirely acceptable and his emphasis on inferential reasoning would, of course, apply to all other instances where, in fact, any element of criminal liability was disputed.[40]

A realistic way for a court to rein in the application of the purely subjective concept of capacity, short of engaging in overt judicial legislation to make the test objective in nature, would be to fall back on the drawing of legitimate inferences of the presence or absence of subjectively-assessed capacity from objective circumstances.

However, it may be difficult for the courts in future to maintain the bright line between, on the one hand, drawing legitimate, exceptional inferences of individual subjective capacity from objective, general patterns of behaviour, and, on the other hand, judicially converting the current subjective criterion for judging capacity into an objective one.

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[38] *Ibid*. This passage does contain a hint of the *actio libera in causa* rule whereby, if prior voluntary conduct, accompanied by the attendant *mens rea* and leading to the unlawful consequence, exists, then liability can result even if at the time the consequence comes about the conduct is technically involuntary.

[39] Both R Louw (n 27) 200-6 and C R Snyman in *Acta Juridica* op cit (n 21) acknowledge that, if Navsa JA in *Eadie* was in fact introducing *novel* elements of objectivity into the current subjective test of capacity, then this approach would run counter to a considerable body of precedent.

[40] R Louw (n 27) 200-6 refers to the possibility that Navsa JA in *Eadie might* merely have been emphasising the role of objective factors in drawing an inference of capacity, but dismisses this possibility on the basis that Navsa JA acknowledges that critics may describe his approach 'as principle yielding to policy' (at para 64 read with the corrigenda in the September (2002) 2 SACR xii).

At the outset, the state in a criminal trial is assisted by 'the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily'.[41] This is a *general* inference applying to all accused persons and must be distinguished from *specific* inferences drawn from the facts in particular cases.

There are strict limits to the drawing of inferences from the facts. In criminal trials it is trite that the inference can only be drawn if it is consistent with all the proved facts and it is the only reasonable inference that can be drawn on the facts.[42] The facts not only include events and circumstances prior to and at the time of the alleged commission of the crime but also events and circumstances occurring after the alleged commission of the crime.[43]

Inferential reasoning not only incorporates negative inferences being drawn against, but also positive inferences in favour of, the accused. For instance, a court could (as in *Eadie*) draw the inference that criminal capacity had been proved beyond reasonable doubt or it could, on other facts, draw an inference that capacity had been lacking, or not proved by the prosecution beyond reasonable doubt. For instance, in an exceptional case of reacting to persistent and brutal spousal abuse over a fairly lengthy period of time, an inference could more readily be drawn that capacity was lacking or at least not proven beyond reasonable doubt, than would be the case in regard to a person who claimed to have suddenly and unexpectedly flared up and assaulted another who had insulted him.

In determining whether an inference is *reasonable* or not, the court could have regard, not just to the facts of the case, but also to broader issues of the court's expectations or assessment of societal behaviour. Such policy issues could include, on the one hand, the norm that the criminal law requires a person to exercise some control over emotions and temper and, on the other hand, the policy that extreme, sustained emotional stress might, in exceptional circumstances excuse the person who commits unlawful conduct while in such emotional state.

The potential problem with the relentlessly subjective approach to provocation is that it could be interpreted to reverse the appropriate rule so that it becomes—provocation of sufficient degree will exclude capacity but, in exceptional circumstances, it will not. The drawing of legitimate inferences (using objective criteria) helps to place the rule in its true perspective: Every person is presumed to act voluntarily and should control emotions but, *in very special circumstances*, a person who succumbs to persistent emotional abuse might escape liability by leading evidence of non-pathological incapacity or automatism, sufficient to raise a reasonable doubt as to the existence of criminal liability. This evidence would, however, have to be tested, at the outset, against the court's expectations drawn from experience.

Despite the dangers implicit in drawing inferences of subjectively held capacity from the

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[41] *S v Eadie* (n 23) at para 2 and *S v Francis* 1999 (1) SACR 650 (SCA) at 652*g-h*.
[42] *R v Blom* 1939 AD 188 at 202-3. On the difficulties of too readily drawing inferences, see E Cameron's critique of the 'Sharpeville Six' case, (1998) 1 *SACJ* 243ff. See generally on drawing inferences of intention, Jonathan Burchell and John Milton *Principles of Criminal Law* 2ed (1997, revised reprint 2002) 307-8.
[43] *S v Eadie* (n 23) at para 66 and *S v Francis* (n 41).

court's expectations based on experience (for instance, blurring the line between a subjective and objective test and possibly infringing the reasonable certainty required from the principle of legality), this accepted form of judicial reasoning might nevertheless provide the best route for courts genuinely concerned about curbing an unbridled, subjective test of capacity. As always, though, any objective factors taken into account in the process of inferential reasoning must be articulated with reasonable clarity. Inferential reasoning must never become a cloak for hiding the norms of individual judges.

Inferential reasoning from the facts, as opposed to altering the test of capacity to reflect objectivity, allows the court to treat each set of facts on its merits. A court could, therefore, treat every defence in its own special way. For instance, X who kills Y but raises the defence that he genuinely, albeit mistakenly, believed that he was about to be attacked by Y, who had approached him with an upraised baseball bat, might more readily be believed[44] than X who claims he lost control and killed Y, who had insulted him.[45]

Of course, inferential reasoning is resorted to most frequently when there is an absence of direct evidence and a reliance on circumstantial evidence. Evidence of a state of a person's mind or his or her mental capacity is most frequently circumstantial, or not able to be substantiated by direct evidence, apart from that of the person himself or herself. In fact, psychiatric or psychological evidence as to state of mind or criminal capacity is notoriously unreliable, because it is essentially based purely on the accused's *ipse dixit*. Hence, the need for inferential reasoning.

(2) *Interpretation (b): Objective test of capacity?*

(*i*) *The comments of Navsa JA on the overlap between the voluntariness and the capacity inquiry*

A difficult feature of the judgment in *Eadie* is the comment of Navsa JA on the interrelationship between the defences of automatism and lack of capacity. At times the judgment seems to regard the second part of the capacity inquiry (ie the conative inquiry) as equivalent to the inquiry into voluntariness, but ultimately the judge of appeal appears to take the approach that the conative inquiry does, nevertheless, have an independent reason for existence. He admits that he is 'not persuaded' that the second leg of the capacity inquiry 'should fall away'. [46]

It is submitted that this cautious separation of the two tests is warranted because, in essence, the conative inquiry relates to the *capacity* to act voluntarily or rationally and the voluntariness inquiry is focused on whether the accused *actually did* act voluntarily ie control his or her conscious will. A particular person may have the capacity to act voluntarily but fail, in fact, to do so. If a particular person lacks the capacity to act voluntarily in the circumstances of the case, there would seem to be no reason to inquire into whether he or she in fact acted voluntarily because an acquittal on the basis of non-pathological incapacity would result subject, of course, to the

[44] See *S v Joshua* 2003 (1) SACR 1 (SCA) and *S v De Oliveira* 1993 (2) SACR 59 (A).
[45] See Navsa JA's comments on *Moses* and *Gesualdo* in *Eadie* (n 23) at paras 49 and 50.
[46] *S v Eadie* (n 23) at para 57.

possible successful invocation by the prosecution of the *actio libera in causa* rule, where there was *capacity* to act voluntarily and, *in fact***,** there was voluntary conduct at some *prior* time.

Navsa JA in *Eadie* draws attention to the fact that numerous judgments prior to *Eadie* (viz *Potgieter*,[47] *Henry*,[48] *Cunningham*[49] and *Francis*[50]) tend to elide the defences of automatism and non-pathological incapacity.[51] Even specialist psychiatric witnesses might confuse the two defences[52]. He then refers to Louw who also contends that since the second part of the test of capacity (viz the capacity to act in accordance with an appreciation of the wrongfulness of conduct) appears to overlap with the test of voluntariness (viz did the accused have control of his conscious will?) there is no need for the second part of the capacity test. According to Louw, only the first part of the capacity test (viz did the accused have the capacity to appreciate the wrongfulness of his or her conduct?) has independent meaning. Navsa JA then holds that Louw concludes that once an accused has been shown to have capacity he may then go on to raise involuntariness as a defence.

Navsa JA in *Eadie* agrees with Louw 'that there is no distinction between sane automatism and non–pathological incapacity due to emotional stress and provocation'.[53] However, it would be tendentious and incorrect to take this quotation out of its context and conclude that the entire defence of provocation, in its form of lack of capacity as opposed to involuntary conduct, virtually ceases to exist after *Eadie*.[54] Navsa JA explains his *limited* agreement with Louw.[55] The judge of appeal gives an example of someone who acts as an automaton as a result of intense provocation. This person naturally lacks both the voluntariness element of liability *and* the capacity element. In the context of a person who acts involuntarily there is no need to proceed any further in determining liability because such person will inevitably also lack capacity and, incidentally, *mens rea* as well. No-one doubts the all-embracing nature of the defence of automatism that swallows up all other defences. That is why our system of law only allows automatism to succeed in exceptional cases where a compelling foundation has been laid for the defence. It is only in this limited, and self-explanatory sense that Navsa JA agrees with Louw.

