CONSULTATION PAPER

ON

HOMICIDE: THE PLEA OF PROVOCATION

(LRC CP 27-2003)

IRELAND

The Law Reform Commission

35-39 Shelbourne Road, Ballsbridge, Dublin 4

First Published October 2003

ISSN 1393 – 3140

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975.*

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date, the Commission has published sixty-nine Reports containing proposals for reform of the law; eleven Working Papers; twenty-six Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty-three Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix to this Consultation Paper.

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INTRODUCTION

1. This Consultation Paper addresses the law relating to the partial defence of provocation. It is the third in a proposed series of papers which is intended to provide a comprehensive review, with the aim of eventual codification, of the law on homicide in this jurisdiction and follows on from the Commission's Consultation Papers on *Homicide: The Mental Element in Murder*[1] and *Corporate Killing*.[2] The law of homicide and the law relating to the partial defence of provocation are matters included in the Commission's Second Programme for Law Reform, approved by the Government in 2000.

2. This Paper endeavours to deal with the unsatisfactory state of the current law on provocation. At common law, the plea of provocation catered for killings done in response to untoward behaviour by the deceased. Its focus was on the standard of conduct that could fairly be expected of accused persons in such circumstances; whereas in Irish law the plea has been metamorphosed into the factual issue of whether or not the accused lost control. The Paper suggests that there should be a *rapprochement* between the current law on the subject and the original basis of the plea.

3. The Paper is divided into seven chapters. Chapter 1 traces the historical evolution of the defence from its emergence in the early modern division of felonious homicide into murder and manslaughter to the appearance of the "reasonable man" criterion in the nineteenth century.

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1 The Law Reform Commission *Consultation Paper on Homicide: The Mental Element in Murder* (LRC CP 17-2001).

2 The Law Reform Commission *Consultation Paper on Corporate Killing* (LRC CP 26-2003).

4. Chapter 2 discusses whether provocation should be treated as a partial justification or partial excuse, and considers the implications of each theory for the operation of the defence.

5. Chapter 3 analyses the modern law relating to provocation in England and Wales, including the emergence of the concept of the "reasonable man", the changes wrought by the *Homicide Act 1957* and the increasing dominance of the subjective test in that jurisdiction.

6. Chapter 4 reviews the modern law in Ireland, including the Court of Criminal Appeal's decision in *The People (DPP) v MacEoin*[3] and the subsequent applications and interpretations of the tests set out in that case.

7. Chapter 5 provides a comparative survey of the law of provocation in the main common law jurisdictions, including Canada, Australia, New Zealand, South Africa and the United States of America.

8. Chapter 6 considers the public policy factors that might be relevant to any reform of the law in this area and examines the contrasting rationales underlying the justification and excuse approaches outlined in Chapter 2.

9. Finally, Chapter 7 evaluates a number of options for reform of the defence and proposes a draft provision which encapsulates the provisional recommendations of the Commission.

10. This Paper is intended to form the basis for discussion and, accordingly, the recommendations contained herein are provisional only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Paper are welcome. To enable the Commission to proceed to the preparation of its Report report, those who wish to do so are requested to make their submissions in writing to the Commission by **31 January 2004**.

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[3] [1978] IR 27.

CHAPTER 1 HISTORICAL OVERVIEW[1]

A Introduction

1.01 The emergence of the defence of provocation in these islands is bound up with the division of felonious homicide into murder and manslaughter. The benefit of clergy exemption to a charge of murder, which was devised in medieval times so that defendants could escape liability under the secular law and the consequent imposition of the death penalty for the unlawful killing of another, was the catalyst in the emergence of the distinction between murder and manslaughter.

1.02 The exemption was claimed by accused persons who successfully demonstrated their status as members of the clergy. There were no fixed rules as to the criteria necessary to prove clerical status. Unsurprisingly, the exemption was widely mistreated by defendants who successfully convinced the relevant court that they were members of the clergy by displaying an ability to read and quote passages from religious texts. Eventual recognition by Parliament of the systematic abuse of the system brought with it a desire, first, to limit the scope of benefit of clergy and, later, to abolish the exemption altogether on the grounds that it undermined the secular law.[2]

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1 See generally Horder *Provocation and Responsibility* (Clarendon Press 1992); Green "The Jury and the English Law of Homicide, 1200-1600" (1976) 74 Michigan LR 414; Stephen *History of the Criminal Law of England* (MacMillan & Co 1883) vol 3, at 1-107; McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 849-885.

2 A series of statutes was successively enacted during the reigns of King Henry VII, King Henry VIII and King Edward VI which progressively limited the scope of the benefit of clergy: 12 Hen 7, c7 (1496) no exemption for the clergy for petty treason; 4 Hen 8, c2 (1512) no exemption for the clergy for "murder upon malice prepensed"; 23 Hen 8, c1, sections 3 & 4 (1531); 1 Edw 6, c12, section 10 (1547); 2 Hale PC 343-

1.03 In 1512 benefit of clergy was removed by statute from homicides carried out with malice aforethought.[3] At that time, malice aforethought or "malice prepensed" simply meant planned or premeditated killing.[4] The denial of benefit of clergy in respect of homicides carried out with malice aforethought had the effect of creating a distinction between that type of killing, which became known as murder, and killings lacking malice aforethought, which became known as manslaughter.[5]

1.04 By the late sixteenth century, "an ingenious … legal fiction had been devised to rationalize and systematize"[6] the policy of treating cases of intentional killing as murder despite the absence of literal premeditation. This was the doctrine of implied malice. The aim of the doctrine was to give the mental element in murder a wider ambit in order to enable the law to treat brutal, though unpremeditated, killings as murder rather than manslaughter.[7] The doctrine operated by presuming or implying[8] the requisite malice for murder from the surrounding circumstances of a brutal killing, where the accused was considered to be "bent upon mischief"[9] despite the lack of evidence that there was such malice. The doctrine permitted

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348. See Baker *An Introduction to English Legal History* (3rd ed Butterworths 1990) at 586-589.

3 See 4 Hen 8, c2 (1512).

4 Coke defined malice aforethought as "when one compasseth to kill, wound, or beat another, and doth it *sedato animo*. This is said in law to be malice forethought prepensed – *malitia praecogitata.* This malice is so odious in law, as though it be intended against one, it shall be extended towards another": 3 Co Inst 51.

5 As a result of this restriction on the benefit of clergy, only manslaughter remained a clergyable offence and this involved punishment of up to one year's imprisonment and burning of the thumb.

6 See Horder *Provocation and Responsibility* (Clarendon Press 1992) at 16.

7 See McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 852; Stephen *History of the Criminal Law of England* (MacMillan & Co 1883) at 55; Horder *Provocation and Responsibility* (Clarendon Press 1992) at 16.

8 This presumption was a rebuttable one; see Horder *Provocation and Responsibility* (Clarendon Press 1992) at 16.

9 Fost 291.

an expansion of the net of criminal liability for unlawful killings carried out without malice aforethought, in the early modern sense of premeditation, where they were considered to be as morally blameworthy as premeditated killings.[10]

1.05 One important category of killings was excluded from the doctrine of implied malice. Killings carried out in "hot blood" or anger could provide a valid rebuttal of the presumption of malice under the doctrine. To rebut the presumption, the accused had to show that the killing was caused by some provocation on the part of the deceased and not as a result of any malice aforethought or premeditation on his part. In this way, the doctrine of implied malice laid the foundation stone for the law of provocation.[11]

1.06 According to a statute passed in 1604, killings done "on the sudden", which were also known as "chance-medley" killings, were considered to lack the requisite malice aforethought for murder and therefore did not attract the mandatory death penalty.[12] These slayings were instead considered to be passionate killings, carried out in "heated blood" and without premeditation. Coke defined "chance-medley" as follows: "[h]omicide is called chance-medley … for that it is done by chance (without premeditation) upon a sudden brawle, shuffling, or contention."[13] This notion of heated-blood manslaughter expressed the more merciful approach taken by the law in relation to less heinous killings. By the seventeenth century, the general position

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10 1 Hawk PC chapter 31, section 18: "… and therefore that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversly wicked, is adjudged to be of malice prepense, and consequently murder."

11 See 1 Hale PC 455: "When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious.…"

12 *The Statute of Stabbing* (1604) 2 Jas 1, c8, which was initially introduced to deal with conflicts between the English and Scots under James I, is referred to in Stephen *History of the Criminal Law of England* (MacMillan & Co 1883) at 47-48.

13 3 Co Inst 57. See also 1 Hawk PC chapter 30, section 1: "That which is without Malice is called Manslaughter, or sometimes Chance-medley, by which we understand such killing happens either on a sudden Quarrel, or in the commission of an unlawful Act, without any deliberate Intention of doing any Mischief at all."

appears to have been that *all* hot-blooded killings (chance-medley) were treated as manslaughter, rather than murder, regardless of whether the provocation was considered grave or not.

1.07 That position changed, however, when the distinction between killing with malice aforethought (murder) and killing by chance-medley (manslaughter) evolved into a further bifurcation between provoked and unprovoked killings.[14] This development evolved from the recognition that the category of chance-medley did not differentiate between situations where the defendant was an innocent victim of a sudden outburst of violence and situations where he was responsible for starting the *mêlée* in the first place. The accused in the former category thus came to be regarded as less morally blameworthy than the accused in the latter.

B The Early Development of Provocation

1.08 Although provocation was firmly established as a partial defence by the beginning of the seventeenth century, it is clear from the contemporary institutional writers that the plea was already heavily circumscribed. By that time, the evident concern of the law was to identify the boundary between intentional and unintentional killings. As the limits placed on the plea of provocation corresponded with the line drawn between those categories, the commentators' consideration of provocation overlapped considerably with their treatment of the law on malice. Nevertheless, several themes that were to shape the subsequent development of the law are discernible in their writings.

1.09 In particular, the institutional writers were at pains to stress that certain forms of killing were so excessive (or, in the modern idiom, "disproportionate") that they must be presumed to have been actuated by malice rather than provocation. Their commentaries also reveal an important distinction between trivial and serious provocation, and suggest that the plea had been confined to the latter: it was made clear that "slight" provocation was insufficient.

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[14] See Stephen *History of the Criminal Law of England* (MacMillan & Co 1883) vol 3, at 58-60. The concept of chance-medley eventually fell into desuetude: *R v Semini* [1949] 1 KB 405.

Moreover, it was accepted that, as with the category of chance-medley homicide, provoked killing occurred "on the sudden".

1.10 As to the issue of proportionality, Sir Matthew Hale (whose *Historia Placitorum Coronae* was completed in 1676 but not published until 1736) observed that in some cases where an accused had responded to provocative conduct the means adopted might have been such that the killing should be presumed to have been intentional. He illustrated the point thus:

> "He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder, the reason is, because it is an act of deliberation odious in law, and presumes malice."[15]

1.11 He also observed that malice might be presumed in circumstances where the accused had used a lethal weapon, such as a sword or pistol.[16]

1.12 On the question of the sufficiency of provocation, Hale endeavoured to pick out the dividing line between provocative conduct that would not merit a verdict of manslaughter, on the one hand, and that which would warrant such mitigation, on the other. By way of delineating the former category, he cited several examples of circumstances in which the defence would not succeed: *viz*, the service of a subpoena on the accused by the deceased;[17] the making of an insolent facial gesture by the deceased;[18] and the taking of a wall

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15 1 Hale PC 455.

16 *Ibid* at 457. See also Fost CC 290-291; 1 East PC 235. East (writing in 1803) expressly employed the notion of proportionality in the context of provocation: "it must again be observed, that the punishment must not be greatly disproportionate to the offence" (at 235); "but to have received such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment…" (at 238).

17 1 Hale PC 455.

18 *Ibid* at 455, citing *Brains' case* (1600) Cro Eliz 778: "Watts came along by the shop of Brains, and distorted his mouth, and smiled at him, it is murder, for it was no such provocation."

by the deceased.[19] He also stated that the preponderant contemporary view was that "bare words of fighting, disdain, or contumely would not of themselves make such a provocation, as to lessen the crime to manslaughter";[20] and, in similar vein, that the "chiding" of a wife will not be considered sufficient provocation.[21]

1.13 Hale provided fewer examples of cases where a plea of provocation would be successful. However, he noted that:

> "…if B had justled A this justling had been a provocation, and would have made it manslaughter and so it would be, if A riding on the road, B had whipt the horse of A out of the track, and then A had alighted, and kild B it had been manslaughter."[22]

1.14 He also distinguished "words of menace of bodily harm"[23] from "fighting words", stressing that the former, but not the latter, would amount to provocation.

1.15 Writing in 1716, a decade after the pivotal decision in *R v Mawgridge*[24] (considered in the next section) Serjeant Hawkins expanded on Hale's treatment. In Hawkins' account, provocation is allied to cases of sudden quarrels and there is an obvious concern that the deceased should have been given an opportunity to defend himself if the plea is to succeed. Hawkins also accepted that a reaction to "slight" provocation is consistent with an intention to kill:

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19 1 Hale PC 455: "If A be passing in the street, and B meeting him, (there being convenient distance between A and the wall) take the wall of A and thereupon A kills him, this is murder".

20 *Ibid* at 456.

21 *Ibid* at 457.

22 *Ibid* at 455-456.

23 *Ibid* at 456 citing *Morley's case* (1666) Kel 54. East suggested that Hale misinterpreted that case and argued that "no such proposition is to be found" in the report: he felt that the words in question "ought to be accompanied by some act denoting an immediate intention of following them up by an actual assault." 1 East PC 233.

24 (1706) Kel 119.

> "And it hath been adjudged, that even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another, as to make him push at him with a sword, or to strike at him with any other such weapon as manifestly endangers his life before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he showed that he intended not to fight with him but to kill him, which violent revenge is no more excused by such a slight provocation, than if there had been none at all."[25]

1.16 Hawkins added to Hale's catalogue of cases that do *not* amount to provocation as follows:

> "Also it seems to be agreed that no breach of a man's word or promise, no trespass either to land or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated by the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby, as immediately to attack the person who offends him, in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such an assault, whether the person slain did at all fight in his defence or not; for so base and cruel a revenge cannot have too severe a construction."[26]

1.17 However, these remarks were immediately qualified by the observation that if the accused's response was moderate, or the deceased had been afforded an opportunity to defend himself (or herself), the killing would be manslaughter.[27] Moreover, Hawkins

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25 1 Hawk PC chapter 31, section 27.

26 *Ibid* at section 33.

27 *Ibid* at section 34: "But if a person so provoked, had beaten the other only in such a manner, that it might plainly appear that he meant not to kill, but only to chastise him; or if he had refrained himself till the other had put himself on his guard, and then in fighting with him had killed him, he had been guilty of manslaughter only."

also identified the type of defendant who would get the benefit of the plea:

> "Neither can he be thought to be guilty of a greater crime who finding a man in bed with his wife, or being actually struck by him, or pulled by the nose, or fillipped upon the forehead, immediately kills him; or who happens to kill another in a contention for the wall…."[28]

1.18 Although Hale was silent on the third issue – the element of suddenness – its importance was stressed by Hawkins. Hence that writer's frequent reference to "sudden provocation" and his bracketing together of provocation cases with sudden quarrels. Thus, in Hawkins' view, an accused who is "master of his temper"[29] at the time of the killing is guilty of murder. Contrariwise, he noted that if two individuals "fall out upon a sudden" and one kills the other the former is guilty of manslaughter because he acted "in the heat of blood";[30] mitigation in these circumstances was an "indulgence [which] is shewn to the frailties of human nature".[31] The significance of the element of suddenness is that it came to be perceived as an indication that the accused acted in hot blood or, in other words, that he or she had lost self-control. As Sir Michael Foster would later remark: "if there is sufficient time for passion to subside, and for reason to interpose, [the] homicide will be murder."[32] Killing in those circumstances is taken to be a calculated act of revenge and "no man

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28 1 Hawk PC chapter 31, section 36. The other examples cited in this section are "the defence of his person from an unlawful arrest; or in the defence of his house from those who claiming title to it attempt forcibly to enter it, and to that purpose shoot at it, etc or in the defence of his possession of a room in a publick house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing of the assailant hath been holden by some to be justifiable: but it is certain, that it can amount to no more than manslaughter." The latter cases are better thought of as cases of excessive defence rather than manslaughter.

29 *Ibid* at section 23.

30 *Ibid* at section 29.

31 *Ibid* at section 30.

32 Fost 296. See also 1 East PC 232: "[if] the blood has reasonable time to cool … it will be murder."

under the protection of the law is to be the avenger of his own wrongs."[33]

C Recognised Categories of Provocation

1.19 The seventeenth and eighteenth centuries witnessed the emergence of distinct categories of provocation which operated to reduce murder to manslaughter. Four categories were succinctly set out by Holt LCJ in *R v Mawgridge*:[34]

(i) a 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[35]

1.20 In the earlier *Maddy's case*,[36] the facts of which involved the killing of a man discovered by the defendant in the act of committing adultery with the latter's wife, a verdict of manslaughter was returned: "the provocation being exceeding great and ... there was no precedent malice".[37] The common denominator underlying the recognised categories of provocative conduct had been identified as the element of unlawfulness or wrongfulness in the provoker's actions.[38]

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33 Fost 296.

34 (1706) Kel 119.

35 It was later held that the defence might be available to a father who witnesses his son being sodomised: *R v Fisher* (1837) 8 Car & P 182. At common law, adultery and sodomy were recognised categories of provocation as they were considered to be infringements of one's proprietary rights in the body of the wife or son. See, further, Alldridge "The Coherence of Defences" [1983] Crim LR 665, 669-670.

36 (1671) 1 Vent 158; 86 ER 108. Also reported as *R v Maddy* 2 Keble 829; 84 ER 524 and as *R v Manning* T Ryam 212; 83 ER 112.

37 *Maddy's case* (1671) 1 Vent 158, 158-159.

38 Ashworth "The Doctrine of Provocation" [1976] Camb LJ 292, 294.

1.21 In *Mawgridge*,[39] it was said that provocation had to be significant in order to reduce murder to manslaughter. In that case the alleged provocation (the throwing of a bottle at the defendant) was found to be too trivial to justify that result. It is interesting to note also that insulting words or gestures were regarded as insufficiently grave for the purposes of the plea of provocation, thus confirming the views that had been reported by Hale.[40]

D From *Mawgridge* to *Welsh*

1.22 The nineteenth century development of the law of provocation confirmed the basic principles of the defence as laid down in the preceding centuries. Thus in *R v Kirkham*,[41] Coleridge J said that the overriding purpose of the plea was to take account of human frailties:[42]

> "[A]s it is well known that there are certain things which so stir up in a man's blood that he can no longer be his own master, the law makes allowances for them … [when] what he did was done in a moment of overpowering passion, which prevented the exercise of reason."[43]

1.23 However, the resultant concession to human frailty was not regarded as open-ended:

> "[T]hough the law condescends to human frailty, it will not indulge to human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions."[44]

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39 (1706) Kel 119.

40 See paragraph 1.12 above.

41 (1837) 8 Car & P 115.

42 In *R v Hayward* (1833) 6 Car & P 157, 159 Tindal CJ described the purpose of the principle as to give "compassion to human infirmity."

43 *R v Kirkham* (1837) 8 Car & P 115, 117.

44 *Ibid* at 119 *per* Coleridge J. Similar considerations are evident in the earlier decision *R v Oneby* (1727) 2 Ld Raym 1485, 1496 where Lord

1.24 While this statement clearly demonstrated the importance the law attached to individual self-control as a shared societal expectation in the context of provocation, it also pointed up the absence of a clear *standard* of self-control that could be used by trial judges when directing juries. In the absence of such a standard, cases were determined by judges presenting juries with examples of situations where the presence of provocation would reduce murder to manslaughter. Writing in 1883, Stephen criticised this aspect of the plea as follows:

> "It would be a great improvement in the law [of provocation] to have a clear, definite rule upon the subject, for there is at present nothing which can properly be called by that name."[45]

1.25 Arguably Stephen's criticism was too harsh. In *R v Welsh*,[46] decided in 1869, Keating J had introduced a new point of reference by invoking the concept of the "reasonable man" as the standard by which an accused's reaction to provocation was to be measured, thereby laying the foundation stone for the modern defence:

> "[I]t is for the jury [to decide] whether [the evidence] was such that they can attribute the act to the violence of passion naturally arising … and likely to be aroused … in the breast of a reasonable man."[47]

1.26 The facts of *Welsh*[48] were as follows. The accused had had a claim dismissed by a court for recovery of a debt owed to him by the deceased. Following the hearing, angry words were exchanged, with the accused threatening another summons on the deceased. The accused was seen to stab the deceased with fatal consequences. The issue before the court was whether there was sufficient provocation to

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Raymond stated that "a man ought to keep [anger and passion] under and govern."

45 Stephen *History of the Criminal Law of England* (MacMillan & Co 1883) vol 3, at 87.

46 (1869) 11 Cox CC 336.

47 *Ibid* at 338.

48 *R v Welsh* (1869) 11 Cox CC 336.

reduce the crime from murder to manslaughter and whether there was such provocation as might naturally kindle ungovernable passion in the mind of the accused.

1.27 As already indicated, earlier cases had relied on individual judges to establish what counted as sufficient provocation by alluding to the well-established categories of untoward conduct. The effect of the ruling in *Welsh*[49] was to replace this method of reference to types of behaviour with the standard of the hypothetical "reasonable man"; whereas the old approach had its focus on the conduct of the *deceased,* the new criterion dealt directly with the role of the *accused* as measured against this standard. In the result, the new criterion effectively precluded unusually irascible, bad-tempered or excitable individuals from taking advantage of the defence; the "reasonable man" could not be said to suffer from such volatile characteristics.

1.28 *Welsh*[50] also reiterated the opinion that words or gestures on their own did not amount to provocation.[51] Keating J based this proposition on the earlier case of *R v Sherwood*.[52] Consequently, a successful defence of provocation henceforth required the presence of two basic elements: actual passion on the part of the accused and provocation sufficient to kindle ungovernable passion in the mind of the ordinary "reasonable man". Together these components came to be referred to as the subjective and objective elements, respectively.[53]

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49 *R v Welsh* (1869) 11 Cox CC 336.

50 *Ibid*.

51 *Ibid* at 338 *per* Keating J: "It has been laid down that mere words or gestures will not be sufficient to reduce the offence, and at all events the law is clear that the provocation must be serious."

52 (1844) 1 Car & K 556. However, Keating J also noted the "very peculiar case" of *R v Smith* 4 F & F 1066, which Keating J summarised as follows: "[The trial judge held] that "an assault of a very offensive nature, as spitting in a person's face, coupled with words of an extremely insulting character, may be sufficient to reduce the crime to manslaughter": (1869) 11 Cox CC 336, 338.)

53 See Macklem and Gardner "Provocation and Pluralism" (2001) 64 MLR 815, 828: "[T]hat terminology [*ie* 'subjective element'] is misleading. It is better described as the *narrative* element of the defence – that is to say, the story of the defendant's actual reactions, to which objective standards are applied." (Emphasis in original.)

Keating J in *Welsh* explained the importance of the new emphasis on the requirement of reasonableness[54] as follows:

> "When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it - the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter."[55]

1.29 The movement from *Mawgridge*[56] to *Welsh*[57] thus marked a transition from the particular to the general. The former case had set out the specific instances in which the plea of provocation could be invoked; the latter established a general principle applicable to provocative conduct in whatever form it might arise. Moreover, by emphasising the universal requirement to exercise self-control, *Welsh* continued to endorse the normative approach evident in the earlier cases. In this respect, the decision did not change the fundamental philosophy of the law; it merely restated the requirement for an authoritative standard in general terms.

1.30 In other words, the legacy of *Welsh*[58] was to give modern expression to the traditional concern with the objective component in the test of provocation. Henceforth that concern would be embodied in the figure of the "reasonable man" as representative of a communal

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54 Horder *Provocation and Responsibility* (Clarendon Press 1992) at 97 states: "Keating J assumes that, when people are angered by a trivial provocation and kill in response to it, they did not lose their self-control because of impetuosity, because of the sudden displacement of reason from its controlling seat within the soul. Keating J supposes instead that such people *give way* to their passions, indulge them rather than conform their actions, as it is supposed that they could have done, to the dictates of reason." (Emphasis in original.)

55 *R v Welsh* (1869) 11 Cox CC 336, 338.

56 *R v Mawgridge* (1706) Kel 119.

57 *R v Welsh* (1869) 11 Cox CC 336.

58 *Ibid*.

standard expected of all members of society in the face of provocation.[59]

1.31 The immediate impact of the ruling in *Welsh*[60] is difficult to gauge. There appears to be no discussion of the decision in the contemporary case law; although this may mean no more than that juries had no trouble applying directions based on it. Nor was the decision mentioned by Stephen in his *Digest*, published in 1877, but it appears to have come to the attention of the Criminal Code Commissioners of 1879.[61] Despite this seemingly inauspicious debut, the "reasonable man" standard derived from *Welsh* was destined to play a role of paramount importance in the subsequent development of the plea of provocation throughout the common law world. As will be seen in Chapters 3 and 4, respectively, the fundamental principle that provocation should be linked to a community standard based on the capabilities of the ordinary person has been a cornerstone of English law down to the present day; and of Irish law until the

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59 Glanville Williams "Provocation and the Reasonable Man" [1954] Crim LR 740, 741 takes the view that "there was a superficial attraction in allotting him a new task in the law of provocation." He also suggests that "[t]his new mode of statement seems to have been the invention of Keating J in *Welsh* (1869) 11 Cox 336."

60 *R v Welsh* (1869) 11 Cox CC 336.

61 Stephen *History of the Criminal Law of England* (MacMillan & Co 1883) vol 3, at 81 sets out the definition for provocation in section 176 of the Draft Code (Code appended to the *Report of the Criminal Code Commission* (1879)). Article 245 from Stephen *A Digest of the Criminal Law* (6th ed MacMillan & Co 1904) at 185 is largely based on section 176 of the Draft Code and it provides: "Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm." Article 246 of the *Digest,* at 188, deals with the elements necessary for provocation: "Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received; and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to show the state of his mind."

decision of the Court of Criminal Appeal, in 1978, in *People (DPP) v MacEoin*.[62]

E Provocation and Intention

1.32 Mention has already been made of the fact that, in its original, early modern incarnation, a successful plea of provocation negated malice aforethought; but, with the passage of time, provocation came to be regarded as a partial defence in its own right. The older view of the plea as going to *mens rea* has however proved surprisingly resilient and continued to surface in the modern case law. Thus, in *Welsh*[63] Keating J stated that it was for the accused to show "sufficient provocation … because it tends to negative the malice [aforethought]."[64] A similar direction was given in *R v Selten*[65] where Hannen J stated that "the law … admits evidence of such provocation as is calculated to throw a man's mind off its balance, so as to show that he committed the act while under the influence of temporary excitement, and *thus to negative the malice which is of the essence of the crime of murder*."[66] As recently as the 1940s the House of Lords reiterated the view that provocation negates malice.[67]

1.33 This view of provocation was finally purged from the law during the second half of the twentieth century. In *Attorney General*

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62 [1978] IR 27.