The more difficult matter to decide is whether a person who apparently engages in goal-directed conduct, ie appears to act voluntarily, and has the capacity to appreciate the wrongfulness of his or her conduct, in fact also has the capacity to act in accordance with that appreciation? A starving child of 8 years-of-age, who lives in abject poverty, takes a loaf of bread from a café without paying for it. His conduct is apparently purposive (voluntary) and, if he has been told in school that stealing is wrong, his conduct is accompanied by an appreciation of its wrongfulness (the first

[47] *S v Potgieter (*n 20).
[48] *S v Henry* (n 33).
[49] 1996 (1) SACR 631 (A).
[50] *S v Francis* (n 41).
[51] *S v Eadie* (n 23) at para 42.
[52] See Dr Kaliski in *S v Eadie* (n 23) at para 43.
[53] *S v Eadie* (n 23) at para 57.
[54] As does C R Snyman op cit (n 21).
[55] *S v Eadie* (n 23) in the rest of para 57.

part of the capacity test). But, does the child have the ability to act, not only in accordance with his conscious will, also in accordance with the perceived wrongfulness of his conduct? The second part of the capacity test might not be satisfied on these facts as the child may be so driven by hunger so as not to be able to reconcile the voluntariness of his conduct with its wrongfulness or, to put it in the traditional words, he may not be capable of acting in accordance with the perceived wrongfulness of his conduct. Furthermore, this inability of the child to control irrational acts might also be compatible with the conduct of the hypothetical reasonable child, in the same circumstances—an additional normative evaluation that, it is submitted, is implicit in the second part of the capacity formulation.

The above interpretation of Navsa JA's judgment is re-inforced by the sentence in his judgment after his stated concurrence with Louw's views on the apparent oneness of the inquiry into the voluntariness of conduct and the second part of the capacity inquiry. The judge of appeal at this point states: 'I am, however, not persuaded that the second leg of the test expounded in *Laubscher's* case [viz the second leg of the traditional capacity formulation] should fall away'[56] and then later he says: 'Whilst it may be difficult to visualise a situation where one retains the ability to distinguish between right and wrong yet lose the ability to control one's actions it appears notionally possible'.[57]

It is too simplistic to equate the voluntariness aspect of capacity entirely with the second part of the capacity inquiry. At the outset the voluntariness inquiry deals with whether the conduct of the accused was *actually* controlled by the accused's conscious will, while the preliminary inquiry into the second part of the capacity test asks whether the accused had the *capacity* to act voluntarily. In addition, the second part of the capacity test covers more than the subjective capacity of the accused to control his conscious will (ie act voluntarily).[58]

Navsa JA in *Eadie* might be seen as levelling some harsh criticism at the distinction, supported by Snyman, between the voluntariness inquiry and the second leg of the capacity inquiry. The judge of appeal states:

> '[t]he view espoused by Snyman and others, and reflected in some of the decisions of our Courts, that the defence of non-pathological criminal incapacity is distinct from a defence of automatism, followed by an explanation that the former defence is based on loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law. *This approach suggests that someone who gives into temptation may be excused from criminal liability, because he may have been so overcome by the temptation that he lost self control—a variation on the theme: "the devil made me do it".*'[59]

[56] *Ibid*.
[57] *S v Eadie* (n 23) at para 59.
[58] See further below 16.
[59] At para 60 (italics supplied).

However, it is clear from the italicised words in the above passage that Navsa JA's criticism is levelled more at the suggestion that a self-respecting system of law might allow an accused to offer as an excuse for his conduct 'temptation' or the exhortations of the 'devil', than at challenging the theoretical basis of the distinction between the separate inquiries into voluntariness and the second leg of capacity. Surely, it is beyond question that the injunction of every system of criminal law must be to resist 'temptation', or the 'devil' (whoever this entity might be), and to adhere to civilised patterns of behaviour? It is the *criminal law* that sets the standards of normative behaviour that determine the line between innocent and guilty conduct—not the *devil*. This theme will be developed more fully, and in less emotive terms, in the next part of this paper.

(*ii*) *Is the test of capacity now objectively assessed after Eadie?*

Passages in the judgment of Navsa JA in *Eadie* might seem to indicate that certain previous judgments of the courts, such as *Moses*[60] and *Gesualdo*[61], by regarding provocation as a possible excuse, have unacceptably moved our law to a position where provocation is more than just a mitigating factor.[62] Later in Navsa JA's judgment he says that it is

> 'absurd to postulate that succumbing to temptation ["the devil made me do it" reasoning] may excuse one from criminal liability. One has a free choice to succumb to or resist temptation. If one succumbs one must face the responsibility for the consequences.'[63]

These statements, in conjunction with other passages in the judgment that imply a co-incidence between the voluntariness inquiry and the second part of the capacity inquiry, seem to indicate a drastic curtailing, or even abolishing, of the defence of provocation. These passages must, however, be seen in the light of the apparent clear preference for the approach of inferential reasoning suggested in interpretation (*a*) above. Furthermore, it is highly unlikely that the unanimous Supreme Court of Appeal in *Eadie* would have been unmindful of the dramatic consequences of a drastic revision of the test of capacity. Established precedent in both provocation and other cases of alleged non-pathological incapacity would have to be revisited *by implication*—an approach that could have severe implications for the principle of legality by restricting the scope of a defence and so increasing the scope of criminality.

Courts are, however, expected to develop the law in keeping with constitutional norms. Although the Constitution does not tell us anything specific about self-control or lack of it, it does emphasize the need to treat everyone with dignity and respect. It is possible to argue that a change from subjective to objective standards in determining liability, by emphasizing norms of reasonable and level-headed behaviour, could further the respectful treatment of others, especially in limiting the scope of legitimate

[60] *S v Moses* (n 17).
[61] 1997 (2) SACR 68 (W).
[62] *S v Eadie* (n 23) at para 51.
[63] *S v Eadie* (n 23) at para 60.

force permissible against even the 'provoker'. But, the invoking of the constitutional protection of dignity in order to encourage the courts to introduce new elements of objectivity into a hitherto subjective test of capacity could be counterproductive and beg the question. Who is to say that the dignity of the 'provoker' as opposed to the provoked is more worthy of protection and, if both rights are to be balanced, what is the ideal balance? There are dangers in relying on a simplistic resort to constitutional values to introduce objective elements into the test of capacity.

The legislature is arguably a more appropriate forum for addressing this delicate balancing process but it is also not the ideal forum for achieving quick and effective change and accommodating exceptional cases. Relying rather on inferential reasoning by judges, with known limits and articulated policy bases, is possibly a more reliable route than resorting to notoriously lengthy and uncertain legislative reform or even speculative injunctions to the courts to develop the common-law in accordance with vaguely-defined norms in the Constitution.

(3) *Interpretation (c): an existing normative facet of subjective capacity?*

Although interpretation (*a*), it is submitted, is the most instantly defensible approach to Navsa JA's judgment in *Eadie*, there is perhaps one possible way in which the judgment could be seen as having a wider sweep than simply re-affirming the traditional approach to inferential reasoning. Was Navsa JA in *Eadie*, in fact, simply unearthing an objective aspect of the capacity inquiry, *which had always been implicit in the concept of capacity but not until now judicially acknowledged?*

The second part of the capacity test (ie the conative part) involves an inquiry, in essence, into whether the accused could have acted differently?[64] If, *in no circumstances*, could he or she have acted differently, then his or her conduct would inevitably and always be involuntary, or not controlled by the conscious will. Only if there was a *choice* facing the accused, would conative capacity come into play and the capacity inquiry implies a choice.

The test of whether the accused could have acted differently is implicit in the phrase that is sometimes used to describe the conative aspect of capacity—did the accused have the capacity to control *irrational* acts?[65] The determination of the nature of irrational acts must involve a comparison of the accused's conduct against some normative standard. In the case of children, for instance, that standard would naturally have to be that of the reasonable child of more-or-less the same age as the child in question.[66]

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[64] This insight is gleaned from a very perceptive analysis of the lack of capacity defence by V Tadros 'The character of excuse' (2001) 21 *Oxford Journal of Legal Studies* 495.

[65] See the words cited by Jansen JA in *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 400*E-F*.

[66] Jansen JA in *Weber v Santam Versekeringsmaatskappy Bpk* (n 65) says that if a court, in deciding the preliminary inquiry into a child's capacity for fault, is cautious about not placing 'an old head on young shoulders' and is prepared to take account of the fact that some children may act irrationally and forget all they have been taught, then there is no need to adjust the ordinary, adult standard of the reasonable person for assessing negligence (at 400G-H).

It is also sometimes said that the conative part of the capacity inquiry is the capacity to exercise 'judgement' and is not simply based on an inquiry into 'knowledge'.[67] Surely any determination of whether a person could exercise 'judgement' must involve some assessment of a standard or norm, against which to evaluate whether the person in question's capacity to form this ideal judgement has been impaired and whether he or she could, in the circumstances, have exercised this capacity? A court cannot determine whether a person's capacity to exercise such judgement has been impaired solely according to that individual's own faculties for judgement, otherwise capacity would never be found to exist, as each accused (or defendant) would be entitled to argue that any temporary lapse in his or her capacity to form judgement would excuse.

If it is correct to regard the second leg of the capacity inquiry as 'the capacity to act differently' then this inquiry must imply an evaluation of the accused's conduct against some other standard of conduct, extrinsic to the accused himself or herself. In other words, the test of capacity must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused's conduct *in the circumstances* and against the standard of persons falling into a *particular grouping*.

Tadros[68] argues convincingly that, in assessing criminal capacity, we must first determine the reason why the accused could not act differently. If the inability to act differently is 'due to some reprehensible characteristic, but a characteristic that is not rightly the target of the criminal law' then the accused, who so acts, 'isn't worthy of the kind of blame that is particular to criminal liability'.[69] So, for instance, a person who yields, out of cowardice, to the threats of a criminal gang and commits unlawful conduct while under such compulsion might be excused from criminal liability for such conduct. Cowardice is not necessarily the target of the criminal law.[70] However, a driver of a car who kills another driver out of 'road rage' has acted as a result of some reprehensible characteristic that is rightly the target of criminal law. Any system of criminal law must encourage restrained conduct on the roads. Another way of expressing the test is to inquire whether the accused could reasonably be expected, in the circumstances, to have acted differently.

This approach to capacity ensures that all the judicial statements about the subjective nature of the capacity criterion in regard to children, insane, intoxicated and provoked persons do not simply disappear out of the window.

The test is still subjective in the sense that it includes reference to the group of persons to which the accused belongs. So, in the case of children, the conduct of the particular young accused is central, and that person's conduct must be compared to that of a reasonable child within the grouping of children of more-or-less the same age as the accused. The category 'children of more-or-less the same age as the accused' is quite a narrow grouping and so the scope for the element of subjectivity is fairly great. The element of subjectivity is even greater in regard to insane persons where a

[67] See *Weber v Santam Versekeringsmaatskappy Bpk* (n65) (in the context of determining whether a child of 7 years' and two months' age was *culpae capax*).
[68] Tadros (n 64).
[69] Tadros (n 64) 518.
[70] Tadros (n 64) 512.

reasonableness criterion itself is hardly appropriate because it implies a *sane* person. So the test of capacity in insanity cases remains essentially subjective ie *this* person suffering from *this* mental condition.

However, in the case of intoxication or provocation, the subjective test not only takes account of the accused's subjective mental condition but also, in determining the conative aspect of capacity, the court must inquire whether the accused could reasonably be expected to have acted differently. This inquiry accommodates a comparison of the accused's conduct with the societal norms of sobriety and level-headedness. If the reason why the provoked or intoxicated accused cannot act differently is a *blatant* disregard of the values of level-headedness or sobriety enshrined in the criminal law, the defence of lack of capacity should not succeed. If, however, a person, who in normal circumstances would have exercised self-restraint and respected the values of the criminal law, kills the person who has abused her physically and mentally over a lengthy period of time, it might be said that she could not have acted differently due to a characteristic (for instance, fear or depression[71]) that is not rightly the target of the criminal law. The defence of lack of capacity could, in special circumstances, be available to the victim of such long-term abuse.

The only Supreme Court of Appeal case in which an accused, who killed her abusive husband, had been acquitted on the basis that she lacked criminal capacity as a result of the abuse that she had suffered, is *S v Wiid*.[72] However, in this case the accused had, just before shooting her husband several times, been seriously assaulted by him and, in fact, there was some evidence compatible with the conclusion that she might have been concussed. The facts of the case were arguably strong enough to lead to a conclusion that not even the *voluntariness* of her conduct had been proved beyond reasonable doubt.

A conclusion that capacity is, in fact, tested *both subjectively and objectively* would only apparently be incompatible, in the context of recent provocation cases, with the High Court decisions in *Arnold*,[73] *Nursingh*,[74] *Moses*[75] and *Gesualdo*,[76] and these are the very decisions that Navsa JA placed in doubt in *Eadie*. It is submitted that the issue is not only whether the accused persons *in fact* lacked criminal capacity, subjectively assessed. The central matter is whether these accused persons could reasonably be expected to have acted differently, even taking into account the provocation they received or the emotional stress they acted under. For instance, in *Moses*, the accused, who killed his sexual partner in a fit of rage, after the sexual partner had revealed his HIV-positive status, should not have been acquitted as he *could* reasonably have been

[71] Rather than, say, a flagrant disregard for the value of human life.
[72] *S v Wiid* (n 18). It is the common law in South Africa that governs the defences of 'non-pathological incapacity' and 'automatism' in domestic abuse and other circumstances. For legislative measures designed to provide abused persons with further lawful remedies (other than the resort to legitimate selfhelp), see the Domestic Violence Act 116 of 1998, which provides for protection orders against and warrants of arrest of abusers, see infra (n 83).
[73] *S v Arnold* (n17).
[74] *S v Nursingh* (n 17). Although Navsa JA acknowledges that the judgment in *Nursingh* leaves one with a 'sense of disquiet' he regards it as a case with 'extreme and unusual' facts.
[75] *S v Moses* (n 17).
[76] *S v Gesualdo* 1997 (2) SACR 68 (W).

expected to have acted differently. Or, to use the traditional terminology, he had the *capacity* to act in accordance with the appreciation of the wrongfulness of his conduct. It would be timely if the courts were to openly acknowledge this hidden, but nevertheless implicit, normative aspect of the second part of the capacity inquiry.

The *De Blom*[77] rule that knowledge of unlawfulness is required as a part on intention would, however not inevitably require similar re-interpretation because, of course, the *first part* of the capacity test (ie the capacity to appreciate the unlawfulness of conduct) is the appropriate preliminary inquiry that must take place before the court examines whether, in actual fact, the accused *did* possess the required knowledge of unlawfulness. This preliminary inquiry into the *capacity* of the accused to appreciate the unlawfulness of the conduct is naturally purely subjective and has little to do with the second part of the capacity inquiry, which we have defined as the 'capacity to act differently'. Furthermore, in *De Blom* the Appellate Division inferred from the facts that Mrs de Blom's story (that she did not know that the exchange control regulations at the time required her to obtain prior permission to take large sums of money out of the country) was not genuine and, therefore, she possessed, despite her protestations to the contrary, knowledge of the unlawfulness of her conduct.

Just as the *De Blom* rule would not necessarily require re-evaluation, so the attendant rules governing putative defences, based on lack of knowledge of unlawfulness flowing from either a mistake, or ignorance, of fact or of law, would also not inevitably require revisiting. The normative dimension of the second (ie conative) part of the capacity inquiry would not necessarily extend to situations where the first (ie cognitive) part of the capacity inquiry would be in issue or to where the current subjective approach to intention and knowledge of unlawfulness were in contention. Furthermore, the normative dimension would be restricted to those cases where clear norms of self-control, sobriety and reasonable fortitude have received recognition.

V CONCLUDING REMARKS ON PROVOCATION AND EMOTIONAL STRESS AFTER *EADIE*

At the end of the day, the true legal effect of provocation/emotional stress (and possibly also intoxication and even compulsion) might have to be comprehensively addressed by the legislature.[78] But, the legislative route is notoriously long, tortuous and not necessarily the most appropriate in dealing with individual and exceptional cases.

Failing legislative intervention, the judgment in *Eadie* provides courts with a salutary reminder of how the legitimate process of inferential reasoning can help to bring some common sense back into the judicial approach in South Africa to cases where provocation or emotional stress are raised as defences. Incidentally, Rumpff CJ in *Chretien* in 1981 issued the same reminder about the need for appropriate inferential reasoning in intoxication cases.[79] However, this inferential reasoning process contains

[77] 1977 (3) SA 513 (A).
[78] The present author has suggested a possible legislative route in 'Unravelling compulsion draws provocation and intoxication into focus' (2001) 14 *SACJ* 363 at 370.
[79] See above (n 29).

inherent limits and must, of necessity, be cautiously applied by judges so as to avoid judicial policy making.