63 *R v Welsh* (1869) 11 Cox CC 336.

64 *Ibid* at 338.

65 (1871) 11 Cox CC 674.

66 *Ibid* at 675 (emphasis added).

67 *Holmes v DPP* [1946] AC 588, 598: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill…, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very special exception has been recognized, viz., the actual finding of spouse in the act of adultery. This has always been treated as an exception to the general rule: *R v Manning* [T Raym. 212]."

for Ceylon v Perera,[68] Goddard LCJ, speaking on behalf of the Privy Council, concluded:

> "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has regarded that, although an intentional act, as amounting only to provocation…."[69]

1.34 It is clear from this statement that provocation is not inconsistent with the existence of an intention to kill or cause serious harm and that proof of that state of mind by the prosecution will not, of itself, operate to deny the defence of provocation. In other words, a provoked killing is an intentional killing.

1.35 The position in *Perera*[70] is now preferred to that outlined in *Holmes v DPP*.[71] In *Lee Chun-Chuen v The Queen*,[72] Lord Devlin took the view that the remarks in *Holmes* were confined to actual intent in the sense of premeditation, faintly echoing the literal interpretation of "malice prepense" that was adopted in early modern law. The same conclusion was reached in *MacEoin*[73] where the Court of Criminal Appeal held it to be a misdirection to instruct the jury that provocation had to be such as to render the accused incapable of forming an intention to kill or cause serious injury. The Court of Criminal Appeal reinforced this view in *People (DPP) v Bambrick*[74] with the observation that "[t]he question of provocation is separate and distinct from the question of intention. If there was provocation it may reduce the killing from murder to manslaughter notwithstanding

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68 *Attorney General for Ceylon v Perera* [1953] AC 200.

69 *Ibid* at 206.

70 *Attorney General for Ceylon v Perera* [1953] AC 200.

71 [1946] AC 588. See footnote 67 above.

72 [1963] AC 220, 227.

73 *People (DPP) v MacEoin* [1978] IR 27.

74 [1999] 2 ILRM 71.

that the accused person intended to kill or cause serious injury."[75] This conception of the relationship between provocation and intention is now shared by most common law jurisdictions.[76]

F Summary

1.36 This chapter outlined the development of the plea of provocation from its sixteenth-century roots in the division of felonious homicide into murder and manslaughter. From the beginning, the plea was confined to distinct categories of provocation and was governed by normative standards. 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 *Welsh*,[77] the fundamental principle that provocation should be measured by objective criteria continued to operate well into the twentieth century. However, as will be seen in Chapters 3, 4 and 5, subsequent judicial and legislative developments, particularly in Ireland and England, have substantially eroded this position to the extent that a more or less subjective approach is now in the ascendancy.

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75 *People (DPP) v Bambrick* [1999] 2 ILRM 71, 74.

76 *Parker v The Queen* [1964] 2 All ER 641, 651: "[I]t has long been recognised that the defence of provocation may apply even where an intent to kill has been created."; *R v Martindale* [1966] 3 All ER 305; *R v Barton* [1977] 1 NZLR 295, 299: "It is, however, quite clear that a defence of provocation is open even though an intent to kill or intent to kill recklessly is established, provided such intent arises from the provocation"; *Straker v R* (1977) 15 ALR 103; *R v Cameron* (1992) 71 CCC (3d) 272, 274: "The statutory defence of provocation does not detract from the *mens rea* required to establish murder, but rather, where applicable, serves to reduce homicides committed with the *mens rea* necessary to establish murder to manslaughter."

77 *R v Welsh* (1869) 11 Cox CC 336.

CHAPTER 2 JUSTIFICATION VERSUS EXCUSE

> **"Partial justifications reduce the wrongfulness of acts; partial excuses reduce the blameworthiness of agents."[1]**

A Introduction

2.01 Although it has long been settled law in these islands that provocation is, at best, a partial defence to murder, courts and commentators differ as to whether the rationale underpinning the plea is one of partial justification or partial excuse. Strongly reasoned arguments have been advanced in support of both possibilities and, accordingly, it has recently been suggested that the plea is best viewed as a combination of justificatory *and* excusatory elements.[2] As will be seen presently, although this debate has taken on a somewhat forbidding theoretical character, it remains crucial to a proper understanding of the plea of provocation,[3] and sheds valuable light on how efforts to reform the law in this area should proceed.

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1 Husak "Partial Defences" (1998) 11 Can JL & Juris 167, 170.

2 Austin "A Plea for Excuses" (1956) 57 *Proceedings of the Aristotelian Society* 3; Ashworth *Principles of Criminal Law* (3rd ed Oxford University Press 1999) at 238; Horder *Provocation and Responsibility* (Clarendon Press 1992) at 111; McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 855-856.

3 According to Dressler "Provocation: Partial Justification or Partial Excuse?" (1988) 51 MLR 467, 468, the distinction between justification and excuse is important for three reasons: "First, if lawmakers act thoughtfully, the elements of the defense, and therefore its applicability in individual cases, will differ depending on whether the defense is viewed as a (partial) justification or as an excuse. Second, careful attention to the justification-excuse distinction can tell us a great deal about how we should think about analogous defenses [such as self-defense and duress]…. Third, the criminal law ought to send clear moral messages. There is considerable moral difference between saying that an intentional killing is warranted (partially or fully), and saying that it is entirely wrong but that

B The Basic Distinction

2.02 The partial justification rationale is based on the theory that the killing was to some extent warranted by words said or acts done by the provoker to the accused. The idea is that a portion of the responsibility for the killing is transferred to the deceased on the grounds that he or she was partially to blame for his or her own demise. In contrast, the partial excuse rationale is based on the assumption that the accused should not be held fully accountable for his or her actions by reason of loss of control caused by provocation:

> "The focus of the defence varies according to whether it is perceived as a partial justification or partial excuse. The argument from partial justification concentrates on the wrongful conduct of the deceased that provoked the homicide, whereas the focus of a partial excuse theory is on the accused's loss of self-control."[4]

C Academic Opinion

2.03 The modern debate on the justification-excuse distinction as applied to provocation was initiated by McAuley in an article in the *Modern Law Review* in the late 1980s.[5] The burden of that writer's argument was that, bearing in mind their repeated emphasis on the deceased's contribution to the killing, the early modern authorities pointed clearly to partial justification as the governing rationale underlying the plea of provocation;[6] although he acknowledged that the old cases also evinced judicial concern for the excusatory aspect of the defence as reflected in the requirement that the killing must have occurred in "heat of blood".[7]

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the actor is partially or wholly morally blameless for his wrongful conduct."

4 McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 853.

5 McAuley "Anticipating the Past: The Defence of Provocation in Irish Law" (1987) 50 MLR 133.

6 *Ibid* at 150-151.

7 *Ibid* at 156.

2.04 McAuley's assessment was criticised by Dressler as an over-simplification; although that author in turn acknowledged that the inherent contradictions that beset the modern plea of provocation derive in part from the fact that courts and commentators had gradually lost sight of its original justificatory rationale.[8]

2.05 More recently, Horder has suggested that "there has always been a key justificatory element or condition to a plea of provocation, bound up with the excusatory element",[9] while Ashworth, commenting on the division of opinion outlined in the preceding paragraphs, has expressed the view that the doctrine of provocation rests just as much on notions of partial justification as upon the excusing element of loss of self-control;[10] and this would now appear to be the more settled and accepted academic position on the matter.[11]

2.06 In the result, most writers now caution against undue emphasis on one rationale at the expense of the other. Thus Ashworth has warned that, "[s]tanding alone, [partial justification] would lead the courts to indulge those who take the law into their own hands and deliberately wreak vengeance upon those who insult or wrong them."[12]

2.07 Similarly, McAuley and McCutcheon have lamented the virtual eclipse of the justificatory component of the plea in modern Irish law,[13] arguing that there has been an effective closing out of the communal standard of self-control which has been a key ingredient of

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8 Dressler "Provocation: Partial Justification or Partial Excuse?" (1988) 51 MLR 467, 480.

9 Horder *Provocation and Responsibility* (Clarendon Press 1992) at 111.

10 Ashworth *Principles of Criminal Law* (3rd ed. Oxford University Press 1999) at 238.

11 See Austin "A Plea for Excuses" (1956) 57 *Proceedings of the Aristotelian Society* 3; Ashworth *Principles of Criminal Law* (3rd ed Oxford University Press 1999) at 238; Horder *Provocation and Responsibility* (Clarendon Press 1992) at 111; McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 855-856.

12 Ashworth "The Doctrine of Provocation" [1976] Camb LJ 292, 309.

13 McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 853-856.

the defence since it was introduced in 1869 in the guise of the "reasonable man" criterion in the seminal case of *R v Welsh*.[14]

D The Distinction in Practice

2.08 The practical implications of this debate can best be gleaned from a brief overview of the modern development of provocation. As Chapter 1 illustrates, the seventeenth and eighteenth century authorities show that, although they were aware of the excusatory dimension of the plea, the judges initially perceived provocation as a partial justification. Hence the early modern insistence on a bedrock of unlawful conduct on the part of the deceased as a *sine qua non* of a successful plea of provocation; and the concomitant rule that blows struck in self-defence or in response to provocation by the *accused* did not qualify for protection under it.[15] Hence, too, the contemporary doctrine that trivial provocation falling short of a criminal or tortious assault and, *a fortiori*, mere insulting words or gestures, unaccompanied by wrongful deeds, were insufficient to support the defence.[16]

2.09 In contrast, the modern approach to the defence has effectively inverted this order of priorities. Thus in *R v Smith,*[17] Lord Hoffmann noted that the test of provocation had shifted from a consideration of "whether the angry retaliation by the accused, though excessive, was in principle justified, to [one] of whether the accused had lost his self-control", adding that the old dispensation belonged to "a world of Restoration gallantry" in which "[t]o show anger 'in hot blood' for a proper reason by an appropriate response was not merely permissible but the badge of a man of honour."[18]

2.10 Leaving aside Lord Hoffmann's observations about the *raison d'être* of the early modern approach to provocation, his assessment of the more recent history of the plea cannot be gainsaid.

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14 *R v Welsh* (1869) 11 Cox CC 336.

15 *R v Keite* (1697) 1 Ld Raym 139.

16 See paragraphs 1.08-1.21 above.

17 [2001] 1 AC 146.

18 *Ibid* at 159-160.

It is now commonplace for courts to consider the accused's personal characteristics when assessing his or her response to provocation. Indeed, in some jurisdictions – notably Ireland – this tendency has ripened to the point that it is no longer meaningful to speak of a *test* of provocation in the strict sense of the term: to all intents and purposes, provocation is now circularly defined as that which triggered the accused's loss of control, there being no antecedent requirement of unlawful (or even untoward) conduct on the part of the deceased and no threshold of self-control that excused persons generally are expected to meet.[19]

2.11 Moreover, it would appear that there is no longer any requirement that the deceased must even have been the source of the alleged provocation. In *R v Davies*[20] the defence succeeded notwithstanding the fact that the alleged provocation emanated from a third party. Similarly, in *People (DPP) v Hennessy*[21] it appears to have been accepted that evidence of the "surrounding circumstances" leading to the killing could go to the jury on the issue of provocation.[22] Given that the circumstances in question were that the accused was suffering from stress occasioned by the fact that he had been suspended from his job on suspicion of embezzlement, and that the trial judge acknowledged that the deceased's contribution to his violent outburst – she had told him that he was "no good" and had slapped him across the face[23] – appeared to be "of a very low level",[24] *Hennessy* might thus be regarded as a dramatic illustration of Lord Hoffmann's conclusion, in *Smith*,[25] that the modern defence of

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19 For discussion, see Chapter 4 below.

20 [1975] QB 691.

21 Central Criminal Court (Finnegan J) October 2000 and April 2001.

22 Central Criminal Court (Finnegan J) October 2000 and April 2001, reported in *The Irish Times* "Husband killed his wife in a 'moment of rage'" 11 October 2000 at 4.

23 Central Criminal Court (Finnegan J) October 2000 and April 2001, reported in *The Irish Times* "Documents destroyed by fire in office of accused" 6 October 2000 at 4 and *The Irish Times* "Husband killed his wife in a 'moment of rage'" 11 October 2000 at 4.

24 Central Criminal Court (Finnegan J) October 2000 and April 2001, reported in *The Irish Times* "Victim's father tells court of disappointment with sentence" 4 April 2001 at 4.

25 *R v Smith* [2001] 1 AC 146.

provocation has shed its justificatory plumage to the extent that it can now be more accurately described as a plea of loss of control *simpliciter*.

2.12 *A fortiori*, it is arguable that the modern plea, at least in its extreme subjectivist guise, should not even be described as a partial *excuse*, let alone as a partial justification. If, following Austin,[26] we define the concept of a legal or moral excuse as presupposing a standard of conduct with which, barring the presence of a recognised exculpatory condition, individuals are generally expected to comply, then it follows that a criterion of provocation which is capable of infinite variation in order to take account of an accused's "temperament, character and circumstances"[27] does not satisfy that definition.

2.13 On the contrary, given that it has been accepted that it is virtually impossible to disprove evidence of provocation once it has been introduced under the rubric of the subjective test,[28] such a criterion might be more accurately characterised as a quasi-automatic exemption from liability for murder, rather than as a plea in mitigation strictly defined.

E Summary and Conclusions

2.14 The debate is ongoing as to whether provocation should be seen as a partial justification (which has its focus on the wrongful conduct of the deceased), as a partial excuse (which concentrates on the accused's loss of self-control) or as a plea embodying both rationales. This issue has important implications for the operation of the defence. For example, a partial justification rationale would dictate that provocation must emanate from the deceased, whereas under partial excuse theory it could come from any source. Similarly, partial justification theory requires evidence of untoward conduct – as measured by ordinary community standards – on the part of the deceased as a necessary condition of the plea; whereas excuse theory

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26 Austin "A plea for Excuses" (1956) 57 *Proceedings of the Aristotelian Society* 3.

27 *People (DPP) v MacEoin* [1978] IR 27, 34.

28 *People (DPP) v Davis* [2001] 1 IR 146, 157.

knows no such limitation, it not being premised on a standard of reasonable behaviour. For the reasons set out in Chapter 7,[29] the Commission broadly favours the introduction of a justification-based model of the defence of provocation, although it acknowledges that reform should be tempered by excuse-based considerations going to the culpability of the individual accused.

[29] See paragraphs 7.28-7.35 below.

CHAPTER 3 THE MODERN LAW IN ENGLAND AND WALES

> **"My Lords, it is impossible to read even a selection of the extensive modern literature on provocation without coming to the conclusion that the concept has serious logical and moral flaws."[1]**

3.01 This chapter examines the evolution of the law of provocation in England and Wales since the landmark decision in *R v Welsh*[2] in 1869.

A The "Reasonable Man"

3.02 As discussed in Chapter 1, the modern law of provocation can be said to derive principally from the nineteenth-century case of *Welsh*[3] where, for the first time, the rudiments of the defence were expressed in general terms by invoking the concept of the "reasonable man":

> "The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion."[4]

3.03 It would appear that the figure of the "reasonable man" as encountered in *Welsh*[5] was a migrant from the contemporary law of

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1 *R v Smith* [2001] 1 AC 146, 159 *per* Lord Hoffmann.

2 (1869) 11 Cox CC 336.

3 *Ibid*.

4 *Ibid* at 338 *per* Keating J.

5 *R v Welsh* (1869) 11 Cox CC 336.

tort and was hitherto unknown to the criminal law.[6] Moreover, it has been suggested that, in its new surroundings, the concept was originally intended to operate more as a metaphor than as a precise legal standard. As Lord Hoffmann explained in *R v Smith*,[7] it was originally conceived as a way of explaining the law of provocation to juries, as

> "an anthropomorphic image [designed] to convey to them, with a suitable degree of vividness, the legal principle that even under provocation, people must conform to an objective standard of behaviour which society is entitled to expect".[8]

B The Case Law

3.04 The first case to come before the courts in England and Wales which attempted to put flesh on the bones of the "reasonable man" criterion enunciated in *Welsh*[9] was *R v Lesbini*.[10] In that case, the accused shot dead a girl at a firing range in an amusement arcade because she had directed some insulting remarks at him. In approving the principle enunciated in *Welsh*, the Court set out a dual test for provocation:

(i) that it might cause a "reasonable man" to lose self-control; and
(ii) that it actually caused the accused to do so.

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6 For an early definition of negligence in a tort context see *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781, 784 *per* Alderson B: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do." See also Glanville Williams "Provocation and the Reasonable Man" [1954] Crim LR 740, 741.

7 [2001] 1 AC 146.

8 *Ibid* at 172.

9 *R v Welsh* (1869) 11 Cox CC 336.

10 [1914] 3 KB 1116.

3.05 This newly devised standard of provocation contained both a subjective and an objective component. The latter component was concerned with whether a "reasonable man" would have reacted as the accused had done if placed in the same situation. The former centred on whether or not the accused had in fact lost his or her self-control. Since *Lesbini*[11] the judges have continued to employ this two-pronged standard. In *Mancini v DPP*,[12] the House of Lords expressly approved the *Lesbini* approach as follows:

> "The test to be applied is that of the effect of the provocation upon a reasonable man, as was laid down by the Court of Criminal Appeal in *R v Lesbini*, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did."[13]

3.06 Similarly, in *Holmes v DPP*,[14] where the defendant sought to rely on his wife's confession of adultery as a basis for the plea, Viscount Simon said that the test of provocation was:

> "(a) whether a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) [whether] the accused was in fact acting under the stress of such provocation.…"[15]

3.07 The formula used by Devlin J in *R v Duffy*[16] is regarded as the classic direction in provocation cases. In the Court of Criminal Appeal, Goddard LCJ described it as "impeccable", "a classic direction", giving "as clear and accurate a charge to a jury when provocation is pleaded as can well be made."[17] Devlin J had stated:

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11 *R v Lesbini* [1914] 3 KB 1116.

12 [1942] AC 1.

13 *Ibid* at 9.

14 [1946] AC 588.

15 *Holmes v DPP* [1946] AC 588, 597.

16 [1949] 1 All ER 932.

17 *Ibid* at 932-933.

> "Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind."[18]

3.08 The "reasonable man" standard as articulated in *Duffy*[19] was significantly overhauled in *Bedder v DPP*[20] where the House of Lords relied on the test laid down by Devlin J in *Duffy*.

3.09 The facts in *Bedder*[21] were as follows. The accused was eighteen years old and sexually impotent. He had been convicted of murdering a prostitute who had ridiculed him and kicked him when he failed in his attempt to have sexual intercourse with her. On appeal, first to the Court of Criminal Appeal and then to the House of Lords, it was argued on behalf of the appellant that the trial judge had misdirected the jury by telling them to assess the provocation by reference to the "reasonable man" standard *simpliciter*; and that he should have told them to invest the "reasonable man" with the accused's physical peculiarities (in this particular case, impotence) before making this assessment.

3.10 The House of Lords expressly rejected this contention, with Lord Simonds LC quoting the trial judge, Sellers J:

> "There may be, members of the jury, infirmity of mind and instability of character, but if it does not amount to insanity, it is no defence. Likewise infirmity of body or affliction of the mind of the assailant is not material in testing whether there has been provocation by the deceased to justify the violence used so as to reduce the act of killing to manslaughter."[22]

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18 *R v Duffy* [1949] 1 All ER 932, 932.

19 *Ibid*.

20 [1954] 2 All ER 801.

21 *Ibid*.

22 *Ibid* at 802.

3.11 Regarding the suggestion that they should draw a distinction between physical and mental characteristics for the purposes of the plea of provocation, their Lordships held that such an approach "is too subtle a refinement" and that it "makes nonsense of the test" (as set out in *Mancini*[23]) as it endows the "reasonable man" with "abnormal characteristics."[24]

3.12 In the earlier case of *Lesbini*,[25] the trial judge had refused to modify the "reasonable man" standard so as to take account of the mental incapacity of the accused. The defence had argued that the accused was suffering from defective self-control and mental imbalance which caused him to kill the deceased and, therefore, was not responsible for his actions. It was suggested that *Welsh*[26] did not apply to the instant case owing to the presence of these particular defects in the accused. This argument was rejected, Reading LCJ stating for the Court that provocation must be such as would "affect the mind of the reasonable man."[27]

3.13 The effect of these two cases was to produce a starkly literal interpretation of the "reasonable man" standard which had been introduced in *Welsh*:[28] none of the personal characteristics of the accused could henceforth be taken into account when determining the gravity of provocation; nor was it permissible to invest the "reasonable man" with any peculiarities of the accused that may have influenced his or her response to provocation.

3.14 The rule in *Bedder*[29] has been heavily criticised by commentators.[30] According to Ashworth, "the true function of the

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23 *Mancini v DPP* [1942] AC 1.

24 *Bedder v DPP* [1954] 2 All ER 801, 804.

25 *R v Lesbini* [1914] 3 KB 1116.

26 *R v Welsh* (1869) 11 Cox CC 336.

27 *R v Lesbini* [1914] 3 KB 1116, 1120.

28 *R v Welsh* (1869) 11 Cox CC 336.

29 *Bedder v DPP* [1954] 2 All ER 801.

30 Smith and Hogan *Criminal Law* (3rd ed Butterworths 1973) at 241; Ashworth "The Doctrine of Provocation" [1976] Camb LJ 292, 300-302.

objective test is to apply a standard of reasonable self-control".[31] On this view, there is no logical contradiction involved in speaking of the level of self-control that can reasonably be expected of an impotent man. On the contrary, Ashworth continued, *Bedder* made "bad law" precisely because it precluded reference to factors – such as impotence – going directly to gravity. In the event, such was the negative impact of the decision in that case that section 3 of the *Homicide Act 1957* was introduced with the express aim of modifying the test associated with it.[32]

C The *Homicide Act 1957*

3.15 Section 3 of the *Homicide Act 1957* states:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

3.16 The 1957 Act was enacted in the wake of the *Report of the Royal Commission on Capital Punishment 1949-1953* and the decision in *Bedder*.[33] The Report had made reference to the limited scope for a successful plea of provocation in the courts, citing in particular the constraints placed on the defence by the judges' rigid interpretation of the impersonal "reasonable man" test.[34] At the same time, it was evident that, given the spectre of the death penalty,[35]

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31 Ashworth "The Doctrine of Provocation" [1976] Camb LJ 292, 301.

32 *Ibid*.

33 *Bedder v DPP* [1954] 2 All ER 801.

34 *Report of the Royal Commission on Capital Punishment* (Cmd 8932-1953).

35 It might be added that the abolition of the death penalty and its replacement with a sentence of mandatory imprisonment for life ensured that concerns about the objective test would be kept alive: see *R v Smith* [2001] 1 AC 146, 161 *per* Lord Hoffmann.

juries were willing to allow the defence of provocation in circumstances where it would have been excluded by a strict application of the "reasonable man" test. These two factors shaped the background to the drive for legislative reform.

3.17 It can be seen from the text of section 3 that the 1957 Act preserved the dual test of provocation as laid down in *Lesbini*[36] and authoritatively reiterated in *Duffy*.[37] However, the Act made two important changes to the existing law on provocation. First, words were recognised as capable of amounting to provocation. Secondly, the Act provided that any evidence to the effect that the accused had lost self-control must be left to the jury.

3.18 Section 3 of the 1957 Act does not, on its face, say that an accused's characteristics may be taken into account in deciding the issue of provocation. Nor does it expressly provide that the "reasonable man" should be notionally invested with the accused's characteristics.

3.19 Yet the effect of the section was undoubtedly to liberalise the test of provocation. This was achieved by leaving the concept of the "reasonable man" at large and by giving the jury freedom to determine whether he or she could have been provoked on the evidence before it. Thus in practice juries were enabled to take the accused's personal characteristics into account when evaluating the gravity of provocation offered by the deceased.

D Broadening the Law

3.20 The doctrinal framework for this arrangement was worked out in *Camplin*[38] where the Court of Appeal criticised *Bedder*[39] and endorsed the practice of taking into account certain characteristics of the accused in order to decide the effect that provocation may have had on the "reasonable man" endowed with those particular traits.

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36 *R v Lesbini* [1914] 3 KB 1116.

37 *R v Duffy* [1949] 1 All ER 932.

38 *R v Camplin* [1978] 1 All ER 1236.

39 *Bedder v DPP* [1954] 2 All ER 801.

The Court of Appeal's decision was approved by the House of Lords.[40] *Camplin* involved an accused aged fifteen years who, without his consent, had been buggered by the deceased, an adult homosexual, who then mocked him when the episode was over. The accused hit the deceased over the head with a chapatti pan and killed him. The defence argued that the accused had been provoked by the deceased.

3.21 The Court of Appeal justified the presence of the objective element in the standard for provocation thus:

> "It is desirable and right that if a defence of provocation, reducing what would otherwise be murder to manslaughter, is to be available, it should not give an exceptional advantage to persons exceptionally sensitive, exceptionally excitable or exceptionally hot tempered in character."[41]

3.22 Bridge LJ, delivering the judgment of that Court, held that the "reasonable man" standard was formulated to exclude from the defence those abnormalities (be they mental or physical) which lead to a deficiency in self-control. However, in that judge's view, youth (the characteristic in issue in this case) was not such an abnormality, nor was the immaturity which accompanied youth, given that they are both "norms through which we must all of us have passed before attaining adulthood and maturity."[42]

3.23 The Court of Appeal distinguished youth from personal idiosyncrasies or abnormalities and held that the latter ought to be excluded from consideration when determining the question of reasonableness. In allowing youth to be taken into consideration, the Court held that "the proper direction to the jury is to invite the [trier of fact] to consider whether the provocation was enough to have made a reasonable person of the same age as the appellant in the same circumstances do as he did."[43] When the Court was referred to

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40 *DPP v Camplin* [1978] AC 705.

41 *R v Camplin* [1978] 1 All ER 1236, 1239.

42 *Ibid* at 1241.

43 *Ibid* at 1242.

Bedder,[44] Bridge LJ declared that this case had carried the principle of the "reasonable man" to "its extreme limit".[45] In support of this conclusion, Bridge LJ alluded to the many criticisms that had been voiced in the aftermath of the decision in *Bedder*.[46]

3.24 *Camplin*[47] was referred from the Court of Appeal to the House of Lords on a point of law of general public importance: namely, whether the jury should be directed to consider the question of reasonableness by reference to a reasonable adult or a reasonable boy of fifteen. Delivering the judgment of the House, Lord Diplock prefaced his answer to this question as follows:

> "The public policy that underlay the adoption of the 'reasonable man' test in the common law doctrine of provocation was to reduce the incidence of fatal violence by preventing a person relying on his own exceptional pugnacity or excitability as an excuse for loss of self-control. The rationale of the test may not be easy to reconcile in logic with more universal propositions as to the mental element in crime. Nevertheless it has been preserved by the 1957 Act but falls to be applied now in the context of a law of provocation that is significantly different from what it was before the Act was passed."[48]

3.25 Turning to the concept of the "reasonable man", Lord Diplock said that it should not be defined exclusively in terms of the adult male. Rather the concept connoted a reasonable person of either sex who possesses powers of self-control which may be expected of every member of society:

> "[The reasonable man] is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they [the jury] think would

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44 *Bedder v DPP* [1954] 2 All ER 801.