The *Eadie* judgment did not, and from the point of view of precedent could not have, blatantly introduced hitherto non-existent objective elements into the defence of lack of capacity. No matter how much the judges of appeal, or even academic commentators, may have wanted to introduce such a change in the law, such change could not have been introduced without specifically, rather than merely by implication, over-ruling numerous previous decisions, not only in provocation cases, but also in other areas where capacity was in issue.

If it is considered necessary to go beyond the use of inferential reasoning as a solution to the current excessive pre-occupation with subjectivity,[80] then, it is submitted, the *Eadie* judgment could possibly be interpreted (in the sense proposed in interpretation (*c*) above) to provide such inspiration. Although it is acknowledged that this implicit meaning contained in Navsa JA's words is by no means an inevitable, or necessary, inference from the judge of appeal's *ipsissima verba*, it is submitted that the tenor of the judgment and its language could be read to highlight a facet of the capacity inquiry that would seem to have been there all along, but not apparently visible to judicial or academic eye.

The conative, or second part of the capacity inquiry, rooted as it is in the subjective assessment of capacity of the accused to act in accordance with his or her appreciation of the unlawfulness (or wrongfulness) of conduct inevitably naturally contains an *evaluative or normative* dimension. It would seem that a court can only judge whether an accused had the capacity to control irrational conduct (or, perhaps more accurately, whether he or she could have acted differently) by assessing his or her conduct against a standard outside of the accused's own capacities or capabilities. It would seem to involve a tautology to inquire whether an accused could have acted differently or could have controlled irrational conduct *according to his or her own lights*. Every departure from rational standards of behaviour by the accused would inevitably serve to demonstrate the self-fulfilling prophecy that he or she was, in fact, not capable of controlling irrational conduct and the inevitable result would simply turn on the respective cogency of competing psychological evidence.

If, more accurately, the court first adopted some evaluative yardstick against which to judge the accused's capacity, and then judged his or her actual capacity (or lack of it) against this standard, the answer could well be different. Depending on the facts, the accused's conduct might or might not reveal a lack of conative capacity if the court has first set the standard of rationality or reasonable behaviour and then determined, in the special circumstances facing the accused at that time, whether he was or was not capable, taking into account these pressures, of acting differently from the way he did act. The reason why the accused in fact fails to act differently must be evaluated against objective norms of behaviour to determine whether he could reasonably be expected to have acted differently. In essence, *Eadie* was convicted because he simply lost his temper when he battered the deceased to death - violently loosing one's temper

[80] Highlighted by the present author in 'Criminal Justice at the Crossroads' (2002) 119 *SALJ* 579 at 587-8 and 591-2.

is, a reprehensible characteristic that is, to use Tadros's expression--'rightly a target of the criminal law'.[81]

For instance, a person who knows or foresees the real possibility that he becomes aggressive when he drinks a lot of alcohol, is capable of preventing himself from being placed in circumstances where his aggression might manifest itself. He should simply control his intake of alcohol. If he does get very drunk and in this state is more readily provoked into aggression, causing death to another, a court could adopt either of two approaches to his liability for unlawfully causing the death of the victim:

(i) His prior conduct in starting out on his drinking, well knowing of his propensity to become aggressive when drunk (or foreseeing the real possibility of becoming aggressive when drunk), may be sufficient to show that he engaged in prior voluntary conduct (drinking) accompanied by legal intention (*dolus eventualis*[82]), or at least negligence (*culpa*), in regard to killing someone and that such killing resulted from this prior conduct. Even though he might have been blind drunk and so acting involuntarily at the time of the killing, he is, therefore, at least guilty of culpable homicide (or possibly murder depending on his mental state) on the basis of the *actio libera in causa* rule; or

(ii) If, however, at the time of killing the victim, the accused's inebriated conduct was controlled by his conscious will (ie voluntary) and the crucial issue becomes whether, in his drunken state, he had the criminal capacity, the court would be entitled to determine whether the accused could reasonably have acted differently in the circumstances. If he knew of, or foresaw, his propensity to become violent when intoxicated he would have the capacity to act differently from the way he did act and so would possess criminal capacity which, accompanied by his negligent conduct, could lead to the appropriate conviction of culpable homicide. Incidentally, even if the accused had no prior indication of his own propensity for violence when drunk, the court would be entitled to take into account, in setting the normative barrier that his conduct would have to be compared with, that many other people do not get aggressive when drunk. The accused could, therefore, have acted differently and avoided the killing by not drinking. Hence the accused had the requisite capacity and, as a reasonable sober person would not have acted as he did, he will be adjudged guilty of culpable homicide.

The same conclusions as in predicaments (*i*) and (*ii*) above could be reached where intoxication was not present. For instance, a sober accused, nevertheless knowing that he is particularly hot-headed and prone to violence when provoked, who places himself in a situation where he could well become provoked to violence, could be treated in the same way as the person who knows that he becomes violent when drunk.

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[81] Tadros (n 64) 518.

[82] The concept of *dolus eventualis*, in essence, involves foresight of the real possibility that the prohibited consequence might occur, in substantially the same manner in which it actually does occur, or the prohibited circumstance might exist, and accepts this possibility in to the bargain (ie is reckless as regards this possibility): see Burchell and Milton op cit (n 42) at 306. The concept of *dolus eventualis* has distinct similarities to the concept of subjective recklessness in English law.

Furthermore, as the *Eadie* judgment reveals, even an accused who, not necessarily aware of any propensity to hot-headedness, kills another in a situation of road rage, will have to have his conduct judicially measured against the standards of behaviour of level-headed members of society generally. The court would always be entitled to draw legitimate inferences regarding the accused's capacity and/or mental state from the objective circumstances of the case.

The normative standard by which the accused's criminal capacity is judged in the context of provocation cases would undoubtedly engage the norm of *level-headedness* and, in the context of intoxication, the norm of *sobriety*. In the context of compulsion the norm of *reasonable fortitude* could, similarly, come into play. It would be extremely difficult to envisage a court departing from these policy norms and regarding the defences of provocation, intoxication or compulsion as leading to complete acquittals on grounds of lack of capacity. In most instances where these defences are raised in the context of, say, homicide, the capacity element will be found to be present, either directly or by inference, and so the next inquiry into fault can then legitimately be made. Depending on *mens rea*, the accused in a homicide case could be found guilty of murder, where subjective intention and knowledge of unlawfulness is proved or inferred, or where intention or knowledge of unlawfulness is not so proved or inferred, a conviction of culpable homicide could be entered if negligence in regard to the death, tested objectively, could be established or inferred. It is also important to bear in mind that, in South Africa, subjective foresight of the real possibility of death resulting from one's conduct, including knowledge of unlawfulness, and nevertheless proceeding with such conduct would be sufficient to establish the mens rea for murder. Objective foreseeability of death plus failure to take reasonable steps to guard against this possibility (ie negligence) would satisfy the fault element for culpable homicide.

In this way, a similar middle course to that of the English law finding of voluntary manslaughter as a result of provocation could be achieved, without compromising any general principle of South African law. However, at the end of the day, unlike the English law, a scintilla of a possibility will exist in South Africa that an accused, who raises lack of capacity resulting from provocation (or emotional stress) in a predicament of *extremely severe* provocation (or emotional stress), probably extending over a lengthy period of time, could be completely excused from liability on the basis of lack of capacity, provided a *reasonable person in his or her position or group* would have acted in the same way as the accused did ie the accused could not reasonably have been expected to have acted differently.[83] In this way the essential

[83] It would seem that 'diminished responsibility' in Scotland, even though it has recently been broadened in *Galbraith v Her Majesty's Advocate* 2001 SCCR 551 to cover mental abnormalities wider than those related to insanity but recognised by the appropriate science (for instance, depression or even post-traumatic stress disorder resulting from sexual abuse, as in *Galbraith*), could at best for the accused lead to a conviction of culpable homicide rather than murder. It would also seem that the accused seeking to rely on diminished responsibility in the Scots law would have to establish the plea on a balance of probabilities. Despite these differences, the formulation of the High Court of Justiciary's instruction to the jury in *Galbraith* bears a distinct similarity to the approach suggested in this chapter as appropriate for a judge to take in South African law: '…the jury should be told that they must be satisfied that, by reason of the abnormality of mind in question, the ability of the accused, as compared with a normal person, to determine or control his actings was substantially impaired' (para 54). The Domestic Violence Act 116 of 1998, which came into operation in South Africa on 15 December 1999, contains provisions for the issuing of protection

merit of the German concept of ‘excuse’ could enter the criminal law without the need for legislative intervention.