45 *R v Camplin* [1978] 1 All ER 1236, 1240.

46 *Ibid* at 1240-1241.

47 *R v Camplin* [1978] 1 All ER 1236.

48 *DPP v Camplin* [1978] AC 705, 716.

affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did."[49]

3.26 The speeches in *Camplin*[50] did not specify the range of characteristics which might legitimately be taken into account when assessing the effect of provocation and it is not clear where the line between admissible and inadmissible factors should be drawn. Age and sex *were* identified as relevant characteristics, but it is safe to assume that race, ethnic origin, religious affiliation and physical infirmity might also qualify in this regard. In *R v Morhall*,[51] it was held that the accused's history and the circumstances in which he or she found himself or herself were relevant. In that case, the accused's addiction to glue sniffing was held to be relevant to the gravity of provocation. The ruling in *Morhall* indicates that discreditable characteristics may be taken into account and it has been suggested that a person's criminal record and paedophile tendencies might also feature in the evaluation of the defence.[52] On the other hand, the speeches in *Camplin* unequivocally excluded temperamental disposition, irascibility and drunkenness from consideration.

3.27 While the English courts have gradually expanded the list of personal characteristics that may be taken into account, a vital distinction was drawn in *Camplin*[53] between characteristics that affect the gravity of provocation and those that relate to the question of self-control. The jury may take the accused's personal characteristics into account when considering the question of gravity since in many cases the impact of provocation can only be grasped by considering such characteristics. On the other hand, personal characteristics were deemed to be irrelevant to the issue of self-control: here the accused is expected to match the standard of the "reasonable man" *simpliciter*.

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49 *DPP v Camplin* [1978] AC 705, 718.

50 *DPP v Camplin* [1978] AC 705.

51 [1996] AC 90.

52 *R v Morhall* [1996] AC 90, 98-99; see also Smith "Commentary" [1993] Crim LR 957, 958.

53 *DPP v Camplin* [1978] AC 705.

The only exception to this rule came in the form of a recognition that age (and perhaps sex)[54] effectively determines the level of an individual's self-control. Thus Lord Diplock felt that age should be taken into account when assessing self-control (as well as gravity of provocation) because "to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity…."[55] This distinction between the issues of the gravity of provocation and the matter of self-control has been central to the development of the law since the decision in *Camplin* and was recently reiterated by the House of Lords in *Morhall*.[56]

3.28 The relevance of mental infirmity to provocation has posed special difficulties for the courts in the aftermath of the decision in *Camplin*.[57] Hitherto, it was clear that mental infirmity was excluded from consideration,[58] but the recasting of the defence in that case forced a rethink. It was argued that mental infirmity should be treated on the same basis as other characteristics affecting the gravity of provocation. This was met by the competing contention that evidence of mental infirmity was appropriate to the defences of insanity and diminished responsibility rather than provocation.[59]

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54 "A proper direction to the jury should explain "that the reasonable man … is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him": *DPP v Camplin* [1978] AC 705, 718 *per* Lord Diplock. Authority in other jurisdictions confines the concession to age and excludes sex: see *R v Hill* (1986) 25 CCC (3d) 322, 351-352 *per* Wilson J (dissenting judgment); *Stingel v R* (1990) 171 CLR 312, at paragraphs 24-26; *Masciantonio v R* (1995) 183 CLR 58.

55 *DPP v Camplin* [1978] AC 705, 717; (note that this passage, as reported in [1978] 2 All ER 168, 174, differs: "… to require old heads on young shoulders is inconsistent with the law's compassion of human infirmity…").

56 *R v Morhall* [1996] AC 90.

57 *DPP v Camplin* [1978] AC 705.

58 *R v Alexander* (1913) 9 Cr App R 139.

59 Ashworth *Principles of Criminal Law* (3rd ed Oxford University Press 1999) at 281-282, 290.

3.29 The authorities are divided on this issue. In a series of decisions in the 1990s, the Court of Appeal held that an accused's mental infirmity could be taken into account in relation both to the question of gravity of provocation *and* to that of self-control. Accordingly, conditions such as eccentric and obsessional personality, depressive illness, paranoia, abnormal personality with immature, explosive and attention seeking traits, battered woman syndrome and personality disorders were held to be relevant.[60] This development had two effects. First, it created an overlap between the plea of provocation and the mental condition defences, especially diminished responsibility. Secondly, it meant that in contrast with other relevant characteristics, mental infirmity could also be taken into account when assessing the question of self-control, thereby weakening the normative dimension of the defence of provocation.

3.30 A more cautious approach was adopted in *Luc Thiet Thuan v The Queen*,[61] an appeal from Hong Kong to the Privy Council. There it was held, by a majority of three to one, that the appellant's mental infirmity which reduced his powers of self-control below that of a normal person could *not* be attributed to the reasonable person when considering the objective (or normative) element of the defence of provocation. Writing for the majority, Lord Goff noted that the objective test had survived the legislative changes (introduced in the 1957 Act) to the defence of provocation and suggested that it was not open to the courts to interpret the law in a manner which subverted that state of affairs.

3.31 Thus, by the end of the 1990s, there was an irreconcilable division of opinion in the authorities on the question of mental infirmity. Trial courts in England and Wales naturally felt bound by the Court of Appeal decisions rather than by the ruling in *Luc Thiet Thuan*.[62] On the other hand, leading commentators took the view that the latter decision "seems right."[63] As will be seen presently, the

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60 See *R v Ahluwalia* [1992] 4 All ER 889; *R v Dryden* [1995] 4 All ER 987; *R v Humphreys* [1995] 4 All ER 1008; *R v Thornton (No 2)* [1996] 2 All ER 1023.

61 [1997] AC 131.

62 *Ibid*. See Archbold *Criminal Pleading, Evidence and Practice* (1999 ed Sweet & Maxwell) at paragraphs 19-62.

63 Smith and Hogan *Criminal Law* (9th ed Butterworths 1999) at 363.

House of Lords effectively settled the matter in *Smith*[64] by all but abolishing the distinction between conditions affecting gravity and characteristics affecting self-control which had been central to the decision in *Camplin*;[65] and, in the process, created a significant overlap between the defences of provocation and diminished responsibility.

E Moves Towards a Subjective Test

3.32 In *Smith*[66] the defendant was charged with murder and relied on the defence of provocation, among others, alleging that he suffered from a serious clinical depression which caused him to lose self-control and carry out the killing. He was convicted of murder but successfully appealed to the Court of Appeal on the ground that the trial judge had misdirected the jury by instructing them that the accused's depressive state should be taken into account in relation to the gravity of the provocation *but not* in respect of his powers of self-control.[67]

3.33 The Crown brought an appeal to the House of Lords in order to determine which characteristics were relevant for consideration by the jury: those relating to the gravity of the provocation and/or those affecting the accused's powers of self-control. Counsel for the Crown argued that personal characteristics must be excluded from consideration, subject to the very limited exceptions of age and sex recognised in *Camplin*:[68] "[d]epartures from that approach destroy the concept of a reasonable man by whose standard of control the behaviour of the particular individual is to be judged."[69] Defence counsel responded by contending that this was not a requirement of section 3 of the 1957 Act and that it would be unfair and unreal to apply the approach advocated by the Crown: "[a] person's response to provocation must be judged by comparison with

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64 *R v Smith* [2001] 1 AC 146.

65 *DPP v Camplin* [1978] AC 705.

66 *R v Smith* [2001] 1 AC 146.

67 *R v Smith* [1999] QB 1079.

68 *DPP v Camplin* [1978] AC 705.

69 *R v Smith* [2001] 1 AC 146, 153 as summarised by Lord Slynn of Hadley.

a reasonable man having the same relevant characteristics as he has."[70]

3.34 Although the appeal turned on the relationship between mental infirmity and the defence of provocation, the House of Lords took the opportunity to conduct a general review of the law in the area. As Lord Hoffmann stated, "this appeal offers an opportunity, within the constraints imposed by history and by Parliament, to make some serviceable improvements."[71] By a majority of three to two, it was held that the jury should take account of the accused's mental infirmity as a relevant characteristic when assessing the questions of gravity of provocation and self-control alike. The majority stated that the distinct roles assigned to the judge and jury by section 3 of the 1957 Act – whereby the judge can no longer direct the jury as to the characteristics it must take into account, or ignore, in determining whether or not the accused was provoked – meant that it was the duty of the trier of fact to consider the *totality* of the accused's characteristics in deciding whether he or she acted under provocation. The majority thus endorsed the Court of Appeal decisions noted in the preceding section in preference to the view which had prevailed in the Privy Council in *Luc Thiet Thuan*.[72] Significantly, it was also held that evidence of mental infirmity was not, in the opinion of their Lordships, confined to the defence of diminished responsibility. The establishment of that defence by section 2 of the *Homicide Act 1957* did not preclude evidence of mental infirmity from being tendered in support of a defence of provocation.

3.35 *Smith*[73] thus represents a significant broadening of the scope of the defence of provocation: henceforth no distinction may be drawn between those characteristics going to the gravity of provocation and those going to a defendant's powers of self-control. This distinction was said to be futile not least because it was too complex for jurors to apply:[74]

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70 *R v Smith* [2001] 1 AC 146.

71 *Ibid* at 159.

72 *Luc Thiet Thuan v The Queen* [1997] AC 131; see paragraph 3.30 above.

73 *R v Smith* [2001] 1 AC 146.

74 *Ibid* at 167 *per* Lord Hoffmann, citing Yeo *Unrestrained Killings and the Law* (Oxford University Press 1998) at 61 as to why jurors find the

> "The jury is entitled to act upon its own opinion of whether the objective element of provocation has been satisfied and the judge is not entitled to tell them that for this purpose the law requires them to exclude from consideration any of the circumstances or characteristics of the accused."[75]

3.36 While willing to countenance the widening of the defence as described above, the majority in *Smith* expressed concern lest the element of objectivity in the test for provocation be entirely eroded. Thus Lord Hoffmann stated that "[f]or the protection of the public, the law should continue to insist that people must exercise self-control"[76] because "[a] person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his antisocial propensity as even a partial excuse for killing."[77] In Lord Hoffmann's view, the objective element in the defence should be preserved by emphasising the need for the public to exercise self-control, as well as by ensuring that a limit is placed on the range of characteristics which the accused may rely upon when introducing evidence of loss of self-control. In this regard, Lord Hoffmann, citing the Australian case of *Stingel v R*,[78] mentioned jealousy and obsession as examples of two anti-social characteristics which would be excluded from consideration.[79] Lord Slynn was equally concerned that the objective standard be retained: "this does not mean that the objective standard of what 'everybody is entitled to expect that his fellow citizens will exercise in society as it is today' is [being] eliminated."[80]

3.37 The decision in *Smith*[81] has been criticised by commentators.[82] The burden of the critique has been that the majority

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distinction so difficult: "[It] bears no conceivable relationship with the underlying rationales of the defence of provocation…."

75 *R v Smith* [2001] 1 AC 146, 166 *per* Lord Hoffmann.

76 *Ibid* at 169.

77 *Ibid*.

78 (1990) 171 CLR 312.

79 *R v Smith* [2001] 1 AC 146, 169.

80 *Ibid* at 155.

81 *R v Smith* [2001] 1 AC 146.

misinterpreted the decision in *Camplin*[83] and overlooked the context of the *Homicide Act 1957*. Thus, it has been suggested[84] that the weight of authority was to the effect that the personal characteristics of the accused are not relevant to the question of self-control; and that the House of Lords had unanimously endorsed this stance several years earlier in *Morhall*.[85] It has also been suggested that mental infirmity more appropriately gives rise to the defence of diminished responsibility provided for in section 2 of the 1957 Act. Perhaps the most trenchant criticism has been that the decision endorses a "culturally relativised" criterion[86] and invites "an evaluative free-for-all in which anything that induces sympathy by the same token helps to excuse, [with the result that] little more than lip service is paid to the all-important objective (impersonal) standard of the reasonable person.…"[87]

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82 Smith "Commentary" [2000] Crim LR 1005; Gardner and Macklem "Compassion without Respect: Nine Fallacies in *R v Smith*" [2001] Crim LR 623; Macklem and Gardner "Provocation and Pluralism" (2001) 64 MLR 815. See also Smith and Hogan *Criminal Law* (9th ed Butterworths 1999) at 363: "It is hard to see how [the Court of Appeal decision in *Smith*] can be upheld without doing violence to the Homicide Act"; Ashworth *Principles of Criminal Law* (3rd ed Oxford University Press 1999) at 282.

83 *DPP v Camplin* [1978] AC 705.

84 Smith "Commentary" [2000] Crim LR 1005.

85 *R v Morhall* [1996] AC 90.

86 Gardner and Macklem "Compassion without Respect: Nine Fallacies in *R v Smith*" [2001] Crim LR 623, 631, state: "When [Lord Hoffmann] cites with approval Lord Diplock's remark in *Camplin* that the reasonableness standard is to be relativised to 'society as it is today' does he mean that it is to be relativised to the standards commonly invoked and relied upon today, never mind how awful?... The jury need to ask themselves what standards of anger and self-control are *right*, not what standards are regarded or treated as right by them, or by society at large, or by some other social constituency."

87 *Ibid at* 635; the same authors trenchantly observed (at 634) that the decision is "lightweight. It replaces important moral distinctions in the law with half-baked pseudo-theories and worthy-sounding platitudes. In its attitude to the jury, it manifests an unholy alliance of judicial cowardice and judicial condescension."

F Comment

3.38 Since the decision in *Bedder*,[88] the courts in England and Wales have been keen to distance themselves from the result achieved by the House of Lords in that case. The movement away from *Bedder* had been confirmed by the House of Lords in *Camplin*[89] and reiterated in *Morhall*.[90]

3.39 It is perhaps too soon to draw definite conclusions as to how precisely the decision in *Smith*[91] fits into this scheme of things. Despite the observations of the majority to the effect that the element of objectivity was being retained, the upshot of the decision appears to be that the law in England and Wales is moving inexorably towards a purely subjective approach to provocation. Given the legislative basis of the objective test in that jurisdiction, it may be questioned whether it is properly within the province of the courts to effect such a radical change in the law. Be that as it may, to the extent that it is thought desirable to introduce an objective component into the Irish law on provocation, experience in England and Wales suggests that section 3 of the *Homicide Act 1957* is unlikely to provide the best model for reform.

G Summary

3.40 This chapter traced the origins and development of the "reasonable man" test of provocation in the law of England and Wales. Although a literal interpretation of this test had been adopted by the mid-twentieth century, the courts gradually came to accept that the hypothetical "reasonable man" should notionally be invested with the characteristics of the accused. Nevertheless, a sharp distinction was drawn between those characteristics affecting the gravity of provocation, which were deemed relevant under the test, on the one hand, and those relating to the question of self-control, which were regarded as irrelevant, on the other. However, even this distinction

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88 *Bedder v DPP* [1954] 2 All ER 801.

89 *DPP v Camplin* [1978] AC 705.

90 *R v Morhall* [1996] AC 90.

91 *R v Smith* [2001] 1 AC 146.

has now been rejected in the recent decision of the House of Lords in *Smith*,[92] prompting suggestions that the law in England and Wales is moving closer to the subjective approach currently applied in Ireland.

[92] *R v Smith* [2001] 1 AC 146.

CHAPTER 4 THE MODERN LAW IN IRELAND

4.01 Irish case law was silent on the subject of provocation until 1978; hence the relevance of developments in England and Wales prior to that date. However, within days of the House of Lords delivering its judgment in *DPP v Camplin*,[1] the Court of Criminal Appeal decided *People (DPP) v MacEoin.*[2] As will be seen presently, the decision in that case was to shape the modern law of provocation in Ireland.

A The Birth of the Subjective Test

4.02 The *MacEoin*[3] 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, in the event, 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 presupposes it. Distinguishing the earlier authorities to the contrary effect,[4] the Court said that:

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1 *DPP v Camplin* [1978] AC 705.

2 [1978] IR 27. The Court comprised Finlay P, Kenny and McMahon JJ. The judgment was delivered by Kenny J.

3 *Ibid*.

4 *Ibid* at 30-31, citing in support of this proposition *Attorney-General for Ceylon v Perera* [1953] AC 200; *Lee Chun-Chuen v The Queen* [1963] AC 220; *Straker v The Queen* (1977) 13 ALR 103.

> "the provocation relied on usually is one, if not the sole, cause of the formation of the intention to kill or cause serious injury to another. To speak of provocation negativing or depriving a man of the intention to kill or cause serious injury is to confuse cause and result."[5]

4.03 Although the misdirection on the relationship between provocation and intention was the basis on which the *MacEoin*[6] 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*[7] form, had been trenchantly criticised not least in the speeches of the House of Lords in *Camplin*:[8]

> "[T]he courts seem to have created the concept of 'the reasonable man' as a mythical person seemingly not only detached from but also rather remote from the accused person and having certain attributes as laid down by the court and as the courts directed juries to accept."[9]

4.04 As noted in Chapter 3, *Camplin*[10] 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*[11] test. Possibly because it had been delivered a mere eleven days previously,[12] the

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5 *People (DPP) v MacEoin* [1978] IR 27, 30.

6 *People (DPP) v MacEoin* [1978] IR 27.

7 *Bedder v DPP* [1954] 2 All ER 801.

8 *DPP v Camplin* [1978] AC 705.

9 *Ibid* at 719-720 *per* Lord Morris of Borth-y-Gest.

10 *DPP v Camplin* [1978] AC 705.

11 *Bedder v DPP* [1954] 2 All ER 801.

12 *DPP v Camplin* [1978] AC 705 was issued on 6 April 1978 and *People (DPP) v MacEoin* [1978] IR 27 on 17 April 1978.

decision in *Camplin* was not brought to the attention of the Court of Criminal Appeal in *MacEoin.*[13] Had *Camplin* been cited, the Irish law of provocation might have taken a different course. In the event, the Court followed the English lead in widening the definition of provocation to include insulting words, stating that the jury must consider "acts or words, or both, of provocation",[14] 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 the Court in *MacEoin* is as follows:

> "[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."[15]

4.05 In framing the new subjective standard, the Court of Criminal Appeal relied on a minority judgment in *Moffa v The Queen*,[16] a recent decision of the High Court of Australia. Murphy J's strong dissenting judgment in that case was quoted at length and formed the basis for the Court of Criminal Appeal's rejection of the objective test. Murphy J had 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 stated, "[t]he test cannot withstand critical examination."[17]

4.06 In Murphy J's opinion the "objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test

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13 *People (DPP) v MacEoin* [1978] IR 27.

14 *Ibid* at 34.

15 *Ibid* at 34.

16 *Moffa v The Queen* (1977) 138 CLR 601.

17 *Ibid* at 625.

is."[18] Thus "[i]t is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flash point, loss of self-control and capacity to kill under particular circumstances."[19] Accordingly, the judge concluded:

> "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.... It degrades our standards of civilisation to construct a model of a reasonable or ordinary man and then to impute to him the characteristic that, under provocation…, he would kill the person responsible for the provocation."[20]

4.07 Murphy J's dissenting judgment in *Moffa*[21] 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*[22] 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 judgment in *Moffa*, the Court of Criminal Appeal opined that the objective test was "profoundly illogical"[23] and that there were inherent inconsistencies in its basic philosophy as theretofore employed by the courts in England and Wales and elsewhere. Not least of these was the difficulty of determining which of the accused's characteristics should be attributed to the reasonable man in order to make the test workable in practice. [24] In *Moffa* Murphy J had made a similar point to the effect that, "unless he had

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18 *Moffa v The Queen* (1977) 138 CLR 601, 626.

19 *Ibid*.

20 *Ibid* at 626-627.

21 *Moffa v The Queen* (1977) 138 CLR 601.

22 *People (DPP) v MacEoin* [1978] IR 27.

23 *Ibid* at 32.

24 *Ibid*.

lived the life of the accused, it would be impractical to speak of what a reasonable or ordinary man would do in the circumstances."[25]

4.08 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*, a case dealing with the problem of excessive self-defence in murder.[26] 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."[27] The Court also referred to a number of academic criticisms of the objective test[28] and concluded that the "test in cases of provocation should be declared to be no longer part of our law."[29] Unfortunately, the Court neither elaborated on, nor discussed the merits of, the newly created *subjective* test. It might also be observed that 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.[30]

4.09 Significant criticism has been levelled against the Court of Criminal Appeal's decision to retain a proportionality component as part of the new test.[31] The resultant standard has been described as no less illogical than the objective test it sought to replace.[32] The gravamen of this charge is that the proportionality part of the *MacEoin* test requires the jury to consider whether "the provocation bears a *reasonable relation* to the amount of force used by the accused"[33] and that this is inconsistent with the Court of Criminal Appeal's stated aim of introducing a radically subjective criterion of

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25 *Moffa v The Queen* (1977) 138 CLR 601, 625.

26 [1972] IR 416, 422.

27 *People (DPP) v MacEoin* [1978] IR 27, 34.

28 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.

29 *People (DPP) v MacEoin* [1978] IR 27, 34.

30 For discussion, see paragraph 6.06 below.

31 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20.

32 *Ibid* at 22.

33 *People (DPP) v MacEoin* [1978] IR 27, 34 (emphasis added).

provocation.[34] 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.[35]

4.10 Admittedly, subsequent interpretations of *MacEoin*[36] 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.[37] 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. Thus two plausible interpretations of the *MacEoin* test are possible; it can be seen as:

(i) a partly subjective/partly objective test where both subjectivity and proportionality are given equal weight; or

(ii) a purely subjective test which only takes the proportionality of the accused's reaction into consideration when weighing up the overall evidence.

4.11 Not surprisingly, the resultant confusion has been criticised. In *People (DPP) v Kelly*,[38] the Court of Criminal Appeal warned against quoting from the judgment in *MacEoin* because of what it regarded as its confusing discussion of the law; and it has also been

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34 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20, 22.

35 McAuley "Anticipating the Past" (1987) 50 MLR 133, 153-154.

36 *People (DPP) v MacEoin* [1978] IR 27.

37 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20, 24.

38 [2000] 2 IR 1. The Court comprised Barrington, McCracken and Kearns JJ. The judgment of the Court was delivered by Barrington J.

suggested that the analogy drawn by the Court of Criminal Appeal in that case with *Dwyer*[39] is misleading. In the nature of things, an accused's unreasonable belief negates the *mens rea* for murder in the case of excessive self-defence, whereas the defence of provocation, as the decision in *MacEoin* itself verified, assumes its existence.[40]

B Attempts to Clarify *People (DPP) v MacEoin*

4.12 The Court of Criminal Appeal has made several attempts to clarify the *MacEoin*[41] ruling.

4.13 In *People (DPP) v Mullane*[42] the appeal was based on the allegation that the issue of provocation had not been adequately explained to the jury. The accused alleged that he killed his partner as a result of her taunts regarding his lack of sexual prowess. The defence relied exclusively on the provocative effect of these taunts. 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*[43] might suggest that there was, after all, a lingering element of objectivity in the defence.[44] However, it was held that it had not been part of the Court of Criminal Appeal's intention in *MacEoin* to retain any such element. In the opinion of the Court, the reference to proportionality in that case was rather 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

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39 *People (Attorney General) v Dwyer* [1972] IR 416.

40 McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 875, footnote 140.

41 *People (DPP) v MacEoin* [1978] IR 27.

42 Court of Criminal Appeal 11 March 1997. The Court comprised O'Flaherty, Carroll and Geoghegan JJ. The judgment of the Court was delivered by O'Flaherty J.

43 *People (DPP) v MacEoin* [1978] IR 27.

44 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997 at 8.

objective standard. That latter construction would go contrary to everything else that is contained in the judgment."[45]

4.14 Interestingly, the Court of Criminal Appeal's attempt to resolve the contradiction involved in the apparent inclusion of a proportionality requirement in *MacEoin*[46] 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*: having laid down the subjective test of provocation, the Court in *McEoin* had continued in the imperative voice to the effect that the trial judge must rule on "whether the provocation bears a reasonable relation to the amount of force used by the accused." Stannard's assessment of *Mullane*[47] 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."[48]

4.15 In *People (DPP) v Noonan*,[49] 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*. 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 on to affirm *Mullane*,[50] 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.[51]

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45 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997 at 7.

46 *People (DPP) v MacEoin* [1978] IR 27.

47 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997.

48 Stannard "Making Sense of MacEoin" (1998) 8 ICLJ 20.

49 [1998] 2 IR 439. The Court comprised O'Flaherty, Geoghegan and McGuinness JJ. The judgment of the Court was delivered by Geoghegan J.

50 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997.

51 *People (DPP) v Noonan* [1998] 2 IR 439, 442.

4.16 Similarly, in *People (DPP) v O'Mahony*[52] the appeal was grounded on the trial judge's alleged failure to direct the jury as to the correct standard to be applied in relation to provocation. It was argued on behalf of the appellant that the fact that the trial judge had used the phrase, "it is not whether [the conduct] would provoke a reasonable man, but whether it would provoke a person of the disposition and character and circumstances of the accused", had effectively transposed the matter into third-person terms, thereby introducing an objective dimension into the test. The Court of Criminal Appeal found that this contention amounted to an over-analysis of the charge to the jury and that the broad thrust of the trial judge's remarks was enough to leave the trier of fact in no doubt that the test of provocation was subjective in nature.

4.17 In *People (DPP) v Bambrick*[53] the deceased, who was intoxicated, had made suggestive homosexual remarks, followed by a physical homosexual advance, to the accused (who was also intoxicated). The accused said in evidence that this episode triggered memories of his own childhood abuse and caused him to lose control and batter the deceased to death with a wooden stake. It was argued on behalf of the defendant that the trial judge failed to tell the jury that provocation 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 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 on his part.[54] In counsel's submission, 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, neglected to explain how the trial judge should have addressed the jury on the relevant matters.

4.18 In *Kelly*,[55] the trial judge, having emphasised that the test of provocation in this jurisdiction was subjective, went on to rely on

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52 Court of Criminal Appeal 30 November 1998 (*ex tempore*).

53 [1999] 2 ILRM 71. The Court comprised Lynch, Carroll and Cyril Kelly JJ. The judgment of the Court was delivered by Lynch J.

54 The trial judge's direction was cited at *People (DPP) v Bambrick* [1999] 2 ILRM 71, 75.

55 *People (DPP) v Kelly* [2000] 2 IR 1.

passages from earlier judgments, including those in *MacEoin*[56] and *Mullane*,[57] 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.

4.19 The gravamen of the appellant's complaint in *Kelly*[58] 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."[59] 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 provocation had *not* caused the accused to lose self-control.[60]

4.20 Yet 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. The Court stated:

> "If the reaction of the accused in totally losing his self control in response to the provocation appears to the jury to have been strange, odd, or disproportionate that is a matter which they are entitled to take into consideration in deciding

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56 *People (DPP) v MacEoin* [1978] IR 27.