Unlike some systems of law that do not allow provocation to be a defence to assault, the South African law would not, in principle, rule out such a defence although, in practice, most cases of provoked assaults will lead to the conclusion that capacity and intention to apply force will be present. In fact, the provocation received will often heighten the intention to apply force to the provoker and may even serve to confirm the intention to kill, so provocation will only excuse in most exceptional of circumstances.

The restrictions imposed by the principle of legality on judicial expansion of the common-law definitions of the scope of criminality, without reference to Constitutional imperatives, would not be threatened by the approach to provocation suggested above. The objective, evaluative dimension to the subjective test of capacity in South Africa was *always implicit* in the test and not judicially invented. It merely required an observant court to identify the already *pre-existing* normative aspect [84]of the test of capacity.

VI DIMINISHED RESPONSIBILITY

Section 2 of the Homicide Act 1957 introduced the defence of diminished responsibility in cases of murder, the accused being found guilty of manslaughter where he was suffering from mental abnormality, short of legal insanity, which substantially impaired his mental responsibility.[85]

A concept of diminished responsibility, adopted in the South African law, has been used to cover an accused’s mental condition, which although abnormal, did not satisfy the requirements of the defence of insanity. In essence, the accused suffering from diminished responsibility would receive a *lesser punishment*. It has been said that the mental condition, short of insanity, could be evidence leading to the conclusion that the accused’s ability to form intention was impaired and he could not merely be sentenced more leniently but also receive a lesser verdict, which is competent in terms of chapter 26 of the Criminal Procedure Act.[86] In this way, an accused, suffering a mental impairment short of clinical insanity, which impairs his ability to foresee his conduct leading to the death of the victim, could be found guilty of culpable homicide. This verdict would be entered only after a finding of lack of intent to kill and the presence of negligence in regard to death resulting. (In terms of South African law the negligence regarding death

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orders, arrests of those reasonably suspected of domestic violence and other measures designed to assist victims of domestic violence. The Act contains detailed definitions of domestic violence, economic abuse and harassment. However, it is the common law, rather than the Domestic Violence Act that governs the criminal defence of emotional stress.

[84] This chapter does not purport to venture into the murky waters of determining the precise list of factors that are relevant to the 'reasonableness' or 'normative' inquiry. See, for instance, the debate in the current English law regarding the appropriate characteristics, relevant not only to the gravity of provocation but also to the standard of self-control, that can be taken into account in assessing the reasonableness of behaviour and the role of the jury in such assessment: *R v Smith* [2000] 4 All ER 289 (HL).

[85] The concept emerged earlier in Scots law: *H M Advocate v Alexander Dingwall* (1867) 5 Irvine 466.

[86] Act 51 of 1977.

does not have to be 'gross' to give rise to criminal liability for culpable homicide.) In other words, this entering of a lesser verdict would be based upon an application of general principles of mens rea not on an automatic reduction to the lesser offence once the elements of provocation were present, which would seem to be the essence of s 2 of the Homicide Act.

Prior to the Rumpff Commission's Report[87] in South Africa, a finding of diminished responsibility was reached in cases where the accused was found to be a psychopath[88], suffering from epilepsy and any other mental deficiency, which did not amount to insanity.

The Rumpff Commission recommended that insanity in the law be tested by the criterion of capacity (ie the capacity to appreciate the wrongfulness of conduct and the capacity to act in accordance with that appreciation) and this criterion for determining insanity was subsequently incorporated into s78(1) of the Criminal Procedure Act.[89] This provision stipulates that the accused will be found not responsible on the grounds of mental illness or mental defect if he or she is *incapable* of appreciating the wrongfulness of his conduct or of acting in accordance with that appreciation.

The Rumpff Commission also recommended that 'the principle of diminished responsibility as accepted in South African law be maintained'. This recommendation was also enshrined in s 78(7) of the Criminal Procedure Act, which reads:

> `If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.'

Diminished responsibility is usually[90] the finding in cases of mental deficiency[91] that does not amount to legal insanity. In deciding whether a finding of diminished responsibility is justified[92] `the court will be guided by the specialist medical evidence, but will also take all the other evidence into account.'[93]

The concept of diminished responsibility appears not to be frequently invoked in practice and this is probably attributable to the fact that the concept of incapacity has been given a broad meaning and applies to both pathological incapacity (insanity) and non-

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[87] See above 3.
[88] Now no longer a term that is used in the criminal law: see Jonathan Burchell *Principles of Criminal Law* 2ed (1997, revised reprint 2002) 248-50.
[89] 51 of 1977.
[90] *S v McBride* 1979 (4) SA 313 (W) at 319–20, 323B-E.
[91] For example, *R v Hugo* 19l0 WLD 285; *R v Molehane* 1942 GWL 64; *R v Anderson* 1956 (4) SA 756 (A); *S v De Boer* 1968 (4) SA 866 (A); *S v Makete* 1971 (4) SA 214 (T); *S v Loubscher* 1979 (3) SA 49 (A) at 60.
[92] And if so, whether in a case of murder, the death penalty should or should not be imposed: *R v Nell* 1968 (2) SA 576 (A) at 580. The death penalty has, however, been abolished in South Africa: *S v Makwanyane* 1995 (3) SA 391 (CC).
[93] *McBride* supra n 90 at 320G.

pathological incapacity (conditions short of insanity affecting the accused's capacity, for instance, provocation, emotional stress, epilepsy etc).

Furthermore, the Supreme Court of Appeal[94] and Constitutional Court[95] have re-asserted scope for a broad judicial discretion in sentencing even in the face of minimum sentence legislation.

There would appear to be little need for a plea of diminished responsibility as a mitigation in sentence or even to reduce murder to culpable homicide in South Africa because the general defence of absence of capacity, whether the cause of incapacity is youthfulness, insanity, self-induced intoxication,[96] provocation or emotional stress, and the judicial discretion in interpreting 'substantial and compelling reasons' for departing from a minimum sentence prescribed by legislation, provide the broad framework for dealing with both pathological and non-pathological conditions.

There is a striking similarity between the South Africa concept of criminal capacity (which is derived to some extent from the Roman law and German inspiration) and the test for determining diminished responsibility in the English and Scottish law. The definition of 'abnormality of the mind' for determining diminished responsibility set out in the Court of Criminal Appeal in *R v Byrne*[97] contains the essence of the South African test of capacity in the following words:

> 'It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment.'

Lord Justice-General Rodger in the High Court of Justiciary in *Galbraith* also expressed himself in terms markedly similar to the South African concept of capacity in defining diminished responsibility:

> 'In essence, the jury should be told that they must be satisfied that, by reason of the abnormality of mind in question, the ability of the accused as compared with a normal person, to determine or control his actings was substantially impaired.'[98]

Not only does this test of diminished responsibility in *Galbraith* reflect the South African concept of capacity, it also includes a vital *objective* evaluation of capacity, which is argued for in this paper. It is argued that especially the ability to control one's acts should be determined according to standards of reasonableness.

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[94] *S v Malgas* 2001 (1) SACR 469 (SCA).
[95] *S v Dodo* 2001 (1) SACR 594 (CC).
[96] There is a statutory provision in South Africa that punishes the commission of prohibited conduct while the accused's criminal capacity is impaired by intoxication: s 1(1) of the Criminal Law Amendment Act 1of 1988.
[97] [1960] 2 QB 396 at 403.
[98] Supra n 83 at 52.8.

Could it simply be argued that the current doctrine of diminished responsibility in Scotland and England is equivalent to the South African rule regarding non-pathological incapacity and we could then, like Fletcher, call the rule diminished 'capacity'.[99] This conclusion would be all too beguilingly simple. The rule of diminished responsibility is essentially a rule in mitigation of sentence, casting an onus of proof on the accused, rather than a defence, which would place, at most, an evidential burden on the accused. In so far as diminished responsibility might be seen as a type of defence, it reflects only a *partial* defence, confined to a reduction of murder to manslaughter or culpable homicide. If the diminished responsibility rule is to do the work of a defence of lack of capacity it must be severed from its links with partial excuse and the onus of proof must be placed back where it should be, according to the presumption of innocence, on the state, not the accused.

VII **RECOMMENDATION 1**

In the terms of the Law Commission's parameters of review I would, therefore, recommend the abolition of the concept of a *partial* defence to murder; The re-formulation of a new defence of 'diminished capacity', combining certain aspects of the existing law in the United Kingdom on the subject of provocation and diminished responsibility. The basis of the new defence of 'diminished capacity' could include the current test for determining diminished responsibility as set out in *Byrne*[100] and *Galbraith*[101]. This test (the capacity or ability to appreciate the wrongfulness of conduct and the capacity or ability to act in accordance with that appreciation) would include an evaluation of the evidence of lack of capacity, from whatever cause, against the standard of the reasonable self-control.

There would be no need to list, in advance, all the forms of evidence that would be relevant to the inquiry into capacity. But, at the outset, the new defence would only provide a complete defence in very special circumstances, which might include both provocation and emotional stress cases. In the light of precedent in South Africa and the United Kingdom, the mere loss of temper or rage would not be enough to invoke this defence. However, in very special cases (for instance, involving prolonged domestic abuse giving rise to a recognised form of depression or syndrome) a complete defence, even to manslaughter, might be available.

A central part of the 'provocation doctrine' as it now stands in the United Kingdom could profitably be retained as part of this new defence of diminished capacity. The High Court of Justiciary in *Galbraith* has already acknowledged the crucial need for an objective evaluation of diminished responsibility. Therefore, the jurisprudence in the United Kingdom on what qualities must be attributed to the reasonable person could remain useful—but as part of a defence of diminished or lack of capacity.

The approach of the Scottish High Court of Judiciary in *Drury* of regarding provocation as a factor affecting *intention* could also provide the beacon for the further development of the English law on provocation. Emotional stress of

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[99] George P Fletcher *Rethinking Criminal Law* (1978) para 4.2.2.
[100] Supra n 97.
[101] Supra n 83.

insufficient degree to exclude capacity might nevertheless, in special circumstances, be sufficient to exclude intention or recklessness, in its subjective or even objective sense.

The interpretation of the judgment of the South African Supreme Court of Appeal in *S v Eadie*[102] suggested in this paper could provide useful guidance for an United Kingdom court assessing evidence on, and the effect of, provocation or emotional stress as a defence.

It is suggested below that a defence of putative self- (or private-) defence, affecting the fault element of liability, might also provide an additional way of dealing justly and fairly with persons who react violently to prolonged physical or psychological abuse.

The advantage of this suggested approach would be to introduce a more principled and fair way of dealing with provocation and emotional stress cases, especially those involving domestic abuse over a prolonged period. It would also be an approach that would retain enough of what is good in the current jurisprudence. It would also encourage a synergy between the United Kingdom and South African approach.

A possible by-product of the recommended solution is that it might have a ripple effect on the law relating to insanity. There is much merit in including not merely irresistible impulse cases but also gradual disintegration of the ability to act in accordance with the appreciation of the wrongfulness of conduct (ie inability to control one's conduct) as a result of mental illness, into the fold of the defence of insanity (as is done in South Africa[103]).
A further by-product of the recommended solution might be a more defensible analogy for cases of voluntary intoxication than the current specific intent rule, which contains elements of a 'partial excuse' rule.

VIII PUTATIVE PRIVATE DEFENCE[104] AND EXCEEDING THE BOUNDS OF PRIVATE DEFENCE

(i) Putative private defence[105]

In South African law where the accused genuinely believes that a defence excluding unlawfulness exists, whereas it does not, or that he or she is acting within the bounds of a legitimate defence, whereas he or she is exceeding these bounds, then he or she lacks fault (*mens rea*) in the form of intention.[106] If the mistake is reasonable as well as genuine, the accused will not be negligent either. If intention is the fault element for the offence, the mistake will not be defence if the prosecution proves beyond reasonable

[102] Supra n 23.
[103] See *S v Kavin* 1978 (2) SA 731 (W), discussed in Burchell and Milton op cit n 42 at 244.
[104] Self-defence includes defence of a *third party* as well as defence of self and is distinguishable from the use of self-help endorsed by the *state* (for instance, legitimate force used by a police officer in effecting an arrest or apprehending a fleeing suspect). Therefore the term 'private defence' will be used in preference to self-defence.
[105] See especially *S v De Oliviera* 1993 (2) SACR 59 (A), *Van Zyl v S* [1996] 1 All SA 336 (W) and *S v Joshua* 2003 (1) SACR 1 (SCA).
[106] Although putative defence failed on the facts in *S v De Oliviera* supra (n 105), the court drew the distinction between objective self-defence, which affects unlawfulness, and putative self-defence, which affects fault.

doubt that the accused at least foresaw the possibility of the unlawfulness of his or her conduct.[107]

Although, objectively assessed, the circumstances may not indicate that the accused acted lawfully in defence nevertheless the accused may have mistakenly thought his conduct was unlawful,[108] or mistakenly believed that his life was in danger[109] or that he was using reasonable means to avert the attack?[110] In such cases the accused may nevertheless escape liability on the ground that he lacked the intention to act unlawfully.

Thus, in *S v Botes*[111] it was found that the accused persons did not have the necessary intention for assault because, on account of a mistake of fact, they believed they had the right to arrest the complainant. In *S v Mokoena*[112] the accused believed that he was allowed to assault the man trying to rape his daughter.[113]

Since intention is tested subjectively, the question of whether the accused knew he was exceeding the bounds of private defence must be determined by examining the state of mind of the accused himself and especially his perceptions and beliefs relating to the attack and his defence. Thus, if, as the result of a mistake, the accused himself genuinely believed the attack was unlawful, or that his life was in danger, or that he was using reasonable means to avert the attack,[114] he should escape liability for a crime requiring intention on the ground that he did not intend his conduct to be unlawful.

This approach to a mistake as regards a ground of justification is one that is supported by Fletcher in his book *Rethinking Criminal Law*.[115]

In South Africa, where the accused has killed in private defence, the fact that he bona fide believed that he was acting lawfully will not necessarily prevent him from being convicted of culpable homicide. This is because negligence, rather than intention, is the fault element for this crime, with the result that the test of liability is whether a reasonable person would have foreseen that the resort to private defence was not lawful. If the reasonable person would have foreseen this, then the defender was negligent in not foreseeing that his defence was unlawful and thus guilty of culpable homicide.[116]

The mistake involved in a putative private defence situation is most often one of fact[117] (for instance, the accused mistakenly thought she was about to be attacked or that she was acting within the bounds of private defence). This defence can become extremely important for the victim of persistent abuse who might well subjectively, and possibly

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[107] See *S v De Oliveira* supra n 105.
[108] *R v Ntloko* 1912 EDL 402; *R v Schultz* 1942 OPD 56 at 60; *R v Ndara* 1955 (4) SA 182 (A) at 184--5; *S v Botes* 1966 (3) SA 606 (O) at 611; *S v Marshall* 1967 (1) SA 171 (O).
[109] *R v Attwood* 1946 AD 331 at 340; *Hele* 1947 (1) SA 272 (E) at 276; *S v Ngomane* 1979 (3) SA 859 (A).
[110] *R v Tsutso* 1962 (2) SA 666 (SR); *S v Wassenaar* 1966 (2) PH H351 (T); *Ngomane* supra n 109
[111] 1966 (3) SA 606 (O) at 610--11.
[112] 1976 (4) SA 162 (O).
[113] See also *S v Marshall* 1967 (1) SA 171 (O); *R v Tsutso* 1962 (2) SA 666 (SR).
[114] As in *Mokoena* supra n 112.
[115] Op cit n 99 chap 9.
[116] See *S v Ngomane* 1979 (3) SA 859 (A) See also *S v Ntuli* 1975 (1) SA 429 (A) at 436--7.
[117] In terms of *S v De Blom* 1977 (3) SA 513 (A) in South Africa, where the *ignorantia juris* common-law rule was rejected, even a genuine mistake or ignorance of *law* might exclude the knowledge of unlawfulness required for intention and a reasonable mistake will exclude negligence.

even reasonably, believe that in the light of the past abuse she was about to be attacked again. This approach to putative private defence allows the accused's mental state or perception to be factored into the inquiry in terms of general principles of mens rea.

It would seem that an analogous conclusion could apply in England in terms of the approach taken in *Williams*[118] where it was held that mens rea must extend to the unlawfulness of conduct and so a mistaken belief that one is acting in self-defence could exclude intention without having to be reasonable. This position is preferable to the rejected reasoning in *Albert v Lavin*[119] that a mistake relating to a matter of defence, as opposed to a definitional element of an offence had to be reasonable to excuse. It has long been recognized, in South African law, that unlawfulness of conduct is an element of liability and that mens rea must extend to the unlawfulness element.[120]

(ii) Exceeding the bounds of private defence

At one stage of South African law, an accused who exceeded the bounds of reasonable private defence and killed his assailant could be found guilty of culpable homicide despite the fact that the killing was intentional. However, if the killing were immoderate a verdict of murder would be entered.[121] This approach was yet another manifestation of a 'partial excuse' situation and the Appellate Division in 1982[122] rejected the partial excuse predicament as it applied generally in South African law at the time.