57 *People (DPP) v Mullane* Court of Criminal Appeal 11 March 1997.

58 *People (DPP) v Kelly* [2000] 2 IR 1.

59 *Ibid* at 8.

60 *Ibid* at 9.

whether the evidence on which the plea of provocation rests is credible."[61]

C *The People (DPP) v Davis*: A Reappraisal of the Subjective Test

4.21 In *People (DPP) v Davis*[62] the Court of Criminal Appeal accepted the need for a re-examination of the Irish approach to provocation, adding ruefully that "[i]t is with some trepidation that the court ventures into [that] territory".[63]

4.22 Mindful of the background of inconsistent cases referred to above, the Court endeavoured to identify the difficulties involved in applying the *MacEoin*[64] 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. That standard, however, remained relevant on the question of credibility."[65] In addition, the Court noted that "[t]he totally subjective criteria for the defence of provocation had been criticised by a number of commentators who [had expressed] concern that it places an exceptionally onerous burden on the prosecution";[66] and made reference to the submissions of counsel for the prosecution in *Kelly*[67] to the effect that "it would be almost impossible for the prosecution to satisfy a jury that words or acts alleged by the defence to constitute provocation were not reasonably capable of causing the accused to lose his self-control."[68]

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61 *People (DPP) v Kelly* [2000] 2 IR 1, 11. The subjective test was confirmed in two subsequent decisions: *People (DPP) v Boyle* [2000] 2 IR 13; *People (DPP) v Heaney* Court of Criminal Appeal 17 January 2000. In each case a brief *ex tempore* judgment was delivered.

62 [2001] 1 IR 146. The Court comprised Hardiman, O'Higgins and Kearns JJ. The judgment of the Court was delivered by Hardiman J.

63 *Ibid* at 154.

64 *People (DPP) v MacEoin* [1978] IR 27.

65 *People (DPP) v Davis* [2001] 1 IR 146, 159.

66 *Ibid* at 157.

67 *People (DPP) v Kelly* [2000] 2 IR 1.

68 *People (DPP) v Davis* [2001] 1 IR 146, 157.

4.23 Turning to the rules and principles governing provocation, the Court of Criminal Appeal observed that the plea had "changed greatly from its earliest manifestations at the beginning of the common law era to the form in which it is presently found in Ireland."[69] In a striking invocation of the early modern conception of the plea, the Court remarked that provocation "was a concession to the acknowledged weaknesses of human nature and in particular an acknowledgement … that there were specific events calculated to rob a person of his self-control."[70] Finally, the Court drew attention to a shift of emphasis in the defence from cause to effect – from the factors leading to a loss of self-control to the psychological effects thereof, which it also identified as the motor behind the judicial adoption in Ireland of an "extreme form of subjectivity".[71]

4.24 As already indicated, the Court in *Davis*[72] accepted that the form of the provocation defence in Ireland "may, perhaps, require restatement."[73] In this regard, it was 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 [allowing it would] promote moral outrage."[74] It was observed that factors less common at the time of *MacEoin*[75] may now have an important bearing on the limits of the defence. Citing McAuley and McCutcheon,[76] the Court mentioned road rage and other comparable types of "socially repugnant violent reaction"[77] as examples of the sort of conduct that might be excluded from the ambit of the plea on policy grounds.

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69 *People (DPP) v Davis* [2001] 1 IR 146, 158-159.

70 *Ibid* at 159.

71 *Ibid*.

72 *People (DPP) v Davis* [2001] 1 IR 146.

73 *Ibid* at 159.

74 *Ibid*.

75 *People (DPP) v MacEoin* [1978] IR 27.

76 In *People (DPP) v Davis* [2001] 1 IR 146, 159-160, the Court quoted the example provided by McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 877 of a white supremacist who kills in the throes of a racist passion.

77 *People (DPP) v Davis* [2001] 1 IR 146, 160.

Again alluding to the classical roots of the plea 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.[78]

D Elements of the Defence

4.25 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: *viz*, 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.

4.26 Thus in *Davis*,[79] the Court noted that the defence "does not arise automatically":[80] the accused must be able to show that provocation is a live issue; "the defence must be raised, and not merely invoked."[81] 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",[82] as it involves a "low threshold",[83] 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."[84] A similar view was

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78 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.

79 *People (DPP) v Davis* [2001] 1 IR 146.

80 *Ibid* at 155.

81 *Ibid* at 158.

82 *Ibid* at 156.

83 *Ibid* at 158.

84 *Ibid* at 155. (Emphasis added).

expressed in *People (DPP) v McDonagh*.[85] Counsel for the applicant contended that the subjective nature of the defence could lead to the conclusion that, in light of a particular defendant's susceptibilities, the mere clicking of fingers amounted to provocation. The Court accepted that this was conceivable but added that "even then the evidence must be such as to give rise to the possibility that the accused may have been so provoked into losing control of himself at the time for provocation to go to a jury."[86] The same point arose more recently in *People (DPP) v Doyle*,[87] where the Court of Criminal Appeal held that the trial judge was justified in concluding that there was insufficient evidence of provocation for the matter to go to the jury.

4.27 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*[88] the Court of Criminal Appeal has reiterated the point that provocation involves a sudden and complete loss of control:

> "The loss of self-control must be total and the reaction must come suddenly and before there has been time for passion to cool. The reaction cannot be tinged by calculation and it must be genuine in the sense that the accused did not deliberately set up the situation which he now invokes as provocation. To justify the plea of provocation there must be a sudden unforeseen onset of passion which, for the moment, totally deprives the accused of his self-control."[89]

4.28 Similar views had been expressed in *Davis*[90] and the foregoing passage was quoted in *McDonagh*,[91] where the Court went

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85 [2001] 3 IR 201. The Court comprised Murray, Johnson and Kelly JJ. The judgment of the Court was delivered by Murray J.

86 *Ibid* at 209.

87 Court of Criminal Appeal 22 March 2002. The Court comprised Keane CJ, Carroll and Butler JJ. The judgment of the Court was delivered by Keane CJ.

88 *People (DPP) v Kelly* [2000] 2 IR 1.

89 *Ibid* at 11.

90 *People (DPP) v Davis* [2001] 1 IR 146.

on to state that "provocation has two main elements, an act or series of acts of provocation (which may comprise in whole or in part of things said) leading to a total loss of self-control at the time of the wrongful act."[92]

4.29 On the latter issue, the Court has made it clear that the alleged loss of control must be such that the accused is "not master of his mind";[93] it must be clear that he was not acting in a calculating or deliberate manner. Loss of control therefore involves more than a mere loss of temper[94] or the condition of being "vexed".[95]

4.30 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. Thus, a mere assertion by the accused that there was provocation will not of itself be sufficient to raise the defence: the defendant must point to supporting evidence. Similarly, the defence appears to involve a sudden and immediate loss of self-control which has not been engineered by the accused's conduct.

4.31 The position regarding loss of self-control caused by intoxication is less clear. At common law, the accused's drunkenness was excluded from consideration when evaluating the defence of provocation.[96] This stance survived the change in the law in England and Wales wrought by the decision in *Camplin*.[97] It has been suggested that intoxication, being a transient state, is not a personal characteristic and thus should not be taken into account when determining the gravity of provocation.[98] However, it has recently been held that the decision to exclude intoxication from the scope of

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91 *People (DPP) v McDonagh* [2001] 3 IR 201.

92 *Ibid* at 208.

93 *Ibid* at 211 citing a passage from *People (DPP) v Kelly* [2000] 2 IR 1, 10, which in turn cites *R v Duffy* [1949] 1 All ER 932, 932 *per* Devlin J.

94 *People (DPP) v Kelly* [2000] 2 IR 1, 11.

95 *People (DPP) v Davis* [2001] 1 IR 146, 157.

96 *R v McCarthy* [1954] 2 All ER 262.

97 *DPP v Camplin* [1978] AC 705.

98 *R v Newell* (1980) 71 Cr App R 331

the plea is a matter of policy.[99] Moreover, it has been accepted that *addiction* to an intoxicant, as distinct from the fact of being intoxicated, *is* a relevant personal characteristic in the context of provocation.[100]

4.32 The relationship between provocation and intoxication awaits an authoritative ruling in Irish law. Although intoxication was a factor in a number of the recent cases, none of the decisions appears to have turned on that issue. The strict logic of the subjective test suggests that the fact of intoxication, as it is plainly relevant to the accused's "circumstances", could be taken into account. As already indicated, this possibility was hinted at in *Kelly*[101] where it was observed that, while the accused's drunkenness would not be sufficient to raise the defence of provocation, it might be a factor in the situation.[102] The policy question of whether intoxication should be a bar to a plea of provocation thus remains unanswered in Irish law.

E Comment

4.33 The foregoing review of case law on provocation illustrates the difficulties surrounding the interpretation and application of the *MacEoin*[103] judgment.[104] The fact that the trial judge in *Kelly*[105] immediately granted leave to appeal is indicative of continuing judicial uncertainty as to the correct interpretation of *MacEoin*. Other cases highlight the difficulty of reconciling the liberal implications of a subjective test with a range of important policy considerations.

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99 *R v Morhall* [1996] AC 90.

100 *Ibid*.

101 *People (DPP) v Kelly* [2000] 2 IR 1.

102 *Ibid* at 11.

103 *People (DPP) v MacEoin* [1978] IR 27.

104 See Goldberg "Developments in Criminal Law" [2000] 2(3) P & P 15, 16: "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."

105 *People (DPP) v Kelly* [2000] 2 IR 1.

4.34 In *People (DPP) v Hennessy*[106] the defendant had been suspended from his job as manager of the Callan Social Welfare Office on suspicion of having embezzled monies from the office over a number of years. At sentencing stage Finnegan J opined that the alleged provocation – a critical remark made by the deceased, the accused's spouse, followed by a slap across the face – appeared to be "of a very low level",[107] but had allowed the issue to go to the jury. The jury subsequently found that there had been a temporary and total loss of control at the time of the killing. It was noted that the accused had suffered from very severe stress when the embezzlement investigation began, but that he was responsible for the stress thus created. A sentence of eight years' imprisonment for manslaughter was imposed.

4.35 *Hennessy*[108] typifies the difficulties associated with the subjective test. 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. A related matter concerns the range of factors which may be taken into account when determining the evidential threshold and whether certain factors – such as self-induced stress – should be excluded altogether. It will be recalled that the prosecution in *Kelly*[109] argued that, once the defence of provocation has been raised on the evidence, 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.

4.36 Arguably the judgment in *Davis*[110] contains the strongest criticism to date of the application of the *MacEoin*[111] test in Ireland.

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106 Central Criminal Court (Finnegan J) October 2000 and April 2001.

107 *People (DPP) v Hennessy* Central Criminal Court (Finnegan J) October 2000 and April 2001, reported in *The Irish Times* "Victim's father tells court of disappointment with sentence" 4 April 2001 at 4.

108 *People (DPP) v Hennessy* Central Criminal Court (Finnegan J) October 2000 and April 2001.

109 *People (DPP) v Kelly* [2000] 2 IR 1.

110 *People (DPP) v Davis* [2001] 1 IR 146.

There the Court of Criminal Appeal suggested 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.

F Summary

4.37 This chapter reviewed the effects of the *MacEoin*[112] decision on the Irish law of provocation. In that case, the Court of Criminal Appeal departed from the traditional common law approach to the plea and laid down a new subjective standard purged of the concept of the "reasonable man". Subsequent decisions have struggled with the meaning of the *MacEoin* judgment. In particular, difficulties have arisen regarding the status of the traditional requirement that an accused's response should be proportionate to the provocation. Some normative features of the traditional test of provocation – such as the requirement of a sudden and complete loss of self-control – nevertheless appear to have survived the *MacEoin* revolution. However, given the subjective nature of the test, the charge that it is virtually impossible for the prosecution to rebut evidence of provocation once the plea has been raised seems justified. As will be seen from the comparative survey in the next chapter, Ireland would appear to be alone among common law jurisdictions in having saddled itself with this dispensation.

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111 *People (DPP) v MacEoin* [1978] IR 27.

112 *Ibid*.

CHAPTER 5 COMPARATIVE SURVEY

5.01 In these islands provocation is a partial defence to murder and, where successful, leads to a conviction for manslaughter. However, in some jurisdictions, the defence is not confined to murder, but is also available to attempted murder and certain assault offences. Moreover, it is sometimes a *complete* defence. This chapter examines the plea of provocation in other jurisdictions in order to determine what possible changes and improvements might be made to its Irish counterpart. The related defence of extreme emotional disturbance as developed in the United States is considered separately at the end of the chapter.

A Governing Provisions

5.02 A variety of differently worded statutory formulae govern the defence of provocation worldwide.

5.03 In Canada the defence is set out in the Canadian *Criminal Code*, the common law having been codified in section 232 thereof, which provides:

> "(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 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."[1]

5.04 As can be seen from section 232, Canadian criminal law, like Irish law, confines the defence of provocation exclusively to murder, serving to reduce that offence to manslaughter. It has been settled that provocation under Canadian law is not applicable to attempted murder,[2] nor is it a defence to a charge of assault, although it has been held that it may be relevant thereto in terms of mitigation of sentence.[3]

5.05 Australian law demonstrates numerous ways in which the defence may be applied. In four of the six Australian states, and in the two self-governing Territories, provocation is regulated by statute. The common law continues to apply in the remaining two states, namely South Australia and Victoria.

5.06 In 1899, the *Griffith Code* was adopted as the Queensland *Criminal Code*. Several sections of that Code are relevant to provocation. Section 304 provides a partial defence to murder:

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1 For a discussion of the issues raised by subsection(4), see paragraph 7.42(ii) below.

2 *R v Campbell* (1977) 38 CCC (2d) 6 (Ontario Court of Appeal).

3 *R v Doucette, Dongen and McNutt* (1960) 129 CCC 102 (Ontario Court of Appeal).

"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."

5.07 Sections 268 and 269 of the Code provide a complete defence to assault offences:

"268(1) In this section –

'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 the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.

(2) 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.

(3) A lawful act is not provocation to any person for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.

(5) 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.

269(1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

(2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact."

5.08 Almost identically worded provisions to sections 268 and 269 are to be found in sections 245 and 246, respectively, of the Western Australian *Criminal Code* which, like its Queensland counterpart, is based on the *Griffith Code*. Section 281 of the Western Australian Code, like section 304 of the Queensland Code, provides that provocation is a partial defence to murder.

5.09 In New South Wales provocation is a partial defence to murder only. The law is set out in section 23 of the *Crimes Act 1900*, which stipulates:

"(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 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 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."

5.10 Section 13 of the Australian Capital Territory *Crimes Act 1900* is drafted in similar terms,[4] while section 160 of the Tasmanian *Criminal Code* also provides a partial defence to murder.[5]

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[4] Section 13 of the *Crimes Act 1900* (ACT) states:

"(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."

[5] Section 160 of the *Criminal Code* (Tasmania) states:

5.11 In the Northern Territory, legislation provides for provocation as a partial excuse for homicide, and as a complete defence for other offences, including assault offences. Section 34 of the *Criminal Code* states:

> "(1) A person is excused from criminal responsibility for an act or its event if the act was committed because of provocation upon the person or the property of the person who gave him that provocation 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;
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way;
>
> (e) the act was not intended and was not such as was likely to cause death or grievous harm; and

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"(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

(3) Whether the conditions required by subsection (2) were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.

(4) No one shall be held to give provocation to another only by doing that which he had a legal right to do, 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.

(5) Whether or not an illegal arrest amounts to provocation depends upon all the circumstances of the particular case, and the fact that the offender had reasonable grounds for believing, and did, in fact, believe, that the arrest was illegal, shall be taken into consideration in determining the question whether there was provocation or not."

(f) the act did not cause death or grievous harm.

(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.

(3) A person is excused from criminal responsibility for the use of such force as was reasonably necessary to prevent the repetition of a wrongful act or insult as to be provocation for him provided –

(a) he had not incited the wrongful act or insult;

(b) an ordinary person similarly circumstanced would have acted in the same or a similar way;

(c) the force used was not intended and was not such as was likely to cause death or grievous harm; and

(d) the force used did not cause death or grievous harm."

5.12 In Victoria, the matter is still governed by the common law: provocation is a partial defence to murder. Older authority to the effect that it also provided a qualified defence to certain non-fatal offences has been rejected.[6]

5.13 In New Zealand, section 169 of the *Crimes Act 1961* codified the common law on provocation:

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[6] For discussion, see *R v Farrar* [1992] 1 VR 207.

"(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."

5.14 In Scotland, provocation is governed by the common law. Traditionally Scots law has restricted provocation to cases where the accused was subjected to serious physical assault; trivial assaults and verbal taunts did not suffice to raise the plea. Provocation is admitted

as a partial defence to murder, reducing that crime to culpable homicide (*ie* manslaughter). It seems that provocation is regarded as negating the *mens rea* for murder. In *Fenning v HM Advocate*,[7] the trial judge had stated that "there would be an absence of wicked intent or recklessness because the provocation provoked the act and deprived it of the element of murderous intent which is the essence of murder."[8] The logic of the *mens rea* approach is that provocation should reduce attempted murder to attempted culpable homicide. However, the judicial consensus is that there is no such crime and, in these circumstances, that the appropriate conviction would be for some form of aggravated assault.[9] Provocation is not a defence to assault or breach of the peace, but it is relevant to sentence.[10]

5.15 The South African approach to provocation should be briefly noted.[11] Roman-Dutch law did not regard provocation as an excuse for criminal conduct but admitted it as a factor in mitigation of sentence. The introduction, in 1917, of a mandatory death sentence for murder prompted a change in attitude by the South African courts. In *R v Butelezi*,[12] the court accepted that section 141 of the Transkeian *Penal Code* correctly stated the South African position, despite the fact that, strictly speaking, that Code was confined to the Transkei territory. Section 141 established a partial defence to murder broadly similar to that which operates in most commonwealth jurisdictions: in particular, the criterion adopted was the power of self-control of the ordinary person. Eventually, support in the South African courts for this form of provocation defence evaporated with the relaxation of the mandatory death sentence.

5.16 However, provocation was to assume a different, but no less significant, role in South African law following the decision in *S v*

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7 1985 SCCR 219.

8 *Ibid* at 220 *per* Lord Mayfield.

9 See Jones and Christie *Criminal Law* (2nd ed W Green/Sweet & Maxwell 1996) at 223.

10 *MacNeill v McTaggert* (1976) SCCR Supp 150.

11 See generally Burchell and Milton *Principles of Criminal Law* (rev ed Juta & Co 1994) at chapter 26.

12 1925 AD 160.

Chretien.[13] There it was held that intoxication could negate criminal capacity or voluntariness. The question arose whether provocation would have the same effect, thus giving rise to a complete acquittal. Judicial pronouncements on the question suggest an answer in the affirmative. In *S v Van Vuuren*,[14] it was suggested, *obiter*, that provocation or severe mental or emotional stress may deprive an accused of criminal capacity, *ie* the ability to realise what is happening or to appreciate the wrongfulness of his or her conduct. In *S v Campher*,[15] it was confirmed that non-pathological conditions could support a defence of lack of criminal capacity. Significantly, it has been accepted that in cases of non-pathological incapacity the burden of proof rests with the prosecution.[16]

5.17 The foregoing cases resulted in convictions, but a plea of lack of capacity based on provocation and/or emotional stress was successfully raised in *S v Arnold*.[17] The accused was charged with the murder of his wife. He had been subjected to severe emotional pressures during his marriage and on the occasion in question he had had an argument with the deceased. At the material time, he had a pistol in his possession, which it seems he required for work which involved handling large sums of money. During the course of the argument, he gesticulated with the gun and at some stage it discharged. He admitted that he could not recall reloading the gun but a second shot was fired which struck and killed the deceased. The court accepted the accused's version of events and psychiatric evidence was adduced as to the effect of the emotional stress on him. It was stated by the psychiatrist who testified that the accused's mind was "flooded" with emotions that could have interfered with his capacity to tell right from wrong and that he acted subconsciously at the crucial time. On the strength of this evidence, the court ruled that there was a reasonable doubt as to whether the accused acted consciously and with criminal capacity; accordingly he was acquitted.

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13 1981 (1) SA 1097 (A).

14 1983 (1) SA 12 (A); see also *S v Lesch* 1983 (1) SA 814 (O).

15 1987 (1) SA 940 (A).

16 *S v Wiid* 1990 (1) SACR 561 (A).

17 1985 (3) SA 256 (C).

5.18 It seems that the South African courts have not drawn a clear distinction between provocation and emotional stress. Provocation is regarded as being caused by human beings, whereas emotional stress can be the product of an accumulation of events, rather than an isolated incident, and can result from human conduct or surrounding circumstances. It has been suggested that stressful conditions that cause an accused to lose criminal capacity could include "insulting or oppressive conduct of another person,… pre-menstrual stress suffered by a woman or … overwhelming and debilitating social conditions."[18] Ultimately, the issue is not the source of the stress but its intensity and whether it deprived the accused of capacity or caused him or her to act involuntarily.

5.19 Academic commentators in South Africa have been critical of the approach adopted by the courts. It has been suggested that policy considerations demand that provocation or emotional stress should not provide a complete defence to murder. In particular it has been argued that the accused in *Arnold*[19] acted voluntarily when he fired the fatal shot and that his general conduct during the episode was sufficiently negligent to support a conviction for culpable homicide.[20]

5.20 *The Commission recommends that the plea of provocation should operate as a partial defence to murder and should not apply beyond the confines of that offence. The Commission suggests that section 169 of the New Zealand Crimes Act 1961 may provide an appropriate template for legislative reform in this jurisdiction*.[21]

B Approaches – Objective or Subjective?

5.21 Ireland is the only jurisdiction in the common law world which employs a purely subjective test for provocation. All other jurisdictions have adopted some form of objective text.

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18 Burchell and Milton *Principles of Criminal Law* (rev ed Juta & Co 1994) at 238.

19 *S v Arnold* 1985 (3) SA 256 (C).

20 Snyman (1985) 105 SALJ 240.

21 See paragraph 7.37 below.

5.22 Thus Canadian law maintains an objective approach with subjective elements built into it. Under Canadian law there must be evidence of conduct that would have caused an ordinary person to be deprived of self-control and there must be some evidence that the accused actually lost self-control. In this respect, the governing criterion is essentially the same as that in *DPP v Camplin*.[22] The Canadian Supreme Court in *R v Hill*[23] set out the rationale for the employment of the objective standard in Canada:

> "It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned among other things with fixing standards for human behaviour. We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility. In doing this, the law quite logically employs the objective standard of the reasonable person."[24]

5.23 This stance was reiterated in *R v Gibson*[25] where it was held on appeal that "[t]he objective test in provocation serves to define the boundaries for the type of conduct upon which the defence may be based. These boundaries reflect contemporary standards."[26] The defence was said to act as a partial excuse for murder and to operate as a "compassionate response to human frailty".[27]

5.24 In *R v Parent*,[28] McLachlin CJC identified the requirements of the defence as:

> "(1) a wrongful act or insult that would have caused an ordinary person to be deprived of his or her self-control; (2) which is sudden and unexpected; (3) which in fact caused

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22 [1978] AC 705.

23 (1986) 25 CCC (3d) 322.

24 *Ibid* at 330 *per* Dickson CJC.

25 (2001) 153 CCC (3d) 465.

26 *R v Gibson* (2001) 153 CCC (3d) 465, 467.

27 *Ibid* at 487.

28 [2001] 1 SCR 761.

the accused to act in anger; (4) before having recovered his or her normal control".[29]

5.25 In this respect, McLachlin CJC reiterated the opinion of the Supreme Court of Canada delivered some years earlier in *R v Thibert*.[30] In that decision, there had been support for a broadening of the scope of the defence. Cory J, delivering the majority judgment, stated that "all the relevant background circumstances should be considered"[31] which could embrace "the background of the relationship between the deceased and the accused"; earlier insults delivered by the deceased which eventuated in the final act of provocation might be included in this evaluation.[32] Cory J also expressed his approval of two earlier decisions of the provincial courts where background circumstances were considered relevant to the question of provocation.[33] Nevertheless, this expansion of the frame of reference should not be taken to involve a departure from the predominantly objective nature of the test employed in Canadian law. In *R v Friesen*,[34] the Alberta Court of Appeal rejected the argument that the "ordinary person" ought to be taken to have all the life experiences of the accused: that approach, the Court believed, would amount to a subjective test in all but name.

5.26 As mentioned above, the Canadian standard contains both subjective and objective elements, with the result that those characteristics of the accused which bear on the gravity of provocation may be taken into account. Characteristics relating to self-control, however, are excluded from consideration. Thus in *Hill*[35] Dickson CJC stated that "particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person

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29 *R v Parent* [2001] 1 SCR 761, 767.

30 [1996] 1 SCR 37.

31 *Ibid* at 47.

32 *Ibid*.

33 *R v Daniels* (1983) 7 CCC (3d) 542 (Northwest Territories Court of Appeal); *R v Conway* (1985) 17 CCC (3d) 481 (Ontario Court of Appeal).

34 (1995) 101 CCC (3d) 167.

35 *R v Hill* (1986) 25 CCC (3d) 322.

without subverting the logic of the objective test of provocation."[36] Dickson CJC recommended leaving the question of which characteristics the jury should take into account to the "'collective good sense' of the jury."[37] However, eschewing the decision in *Camplin*,[38] Wilson J argued that, while age could be taken into account in assessing the self-control of the ordinary person, sex was an inadmissible factor. In her view, the demands of equality were such that the sex of the accused should not have a bearing on the question of self-control: men and women were to be held to the same standard of self-control.[39]

5.27 The range of statutory provisions governing provocation in Australia has been outlined above. Despite the variety of legislative formulations, the High Court of Australia can be seen in effect to have harmonised the law in the different states. In *Stingel v R*,[40] the Court announced that the modified objective approach, including the *Camplin*[41] distinction regarding personal characteristics, applies also in Australia. The Court felt that the objective test could not be applied in a vacuum; regard should also be had to the characteristics, attributes and personal history of the accused when assessing the gravity of the provocation. The Court observed:

> "[T]he content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be

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36 *R v Hill* (1986) 25 CCC (3d) 322, 335.

37 *Ibid*, citing Goddard LCJ in *R v McCarthy* [1954] 2 QB 105, 112.

38 *DPP v Camplin* [1978] AC 705.

39 *R v Hill* (1986) 25 CCC (3d) 322, 351-352 *per* Wilson J (dissenting).

40 (1990) 171 CLR 312.

41 *DPP v Camplin* [1978] AC 705.