The current approach to exceeding the bounds of private defence in South Africa is summarized in *S v Ngomane*[123] in 1979, where the accused had exceeded the bounds of legitimate private defence and killed his assailant. He was not convicted of murder, but rather found guilty of culpable homicide (the unlawful, negligent killing of another person) because 'he ought to have realised that he was acting too precipitately and using excessive force and that, by stabbing the deceased with such a lethal weapon on the upper part of his body, he might unnecessarily kill him…'. The finding of culpable homicide was reached not by invoking a partial excuse rule, but by determining whether according to general principles of mens rea he should be liable for murder or culpable homicide. It is possible that an accused who exceeds the bounds of private defence and kills his assailant could be completely acquitted if his conduct was not accompanied by either intention or negligence.

RECOMMENDATION 2

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[118] (1983) 78 Cr App Rep 276 (CA), *Beckford v R* [1988] AC 130 and Card, Cross and Jones op cit n 1 para 7.30

[119] [1982] AC 546.

[120] See, for instance, the leading case of *S v De Blom* 1977 (3) SA 513 (A) supra nn 77 and 117.

[121] Schreiner JA in *R v Krull* 1959 (3) SA 392 (A) at 399). See E M Burchell and P M A Hunt *South African Criminal Law and Procedure* vol 1 General Principles (1970) 278.

[122] 1982 (3) SA 772 (A) at 798-9. The partial excuse in cases of killing under compulsion was also rejected. It was always possible, though, to convict an accused in a partial-excuse-type situation of culpable homicide if intention, including knowledge of unlawfulness was lacking but a reasonable person in the accused's position would have foreseen and guarded against foreseeable death and the accused did not.

[123] 1979 (3) SA 859 (A).

It is recommended that the Law Commission endorse the approach that a factual mistake as regards the existence of a defence excluding the unlawfulness of the conduct (for instance, putative private defence) should only have to be genuine (bona fide) to exclude intention and that the reasonableness of the mistake should be relevant only in regard to lesser forms of mens rea, based on objective criteria.

It is further recommended that the Law Commission not adopt a partial excuse rule relating to exceeding the bounds of self-defence but rather determine liability in such a predicament on the basis of general principles of mens rea ie assessing whether, in fact, there is the relevant intention, recklessness or negligence for the particular crime charged.

Professor Jonathan Burchell
21 August 2003

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CLAUSE 59

RELEVANT STATUTORY PROVISIONS AND PROPOSED PROVISIONS

PROVOCATION

Australia

Australian Capital Territory

1. Section 13 of the Crimes Act 1900:

(1) Where, on a trial for murder:

(a) it appears that the act or omission causing death occurred under provocation; and

(b) but for this subsection and the provocation, the jury would have found the accused guilty of murder; the jury shall acquit the accused of murder and find him or her guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death shall be taken to have occurred under provocation where:

(a) the act or omission was the result of the accused's loss of self-control induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

(b) the conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control:

(i) as to have formed an intent to kill the deceased; or

(ii) as to be recklessly indifferent to the probability of causing the deceased's death; whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death occurred under provocation, there is no rule of law that provocation is negatived if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;

(b) the act or omission causing death did not occur suddenly; or

(c) the act or omission causing death occurred with any intent to take life or inflict grievous bodily harm.

(4) Where, on a trial for murder, there is evidence that the act or omission causing death occurred under provocation, the onus of proving beyond

reasonable doubt that the act or omission did not occur under provocation lies on the prosecution.

(5) This section does not exclude or limit any defence to a charge of murder.

New South Wales

2. Section 23 of the Crimes Act 1900:

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused, and

(b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission,

(b) the act or omission causing death was not an act done or omitted suddenly, or

(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

(4) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(5) This section does not exclude or limit any defence to a charge of murder.

3. Amended section 23 proposed by the New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide: Report 83* (1997):

(1) A person who would otherwise be guilty of murder shall not be guilty of murder and shall be guilty of manslaughter if that person committed the act or omission causing death under provocation.

(2) For the purpose of subsection (1), a person commits an act or omission causing death under provocation if:

(a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by:

(i) the conduct; or

(ii) a belief of the accused (based on reasonable grounds) as to the existence of the conduct;

of someone towards or affecting the accused, in circumstances where the accused kills:

(iii) the person who offered the provocation; or

(iv) the person believed on reasonable grounds to have offered the provocation; or

(v) a third party when attempting to kill or to injure the person who offered or was believed on reasonable grounds to have offered the provocation; and

(b) the accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.

(c) For the purpose of subsection 2(a), "conduct" includes grossly insulting words or gestures.

(3) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if:

(a) the conduct of the deceased or of any other person did not occur immediately before the act or omission causing death;

(b) the conduct of the deceased or of any other person did not occur in the presence of the accused;

(c) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased or of any other person that induced the act or omission;

(d) the act or omission causing death was not an act done or omitted suddenly;

(e) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm; or

(f) the conduct of the deceased or of any other person was lawful.

(4) Where a person is intoxicated at the time of the act or omission causing death, and the intoxication is self-induced, loss of self-control caused by that intoxication or resulting from a mistaken belief occasioned by that intoxication is to be disregarded.

"Self-induced intoxication" in this subsection has the same meaning as it does in s 428A (of the *Crimes Act 1900*).

(5) For the purpose of subsection (1), a person does not commit an act or omission causing death under provocation if that person provoked the deceased or any other person with a premeditated intention to kill or to inflict grievous bodily harm or with foresight of the likelihood of killing any person in response to the expected retaliation of the deceased or of any other person.

(6) Where, on the trial of a person for murder, there is any evidence that the act causing death was an act done or omitted under provocation as provided by subsection (2), the onus is on the prosecution to prove beyond reasonable doubt that the act or omission causing death was not an act done or omitted under provocation.

(7) This section does not exclude or limit any defence to a charge of murder, with the exception that no claim to the defence of provocation shall lie other than as provided by this section.

Northern Territory

4. Section 34 of the Criminal Code:

(1) …

(2) When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided –

(a) he had not incited the provocation;

(b) he was deprived by the provocation of the power of self-control;

(c) he acted on the sudden and before there was time for his passion to cool; and

(d) an ordinary person similarly circumstanced would have acted in the same or a similar way.

Queensland

5. Section 304 of the Criminal Code in the Criminal Code Act 1899:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder,

does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

Western Australia

6. Section 281 of the Criminal Code:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.

7. Section 245:

> The term "provocation" used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control, and to induce him to assault the person by whom the act or insult is done or offered.
>
> When such an act or insult is done or offered by one person to another, or in the presence of another, to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
>
> A lawful act is not provocation to any person for an assault.
>
> An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
>
> An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

Canada

8. Section 232 of the Criminal Code:

> (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> (3) For the purposes of this section, the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

India

9. Exception 1 to section 300 of the Indian Penal Code:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos:-
>
> First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.
>
> Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.
>
> Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defence.

New Zealand

10. Section 169 of the Crimes Act 1961:

(1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who caused the death did so under provocation.

(2) Anything done or said may be provocation if—

(a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and

(b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

(3) Whether there is any evidence of provocation is a question of law.

(4) Whether, if there is evidence of provocation, the provocation was sufficient as aforesaid, and whether it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide, are questions of fact.

(5) No one shall be held to give provocation to another by lawfully exercising any power conferred by law, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

(6) This section shall apply in any case where the provocation was given by the person killed, and also in any case where the offender, under provocation given by one person, by accident or mistake killed another person.

(7) The fact that by virtue of this section one party to a homicide has not been or is not liable to be convicted of murder shall not affect the question whether the homicide amounted to murder in the case of any other party to it.

Professor Yeo's proposal

11. The model contained in S Yeo, *Unrestrained Killings and the Law* (1998):

(1) Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the trier of fact would have found the accused guilty, the trier of fact shall acquit the accused of murder and find the accused guilty of culpable homicide not amounting to murder.

(2) For the purposes of subsection (1), an act or omission causing death is an act done or omitted under provocation where–

(a) the act or omission is the result of a loss of self-control on the part of the accused to such an extent that the accused formed an intent to kill, an intent to cause bodily injury which is sufficient in the ordinary course of nature to cause death or an intent to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(b) the act or omission was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and

(c) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have become enraged and to have performed the same or similar act or omission as the accused did;

whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

(3) For the purpose of subsection (2)(c), when assessing whether such an ordinary person might have become enraged, the ordinary person may be invested with–

(a) any of the accused's characteristics which affect the gravity of the provocation; and

(b) the accused's age, ethnic, cultural and social background.

(4) For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation as provided by subsection (2), there is no rule of law that provocation is negatived if–

(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;

(b) the act or omission causing death was not an act done or omitted suddenly;

(c) the provocation constituted a report on the conduct of the deceased to the accused provided that the report engendered a reasonable belief that such conduct had occurred.