> relevant to an objective assessment of the gravity of the particularly wrongful act or insult."[42]

5.28 Importantly, the Court accepted that, while the enumerated characteristics might provide the context in which to determine the issue of gravity, the question of self-control was to be assessed from the perspective of the ordinary person. The exception to this rule was that the age of the accused may be considered relevant to the question of self-control. On this point, the Court adopted the broadly similar views expressed by Wilson J in the Canadian decision in *Hill*.[43]

5.29 In *Masciantonio v The Queen*[44] the High Court of Australia reiterated its preference for the modified objective approach:

> "The provocation must be such that it is capable of causing an 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 had the opportunity to regain his composure."[45]

5.30 The principles enunciated in *Stingel*[46] and *Masciantonio*[47] have been applied in a number of cases. In *Green v R*,[48] the appellant killed the deceased whom he alleged had made sexual advances towards him. The High Court of Australia held that the trial judge had erred in refusing to allow the appellant to adduce evidence of his particular sensitivity to sexual assault, which, it was said, was the result of a family history in which his father had sexually abused his sisters. That evidence would explain the gravity of the provocation to

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42 *Stingel v R* (1990) 171 CLR 312, 326 *per* Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

43 *R v Hill* (1986) 25 CCC (3d) 322.

44 (1995) 183 CLR 58.

45 *Ibid* at 66.

46 *Stingel v R* (1990) 171 CLR 312.

47 *Masciantonio v The Queen* (1995) 183 CLR 58.

48 (1997) 191 CLR 334.

the appellant. The Supreme Court of Victoria has also confirmed the applicability of the *Camplin*[49] distinction:

> "The objective test is whether the provocative words or conduct, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to lose self-control to the extent that the accused did".[50]

5.31 Unlike the statutory provisions in other jurisdictions, the relevant New Zealand legislation expressly stipulates that the accused's characteristics should be taken into account: provocation is to be evaluated from the perspective of "a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender".[51] *R v McGregor*[52] was the first case to come before the New Zealand courts following the enactment of the *Crimes Act 1961*. The New Zealand Court of Appeal observed that the obvious purpose of the legislation was to mitigate the harshness of the unqualified objective test by taking account of the accused's characteristics in evaluating the sufficiency of provocation. This, the Court noted, involved the merging of "two discordant notions",[53] namely the objective test and the accused's personal characteristics. The Court took the view that characteristics taken into account must be "definite and of sufficient significance to make the offender a different person from the ordinary run of mankind."[54] Such factors would include physical and mental characteristics and "such more indeterminate attributes as colour, race and creed".[55] On the other hand, the Court excluded from consideration factors such as a suspicious disposition, short temper and transitory states such as a mood of depression or excitability. The Court went further in a passage that was subsequently to prove controversial:

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49 *DPP v Camplin* [1978] AC 705.

50 *R v Thorpe (No 2)* [1999] 2 VR 719; see also *R v Curzon* [2000] 1 VR 416.

51 Section 169(2)(a) of the New Zealand *Crimes Act* 1961; see paragraph 5.13 above.

52 [1962] NZLR 1069.

53 *Ibid* at 1081.

54 *Ibid*.

55 *Ibid*.

> "Special difficulties, however, arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristics. In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would, as we have earlier indicated, deny any real operation to the reference made in the section to the ordinary man, and it would, moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. There must be something more, such as provocative words or acts *directed to* a particular phobia from which the offender suffers. Beyond that, we do not think it is advisable that we should attempt to go."[56]

5.32 These remarks were *obiter* and later decisions in New Zealand have moved away from the restrictions suggested in *McGregor*.[57] In *R v McCarthy*,[58] the Court of Appeal welcomed this development and expressed the view that *McGregor* introduced "needless complexity"[59] to the law. Accordingly, the Court felt that characteristics such as the accused's race, age, sex, mental deficiency or "a tendency to excessive emotionalism as a result of brain injury"[60] could be taken into account. In *McCarthy*, it was held that the hypothetical "reasonable man" was to be endowed with the accused's brain damage and the personality consequences which that condition may have had apart from its effect on the power of self-control.

5.33 The *dicta* in *McGregor*[61] restricting the relevance of mental infirmity in relation to provocation were influenced by the fact that New Zealand law does not recognise a defence of diminished responsibility: the Court was concerned not to introduce a version of that defence without legislative sanction. The Court felt no such

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56 *R v McGregor* [1962] NZLR 1069, 1082 (emphasis added).

57 *R v McGregor* [1962] NZLR 1069.

58 [1992] 2 NZLR 550.

59 *Ibid* at 558.

60 *Ibid*.

61 *R v McGregor* [1962] NZLR 1069.

inhibition when it returned to the subject in *McCarthy*[62] where it was accepted that the *status quo* could accommodate diminished responsibility "within a limited field".[63]

5.34 In *R v Campbell*,[64] the Court of Appeal in effect held that the *Camplin*[65] distinction applied in New Zealand. There was evidence in that case that a homosexual advance made to the accused had triggered a "flashback" in which memories of repeated sexual abuse during childhood were recalled. The Court of Appeal held that the "flashback" characteristic should be taken into account in assessing the gravity of the provocation to the accused but should be ignored when considering the ordinary person's capacity for self-control, a view it believed to be in harmony with the law in England and Wales (in its pre-*Smith*[66] guise) and in Australia.

5.35 In *R v Rongonui*,[67] the Court of Appeal returned to the distinction between characteristics going to gravity and self-control respectively. The appellant was a highly dysfunctional individual with a history of family violence and sexual abuse, personality disorders, parenting difficulties and a chaotic lifestyle that was characterised by abusive relationships. Her appeal against a conviction for murder was allowed on admissibility of evidence grounds. However, the Court of Appeal also considered the issue of provocation and, in particular, the relevance of her personal characteristics to that defence. The majority concluded that her personal traits could be considered in relation to the gravity of the provocation offered but were not relevant to the question of self-control. In reaching this conclusion, the majority judges focused on the reference in section 169 of the *Crimes Act 1961* to the power of self-control of an ordinary person. In their view, that section provided the overriding criterion on which an evaluation of the defence was to be based and did not facilitate a general reduction in

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62 *R v McCarthy* [1992] 2 NZLR 550.

63 *Ibid* at 558.

64 [1997] 1 NZLR 16.

65 *DPP v Camplin* [1978] AC 705.

66 *R v Smith* [2001] 1 AC 146.

67 [2000] 2 NZLR 385.

the standard of self-control. Moreover, while the majority accepted that the provocative conduct need not be directed at the characteristic in question, they agreed that there had to be a connection between the two. Tipping J, who spoke for the majority, provided a good explanation of the *Camplin*[68] distinction:

> "The only possible way under the statute in which this ordinary power of self-control can be modified is if the provocation has some relationship to the characteristic which allows the accused to say: This provocation was graver for me with this characteristic than it would have been for a person without the characteristic, not because I have generally lowered self-control, but because of the nature of the provocation for me with my characteristic. Therefore, says the accused, with my characteristic and the resulting gravity of the provocation, even ascribing to me as you must the power of self-control of an ordinary person, the provocation I received was sufficient to deprive me of my self-control. While as was said in *McCarthy*, the concept of the provocation having to be directed at the characteristic may be thought unhelpful, the statute inevitably requires there to be a sufficient relationship between the characteristic and the provocation. A characteristic which produces only a general lowering of the power of self-control is not enough, unless there is in addition a more specific connection between the provocation and the characteristic."[69]

5.36 Elias CJ and Thomas J delivered dissenting judgments. Elias CJ felt that the *Camplin*[70] distinction is "highly artificial," "over-subtle" and that it made the "application of the law of provocation complex" and "uneven."[71] She pointed to the fact that other judges and academic commentators had acknowledged that the distinction is artificial and unsatisfactory in application. She refused to apply the distinction on the grounds that the language of section

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68 *DPP v Camplin* [1978] AC 705.

69 *R v Rongonui* [2000] 2 NZLR 385, paragraph 226.

70 *DPP v Camplin* [1978] AC 705.

71 *R v Rongonui* [2000] 2 NZLR 385, paragraphs 111-113.

169 of the New Zealand *Crimes Act* does not itself differentiate between characteristics going to self-control and those relating to sufficiency of provocation.

5.37 The observations of the majority in *Rongonui*[72] correspond with the approach adopted by the Privy Council in *Luc Thiet Thuan v The Queen*.[73] As was noted in Chapter 3, the House of Lords took a different view in its recent decision in *Smith*[74] where it held that evidence of mental infirmity *was* relevant to the questions of gravity and self-control alike.[75] While the full effect of *Smith* awaits judicial clarification, the decision undoubtedly marks a departure from *Camplin*,[76] at least as far as mental infirmity is concerned. In *R v Makoare*,[77] the New Zealand Court of Appeal was asked to reconsider its decision in *Rongonui* in light of the House of Lords' pronouncements in *Smith*. However, the Court unanimously refused to resile from its ruling in *Rongonui* on the grounds that that decision had resolved "long-standing differences of opinion".[78]

5.38 Despite a proliferation of differently worded provisions on the subject, there is a remarkable consistency of approach to provocation in Canada, New Zealand and Australia. The courts in those jurisdictions have adopted the modified objective test as the appropriate standard. Moreover, they have accepted the *Camplin*[79] doctrine that the personal traits of the accused are relevant to the assessment of the gravity of provocation, but have preserved the normative element of the traditional defence by demanding that the accused exercise the power of self-control of the ordinary person. Given the decision in *Smith*,[80] the current status of *Camplin* is

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72 *R v Rongonui* [2000] 2 NZLR 385.

73 [1997] AC 131.

74 *R v Smith* [2001] 1 AC 146.

75 See paragraphs 3.32-3.37 above.

76 *DPP v Camplin* [1978] AC 705.

77 [2001] 1 NZLR 318.

78 *Ibid* at paragraph 14.

79 *DPP v Camplin* [1978] AC 705.

80 *R v Smith* [2001] 1 AC 146.

somewhat uncertain in England and Wales, yet the preponderance of commonwealth jurisprudence suggests that its authority is not in doubt in most common law jurisdictions. In *Makoare*[81] the New Zealand Court of Appeal was not persuaded by the argument that harmonisation with the law of provocation in England and Wales was desirable and expressed the view that, if such standardisation was felt to be necessary, Australian developments would provide a more useful template on which to model the law!

5.39 The New Zealand experience has special relevance for Ireland:[82] there is no defence of diminished responsibility in New Zealand. Although the Court of Appeal in *Makoare* accepted that the relevant statutory provisions accommodated a limited version of diminished responsibility, it concluded that it lay beyond the judicial sphere of competence to make further provision for the matter by adopting *Smith.*[83] That decision, the Court argued, was based on the actual existence of a defence of diminished responsibility in English law.

5.40 *The Commission recommends the adoption of a justification-based model of the plea of provocation. The recommendation is designed to ensure that an accused's personal characteristics may be taken into account insofar as they affect the gravity of provocation, but must be excluded when assessing the power of self control*.[84]

C The Objective Approach in a Multicultural Society

5.41 The objective approach has traditionally been based on the notion of a homogeneous society adhering to well-recognised customs and standards. Accordingly, it has been criticised on the grounds that it incorporated the values and attributes of the dominant groups in society: on this view, the hypothetical reasonable or ordinary person is Caucasian, Anglo-Celtic and, probably, male.

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81 *R v Makoare* [2001] 1 NZLR 318.

82 Note, however, the recent publication of the *Criminal Law (Insanity) Bill 2002*.

83 *R v Smith* [2001] 1 AC 146.

84 See paragraphs 7.30-7.31 below.

Now that the objective test has been modified to accommodate the accused's personal characteristics, the extent to which cultural traits that markedly depart from the societal norm should be taken into account must be considered, along with the related issue of whether such factors may be considered relevant to the question of self-control (as well as that of gravity of provocation). It might be contended that the traditional concession to human infirmity would be diluted if the law overlooked significant cultural factors that may have influenced the accused's capacity to control his or her behaviour. It is not difficult to imagine circumstances in which a particular cultural sub-group would treat a gesture or taunt, which the majority might consider trivial, as highly provocative. It is also conceivable that, when provoked, members of a given sub-group might display a lower threshold of self-control than that of the ordinary person. Should allowance not be made for cultural characteristics that differentiate the accused from the mainstream of society? The challenges posed by multiculturalism have not been faced by the Irish courts, but the logic of the subjective test appears to be that the accused's cultural traits *should* be considered relevant. Indeed, Murphy J's dissenting judgment in *Moffa v The Queen*,[85] which influenced the Court of Criminal Appeal's decision in *MacEoin*,[86] was based on a concern to accommodate the heterogeneous nature of Australian society. In that judge's view, it was not enough to modify the objective test so to establish different standards for different groups. That course would lead to unequal treatment. The only realistic option was therefore a radically subjective approach in which each person's traits can be evaluated individually.

5.42 Murphy J's preference for a purely subjective test stands alone in commonwealth jurisprudence. Courts in Canada and Australia have not been persuaded to alter the law along the lines he suggested. In *R v Ly*[87] the accused was a recent immigrant to Canada from Vietnam. He suspected his common law wife of infidelity. On the night of the fatal incident his wife refused to explain her whereabouts, saying to the accused, "[i]t's none of your business". At this point the accused killed her. At trial he adduced evidence that

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85 (1977) 138 CLR 601. See discussion in Chapter 4.

86 *People (DPP) v MacEoin* [1978] IR 27.

87 (1987) 33 CCC (3d) 31.

in Vietnamese culture a wife's adultery would be a source of great dishonour to her husband and would be considered a serious psychological blow to the average Vietnamese male. The British Columbia Court of Appeal held that the accused's ethnic background was not relevant to the issue of self-control. The test was whether an ordinary person, not an ordinary Vietnamese male, would have been provoked in the circumstances.

5.43 In some Australian cases[88] juries have been directed on the basis that characteristics such as race, ethnicity and religion go to both gravity and self-control.[89] However, doubts have been cast on the correctness of those rulings by the decision in *Stingel*,[90] where the High Court concluded that the characteristics of the accused are only relevant to gravity of provocation. Subsequent to that decision, the Supreme Court of the Northern Territory was faced with the question of the accused's ethnicity in *R v Mungatopi*.[91] In that case, the Court stated that the ordinary person test was not "intended to be applied in a vacuum and without regard to such of the accused's personal characteristics, attributes or history as served to identify the implications and to affect the gravity of the particular wrongful act or insult." The Court referred to the ordinary Aborigine but it was left unclear whether that feature was considered relevant to the question of self-control as well as to that of gravity.[92] In *Masciantonio*,[93] the

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88 *R v Dincer* [1983] VR 460. In some cases, the accused's membership of a remote Aboriginal community has been considered relevant; see *eg R v Muddarubba* (1951-1976) NTJ 317; *R v Jimmy Balir Balir* (1951-1976) NTJ 633; *Jabarula v Poore* (1989) 42 A Crim R 479.

89 This approach to the question of ethnicity initially attracted some academic support: see Yeo "Power of Self-Control in Provocation and Automatism" (1992) 14 Syd LR 3; Yeo later revised his views: "Sex, Ethnicity, Power of Self-Control and Provocation Revisited" (1996) 18 Syd LR 304. See Leader-Elliott "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 Crim LJ 72, supporting the prevailing view.

90 *Stingel v R* (1990) 171 CLR 312 *per* Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

91 (1991) 2 NTR 1.

92 See Bronitt and McSherry *Principles of Criminal Law* (LBC Information Services 2001) at 269; *cf* Brown *et al Criminal Laws* (2nd ed Federation Press 1996) at 675, pointing to the differently worded provocation provisions in the Tasmanian Code and in the Queensland and Northern Territory Codes.

High Court reiterated the view that the relevance of the accused's personal characteristics is confined to the question of gravity of provocation. The general judicial consensus is that factors such as ethnicity and race do not operate to shape or alter the standard of ordinary self-control.[94] The courts have been resolute in emphasising that the test of provocation remains objective and despite modification, that it serves as a normative standard reflecting the minimum level of self-control demanded by society beyond which human frailty will not be excused.

5.44 The decision in *R v Baraghith*[95] provides an example of the current thinking of the Australian courts on the relevance of ethnic and cultural traits. In that case, the Egyptian-born accused was convicted of the murder of his Australian wife from whom he had separated after one year of marriage. He ascribed the cause of their marital difficulties to "cultural problems and colour and religious differences and the feminism of the deceased". He testified to the effect that he was unable to accept the fact that she would stay out late at night and associate with men. A week before the killing he stood outside her bedroom and witnessed her having sexual intercourse with another man. On the day of the killing, his wife came to his residence and an argument ensued during which she directed verbal taunts at him. He struck her and she retaliated by hitting him repeatedly. It was at this point, according to the accused, that he lost control and killed the deceased. It was argued that the trial judge erred in failing to refer to the impact the deceased's conduct would have had on a person of the accused's background. The New South Wales Court of Appeal upheld the conviction for murder. Samuels JA (Loveday J concurring) noted that there was no evidence which suggested that the wife's conduct was the result of perceived cultural or religious differences: there was no evidence that her conduct was particularly provocative towards him as an Egyptian

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93 *Masciantonio v The Queen* (1995) 183 CLR 58 *per* Brennan, Deane, Dawson and Gaudron JJ.

94 In *Masciantonio v The Queen* (1995) 183 CLR 58, McHugh J departed from the consensus, stating that an accused's ethnic and cultural background should be attributed to the ordinary person; he was alone in these views but nevertheless repeated them in *Green v R* (1997) 191 CLR 334.

95 (1991) 54 A Crim R 240.

or as a Muslim. The majority considered that the decision in *Stingel*[96] had settled the law in cases of this kind:

> "It is therefore clear … that, to paraphrase what was said in *Stingel*, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused although particular characteristics relevant to that assessment must be ignored when determining whether that conduct could have induced the response to which the accused resorted. Hence, when considering the formula 'an ordinary person in the position of the accused' the words 'in the position of the accused' [in section 23 of the *Crimes Act 1900* (New South Wales)] so far as they make relevant attributes or characteristics of a particular accused do so only in assessing the gravity of the alleged provocation and are to be ignored in deciding whether the accused's response was or was not that of an ordinary person."[97]

5.45 Leave to appeal was refused by the High Court of Australia on the grounds that the New South Wales court had correctly applied *Stingel*.[98]

5.46 While the search for a culturally sensitive test of provocation is understandable, it does not entail the conclusion that the standard of ordinary self-control should be diluted. It is one thing to acknowledge that an insult might prove to be an especially grave provocation to a particular accused by virtue of his or her ethnic background. It is quite another to allow that characteristic to shape the standard of self-control to which the accused is to be held. It is submitted that the arguments from equality advanced in support of the modification of the self-control element of the test in order to accommodate cultural diversity are unconvincing. It is perhaps significant that, while both Murphy and McHugh JJ contended, in *Moffa*,[99] that the objective test would bring about inequality, they proposed varying solutions to this problem. Murphy J

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96 *Stingel v R* (1990) 171 CLR 312.

97 *R v Baraghith* (1991) 54 A Crim R 240, 245.

98 *Stingel v R* (1990) 171 CLR 312.

99 *Moffa v The Queen* (1977) 138 CLR 601.

unambiguously opted for the subjective test and suggested that a modification of the objective test which would incorporate the varying standards of different groups would itself be unequal. True equality, in his view, demanded that each individual be assessed on the basis of all his or her characteristics. McHugh J, on the other hand, veered towards the modification of the objective test that Murphy J rejected. However, these solutions themselves run into problems from the perspective of equality. They are apt to result in a situation where different citizens are held to different standards of self-control on the basis of their race, ethnicity, religion or other relevant characteristic. The point might also be made that such an approach opens up the possibility of racial stereotyping, an outcome which scarcely accords with the principle of equality. A further difficulty with a test of provocation predicated on the concept of cultural diversity is that the traits relied on by an accused might be socially repugnant. Should the law be required to accommodate misogynist views or racist attitudes in the name of cultural pluralism?

5.47 *The Commission recommends that issues of culture and ethnicity, insofar as they might be said to affect the issue of self-control, should be excluded from consideration under the plea of provocation*.[100]

D The Wrongful Act Requirement

5.48 At common law, provocation had to emanate from some form of unlawful act such as an assault.[101] This was the logic of the older view that the defence was rooted in partial justification. Some time ago, it was held in Australia that the act in question must be one that is likely to provoke a breach of the peace.[102] In addition, a number of statutory formulae governing the plea of provocation require "a wrongful act or insult."[103] Correspondingly, some codes stipulate that certain lawful acts, such as self-defence or a lawful

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100 See paragraph 7.31 below.

101 See paragraphs 1.12-1.15 above.

102 *R v Scott* (1909) 11 WALR 52, 54.

103 *Eg*, section 232(2) of the Canadian *Criminal Code*; see paragraph 5.03 above.

arrest, are incapable of amounting to provocation.[104] However, nowadays it is clear that the defence is less narrowly construed and that wrongful conduct is not confined to the realms of the criminal or the tortious.

5.49 In *Thibert*,[105] the Canadian Supreme Court interpreted the wrongful act or insult requirement to entail, *inter alia*, "injuriously contemptuous speech or behaviour;… scornful utterance or action intended to wound self-respect; an affront; indignity."[106] The Court held that, for the purposes of provocation, an act may be wrongful if it is not authorised by the law; and that provocative conduct need not necessarily be specifically prohibited by law. A broadly similar conclusion has been reached in Australia, albeit in the context of non-fatal force, where the Codes in the Northern Territory, Queensland and Western Australia require a "wrongful act or insult": it has been held that "wrongful" is not confined to acts that are contrary to law but includes conduct that is wrong by the ordinary standards of the community.[107]

5.50 *The Commission believes that the plea of provocation should not entail a requirement that the deceased must have acted "unlawfully"; it should be enough that the provocation was unacceptable by the ordinary standards of the community*.[108]

E Words as Provocation

5.51 In Canadian law words are capable of amounting to provocation. A similar rule has long obtained in New Zealand by virtue of section 184 of the *Crimes Act 1908* (now section 169 of the *Crimes Act 1961*). Words are not normally admitted as provocation in Victoria and South Australia where the common law continues to

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104 *Eg*, section 232(3) of the Canadian *Criminal Code*: see paragraph 5.03 above; section 169(5) of the New Zealand *Crimes Act 1961*: see paragraph 5.13 above.

105 *R v Thibert* [1996] 1 SCR 37.

106 *Ibid* at 44-45.

107 *Roche v The Queen* [1988] WAR 278; *Jabarula v Poore* (1989) 68 NTR 26.

108 See paragraph 7.08 below.

prevail. In *Moffa*[109] (which originated in South Australia), Barwick CJ stated that mere words could not amount to provocation unless they are of a "violently provocative character."[110] In the other Australian jurisdictions where the law on provocation is governed by statute, words are capable of providing the necessary provocation.

5.52 In Scotland, the general rule is that words on their own cannot amount to provocation. "Scots law has traditionally set its face against allowing insulting words or disgusting conduct to operate as provocation."[111] In *Cosgrove v HM Advocate*[112] the trial judge held that there was no sound basis for treating words of insult, taunts or humiliation as being capable of amounting to provocation:

> "Words of insult, however strong, or any mere insulting or disgusting conduct, such as jostling, or tossing filth in the face, do not serve to reduce the crime from murder to culpable homicide."[113]

5.53 However, there is one important exception in Scots law to the general rule that insults cannot provide provocation in this context – the venerable common law exception of adultery:

> "It has long been accepted in our law that a husband who finds his wife committing adultery and kills her in an immediate reaction to his discovery is entitled to plead provocation. It is also well settled that the same applies if, instead of actually finding his wife committing adultery, the

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109 *Moffa v The Queen* (1977) 138 CLR 601.

110 *Ibid*.

111 Gordon *The Criminal Law of Scotland* (3rd ed W Green & Sons 2001) Vol 2, at 348.

112 1991 SLT 25.

113 The trial judge in *Cosgrove v HM Advocate* 1991 SLT 25 cited Macdonald *A Practical Treatise on the Criminal Law in Scotland* (5th ed W Green & Son 1948) at 93. See also *William Aird* (1683) Hume, i 248: throwing the contents of a chamber pot in the accused's face did not amount to provocation. For a more recent discussion, see *Drury v HM Advocate* 2001 SCCR 583.

husband is told by his wife that she has committed adultery."[114]

5.54 It is also clear that Scots law recognises "that a person who is told of another's infidelity may be swept with sudden and overwhelming indignation which may cause him to lose control and react violently."[115] This special rule in Scottish law has been extended to apply to any relationship in which there is an expectation or obligation of fidelity: it applies to unmarried couples[116] and to homosexual relationships.[117]

5.55 *The Commission recommends that insulting words and gestures which are unacceptable by the ordinary standards of the community should be capable of amounting to provocation for the purposes of the plea.*[118]

F Sources of Provocation

5.56 Consideration of the source of provocation raises the question of the rationale underlying the defence. Viewed as a partial justification, the defence should, strictly speaking, be available only where the deceased was the author of the provocation. This was the general rule at common law[119] and it has been preserved in the *Criminal Code* of the Northern Territory[120] of Australia and in the New South Wales *Crimes Act*.[121] On the other hand, an excusatory

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114 *Rutherford v HM Advocate* 1998 SLT 740 *per* Rodger LJ of Sc.

115 *Ibid*.

116 *McKay v HM Advocate* 1991 SCCR 364; *Rutherford v HM Advocate* 1998 SLT 740; *Drury v HM Advocate* 2001 SCCR 583.

117 *HM Advocate v McKean* 1992 SCCR 402, discussed in Gordon *The Criminal Law of Scotland* (3rd ed W Green & Sons 2001) Vol 2, at 346, footnote 99.

118 See paragraph 7.08 below.

119 Stephen *Digest of Criminal Law* (3rd ed Macmillan & Co 1883) at 162: "provocation on the part of the person committing the offence."

120 Section 34; see paragraph 5.11 above.

121 Section 23(2); see paragraph 5.09 above.

rationale would accommodate provocation emanating from sources other than the victim.

5.57 Authority in a number of jurisdictions reflects the excusatory rationale. In *R v Manchuk*,[122] the Supreme Court of Canada affirmed the Ontario Court of Appeal's decision that provocation need not come from the victim: it was enough that the accused believed that the victim had participated in the provocation, regardless of whether his belief was reasonable or not.

5.58 Two decisions of the Supreme Court of Victoria are also particularly relevant in this context. *R v Terry*[123] was concerned with whether provocation was available to an accused who was not the direct target of the provocation. In this case, the conduct by the deceased was directed towards the sister of the accused (the sister also being the wife of the deceased) in the presence of the accused:

> "[T]he mere fact that the provocation was not offered by the deceased to the accused, but was offered to the deceased's wife and the accused's sister, does not prevent the operation of the principle that provocation will reduce murder to manslaughter provided that the provocation was offered in the presence of the accused, and provided all the other elements of provocation are present."[124]

5.59 The second case, *R v Kenney*,[125] considered whether a mistaken belief on the part of the accused that the victim had been the source of the provocation (when, in fact, it was another) was sufficient to ground the defence. The Court referred to several conflicting authorities and stated that "[t]hose who suggest that mistake will avail are really challenging the supposed fundamental rule that provocation must emanate from the victim by suggesting that it is qualified".[126] Brooking J noted that the conflicting rationales of the defence, those of justification and excuse, were directly relevant

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122 [1937] 4 DLR 737 and [1938] 3 DLR 693.

123 [1964] VR 248.

124 *R v Terry* [1964] VR 248 *per* Pape J.

125 [1983] 2 VR 470.

126 *R v Kenney* [1983] 2 VR 470 *per* Brooking J.

to cases of this kind. He posed the question whether, if the law's concern is for human frailty (the excuse rationale) and not with tit-for-tat retaliation (the justification rationale), there should be any general rule that the provocation must emanate from the victim? "On this view, why should not provocation by any person be available in respect of any victim, given that there is the necessary causal connection between the provocation and the act causing death.…"[127] Relying partly on the Canadian case of *Manchuk*,[128] it was held that the mistaken belief in question does not have to be a reasonable one: "[p]rovocation cannot be relied on unless the victim either was responsible for it or was believed by the accused to be responsible for it."[129]

5.60 The Canadian and Victorian decisions in point have analogues in England and Wales and in Ireland. *R v Davies*[130] would seem to indicate that provocation does not have to emanate directly from the deceased, but may come from other sources; however, it should be noted that the deceased in *Davies* was partly implicated in the provocation. Similarly in Ireland the Court of Criminal Appeal has recently suggested that provocation might emanate from a third party: *People (DPP) v Doyle*.[131] Indeed the Irish rule in this regard may be more permissive than its English counterpart. In *People (DPP) v Hennessy*,[132] it appears that "the surrounding circumstances" leading to the accused killing his wife were regarded as sufficient for the purpose of invoking the defence.[133]

5.61 Under section 169 of the New Zealand *Crimes Act 1961*, provocation must come from the person killed, save in the situations of mistaken identity or accident coming within section 169(6) of that Act. Moreover, according to New Zealand law, the judge must rule

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127 *R v Kenney* [1983] 2 VR 470, 472.

128 *R v Manchuk* (1938) 3 DLR 693 and (1937) 4 DLR 737.

129 *R v Kenney* [1983] 2 VR 470, 473.

130 [1975] QB 691.

131 Court of Criminal Appeal 22 March 2002.

132 Central Criminal Court (Finnegan J) October 2000 and April 2001.

133 *Ibid*, reported in *The Irish Times* "Husband killed his wife in a 'moment of rage'" 11 October 2000 at 4.

on the issue of whether there is enough evidence of provocation to enable the defence to be left to the jury.

5.62 *The Commission recommends that the plea should be available only if (a) the deceased is the source of the provocation or (b) the accused, under provocation given by one person, by accident or mistake kills another*.[134]

G Restrictions on the Defence

5.63 Jurisdictions differ as to the range of restrictions affecting the availability of the defence of provocation.

5.64 At common law, conduct amounting to provocation must occur within the sight or hearing of the accused.[135] This is known as the rule against hearsay provocation. In *R v Arden*,[136] the accused's partner told him that the deceased had raped her in an adjoining room and substantiated her allegation by showing the accused her torn undergarments. The accused confronted the deceased who denied the allegation, whereupon the accused killed him. The defence was rejected. The Court explained that, where an accused has been informed of an incident which he did not directly witness, there is "nothing tangible" on which he can be said to have acted.[137] The rule requiring presence has now been modified by decisions which accept that evidence of a history of provocative conduct, some of which might not have occurred in the accused's presence, may be considered by the jury.[138] However, the full extent of the resultant modification is uncertain and legislative clarification has been recommended.[139]

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134 See paragraph 7.33 below.

135 *R v Fisher* (1837) 8 Car & P 182.

136 [1975] VR 449.

137 *Ibid per* Menhennitt J.

138 *Parker v The Queen* (1964) 111 CLR 665; *R v Gardner* (1989) 42 A Crim R 279; *R v Chhay* (1994) 72 A Crim R 1.

139 New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (R 83 – 1997) at 55.

5.65 *The Commission recommends that hearsay provocation should not be excluded from the ambit of the plea*.[140]

5.66 Self-induced provocation is provided for in some of the Australian Criminal Codes (Queensland, Western Australia, Northern Territory) and it has been held in several cases that the accused may not rely on provocation where the deceased's allegedly provocative acts were incited by the accused in the first place.[141] It is unclear at common law whether self-induced provocation precludes consideration of the defence of provocation.[142] There is no reason to suppose that the Irish approach to the defence would exclude it from consideration.

5.67 *The Commission recommends that conduct incited by the accused should not count as provocation for the purposes of the plea*.[143]

5.68 Given the subjective nature of the Irish approach, there is no reason in principle to suggest that an intoxicated accused would automatically be precluded from raising the defence.[144] In the context of the objective standard obtaining in the other common law jurisdictions, intoxication automatically precludes the possibility of raising the defence. It is established in England,[145] Canada,[146] Australia[147] and New Zealand[148] that the objective test, even in its modified form, connotes the ordinary or reasonable *sober* person.

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140 See paragraph 7.38 below.

141 *R v Newman* [1948] VLR 61, 66.

142 But see *R v Johnson* [1989] 2 All ER 839 where it was held that an accused was entitled to rely on "self-induced" provocation pursuant to section 3 of the *Homicide Act 1957*.

143 See paragraph 7.39 below.

144 See paragraph 4.32 above.

145 *R v McCarthy* [1954] 2 All ER 262

146 *R v Hill* (1986) 25 CCC (3d) 322, 335 *per* Dickson CJC; *R v Rooney* 1994 25 WCB (2d) 598; *R v Taylor* (1995) 28 WCB (2d) 183.

147 *R v Webb* (1977) 16 SASR 309; *R v Croft* [1981] 1 NSWLR 126; *R v O'Neill* [1982] VR 150.

148 *R v Fryer* [1981] 1 NZLR 748; *R v McCarthy* [1992] 2 NZLR 550.

The traditional explanation for the exclusion of intoxication was that, being a transitory state, intoxication lacks the degree of permanence necessary to amount to a "characteristic" that might be attributed to the ordinary person. More recently, the intoxication rule has been explained as being grounded in public policy concerns[149] and as being "traditional and pragmatic."[150]

5.69 *The Commission recommends that an accused's state of intoxication should not be taken into account when assessing the power of self-control of the ordinary person*.[151]

H Extreme Emotional Disturbance

5.70 The law of provocation in the United States of America falls broadly within the common law mainstream.[152] Provocation typically operates as a partial defence to murder and the reasonable person standard is adopted as the appropriate criterion. Generally speaking, that standard is interpreted to exclude the accused's mental characteristics from consideration and, if anything, the United States authorities evince an approach that is remarkably close to the pre-*Camplin*[153] objective test, albeit that some decisions appear to have opened the way for consideration of the accused's personal characteristics within the framework of the objective test.[154]

5.71 Broadly speaking, changes to the law in the United States of America have assumed the form of the *Model Penal Code*'s defence of "Extreme Emotional or Mental Disturbance". The defence is set out in section 210.3(1)(b) of the *Model Penal Code*:

> "(1) Criminal homicide constitutes manslaughter when: … (b) a homicide which would otherwise be murder is

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149 *R v Morhall* [1996] AC 90.

150 Stuart *Canadian Criminal Law* (3rd ed Carswell 1995) at 495.

151 See paragraph 7.39 below.

152 See generally LaFave *Criminal Law* (3rd ed West 2000) at 703-717; Robinson *Criminal Law Defenses* (West 1984) at section 102(b).

153 *DPP v Camplin* [1978] AC 705.

154 *Eg, Ferrin v People* (1967) 164 Colo 130.

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."

5.72 This provision does not limit the events or conditions that might act as a catalyst for the accused's disturbed state. The focus of the defence is on the accused's feelings and to this end the provision incorporates an element of subjectivity in that it allows the characteristics of the accused to be taken into account. However, an objective dimension is also retained: there must be a reasonable explanation for the accused's mental or emotional disturbance, and authority suggests that a "reasonable man" test should be employed in evaluating this matter.[155] If there is no reasonable explanation for the particular emotional state, as judged from the perspective of a reasonable person in the accused's situation, the defence will not be available.[156]

5.73 The objective features of the defence have nonetheless been significantly qualified by the *Model Penal Code* provision: the reasonableness of the explanation for the accused's disturbance is to be "determined from the viewpoint of a person in the actor's situation under the circumstances, as he believes them to be." The drafters of the Code provide an example of how this might operate in practice: *viz*, "[A] man reasonably but mistakenly identifies his wife's rapist and kills the wrong person."[157]

5.74 The *Model Penal Code* provision occupies the middle ground between a regime which excludes consideration of the accused's personal characteristics, on the one hand, and one permitting any form of emotional disturbance to operate by way of

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155 *State v Elliott* (1979) 177 Conn 1.

156 *People v Casassa* (1980) 49 NY2d 668; *State v Ortiz* (1991) 217 Conn 648.

157 Section 210.3(1)(b) of the *Model Penal Code*, Comment 62. Robinson *Criminal Law Defenses* (West 1984) at section 102(b) makes the point that there is nothing in the wording of the Code that requires the mistake to be reasonable.

partial excuse, on the other.[158] The drafters have explained the intention behind the provision thus: courts should take account of the accused's "situation" (a term which they note is deliberately ambiguous and sufficiently flexible to allow a range of factors to be considered). The drafters have further observed that "personal handicaps and some external circumstances [such as] blindness, shock from traumatic injury, and extreme grief" ought to be taken into account but that "idiosyncratic moral values" are excluded from consideration.[159] The ultimate consideration should be whether the accused's loss of self-control is such that it can "arouse sympathy in the ordinary citizen."[160]

5.75 The defence of extreme emotional disturbance has certain affinities with that of diminished responsibility. Both are mitigating defences, reducing murder to manslaughter. However, extreme emotional disturbance generally applies where a mentally healthy person kills in circumstances of emotional stress. In contrast, diminished responsibility typically applies to defendants who are mentally abnormal but whose condition falls short of full-blown insanity. There is a potential overlap between the two offences. The accused's "situation" in the extreme emotional disturbance context might be interpreted to include his mental condition: this interpretation might be thought to be reinforced by the wording of section 210.3(1)(b) which speaks of "extreme *mental* or emotional disturbance".[161]

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158 See *People v Casassa* (1980) NY2d 668, 679-680: "By suggesting a standard of evaluation which contains both subjective and objective elements, we believe that the drafters of the code adequately achieved their dual goals of broadening the 'heat of passion' doctrine to apply to a wider range of circumstances while retaining some element of objectivity in the process. The result of their draftsmanship is a statute which offers the defendant a fair opportunity to seek mitigation without requiring that the trier of fact find mitigation in each case where an emotional disturbance is shown.…"

159 Section 210.3(1)(b) of the *Model Penal Code*, Comment 62.

160 *Ibid*.

161 In some cases the courts have discussed the accused's mental condition in the context of extreme emotional disturbance: see *People v Lyttle* (1976) 408 NYS2d 578; *State v Elliott* (1979) 177 Conn 1.

5.76 Versions of the defence of extreme emotional disturbance have been enacted in a number of American states.[162] However, in some cases the legislation excludes any reference to the accused's "situation" or employs other language that evinces a less subjective approach than that allowed by the *Model Penal Code* provision. A number of states have created an affirmative defence, *ie* one in which the burden of proof rests with the accused. Some states also exclude the defence where the accused was at fault in bringing about the events that triggered his or her condition.

5.77 *The Commission does not recommend the introduction of a defence of Extreme Emotional or Mental Disturbance in lieu of the plea of provocation*.[163]

I Summary

5.78 The comparative survey conducted in this chapter revealed a variety of approaches to provocation among common law jurisdictions. Some jurisdictions allow provocation to operate as a partial defence to charges of attempted murder (Scotland) or even as a full defence to charges of assault (Queensland and Western Australia). However, most jurisdictions (including Canada, New Zealand and the majority of Australian states and territories) take the view that the plea should operate as a partial defence to murder only, and *this view is shared by the Commission*.[164]

5.79 A more or less consistent approach was observed regarding the structure of the various legal criteria of provocation, with most jurisdictions (including Canada, New Zealand and the various states and territories of Australia) preferring a modified objective test, whereby certain characteristics of the accused may be taken into

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162 *Eg,* sections 53a-54 of the *Conn Gen Stat Ann*; title 11, section 641 of the *Del Code Ann*; sections 707-702(2) of the *Hawaii Penal Code*; section 507.020(1)(a) of the *Ky Rev Stat*; section 94-5-103 of the *Rev Codes of Mont*; section 125.25 of the *NY Penal Law*; sections 12.1-16-02 of the *ND Century Code*; section 163.115 of the *Ore Rev Stat*; section 76-5-205 of the *Utah Code Ann*.

163 See paragraphs 7.22-7.27 and 7.29 below.

164 See paragraph 7.37 below.

account when assessing the *gravity* of provocation, but are excluded when the question of self-control is being considered. As a number of Australian decisions have demonstrated, this approach is to be preferred even in "multicultural" cases where the court is urged to take account of the ethnicity of the accused. For the reasons set out in Chapter 7,[165] *the Commission supports this approach*.

5.80 There is also general agreement among common law courts that provocative conduct need not be unlawful. A number of courts have held that conduct may be considered provocative provided it is not authorised by law (the Canadian view) or is considered wrong by the ordinary standards of the community (the Australian view). With some exceptions (such as Scotland[166]), most jurisdictions (including Canada, New Zealand and the majority of Australian states) agree that words are capable of amounting to provocation. For the reasons set out in Chapter 7,[167] *the Commission supports the majority approach to this issue*.

5.81 A few jurisdictions (including the Northern Territory and New South Wales) maintain that the deceased must be the source of the provocation. In contrast, in Canada, New Zealand, Victoria and (arguably) England and Wales, the defence is available even where the accused was mistaken in his or her belief that the deceased was the provoker. This is consistent with the approach adopted in Ireland. For the reasons set out in Chapter 7,[168] *the Commission supports the position adopted by the majority of jurisdictions*.

5.82 It is unclear in many jurisdictions whether the partial defence is available in circumstances of self-induced provocation or where the accused was intoxicated. *The Commission accordingly advocates legislative clarification as set out in Chapter 7*.[169]

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165 See paragraph 7.31 below.

166 However, this prohibition does not apply in the "adultery" cases. See also the law relating to South Australia and Victoria discussed at paragraph 5.51 above.

167 See paragraph 7.08 below.

168 See paragraph 7.33 below.

169 See paragraph 7.39 below.

5.83 Finally, the Commission has noted the defence of "Extreme Emotional or Mental Disturbance" as contained in the *Model Penal Code*. However, for the reasons set out in Chapter 7,[170] *the Commission does not support the introduction of such a defence in lieu of the plea of provocation*.

[170] See paragraphs 7.22-7.27 and 7.29 below.

CHAPTER 6 PROVOCATION AND PUBLIC POLICY

A Introduction

6.01 The contrasting rationales of justification and excuse associated with the defence of provocation reflect competing policy objectives. On the one hand, there is a feeling that the criminal law should make allowance for the infirmities of human nature. On the other, there is the general expectation that members of society should exercise a minimum standard of self-control. The aspiration for set standards inspired by this expectation does not sit easily with the sense of empathy aroused by a concern for human weakness. In most jurisdictions the defence of provocation represents a compromise between these competing policy goals; indeed elements of both justification and excuse are often intermingled in the plea. The recent history of the defence has however been shaped by excusatory considerations, with the result that the issue of justification has, at least temporarily, been pushed to the background.

B The Competing Tests

6.02 As Chapter 3 illustrates, in England and Wales the objective test had hardened into a rigid and inflexible criterion of provocation before the enactment of the *Homicide Act 1957*.[1] In effect, the "reasonable man" standard which had come down from *R v Welsh*[2] had been denuded of precisely those characteristics on which defendants in provocation cases might be expected to rely as a basis for a successful plea. Section 3 of the *Homicide Act* dealt with this problem by divesting trial judges of control over the evidence that could go to the jury on the issue of provocation. This had the effect of giving the jury freedom to determine whether or not the accused could be said to have been provoked, having regard to the standard of

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1 See paragraphs 3.04-3.14 above.

2 (1869) 11 Cox CC 336.

the "reasonable man" unencumbered by judicial refinements. The decision of the House of Lords in *DPP v Camplin*,[3] delivered in 1978, went a step further by enabling the jury to take account of the following (i) the accused's personal characteristics when assessing the gravity of provocation and (ii) the accused's age (and possibly sex) when deciding the issue of loss of self-control; and this general approach has been followed by the courts in Canada, Australia and New Zealand. More recently,[4] the House of Lords has ruled that juries are entitled to consider an accused's personal characteristics *tout court* when assessing his or her reaction to provocation; but this development has *not* been adopted in the Commonwealth jurisdictions.[5]

6.03 The reaction against the extreme version of the objective test reached its apotheosis in the dissenting judgment of Murphy J in the Australian case of *Moffa v The Queen*,[6] decided in 1977, in which that judge recommended the adoption of a radically subjective criterion of provocation. A year later, in *People (DPP) v MacEoin*,[7] the Court of Criminal Appeal relied on *Moffa* when introducing the subjective standard into Irish law. As a result of this development, the net question for the jury became whether the accused had been provoked, taking into account his or her "temperament, character and circumstances".[8] At the time of writing, Ireland remains the only common law jurisdiction to employ the subjective standard in this form; albeit that the courts in England and Wales, by virtue of the decision in *R v Smith,*[9] now seem to be moving in a similar direction. Recently, the Court of Criminal Appeal, in *People (DPP) v Davis*,[10] has suggested that it may be appropriate to set limits to the Irish standard as laid down in *MacEoin*. Thus the views expressed in

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3 [1978] AC 705.

4 *R v Smith* [2001] 1 AC 146.

5 See *R v Makorare* [2001] 1 NZLR 318, rejecting the application of *R v Smith* [2001] 1 AC 146 in New Zealand; see paragraph 5.38 above.

6 (1977) 138 CLR 301.

7 [1978] IR 27.

8 *People (DPP) v MacEoin* [1978] IR 27, 34.

9 *R v Smith* [2001] 1 AC 146.

10 [2001] 1 IR 146.

Davis may pave the way for a reassessment of the plea in the light of the community standards pushed into the background by the radicalism of the *MacEoin* doctrine.

6.04 The retreat from the extreme version of the objective test marked an attempt to reconcile the law's abiding concern for public safety with its historic acknowledgement of human weakness and the reduced culpability typically associated with provoked killings. Hence the evident attraction of the *Camplin* compromise as described above:[11] the emphasis on the "reasonable man" standard was seen as a means of preventing the accused from "relying upon his own exceptional pugnacity or excitability",[12] and thus as upholding the value of public safety; while the factoring in of the accused's personal characteristics, especially insofar as they affect the issue of gravity, was welcomed as making due allowance for the competing concern with individual culpability. As was noted in Chapter 5, Commonwealth courts have not generally been minded to move beyond these parameters as laid down in *Camplin*.[13]

6.05 Several criticisms have nevertheless been directed at the *Camplin*[14] version of the objective test. Perhaps the best-known criticism is that the test is illogical insofar as it is predicated on the assumption that the "reasonable man" is capable of losing self-control and killing.[15] It has also been argued that the distinction between personal characteristics going to gravity and self-control, respectively, has rendered the test unworkable for juries.[16] Thus it has been said that the hypothetical ordinary person or "reasonable man", on whom the test is predicated, "has developed a split personality in that his or

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11 See paragraph 6.01 above.

12 *DPP v Camplin* [1978] AC 705, 716.

13 *DPP v Camplin* [1978] AC 705.

14 *Ibid*.

15 See paragraph 4.06 above and paragraph 6.06 below.

16 See *R v Rongonui* [2000] 2 NZLR 385, paragraph 111 *per* Elias CJ (dissenting): "It is highly artificial to ask the jury to take the characteristics of the accused into account for the purposes of assessing the gravity of the provocation but to disregard them when considering whether the ordinary man would, faced with provocation as grave, have lost his self-control. The distinction is oversubtle and is likely to be so regarded by the jury."

her character suddenly [changes] depending on which part of the test is being addressed."[17] Arguably, this difficulty is exacerbated where the accused is a member of a racial, ethnic or other minority: in cases of this kind, is the ordinary person to be imbued with the characteristics and practices of the relevant group and, if so, would the typical jury be capable of making the appropriate distinction and assessment? More radically, it might be argued that the content of the objective test will inevitably be determined by the social values and concerns of the dominant group in society, to the exclusion of the perspectives and experiences of minorities; and that there is therefore a real risk that the discriminatory views of the majority could determine the standard by which defendants are judged in the context of provocation.[18]

6.06 Theoretically speaking, the invocation of the ordinary person as the lens through which the accused's conduct should be judged is a contradiction in terms: by definition, the ordinary person does not react with fatal violence. However, this line of reasoning assumes that the ordinary person is being employed as a model of right conduct, and that he plays much the same role in criminal law as the "reasonable man" does in tort; but this assumption has been disputed:

> "The ordinary person test has been a continuing source of confusion and controversy. In part at least, this is a consequence of the misleading appearance of the test. One might expect the 'ordinary person' to be invoked as a standard of acceptable, if not desirable, social conduct. On reflection, however, it is obvious that the ordinary person of provocation lore is no social exemplar, though there are many instances in which courts and commentators have fallen into error on this point. The putative reactions of the ordinary person who loses self-control are not acceptable. On the contrary, the hypothetical reactions of the ordinary person mark the boundary between murder and manslaughter, two of the most serious offences in the statute

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17 Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 79.

18 This argument ultimately questions the retention of a defence of provocation; see paragraph 6.37 below.

> books. This fictitious being is far removed from the 'reasonable person', who is invoked to set standards of acceptable conduct in other areas of the law. By definition, the ordinary person of provocation law is one who can be driven to unlawful homicide."[19]

6.07 Similarly, the claim that the objective test is unsuitable in a multicultural society has been vigorously contested. Thus it has been suggested that a modified version of the test, whereby an accused's personal characteristics may be taken into account when assessing the gravity of provocation, adequately caters for the phenomenon of cultural diversity in this context.[20] Indeed, supporters of this view have expressly rejected the claim that the argument from multiculturalism requires any relaxation of the traditional standard of self-control in provocation cases. In the nature of things, racist remarks or taunts go to the gravity of impact of such taunts on a member of a particular group, *not* to a person's capacity for self control.[21]

6.08 Two principal arguments can be advanced in support of the subjective test. The first is the claim that it is better suited to the problem of cultural diversity in the context of provocation. As noted previously, it was this consideration which led Murphy J to deliver his dissenting judgment in *Moffa*.[22] Secondly, it may be argued that a subjective evaluation is a better guide to the issue of culpability. On this view, the accused's guilt can only be properly measured when all relevant personal circumstances have been taken into account.

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19 Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 81. See *R v Morhall* [1996] AC 90, 97-98 *per* Lord Goff: "[T]he 'reasonable person test' is concerned not with ratiocination, nor with the reasonable man whom we know so well in the law of negligence … nor with reasonable conduct generally. The function of the test is only to introduce, as a matter of policy, a standard of self-control which has to be complied with …"; see also *Stingel v R* (1990) 171 CLR 312, 327.

20 Macklem and Gardner "Provocation and Pluralism" (2001) 64 MLR 815; see also Detmold "Provocation to Murder: Sovereignty and Multiculture" (1997) 19 Syd LR 5.

21 Allen "Provocation's Reasonable Man: A Plea for Self-Control" (2000) 64 J Crim Law 216, 228-229.

22 *Moffa v The Queen* (1977) 138 CLR 601.

Similarly, advocates of this position might argue that it would be unjust to expect an "abnormal" person to meet "normal" standards of self-control; and that, if the idea of a concession to human weakness is to have any real meaning, an accused must be judged according to his or her "abnormality" and not on the basis of hypothetical normality. The judgment in *MacEoin*,[23] and the decisions of the Court of Criminal Appeal which followed it, reflect this second consideration. An important practical consideration might also be cited in support of the subjective test. If the objective test is as confusing and difficult to apply as is commonly assumed, the prudent option would be to abandon attempts to modify the old standard and introduce a radically subjective criterion of provocation in its stead.

6.09 On the other hand, formidable arguments can also be marshalled against the subjective test. The inconsistencies in the *MacEoin*[24] judgment establishing the test have already been considered in Chapter 4.[25] Suffice it to concentrate here on four aspects of the regime established in *MacEoin*. First, it quickly became apparent that the "reasonable relation" requirement was incompatible with the radically subjective criterion of provocation which that decision purported to lay down. In the 1990s the Court of Criminal Appeal sought to overcome this difficulty by treating the "reasonable relation" requirement as a factor bearing on the credibility of the accused's case, rather than as an integral part of the *ratio decidendi* in *MacEoin*. However, as Chapter 1 illustrates,[26] the "reasonable relation" or proportionality requirement has been a key component of the plea of provocation since its original early modern incarnation. Moreover, it has been argued that the decision to downgrade it to a mere evidentiary consideration appears to have been taken without due regard to the effect such radical surgery was likely to have on the doctrine of provocation as a whole; and, in particular, on that part of the doctrine designed to promote the value of public safety.[27]

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23 *People (DPP) v MacEoin* [1978] IR 27.

24 *Ibid*.

25 See paragraphs 4.09-4.11 above.

26 See paragraphs 1.09-1.10 above.

27 See McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 875-877.

6.10 Secondly, the decision in *MacEoin*[28] has seriously compromised the classical principle that the plea of provocation presupposes a standard of conduct – encapsulated in the concept of the "reasonable man" since the mid-nineteenth century – applicable to individuals generally. In *MacEoin*, the Court of Criminal Appeal expressed its reservations about the concept of the "reasonable man" as follows: "[W]ords which would have no effect on the abstract reasonable man may be profoundly provocative to one having knowledge of what people say about him. A hot-tempered man may react violently to an insult which a phlegmatic one would ignore."[29] In the result, the hot-tempered individual is held to a different standard of self-control than his or her phlegmatic counterpart,[30] notwithstanding the fact that the law of provocation has always excluded the reactions of unusually pugnacious or excitable individuals from the scope of the plea. Indeed, it is arguable that a regime which permits the criterion of provocation to vary from defendant to defendant has effectively nullified the idea of a standard of conduct in the strict sense. Standards normally presuppose compliance or conformity on the part of those at whom they are aimed; whereas the logic of the *MacEoin* doctrine is that they should be adjusted to suit the exigencies of individual members of their target audience.

6.11 Thirdly, by installing the accused's "temperament, character and circumstances" as the criterion of provocation, the Court of

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28 *People (DPP) v MacEoin* [1978] IR 27.

29 *Ibid* at 32.

30 The New South Wales Law Reform Commission has taken a different view in its *Discussion Paper Provocation, Diminished Responsibility and Infanticide* (DP 31 – 1993) at paragraph 3.63: "This argument needs only to be stated to be rejected. If the good-tempered person does not lose self-control then he or she will not kill and there will be no occasion for a murder trial at all. If she or he does kill but still does not lose self-control then provocation is not applicable because the killing was done in cold blood. Finally if she or he kills and does lose self-control then there is no reason why provocation cannot be raised, the defendant will pass both the subjective (although it may be a little more difficult to prove) and the objective tests." However, these remarks were made in the context of a law that adopts an objective approach that, unlike the approach endorsed in *MacEoin*, is designed to prevent a person from relying on his or her "exceptional pugnacity or excitability".