(5) For the purpose of subsection (1), any conduct of the deceased which induced the accused to lose self-control cannot be taken into account if–

(a) such conduct was sought by the accused as an excuse to kill or cause harm to the deceased or any other person;

(b) such conduct was a reasonably predictable result of the accused's own conduct;

(c) such conduct was performed in the lawful exercise of a public duty or in obedience to law;

(d) such conduct was performed in the lawful exercise of defence of person or property.[1]

Draft Criminal Code for England and Wales 1989

12. Clause 58 of the Draft Criminal Code for England and Wales 1989:

A person who, but for this section, would be guilty of murder is not guilty of murder if –

(a) he acts when provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and

[1] SYeo, *Unrestrained Killings and the Law* (1998) p 177–199.

(b) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control.[2]

DIMINISHED RESPONSIBILITY

Australia

Australian Capital Territory

13. Section 14 of the Crimes Act 1900:

(1) A person on trial for murder shall not be convicted of murder if, when the act or omission causing death occurred, the accused was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent cause or whether it was induced by disease or injury) that substantially impaired his or her mental responsibility for the act or omission.

(2) An accused has the onus of proving that he or she is, by virtue of subsection (1), not liable to be convicted of murder.

(3) A person who, but for subsection (1), would be liable (whether as principal or accessory) to be convicted of murder is liable to be convicted of manslaughter.

(4) The fact that a person is, by virtue of subsection (1), not liable to be convicted of murder does not affect the question whether any other person is liable to be convicted of murder in respect of the same death.

(5) Where, on a trial for murder, the accused contends:

(a) that he or she is entitled to be acquitted on the ground that he or she was mentally ill at the time of the act or omission causing the death; or

(b) that he or she is, by virtue of subsection (1), not liable to be convicted of murder; the prosecution may offer evidence tending to prove the other of those contentions and the court may give directions as to the stage of the proceedings at which that evidence may be offered.

New South Wales

14. Section 23A of the Crimes Act 1900:

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if:

[2] A Criminal Code for England and Wales (1989) Law Com No 177, clause 58.

(a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by an abnormality of mind arising from an underlying condition, and

(b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

(5) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder is to be convicted of manslaughter instead.

(6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any is liable to be convicted of murder in respect of that death.

(7) If, on the trial of a person for murder, the person contends:

(a) that the person is entitled to be acquitted on the ground that the person was mentally ill at the time of the acts or omissions causing the death concerned, or

(b) that the person is not liable to be convicted of murder by virtue of this section, evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

(8) In this section:

"underlying condition" means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

15. Recommendation 4 of New South Wales Law Reform Commission:

(1) A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:

(a) understand events; or

(b) judge whether that person's actions were right or wrong; or

(c) control himself or herself,

was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.

"Underlying condition" in this subsection means a pre-existing mental or physiological condition other than of a transitory kind.[3]

Northern Territory

16. Schedule 1, section 37, Criminal Code Act 1983:

> When a person who has unlawfully killed another under circumstances that, but for this section, would have constituted murder, was at the time of doing the act or making the omission that caused death, in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not do the act, make the omission or cause that event, he is excused from criminal responsibility for murder and is guilty of manslaughter only.

Queensland

17. Schedule 1, section 304A Criminal Code Act 1899:

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When 2 or more persons unlawfully kill another, the fact that 1 of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.

[3] New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility: Report 83* (1997), recommendation 4.

Ireland

18. Section 5 Criminal Law (Insanity) Bill 2002:

> (1) Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person –
>
> (a) Committed the act alleged,
>
> (b) Was at the time suffering from a mental disorder, and
>
> (c) The mental disorder was not such as to justify finding him or her guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act,
>
> the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.
>
> (2) Subject to *section 4(4)*, where a person is tried for the offence specified in *subsection (1)*, it shall be for the defence to establish that the person is, by virtue of this section, not liable to be convicted of that offence.

Scotland

19. Section 38 of the Draft Criminal Code for Scotland:

> (1) …
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) A person who, but for this subsection, would be guilty of murder is not guilty of murder, but is guilty of culpable homicide, if at the time of the act leading to the death the person, although not entitled to a complete acquittal under section 27 (Mental disorder), was suffering from an abnormality of mind of such a nature as to diminish substantially the degree of responsibility.
>
> (6) A person cannot take advantage of subsection (5) unless the abnormality of mind giving rise to the diminished responsibility is admitted by the prosecution or proved on a balance of probabilities.

Professor Mackay's proposal

20. "A defendant who would otherwise be guilty of murder is not guilty of murder if, at the time of the commission of the alleged offence his mental functioning was so

aberrant and affected his criminal behaviour to such a substantial degree that the offence ought to be reduced to one of manslaughter".[4]

Butler Report's proposal

21. "Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983, that is, "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"] and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter".[5]

Criminal Law Revision Committee's proposal

22. "Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983] and if, in the opinion of the jury, the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter".[6]

Draft Criminal Code for England and Wales 1989

23. Clause 56 of the Draft Criminal Code for England and Wales 1989:

    (1) A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such mental abnormality as is a substantial enough reason to reduce his offence to manslaughter.

    (2) In this section "mental abnormality" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.

    (3) Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated.[7]

HYBRID PROVISIONS

United States of America

24. Section 210.3 of the Model Penal Code:

    (1) Criminal homicide constitutes manslaughter when:

[4] R D Mackay, "Diminished Responsibility and Mentally Disordered Killers" in Professors A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) 55.

[5] Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244 at para 19.17.

[6] Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980) Cmnd 7844, para 93.

[7] A Criminal Code for England and Wales (1989) Law Com No 177, clause 56.

(a) …

(b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.

Professors Mackay and Mitchell's proposal

25. "A defendant who would otherwise be guilty of murder is not guilty of murder if, the jury considers that at the time of the commission of the offence, he was:

(a) under the influence of extreme emotional disturbance and/or

(b) suffering from unsoundness of mind

either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter.[8]

USE OF EXCESSIVE FORCE IN SELF-DEFENCE

Australia

New South Wales

26. Section 421 of the Crimes Act 1900:

Self-defence – excessive force that inflicts death

(1) This section applies if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

(2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

[8] R D Mackay and B J Mitchell, "Provoking Diminished Responsibility: Two Pleas Merging into One?" Crim LR (forthcoming in November edition).

South Australia

27. Section 15 of the Criminal Law Consolidation Act 1935:

(1) It is a defence to a charge of an offence if

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and

(b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but

(b) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist. [2]

(3) For the purposes of this section, a person acts for a defensive purpose if the person acts

(a) in self defence or in defence of another; or

(b) to prevent or terminate the unlawful imprisonment of himself, herself or another.

(4) However, if a person

(a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or

(b) resists another who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party,

the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.

(5) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

28. Section 15(A) Criminal Law Consolidation Act 1935:

(1) It is a defence to a charge of an offence if

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable

(i) to protect property from unlawful appropriation, destruction, damage or interference; or

(ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or

(iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and

(b) if the conduct resulted in death--the defendant did not intend to cause death nor did the defendant act recklessly realising that the conduct could result in death; and

(c) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist.

(2) It is a partial defence to a charge of murder (reducing the offence to manslaughter) if

(a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable--

(i) to protect property from unlawful appropriation, destruction, damage or interference; or

(ii) to prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or

(iii) to make or assist in the lawful arrest of an offender or alleged offender or a person who is unlawfully at large; and

(b) the defendant did not intend to cause death; but

(c) the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat that the defendant genuinely believed to exist. [2]

(3) For the purposes of this section, a person commits a criminal trespass if the person trespasses on land or premises--

(a) with the intention of committing an offence against a person or property (or both); or

(b) in circumstances where the trespass itself constitutes an offence.

(4) If a defendant raises a defence under this section, the defence is taken to have been established unless the prosecution disproves the defence beyond reasonable doubt.

India

29. Section 300 of the Indian Penal Code, exception 2 to the offence of murder

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.[9]

Criminal Law Revision Committee proposal

30. The Criminal Law Revision Committee recommended:

> We are of the opinion that where a defendant kills in a situation in which it is reasonable for some force to be used in self-defence but he uses excessive force, he should be liable to be convicted of manslaughter and not murder if, at the time of the act, he honestly believed that the force he used was reasonable in the circumstances. Furthermore, where a person has killed using excessive force in the prevention of crime in a situation in which it was reasonable for some force to be used and at the time of the act he honestly believed that the force he used was reasonable in the circumstances, we consider that he should not be convicted of murder but should be liable to be convicted of manslaughter.[10]

Draft Criminal Code for England and Wales 1989

31. Clause 59 of the Draft Criminal Code:

> A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of the force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force in public and private defence), but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.[11]

[9] See Appendix A, S Yeo, para 4.22.

[10] Criminal Law Revision Committee, 14th Report, Offences against the Person (1980) Cmnd 7844, para 288.

[11] A Criminal Code for England and Wales (1989) Law Com No 177, clause 59.