Criminal Appeal ensured that the plea could no longer be qualified by considerations of principle or policy. Thus, while the reasons for the accused's lethal reaction might be rooted in a flawed character, once it is established that he or she was in fact provoked the defence must succeed. As McAuley and McCutcheon have suggested, an unfortunate, and perhaps unforeseen, consequence of this approach is that immoral and anti-social traits can be accommodated within the Irish version of the defence:

> "An illustration is the case of the defendant who holds white supremacist beliefs and who genuinely believes that it is the gravest insult for a black person to speak to a white person unless spoken to first. On being spoken to by a black person he becomes enraged and kills whilst in the throes of his bigoted passion. Tested subjectively he has been provoked but there is no reason why the law's compassion should be extended to him, given that his beliefs are not merely unreasonable but are morally repugnant. The strictly subjectivist terms in which Irish law has expressed the defence lend themselves to allowing the defence to the racist.…"[31]

6.12 Those authors go on to suggest that the defence should be "circumscribed by policy limitations and should be denied, in cases where *inter alia*, to allow it would provoke moral outrage."[32]

6.13 Fourthly, nor does the multiculturalism argument as used by supporters of the *MacEoin*[33] doctrine survive critical scrutiny. Apart from the fact that it is highly questionable whether it can ever be scientifically established that ethnicity or cultural background gives rise to differences in the ability to exercise self-control,[34] the subjective test invites the type of stereotyping that a truly pluralist society should seek to eliminate. On this view, the evaluation of human conduct through the prism of unprovable assumptions about race, cultural background and gender should be discountenanced.

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31 McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at 877.

32 *Ibid*.

33 *People (DPP) v MacEoin* [1978] IR 27.

34 See Reilly "Loss of Self-Control in Provocation" (1997) 21 Crim LJ 320.

6.14 *Having considered the excuse-based and justification-based models of provocation, the Commission recommends the adoption of a modified version of the latter.*[35]

C Cumulative Provocation, Immediacy and Domestic Homicide

6.15 Cumulative provocation consists of a series of acts directed towards the accused which, when aggregated, constitute a sufficient basis for the defence. Viewed in isolation, any one of the acts in question would not amount to provocation. In the nature of things, the focus of the doctrine of cumulative provocation is on the *totality* of the deceased's conduct *vis-à-vis* the accused rather than on his or her last, isolated act, as is the case with the defence *simpliciter*. Cumulative provocation has not been specifically recognised in Irish law. The decisions in *People (DPP) v O'Donohoe*[36] and *People (DPP) v Bell*[37] show evidence of a permissive approach to

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35 See paragraphs 7.30-7.31 below.

36 Central Criminal Court Lavan J 15-18 March and 10 June 1993, reported in *The Irish Times* 16-19 March and 11 June 1993. The jury in this case were directed by the trial judge to return a verdict of manslaughter and to acquit the accused of the murder of her estranged husband whom she had killed by striking him repeatedly with a hammer. There was a history of abuse by the husband against the accused dating back almost 10 years. Five years before the killing the accused had obtained a barring order against her husband, but in the previous nine months had allowed him back into her home as he had nowhere else to live. During this period the husband had resumed the verbal abuse, had struck the accused and had refused to leave the home. On the night of the killing the husband arrived home drunk, had verbally abused the accused and had taunted her that she would never get him out of the house. The accused was also under the influence of alcohol and drugs at the time of the killing. She claimed to have lost control. Upon conviction, she received a suspended sentence of imprisonment.

37 Central Criminal Court McGuinness J 8-22 March 1999 and 14 November 2000, reported in *The Irish Times* 9-11, 16-17, 19-20, 23 March and 10 July 1999 and 14 November 2000. The accused was acquitted of the murder of her abusive partner, whom she had stabbed six times with a kitchen knife, and convicted of manslaughter. Prior to commencing her "pathological" relationship with the deceased, the accused had suffered from physical and sexual abuse throughout her childhood and adult years; she displayed features of an extreme form of post-traumatic stress disorder. Two days before the killing the accused had learnt that her sister (the

provocation in the context of domestic homicide.[38] However, the phenomenon of cumulative provocation is not confined to domestic homicides: it would, for instance, be potentially applicable to the case of a person who is driven to kill by the persistently anti-social antics of "neighbours from hell".

6.16 The question of immediacy is an important consideration in the context of domestic homicide. The essence of the provocation defence is that the killing has been carried out in hot blood. An accused is less likely to have acted under provocation if time has elapsed between the provocative conduct and the killing. 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:[39] frequently, 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 traditional provocation doctrine. First, the absence of a provocative act capable of serving as a triggering condition in its own right forces reliance on the argument that the deceased's last act was "the straw that broke the camel's back." Secondly, the delay between the

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estranged wife of the deceased) had committed suicide two months earlier. On the night of the killing, both the accused and the deceased were intoxicated with drugs and/or alcohol; the deceased made abusive remarks about the accused's dead sister and triggered memories of her own sexual abuse which, the accused claimed, caused her to lose control. Upon conviction, the accused received a suspended sentence of imprisonment.

38 A similar "contextual" approach has been taken in Australia: see *R v R* (1981) 28 SASR 321; *R v Hill* (1981) 3 A Crim R 397. It would also appear that a specific triggering incident is not essential: *R v Chhay* (1994) 72 A Crim R 1. See also Wasik "Cumulative Provocation and Domestic Homicide" [1982] Crim LR 29.

39 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.

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.[40]

6.17 As noted above, there is evidence that the courts 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 several cases such evidence has been accompanied by testimony of mental infirmity such as "battered woman syndrome" or post-traumatic stress disorder. However, although the English courts have expressed their willingness to admit such evidence,[41] the requirement that there must be a sudden and temporary loss of self-control appears to have survived this move. In *R v Thornton*,[42] the defence failed because the appellant had admitted that her action in stabbing her husband was not the result of a sudden loss of self-control induced by the provocative statements he had made shortly beforehand. In *R v Thornton (No 2)*,[43] new evidence was tendered to the effect that the accused had been suffering from "battered woman syndrome" as well as a personality disorder. The appeal was allowed on the grounds that a reasonable person with those characteristics might have reacted to the alleged provocation as the appellant had done. In other words, if the jury had known that the appellant was suffering from "battered woman syndrome" at the relevant time, they might have concluded that there *had been* a sudden and temporary loss of self-control on her part!

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40 The law in New South Wales was amended to deal with the difficulties presented by the immediacy requirement: section 23(2) of the *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) of the *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".

41 *R v Ahluwalia* [1992] 4 All ER 889; see Nicolson and Sanghvi "Battered Women and Provocation: The Implications of *R v Ahluwalia*" [1993] Crim LR 728.

42 [1992] 1 All ER 306.

43 [1996] 2 All ER 1023.

6.18 Given that the burden of the evidence in cases of this kind is that the accused did *not* suffer a sudden loss of self-control, albeit for understandable reasons,[44] the reasoning in *Thornton (No 2)*[45] looks suspiciously like a case of clinging to a legal form having effectively abandoned its substantive content.[46]

6.19 Although it is arguable that defendants of this type may at times deserve to be convicted of manslaughter rather than murder and, indeed, that the contrary result would invite public condemnation, the legal basis for a successful plea of provocation in such cases remains unclear. Arguably, the doctrine of cumulative provocation tears the heart out of the original plea. A better solution might be to process these cases under the rubric of diminished responsibility or extreme emotional disturbance, thereby avoiding needless damage to the architecture of existing defences.[47] 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.[48] Moreover, the removal of the immediacy requirement seems less vulnerable to the criticism that might be levelled at the extreme emotional disturbance option: namely, bearing in mind that homicide

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44 See paragraph 6.16 above.

45 *R v Thornton (No 2)* [1996] 2 All ER 1023.

46 In other words, although the Court purported to uphold the requirement of a sudden loss of control, it relaxed the standard to such an extent as to render it effectively meaningless.

47 The Law Commission of New Zealand declined to recommend the creation of a special partial defence for battered defendants. Indeed, the Commission took the view that the partial defence of provocation should be abolished altogether and that matters of provocation should be taken into account in the exercise of a proposed sentencing discretion for murder: see *Some Criminal Defences with Particular Reference to Battered Defendants* (R 73 – 2001) at paragraphs 84-86 and 114-120. It is also conceivable that the accused could avail of a defence of self-defence: see, *inter alia*, *R v Lavallee* (1990) 55 CCC (3d) 97 discussed in the Law Reform Commission's upcoming *Consultation Paper on Legitimate Defence in Cases of Homicide*.

48 In other words, this option would avoid the need to label defendants in such cases as suffering a mental disorder or condition.

is generally the product of powerful emotions, the introduction of that option would make it extremely difficult, if not impossible, to secure a conviction for murder.

6.20 *The Commission recommends that the traditional requirement of immediacy should be diluted in order to allow greater flexibility in dealing with cases of domestic homicide.*[49]

D Provocation and Mental Disorder

6.21 The relevance of the issue of mental disorder to the defence of provocation and the proper relationship between that defence and diminished responsibility need careful consideration. As matters stand, Irish law does not recognise the defence of diminished responsibility, although the introduction of a plea of that name is envisaged in the *Criminal Law (Insanity) Bill 2002*. It should however be borne in mind that, the imminent introduction of a plea of diminished responsibility notwithstanding, the *MacEoin*[50] doctrine already appears to permit evidence of mental disorder to be taken into account on the issue of provocation: on a literal reading of the doctrine, evidence of mental infirmity would arguably be relevant to the "temperament, character and circumstances" of the accused. As the Irish Courts have yet to pronounce on the admissibility of such evidence in provocation cases, it may be instructive to examine the attitude of their New Zealand counterparts in this regard,[51] not least because, like Ireland, New Zealand does not recognise a defence of diminished responsibility. Indeed, the absence of a plea of diminished responsibility initially prompted the New Zealand Court of Appeal to exclude mental infirmity from the range of characteristics which could be attributed to the reasonable person for the purposes of provocation.[52] However, the Court has since changed tack and acknowledged that the defence of provocation could accommodate evidence of diminished responsibility "within a limited

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49 See paragraphs 7.34 and 7.40 below.

50 *People (DPP) v MacEoin* [1978] IR 27.

51 See paragraphs 5.31-5.36 above.

52 *R v McGregor* [1962] NZLR 1069, 1082.

field."[53] It should moreover be remembered that this conclusion was reached in the context of the modified objective test and, consequently, that the Court's reasoning on this point would have greater force in a jurisdiction that operates a full-blown subjective test.

6.22 In England and Wales the defence of diminished responsibility was established by section 2 of the *Homicide Act 1957*. Although separate and distinct from the plea of provocation, which is provided for in section 3 of the 1957 Act,[54] recent case law on provocation has tended to blur the line between that defence and diminished responsibility.[55] Thus, in a series of decisions adapting the modified objective test, the Court of Appeal has held that evidence of the accused's mental infirmity is relevant to the defence of provocation both in respect of the question of gravity *and* that of self-control.[56] In other words, for the purposes of the issue of self-control the reasonable person can be invested with the accused's mental disorder. Moreover, the House of Lords has endorsed these rulings in its recent decision in *Smith*,[57] where it was held that the accused's clinical depression should have been taken into account in respect of the issue of self-control.[58] Indeed, the majority rejected the proposition that the existence of a separate defence of diminished responsibility effectively precluded the jury from considering the

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53 *R v McCarthy* [1992] 2 NZLR 550, 558.

54 See paragraph 3.15 above.

55 See Mackay "Pleading Provocation and Diminished Responsibility Together" [1988] Crim LR 411; Mackay *Mental Condition Defences in the Criminal Law* (Oxford University Press 1995) at 198-202; Horder "Between Provocation and Diminished Responsibility" (1999) 2 King's College LJ 143.

56 *R v Ahluwalia* [1992] 4 All ER 889; *R v Dryden* [1995] 4 All ER 987; *R v Humphreys* [1995] 4 All ER 1008; *R v Thornton (No 2)* [1996] 2 All ER 1023.

57 *R v Smith* [2001] 1 AC 146.

58 The Privy Council has taken a different view, confining evidence of mental infirmity to the question of gravity with the standard of self-control being that of the "reasonable man": *Luc Thiet Than v The Queen* [1997] AC 131; see paragraph 3.30 above. The position in New Zealand is similar: *R v Campbell* [1997] 1 NZLR 16; *R v Rongonui* [2000] 2 NZLR 385; see paragraphs 5.34-5.37 above.

accused's mental condition in the context of provocation. The decision in *Smith* has been criticised by commentators[59] on the grounds, among others, that it has pushed the law too far in the direction of an unqualified subjectivism.

6.23 These developments highlight the need for clear thinking on the proper role of mental infirmity evidence in the context of provocation. Arguably, evidence of mental infirmity should be confined to the defences of insanity and/or diminished responsibility.[60] As Glanville Williams has observed:

> "Provocation is traditionally a defence for 'normal' people. Abnormal people can shelter under it, but only on the same conditions as apply to normal ones. If they want their abnormality to be taken into account they must raise a defence appropriate to them – insanity or diminished responsibility."[61]

6.24 Similarly, commenting on the overlap between provocation and diminished responsibility, Horder has suggested that "the moral integrity of each defence is preserved only if such defences are capable of operating largely (but not wholly) independently of one another."[62] Many will find these conclusions compelling.

6.25 *The Commission is satisfied that mental disorder raises issues that properly fall outside the scope of the plea of provocation. Accordingly, it recommends that an accused's mental disorder should not be taken into account when assessing the power of self-control of the ordinary person.*[63]

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59 See footnote 82 in Chapter 3 above.

60 Ashworth *Principles of Criminal Law* (3rd ed Oxford University Press 1999) at 281-282, 290.

61 Williams *Textbook of Criminal Law* (2nd ed Stevens and Sons 1983) at 544.

62 Horder "Between Provocation and Diminished Responsibility" (1999) 2 King's College LJ 143, 147.

63 See paragraphs 7.04 and 7.35 below.

E The Nature and Sources of Provocative Conduct[64]

6.26 At common law provocation consisted of a wrongful act and a number of statutory formulations have retained the wrongfulness requirement.[65] This reflects the early modern view that provocation is a species of partial justification. Recent developments are more consistent with an excuse-based theory of provocation. In the first place, the law's conception of what is "wrongful" for the purposes of provocation has changed. It is no longer necessary that the conduct be wrongful in the sense that it violates the law: it is enough that it was in breach of ordinary community standards. Hence, Lowry LCJ's remarks in *R v Browne*:[66] "I should prefer to say that provocation is something unwarranted which is likely to make a reasonable person angry or indignant.…"[67] Secondly, it is now accepted in most jurisdictions that words alone, unaccompanied by wrongful deeds, can amount to provocation; and, as every law student knows, the uttering of insulting words does not in general amount to a criminal or tortious wrong.

6.27 Traditionally the defence was available only where the deceased was the author of the provocation. This position was the logical result of a justification-based view of the defence: fatal retaliation could only be partially justified where it was directed at the person who committed the provocative wrongful act. However, under the growing influence of the excuse rationale, the law would appear to have moved to a position where provocation need no longer be seen to have emanated from the deceased.[68]

6.28 A reform package inspired by the theory of justification would seek to restore the traditional common law position on this

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64 For discussion of the issues raised in this section see McAuley "Anticipating the Past: The Defence of Provocation in Irish Law" (1987) 50 MLR 133.

65 See paragraphs 5.48-5.49 above as to the *Criminal Codes* of Canada, the Australian jurisdictions of the Northern Territory, Queensland and Western Australia, and the New Zealand *Crimes Act 1961*.

66 [1973] NI 96.

67 *Ibid* at 108.

68 See paragraphs 5.56-5.61 above.

point: the defence would be confined to cases where the deceased had perpetrated a wrongful act on the defendant. On the other hand, it may be thought that this would entail undue interference with the present position and, bearing in mind that the defence is widely perceived as a concession to human infirmity, a more permissive excuse-based approach extending at least to cases of mistaken identity, might be preferred. Chapter 5 reviews several legislative models designed to accommodate this point.

6.29 *The Commission believes that the plea of provocation should not entail a requirement that the deceased must have acted "unlawfully"; it should be enough that the provocation was unacceptable by the ordinary standards of the community.*[69] *The Commission also recommends that the plea should be available only if (a) the deceased is the source of the provocation or (b) the accused, under provocation given by one person, by accident or mistake kills another.*[70]

F Provocation and Intoxication

6.30 The relationship between intoxication and provocation awaits judicial clarification in Ireland despite the fact that evidence of severe intoxication appears to have played a role in several recent cases.[71] In many jurisdictions, intoxication has been excluded from consideration as a matter of policy.[72] Strong arguments can be made in support of a policy of exclusion.[73] Many will feel that as the drunken accused was responsible for bringing about his or her own

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69 See paragraph 7.08 below.

70 See paragraph 7.33 below.

71 See paragraph 4.32 above.

72 See *R v Morhall* [1996] AC 90: however, in that case it was held that the accused's addiction, as opposed to his intoxicated state, was a characteristic that could be attributed to the "reasonable man".

73 The Commission has recommended that self-induced intoxication should not be allowed as a criminal defence: see *Consultation Paper on Intoxication as a Defence to a Criminal Offence* (1995) and *Report on Intoxication* (LRC 51 – 1995). Neither the Consultation Paper nor the Report considered the question of intoxication in relation to the defence of provocation.

condition, he or she should not be allowed to profit from its effects, at least to the extent that the latter include enhanced susceptibility to provocation. Alternatively, it might be contended that the principle of compassion for human frailty underpinning the plea of provocation should not be extended to defendants who were clearly responsible, as a result of drink or drugs, for their own excitable state. Finally, there is the argument that the standard of normal self-control associated with the traditional doctrine of provocation does not on any reasonable view countenance the indulgence of the drunken defendant. On the other hand, there will be those who, reflecting the permissive side of the debate on intoxication and criminal liability, will argue that an accused whose mind was befuddled by drink or drugs does not deserve to be treated as an intentional killer notwithstanding that he or she might not have reacted in the same manner had he or she been sober.[74] However, by parity of reasoning with what was said on the issue of cumulative provocation,[75] this is really an argument about the proper limits of the plea of *intoxication* and, consequently, should not be allowed to cloud the quite separate matter of setting appropriate boundaries to the defence of provocation.

6.31 *The Commission recommends that an accused's state of intoxication should not be taken into account when assessing the power of self-control of the ordinary person*.[76]

G Should the Defence of Provocation be Retained?

6.32 The difficulties besetting the plea of provocation might be summarised as follows. First, insofar as it is confined to the crime of murder, it arguably leads to inconsistency between offences; in respect of offences other than murder, evidence of provocation goes only to sentence. Secondly, the plea looks anomalous when compared with other criminal law defences. For example, in most common law jurisdictions, a plea of coercion is no answer to murder, yet a defendant who kills in the face of a threat to his or her own or a

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74 For discussion, see McAuley and McCutcheon *Criminal Liability* (Round Hall/Sweet & Maxwell 2000) at Chapter 13.5.

75 See paragraphs 6.15-6.20 above.

76 See paragraph 7.39 below.

loved one's life seems no less deserving of a manslaughter verdict than the provoked killer. *Mutatis mutandis*, the concession to human infirmity principle underpinning the plea of provocation seems equally applicable to the defendant who kills his or her victim in circumstances of necessity. The psychological forces at play in cases of this kind, which often include the survival instinct and the desire to save a loved one from virtually certain death, seem no less coercive than the anger states which actuate the typical provoked killer. Thirdly, the problem of fashioning a workable criterion of provocation seems insuperable. On the one hand, the ordinary person or "reasonable man" concept has given rise to what many regard as an unworkable distinction between personal factors going to gravity and self-control, respectively; and to an entirely unsuitable criterion of provocation in the context of multiculturalism. On the other hand, the subjective test, at least in its extreme form, seems effectively to negate the concept of self-control as a standard of conduct:[77] virtually every human trait, not excluding the most virulent forms of racism and sexism, seems capable of being brought within the protective reach of the concept of the accused's "temperament, character and circumstances" as laid down in *MacEoin*.[78]

6.33 Mindful of these difficulties, a number of review bodies[79] and academic commentators[80] have argued that the defence of

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77 See Horder *Provocation and Responsibility* (Clarendon Press 1992) at 144-145, discussing the issue in relation to *DPP v Camplin* [1978] AC 705. The observations have greater force where a subjective test is employed; see discussion at paragraphs 6.10-6.12 above.

78 *People (DPP) v MacEoin* [1978] IR 27.

79 *Eg*, New Zealand Criminal Law Reform Committee *Report on Culpable Homicide* (1976); New Zealand Crimes Consultative Committee *Crimes Bill 1989: Report of the Crimes Consultative Committee* (1991); Law Commission of New Zealand *Some Criminal Defences with Particular Reference to Battered Defendants* (R 73 – 2001) at paragraphs 114-120; Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998). The Law Reform Commission of Canada abandoned the defence in its proposed revision of the Canadian *Criminal Code*: Canadian Law Reform Commission *Recodifying Criminal Law* (R 31 – 1987).

80 Horder *Provocation and Responsibility* (Clarendon Press 1992) at chapter 9; Wells "Provocation: The Case for Abolition" in Ashworth and Mitchell (eds) *Rethinking English Homicide Law* (Oxford University Press 2000) at

provocation should be abolished. For example, in 1998, the Australian Model Criminal Code Officers Committee ("MCCOC") recommended abolition in its *Discussion Paper on Fatal Offences Against the Person*.[81] The MCCOC's review of the arguments for abolition of the defence is worth noting.

6.34 According to the MCCOC, the principal argument in favour of abolishing the defence lies in the fact that provoked killings are intentional; and in the invalidity of the assumption that hot-blooded killers are less culpable than their cold-blooded counterparts.[82] On the first of these matters, the Committee noted that the notion of loss of self-control as used in provocation is conceptually different from loss of control in the context of a successful plea of automatism:

> "[P]eople who lose self-control are not perceived as being in the same category as people who act automatically or without intention. The person who acts in circumstances of extreme passion does act with conscious volition [and] such people do intend their actions and the results thereof."[83]

6.35 In respect of the second matter, the MCCOC proceeded by way of a series of rhetorical questions intended to cast doubt on the traditional assumption that the hot-blooded killer deserved the benefit of the plea in mitigation:

> "Why is a husband who kills his wife because he found her committing adultery morally less guilty than a murderer? Why is a conservative Turkish Muslim father partially excused when he stabs his daughter to death because she refuses to stop seeing her boyfriend?[84] Why do we partially excuse a man who kills another man who has made a

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85; Goode "The Abolition of Provocation" in Yeo (ed) *Partial Excuses to Murder* (Federation Press 1992) at 37.

81 Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 87.

82 *Ibid* at 87.

83 Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998).

84 The facts of *R v Dincer* [1983] VR 460.

homosexual advance on him?[85] Why is deadly violence mitigated in these cases?" [86]

6.36 These considerations prompted the conclusion that differences of culpability between provoked and unprovoked killers would be better handled at sentencing stage; and, in this connection, the Committee drew attention to the fact that, in most jurisdictions, the issue of provocation is handled in this way in respect of non-fatal offences against the person.[87] In the Committee's opinion, the "elevated status"[88] enjoyed by provocation in the context of homicide was brought about by the fixed penalty associated with murder. Bearing in mind that the Law Reform Commission[89] has recommended the abolition of the mandatory life sentence for murder in this jurisdiction, the MCCOC's argument on this point might be thought to apply with equal force in Ireland.

6.37 The MCCOC also relied on the argument that the plea of provocation is gender biased to the extent that it fails to provide for the normal pattern of female aggression. Hence its critique of the suddenness requirement: a battered woman frequently waits until her abuser is drunk or asleep before striking and consequently, has no realistic hope of securing the benefit of the plea of provocation. In the opinion of the MCCOC, this problem is so deeply entrenched within the architecture of the defence that nothing short of outright abolition offers the prospect of a satisfactory solution to it. It should however be borne in mind that, although there is some evidence to support the view that the provocation defence favours men over women,[90] the Committee cited studies in Victoria[91] and New South Wales[92] which reached the opposite conclusion.

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85 The facts of *Green v R* (1997) 191 CLR 334.

86 Australian Model Criminal Code Officers Committee *Discussion Paper on Fatal Offences Against the Person* (1998) at 89.

87 *Ibid* at 89.

88 *Ibid*.

89 Law Reform Commission *Report on Sentencing* (LRC 53 – 1996) at 68, Recommendation 12.

90 See, *eg*, Horder *Provocation and Responsibility* (Clarendon Press 1992) at 186-191.

6.38 Turning to the position of the commentators, Horder has advanced two arguments in support of abolition. His first argument is that the defence is gender biased both in its formal structure and actual operation: the plea "reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular *women's* natural aggressors."[93] Secondly, Horder contends that there is no reason why anger should be singled out for special treatment by the defence of provocation when killings driven by other emotions, such as envy, lust or greed, are routinely treated as murder. On this view, the natural desire, borne out of anger, to inflict retaliatory suffering must be distinguished from the actual infliction of suffering. In a civilised society, the latter is the preserve of the state and individuals must content themselves with other means of demonstrating their justly felt anger by expressing what he calls "[r]ighteous indignation."[94]

6.39 Wells has criticised the operation of the provocation defence as sexist, "homophobic", racist and "defamatory" of the deceased: in the nature of things, an accused seeking to rely on provocation will point to evidence that places the victim in an unfavourable light. Accordingly, that writer concluded:

> "We should cut our ties with a defence that is rooted in a criminal justice system that we would hardly now recognize, in an era where punishment was (at least in its officially pronounced forms) crude and vengeful, and in a social, economic and political world informed by entirely different values. The result is a defence that constrains and constructs homicides into distortions of people's lives, adversely affecting victims' families, defendants, and more

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91 Law Reform Commission of Victoria *Report on Homicide* (R 40 – 1991) at paragraphs 164-168.

92 Donnelly, Cumines & Wilczynski "Sentenced Homicides in New South Wales 1990-1993: A Legal and Sociological Study" (Judicial Commission of New South Wales, Monograph Series No 10, 1995), summarised in New South Wales Law Reform Commission *Report on Partial Defences to Murder: Provocation and Infanticide* (R 83 – 1997) at 68-69.

93 Horder *Provocation and Responsibility* (Clarendon Press 1992) at 192 (emphasis in original).

94 *Ibid* at 195.

generally lending legitimacy to superficial explanations of violence."[95]

6.40 Equally compelling arguments can be advanced in support of the retention of the defence. Perhaps the most important of these is the abiding moral perception that provoked killings are less heinous than unprovoked ones, and that this difference cannot adequately be catered for by adjusting the quantum of punishment at sentencing stage. According to this argument, the real issue is one of appropriate labelling: provoked killers do not deserve to be branded as murderers on moral grounds;[96] and, on that analysis, provocation is a liability issue which must be determined at *trial* stage. In response to the suggestion that the defence is gender biased, it has been contended that reform rather than abolition is the better strategy;[97] as can be seen from its provisional recommendation and the draft clause accompanying them, the Commission is in broad agreement with this approach. Similarly, the parallel argument that the defence is irremediably discriminatory in its effects seems overstated. Once again, the more appropriate remedy might be thought to lie in reform rather than abolition.[98] Finally, it should be borne in mind that, if, as the Commission believes, the doctrine of provocation is rooted in the moral perception that provoked killings should not be treated as murder, that perception is likely to seek alternative expression in the event of abolition. For example, it is not inconceivable that, following abolition, the concept of intention could become the new battleground for the provoked killer seeking a manslaughter verdict.

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95 Wells "Provocation: The Case for Abolition" in Ashworth and Mitchell (eds) *Rethinking English Homicide Law* (Oxford University Press 2000) at 86.

96 See Ashworth *Principles of Criminal Law* (3rd ed Oxford University Press 1999) at 284; Criminal Law Revision Committee of England and Wales *Fourteenth Report: Offences against the Person* (Cmnd 7844 – 1980) at paragraph 76.

97 See, *eg*, Sullivan "Anger and Excuse: Reassessing Provocation" (1993) 13 OJLS 421.

98 *Eg*, *Final Report of the New South Wales Attorney-General's Department Working Party on the Review of the Homosexual Advance Defence* (Government Publication 1999) has recommended that amending legislation be introduced to exclude reliance on non-violent homosexual advances as a basis for the defence. Available at http://www.agd.nsw.gov.au/clrd1.nsf/pages/had.

In this scenario, the matching argument would most likely be to the effect that, by reason of provocation, the killing "wasn't really intentional". To say the very least, the "theology" of intention that would inevitably flow from an arrangement of this type is likely to make the current difficulties associated with the plea of provocation pale into insignificance.

6.41 *The Commission rejects the arguments in favour of abolishing provocation and, accordingly, recommends that the plea should be retained.*[99]

H Summary

6.42 This chapter examined the competing policy considerations associated with the contrasting rationales of justification and excuse, noting that recent history has seen the law of provocation move from a predominantly justification-based approach toward a more excuse-based one.

6.43 The subjective and objective tests were assessed against this background; as were the issues of cumulative provocation, provocation and mental disorder, the nature and sources of provocative conduct, provocation and intoxication, and the argument that the defence of provocation should be abolished altogether.

6.44 The recommendations contained in this chapter may be summarised as follows:

> *(i) Having considered the excuse-based and justification-based models of provocation, the Commission recommends the adoption of a modified version of the latter.*[100]
>
> *(ii) The Commission recommends that the traditional requirement of immediacy should be diluted in*

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99 See paragraphs 7.05-7.06 and 7.28 below.

100 See paragraphs 7.30-7.31 below.

order to allow greater flexibility in dealing with cases of domestic homicide.[101]

(iii) *The Commission is satisfied that mental disorder raises issues that properly fall outside the scope of the plea of provocation. Accordingly, it recommends that an accused's mental disorder should not be taken into account when assessing the power of self-control of the ordinary person.*[102]

(iv) *The Commission believes that the plea of provocation should not entail a requirement that the deceased must have acted "unlawfully"; it should be enough that the provocation was unacceptable by the ordinary standards of the community.*[103] *The Commission also recommends that the plea should be available only if (a) the deceased is the source of the provocation or (b) the accused, under provocation given by one person, by accident or mistake kills another.*[104]

(v) *The Commission recommends that an accused's state of intoxication should not be taken into account when assessing the power of self-control of the ordinary person.*[105]

(vi) *The Commission rejects the arguments in favour of abolishing provocation and, accordingly, recommends that the plea should be retained.*[106]

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101 See paragraphs 7.34 and 7.40 below.

102 See paragraphs 7.04 and 7.35 below.

103 See paragraph 7.08 below.

104 See paragraph 7.33 below.

105 See paragraph 7.39 below.

106 See paragraphs 7.05-7.06 and 7.28 below.

CHAPTER 7 OPTIONS FOR REFORM

A Introduction

7.01 The observations made by the Court of Criminal Appeal in *People (DPP) v Davis*[1] to the effect that the defence of provocation may require reformulation serve as a timely reminder of the need for reform of this branch of the law. Four different reform strategies are outlined in this chapter: abolition; one based on justificatory considerations; one based on the excuse rationale; and the replacement of provocation by a more general excuse-based defence.

7.02 A key assumption underlying these reform options is that the sanctity of human life is a core value in any civilised society. Cases of legitimate defence aside, the theme of this chapter takes it for granted that the killing of another human being should be treated as unlawful. In particular, it is assumed that retaliation for wrongs is properly the business of the State, acting through the medium of the criminal law. Accordingly, retaliation by the individual at whom a wrong has been directed should not be legally privileged. However, it is accepted that, by virtue of the conduct of the deceased, some intentional killings involve a lesser degree of culpability than others; and that this reality is best catered for by retaining the defence of provocation in some form.

7.03 The final three reform strategies presented here would operate as partial defences reducing murder to manslaughter. The remaining option, that of abolition, would require the dismantling of the fixed penalty for murder by way of ensuring that reduced culpability for an intentional killing would be reflected in a reduced sentence.

7.04 This chapter also proceeds on the assumption that the criminal liability of defendants suffering from mental disorder raises

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1 [2001] 1 IR 146, 159.

discrete issues and should be the focus of a separate defence or set of defences. Properly construed, provocation assumes that the accused is mentally normal, whereas a successful mental condition defence typically rests on the contrary assumption. On this reasoning, provocation goes to culpability while mental condition defences are concerned with criminal capacity. The Commission welcomes the recent publication of the *Criminal Law (Insanity) Bill 2002*, and notes that it seeks to preserve the distinction between culpability and capacity just outlined.

B Abolition of the Defence

7.05 The case for abolishing the defence of provocation, including the views of law reform bodies on this question, has been outlined in Chapter 6. Proposals for abolition rest on the assumption that the question of a provoked killer's culpability can be adequately dealt with at sentencing stage. In Ireland, abolition would have to be accompanied by the replacement of the fixed penalty for murder with a discretionary sentence. As it happens, the Commission has already recommended that the fixed penalty for murder should be abolished.[2]

7.06 It does not follow from that recommendation that the defence of provocation should likewise be abolished. Indeed the Commission believes that there are compelling reasons for retaining the plea. In a recent Seminar Paper, the Commission argued strongly in favour of retaining the distinction between murder and manslaughter.[3] In the Commission's opinion, that distinction marks an important moral boundary which, bearing in mind that provoked killings have been recognised as a species of manslaughter for five centuries, would be compromised by the abolition of the plea of provocation.

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2 Law Reform Commission *Report on Sentencing* (LRC 53 – 1996) at 68, Recommendation 12.

3 Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* (LRC SP1 – 2001) at 5-8.

C A Justification-Based Defence of Provocation

7.07 A second strategy would be to reform the defence of provocation by giving greater emphasis to the justificatory components of the plea. The essence of justification theory is that the accused's retaliatory act was partially warranted by the deceased's conduct. This rationale is rooted in the original common law conception of provocation which, as enunciated in *R v Mawgridge*,[4] sought to confine the plea to cases where the accused was the "target" of one of the recognised categories of untoward conduct set out in that case. More recently, the justification rationale was articulated by Lowry LCJ in *R v Browne*,[5] who stated that "provocation is something *unwarranted* which is likely to make a reasonable person angry or indignant.…"[6]

7.08 It is important to stress that justification in this context does not entail the conclusion that the deceased must have acted *unlawfully*. Following extensive comparative research, the Commission is satisfied that it would be enough that the alleged provocation, which might include insulting words or gestures, was unacceptable by ordinary community standards. But it does mean that allegedly provocative conduct falling short of this standard could not be relied on as a basis for the defence.

7.09 Several important consequences would flow from the adoption of a justification model of the provocation defence. First, this model would necessitate the abandonment of the subjective test in its extreme Hibernian form. As already indicated, the essence of justification theory is that loss of self-control, however complete, would attract the defence if and only if it had been triggered by conduct that could be considered untoward by ordinary community standards. Secondly, the element of proportionality, traditionally defined as the "reasonable relation" requirement in Irish law, would assume renewed importance. As a matter of logic, a community standard of provocation would discountenance disproportionate individual reaction.

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4 (1706) Kel 119. See discussion at paragraph 1.19 above.

5 *R v Browne* [1973] NI 96.

6 *Ibid* at 108 (emphasis added).

7.10 Thirdly, the justification model would confine the defence to cases of non-trivial provocation. In the nature of things, evidence of grave provocation would be required to support the conclusion that the deceased was partially responsible for his or her own demise. Finally, given that the gravity of provocation can only be meaningfully measured in terms of the impact of the deceased's conduct on the accused, the justification model would provide a solid basis for considering the personal characteristics of accused persons when assessing their reaction to provocation.

7.11 Arguably the problem of a mistaken belief as to the existence of provocation would pose special difficulties. Strictly speaking, the absence of an underlying basis of provocative conduct should preclude reliance on the doctrine of partial justification; and, on that analysis, cases of this kind would more properly fall to be resolved under the general rubric of mistake of fact. On the other hand, if the accused's mistaken belief was based on reasonable grounds, the conclusion that the response was partially justified *in the circumstances* does not seem unduly strained; and, on that view, the predicament posed by a reasonable but mistaken belief *could* be accommodated by the justification model.

D An Excused-Based Defence of Provocation

7.12 A third strategy would be to reform the defence along excuse lines. In this guise, the defence would concentrate on the accused's loss of self-control but would still require an underlying foundation of provocative conduct, or, as an absolute minimum, conduct that the accused took to be provocative. However, the focus of the defence would be on the accused's emotional state rather than on the quality of the triggering event. A broad range of allegedly provocative conduct, either emanating from the deceased or from another source, would be accommodated by this approach. The emphasis on the accused's loss of self-control would also widen the defence to include provocative conduct that had not been witnessed by the accused (so called "hearsay provocation").

7.13 An excuse-based version of the defence would not necessarily mean that the subjective test would be retained in its present form. Indeed, it is arguable that the strong version of the

subjective test is incompatible with the theory of excuse in its strict meaning.[7] Excuse theory presupposes a standard of conduct to which it would be unfair to hold an accused in the circumstances; whereas the subjective test, at least in its extreme form, eschews the very idea of a standard of conduct in this sense. On the contrary, the essence of that variant of the test is that the criterion of provocation should be allowed to vary with the personal characteristics and circumstances of each individual accused. Moreover, as Chapter 4 illustrates, the practical difficulties involved in applying the subjective test suggest that it is unlikely to survive unaltered in Ireland, at least in the medium to long term.[8]

7.14 These difficulties raise the question as to how the subjective test should be reformulated so as properly to give effect to the excuse rationale. Plainly, the *Camplin*[9] formula, standing alone, would be an unsuitable substitute. Apart from its reliance on the distinction between personal characteristics going to gravity but not to self-control, the rule in that case leaves open the range of characteristics that can be taken into account when assessing the accused's reaction to provocation; and it may be thought that a regime of that kind would not represent a significant advance on the present position. Another possibility would be to remodel the test on one of the *Camplin* variations. For example, the Criminal Law Revision Committee ("CLRC") has suggested that:

> "[I]n place of the reasonable man test the test should be that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control

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7 See Macklem and Gardner "Provocation and Pluralism" (2001) 64 MLR 815, 819-820, arguing that excuse involves moral considerations; see also Gardner "The Gist of Excuses" (1998) 1 Buffalo Crim LR 585, 592 to the effect that a self-respecting person would prefer to be judged "by the proper standards of character applicable to all".

8 See also paragraphs 6.09-6.13 above.

9 *DPP v Camplin* [1978] AC 705; see paragraphs 5.26-5.39 above.

leading the defendant to react against the victim with a murderous intent."[10]

7.15 In the opinion of the CLRC, the omission of any reference to the "reasonable man" in this formulation, would draw the jury's attention to the real issue in provocation cases: namely, whether they thought the defendant's loss of self-control was reasonable in the circumstances. However, the CLRC went on to recommend that "the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered",[11] and this latter recommendation arguably subverts the intention of the former: namely, the leavening of the subjective test with objective considerations.

7.16 The Law Commission of England and Wales has adopted the CLRC recommendation in its *Draft Criminal Code*. Clause 58 of the Code stipulates:

> "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
> (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."[12]

7.17 Although clause 58(b) expressly confines consideration of the accused's personal characteristics to the question of gravity, the Law Commission was satisfied that the wording of the clause gives

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10 Criminal Law Revision Committee of England and Wales *Fourteenth Report: Offences against the Person* (Cmnd 7844 – 1980) at paragraph 81.

11 *Ibid* at paragraph 83.

12 Law Commission of England and Wales *Report on Criminal Law: A Criminal Code for England and Wales* (No 177 1989) at 68.

effect to the CLRC recommendation that the accused should be judged in the light of his or her personal circumstances.[13]

7.18 The New South Wales Law Reform Commission has also recommended a reformulated defence of provocation. It proposed that the ordinary person test be replaced by a subjective criterion suitably qualified by a community standard of blameworthiness:

> "[T]aking into account all of the characteristics and circumstances of the accused, he or she should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily harm or to act with reckless indifference to human life [the three mental states that supply *mens rea* for murder in New South Wales] as to warrant the reduction of murder to manslaughter."[14]

7.19 In that Commission's opinion, the remodelled defence would provide the jury with a "simple, straightforward means"[15] of evaluating the culpability of the accused. The qualification that community standards would operate as a filter for the defence is important: its inclusion was designed to ensure that the unusually excitable or pugnacious individual would be denied the benefit of the defence.

7.20 Given that its primary focus is on the accused's loss of self-control, it would be possible to exclude the immediacy requirement from an excuse-based version of the provocation defence. This would overcome some of the difficulties currently associated with pleading the defence in cases of domestic homicide, especially those involving battered women. It should be noted that this reform has already been implemented in New South Wales and in the Australian Capital Territory.[16]

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13 Law Commission of England and Wales *Report on Criminal Law: A Criminal Code for England and Wales* (No 177 1989) at 251.

14 New South Wales Law Reform Commission *Report on Partial Defences to Murder: Provocation and Infanticide* (R 83 – 1997) at 52.

15 *Ibid* at 51.

16 See footnote 40 in Chapter 6 above.

7.21 The relationship between an excuse-based defence of provocation and mental condition defences tends to be problematic. Reform proposals driven by excuse considerations often involve an overlap between provocation and diminished responsibility. The CLRC envisaged that if its revised version of the defence were enacted there would be an increase in the number of jury verdicts based on both provocation and diminished responsibility.[17] As already indicated,[18] the partial elision of these defences undermines their differing roles in the construction of criminal liability and clouds their respective moral bases.[19] Accordingly, it is recommended that a clear distinction should be maintained between provocation and mental condition defences.

E A General Excuse-Based Defence

7.22 As the preceding chapters illustrate, the bulk of the criticism directed against the modern approach to provocation is that it has given rise, through the medium of the subjective test, to an unduly permissive version of the plea. It remains to consider the contrary argument: that the defence of provocation is too restrictive and should be replaced by a general excuse-based plea that would accommodate provoked and unprovoked killings alike. The essence of this argument is that the traditional emphasis on the requirement of provocation fails to provide for a wide range of *unprovoked* intentional killings that deserve to be treated as manslaughter on moral grounds. For example, it is often suggested that killings actuated by such emotions as fear, despair, hopelessness and compassion naturally fall into this category and, accordingly, should be given the benefit of the concession to human infirmity principle that underpins the traditional plea of provocation.

7.23 Perhaps the best known example of a plea of this kind is the American *Model Penal Code* defence of Extreme Emotional

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17 Criminal Law Revision Committee of England and Wales *Fourteenth Report: Offences against the Person* (Cmnd 7844 – 1980) at paragraph 83.

18 See paragraphs 6.21-6.25 above.

19 See Horder "Between Provocation and Diminished Responsibility" (1999) 2 King's College LJ 143, 147.

Disturbance, which was outlined in Chapter 5.[20] The relevant provision is contained in section 210.3(1)(b) of the Code:

> "Criminal homicide constitutes manslaughter when: … (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."

7.24 While the primary focus of the *Model Penal Code* defence is on the underlying emotional state which actuated the killing, there is also a clear concern with striking the right balance between subjective and objective considerations when fixing liability. As regards the former, account may be taken of the accused's personal characteristics, while objective considerations are reflected in the requirement that there must be a reasonable explanation or excuse for the killing.

7.25 The defence of extreme emotional disturbance has been enacted in a minority of American states, albeit that the legislature has generally seen fit to augment the objective aspects of the plea. As already indicated, the principal argument in favour of the plea is that the removal of the need to introduce evidence of provocation as a triggering condition would facilitate manslaughter verdicts in cases which are morally indistinguishable from those covered by the traditional defence.

7.26 The Commission emphatically rejects this course of reasoning. In a recent Seminar Paper[21] the Commission has accepted the proposition that the law of murder as currently configured is over-inclusive in respect of several categories of intentional killings; and that this state of affairs might usefully be addressed by introducing, among other measures, new defences (and partial defences) not excluding the plea of extreme emotional disturbance. However, the

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[20] See paragraphs 5.70-5.77 above.

[21] Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* (LRC SP1 – 2001) at 5-8.

Commission has also cautioned against the adoption of reforms in this area which would have the effect of compromising the principle of accurate labelling in the definition of offences and defences.[22] In the Commission's opinion, provoked killings are *sui generis* and should continue to be treated as such. By parity of reasoning, the Commission is committed to examining, as part of its general review of the law of homicide, the larger question of over-inclusion insofar as it affects *unprovoked* killings; and will return to the arguments for and against the plea of extreme emotional disturbance in that context.

7.27 It should also be borne in mind that the *Model Penal Code* defence of extreme emotional disturbance was introduced at a time when the law of provocation in the United States was virtually on all fours with the rule in *Bedder v DPP*:[23] in general, little or no allowance was made for the personal characteristics of the accused. In short, the new plea was conceived, at least in part, as a way of ameliorating the harshness of the contemporary common and statute law of provocation. No such exigency affects the current law of provocation in Ireland. If anything, the concern with modern Irish law is the exact opposite: the law is too lenient. Moreover, it should be remembered that in the States which adopted the *Model Penal Code* recommendation the defence of extreme emotional disturbance was qualified by the addition of objective considerations which significantly circumscribed the reworked excusatory plea.

F Provisional Recommendations

7.28 The Commission is persuaded by the arguments against the abolition of the defence. Accordingly, it provisionally recommends that the defence be retained, albeit in a modified form.

7.29 The Commission is also of the view that the enactment of a general excuse-based defence by way of a substitute for the plea of provocation is unwarranted. Accordingly, it provisionally recommends that a defence of extreme emotional disturbance should not feature in any reform of the law of provocation.

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22 Law Reform Commission *Seminar Paper on Homicide: The Mental Element in Murder* (LRC SP1 – 2001) at 5-8.

23 [1954] 2 All ER 801.

7.30 The Commission provisionally recommends that the justification-based model should guide reform of the plea of provocation. The focus of the remodelled defence should be on the conduct of the deceased that is said to have provoked the accused to the point of engaging in fatal violence. This would involve a shift away from the current, excuse-inspired, emphasis on the accused's loss of control. 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 a very disorientating experience.

7.31 At the same time, the Commission acknowledges that the adoption of a justification-based defence should be tempered by excuse considerations. It is not proposed to revert to the *Bedder*[24] doctrine which prevented the courts from taking account of the accused's personal situation. The Commission provisionally recommends 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, it is recommended that personal characteristics should not feature in relation to the question of self-control. The Commission notes that this reform would bring Irish law broadly into line with the law in Canada, Australia and New Zealand.

7.32 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 or she 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

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[24] *Bedder v DPP* [1954] 2 All ER 801; see paragraph 3.08-3.11 above. The accused was an impotent eighteen year old who was ridiculed and kicked when he failed to have intercourse.

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.

7.33 As already indicated, excuse considerations have a limited role to play in the proposed model. The logic of a justification-based approach is that the defence should be available only where the deceased was the source of the alleged provocation: arguably, an accused cannot in any sense be said to be partially justified if he or she kills someone other than the author of the provocation. However, it may be thought that it would be unduly restrictive to curtail the defence in this fashion, not least because it has traditionally been seen as a concession to human infirmity. Accordingly, the Commission provisionally recommends that *some* allowance be made for cases where the provocation emanates from someone other than the deceased. This would reflect the balance of authority in Canada and Victoria and is supported by *dicta* in Irish decisions; indeed, the latter seems to take the plea beyond the limits that would be imposed by a justification-based approach.[25] A more orthodox justification-based line on this issue can be seen in section 169(6) of the New Zealand *Crimes Act 1961*, which makes exceptions for cases of mistaken identity and accident.[26]

7.34 The Commission notes 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

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[25] See paragraph 5.60 above.

[26] Section 169(6) of the New Zealand *Crimes Act 1961* states: "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."

be particularly acute in cases of domestic homicide. Accordingly, it may be thought prudent to make express provision for cases of this type. The statutory measures enacted in New South Wales and the Australian Capital Territory provide appropriate models.[27]

7.35 The Commission also feels that it is 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 in Ireland has had unfortunate consequences for the plea of provocation. On the one hand, the plea has been deployed as a necessary but inappropriate substitute for diminished responsibility; while, on the other hand, 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* should alleviate these difficulties by providing a more appropriate means for dealing with mentally disordered offenders. The Commission is strongly of the view that the enactment of this measure should precede or accompany reform of the law relating to provocation.

G Draft Provision

7.36 In the light of the foregoing discussion, the Commission suggests the following draft formulation of a statutory provision to reform the law of provocation:

(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.

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[27] See paragraphs 5.09 and 5.10 above.

(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

(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.

7.37 The Draft Clause is loosely based on section 169 of the New Zealand *Crimes Act 1961*. It opens with a statement, in subclause (1), as to the effect of a successful defence of provocation, namely that it reduces murder to manslaughter.

7.38 Subclause (2) contains the core of the proposed reformulated plea. In essence, it establishes a two-fold test of provocation similar to that adopted in other common law countries.

The first element in the test is the narrative enquiry as to whether the accused was, in fact, provoked to the point of loss of self-control.[28] The second element is the normative evaluation of whether an ordinary person would have lost self-control in similar circumstances. The standard setting test is intended to curtail the unduly broad sweep of the current law in Ireland by re-introducing an impersonal community standard into the law. However, to prevent a retreat to the purely objective formulation represented by decisions such as *Bedder*,[29] provision is made in subclause (3)(i) to enable a jury to invest the hypothetical ordinary person with the relevant characteristics of the accused. Thus, the relevance or otherwise of a particular characteristic will depend on the nature of the provocative conduct in question. For example, if an accused has been taunted about his or her diminutive stature, height would be a relevant characteristic but religious affiliation would not.

7.39 The latitude allowed by subclause (3)(i) is qualified by subclause (3)(ii): an accused's mental disorder, state of intoxication and idiosyncratic personality traits are excluded from consideration. The Commission has expressed the view that lack of self-control due to mental disorder is more appropriately treated as a case of insanity or diminished responsibility and the exclusion of mental disorder in subclause (3)(ii) is intended to reinforce this position. The exclusion of intoxication and of personality traits, such as pugnacity, is consistent with the justificatory theme that underpins the Commission's reform proposals. That theme is also reflected in subclause (4), which stipulates that neither conduct incited by the accused nor conduct done in the exercise of lawful authority may amount to provocation. The inclusion of a proportionality requirement in subclause (5) is also based on justificatory considerations.

7.40 The effect of subclause (6) is two-fold. First, it reiterates, in subclause (6)(ii), the generally accepted proposition that provocation does not negate intention. Secondly, subclause (6)(i) is designed to cater for cases of cumulative provocation and domestic killings by

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[28] It should be noted that provocation can take the form of either conduct or words; hence, "hearsay provocation" is not excluded from the ambit of the provision.

[29] *Bedder v DPP* [1954] 2 All ER 801.

diluting the suddenness requirement. A jury would be entitled to conclude that the defence was made out where an accused delayed his or her fatal response, as is often the case where battered women kill their abusers. By the same token, it would be open to a jury to hold that a series of acts might cumulatively amount to provocation even though the final act would not, of itself, provide a sufficient basis for a successful plea. A similar arrangement is to be found in section 13(3)(b) of the Australian Capital Territory *Crimes Act*.

7.41 Subclause (7) deals with the sources of provocation by providing that the reformulated plea is not confined to conduct perpetrated by the deceased: it also covers cases of mistaken or accidental killing of someone other than the provoker, albeit that the latter must have been the defendant's intended target. This measure is based on the equivalent provision in section 169 of the New Zealand *Crimes Act*.[30]

7.42 The Commission welcomes comments and observations on the foregoing Draft Clause. Such comments and observations are especially welcome on the following matters:

(i) Whether the proposed formulation makes sufficient provision for what might be described as "the crying baby problem"?: *viz*, cases where the allegedly provocative conduct, though perfectly lawful, might nevertheless be deemed to be "of sufficient gravity to deprive an ordinary person of the power of self-control" and thus to qualify as provocation under subclause (2)(ii). On a justification-based theory of provocation, such cases should *not* be given the protection of the plea: the author of the alleged provocation cannot on any reasonable view be said to have committed a wrongful act. On the other hand, some might regard the exclusion from the outset of cases of this kind as unduly harsh on defendants and, accordingly, as unwarranted on moral grounds. However, it is perhaps worth noting that the latter view entails an *excuse*-based version of the plea and

[30] See discussion at paragraph 5.61 above.

is, to that extent, incompatible with the Commission's analysis of the true rationale of provocation.

(ii) Whether the proposed formulation makes sufficient provision for the problem of marginal illegality such as might arise in connection with subclause (4)(ii)? As matters stand, the language of the subsection suggests that *any* deviation from "the lawful exercise of a power conferred by law" is *ex hypothesi* unlawful and, consequently, capable of amounting to provocation under subclause (2). On a sharp application of the subsection, this would mean that evidence of minor and even inadvertent excesses on the part of a police officer making an otherwise lawful arrest would have to be left to the jury, an outcome which some may feel is undesirable on grounds of public policy.

(iii) Whether the Draft Clause lends itself to the framing of comprehensible jury directions on the issue of provocation? On one view, it should be enough for trial judges to supply juries with a copy of the section, although the difficulties identified at (i) and (ii) above suggest that this may not always be enough. Arguably, jurors might also seek further guidance on the meaning of the word "temperament" in subclause (3)(ii). Without wishing to pre-empt discussion of this issue, that concept can be given at least two meanings: *viz*, the manner of thinking, behaving or reacting characteristic of a specific individual (thus one speaks of this or that person having *an equable temperament, a nervous temperament, or a religious temperament)*; and excessive irritability or sensitiveness. Plainly, the latter is the signification contemplated by the subclause. But, is there a danger that judges and juries might interpret the term to include the former meaning, thus precluding consideration of factors that might be relevant to gravity under subclause (3)(i)?

7.43 The Commission welcomes submissions on this Consultation Paper by **31 January 2004**.

The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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