

---

PROVOKED TO ACTION:  
THE IMPLICATIONS OF REPEALING THE PROVOCATION  
DEFENCE TO MURDER

---

M R M GALE

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws  
(Honours) at the University of Otago

October 2010

## ACKNOWLEDGEMENTS

---

To Margaret Briggs for her patience, guidance and ability to impart wisdom at short notice.

To Geoff Hall for his valuable input and invaluable resourcefulness.

To 'the office' for driving me mad and keeping me sane.

To the badueys for always reminding me of the value of a bag of laughs.

To Jono for showing me what determination means.

Most importantly, to Mum and Dad for their love, support and belief in me in everything I do.

## TABLE OF CONTENTS

<b>Introduction .....</b>	<b>1</b>
---------------------------	----------

### PART I

<b>Chapter One: Genesis .....</b>	<b>4</b>
1.1 Defences Generally .....	4
1.2 Distinguishing Justification and Excuse .....	4
1.3 A Theory of Defences.....	5
1.4 Provocation and its Origins.....	6
1.5 Partial Excuse or Partial Justification? .....	7
1.6 Conclusion.....	7
<b>Chapter Two: Provocation in Action .....</b>	<b>8</b>
2.1 The McGregor Approach .....	8
2.2 Modifying McGregor .....	9
2.3 Sentencing Provoked Killers .....	10
2.4 Conclusion.....	12
<b>Chapter Three: Provoking Change .....</b>	<b>13</b>
3.1 Necessary Change? .....	13
3.2 Reasons for Retention .....	16
3.3 Conclusion.....	18

### PART II

<b>Chapter Four: The Significance of Sentencing .....</b>	<b>20</b>
4.1 The Sentencing Framework .....	20
4.2 Guilty Pleas .....	23
4.3 Application in Provocation Cases .....	25
4.4 The Australian Experience .....	27
4.5 Judicial Creativity? .....	28
4.6 Further Considerations .....	28
4.7 Conclusion.....	31

<b>Chapter Five: Trials and Tribulations .....</b>	<b>32</b>
5.1 The Experience in Victoria .....	32
5.2 The Elements of the Offence .....	33
5.3 Mens Rea .....	34
5.4 Actus Reus.....	38
5.5 Other Defences .....	42
5.6 Conclusion.....	43
<b>Chapter Six: Where to from Here?.....</b>	<b>45</b>
6.1 Resurrection .....	45
6.2 Reformation.....	47
6.3 Redemption .....	48
6.4 Conclusion.....	48
<b>Conclusion.....</b>	<b>49</b>
<b>Bibliography .....</b>	<b>50</b>
<b>Appendices.....</b>	<b>58</b>
Appendix A: Historical Statutes.....	58
Appendix B: Crimes Act 1961, s 169. ....	59
Appendix C: Selected Provisions from the Sentencing Act 2002 .....	60
Appendix D: Sentencing Trends in Provocation Cases.....	71
Appendix E: Comparative Chart .....	73

## INTRODUCTION

During 2009 New Zealand watched on in horror as two separate murder-accused used the defence of provocation to vilify their victims at trial while attempting to reduce a murder charge to manslaughter. Clayton Weatherston used the partial defence, provided by s 169 of the Crimes Act 1961, to argue that his butchery of his ex-girlfriend was precipitated by her swearing at him and attacking him with scissors and that consequently he should be convicted of manslaughter and not murder.<sup>1</sup> Ferdinand Ambach invoked the defence to argue that his brutalisation of his 69-year-old victim, which culminated with ramming a banjo down his throat, was in response to a homosexual advance.<sup>2</sup>

In the wake of *Ambach*, where the defence was successful, and *Weatherston*, where it was not, discontent with the defence came to a legislative head in late-2009. On 7 December 2009 the Crimes (Provocation Repeal) Amendment Act was passed into law, removing s 169 of the Crimes Act 1961 from our law and abolishing the partial defence of provocation. Murder-accused in New Zealand were left without the benefit of a defence which had prevailed for over five centuries. The abolition of a defence so firmly entrenched in the criminal law is no small matter. Criminal defences have grown out of the need to “keep the enforcement of the law human, accurate and fair.”<sup>3</sup> The repeal of provocation has the potential to destabilise the delicate balance between offences and defences that has developed in the criminal law over many years. With this firmly in mind, this dissertation examines the consequences of that repeal and the implications for individuals accused of murder.

Part I is backward looking. Providing an historical perspective, it narrates the evolution and abolition of the defence up until the point at which New Zealand now stands – a society embarking on a new and untried course of dealing with provoked killers. Chapter One examines the genesis of the partial defence of provocation against a background of the theories used to rationalise defences. Chapter Two scrutinises the operation of s 169 and the judicial interpretation of that section as well as looking at the sentencing practices which prevailed for provoked killers. Chapter Three then considers the criticisms of the defence and the calls for its reform from academia, the media and the bench, in an attempt to determine why the defence was repealed.

Having traversed five hundred years of legal history, Part II is forward looking. It addresses the uncertainty which the repeal of s 169 has created and, drawing on the experiences of other

---

<sup>1</sup> *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009.

<sup>2</sup> *R v Ambach* HC Auckland CRI-2007-004-027374, 18 September 2009.

<sup>3</sup> Hyman Gross *A Theory of Criminal Justice* (Oxford University Press, New York, 1979) at 136.

jurisdictions, speculatively predicts the various consequences of the abolition of the partial defence. Chapter Four focuses on the immediate consequences of moving the consideration of a provoked killer's culpability to the sentencing process. Chapter Five considers the less obvious effects which repeal may have on the trials of provoked killers. Chapter Six asks whether, if these outcomes prove unsatisfactory, a new direction should be taken in the provision for provoked killers. It is contended that the repeal of the partial defence presents potentially serious challenges for the criminal law but that ultimately the best course of action may be to allow the system to rectify any imbalance internally.

## **PART I**

*Study the past if you would divine the future.*

- Confucius<sup>4</sup>

---

<sup>4</sup> Confucius (551 – 479 BCE)

## CHAPTER ONE: GENESIS

A thorough understanding of what the partial defence of provocation was is required in order to properly understand the consequences of its abolition. This chapter examines defences generally and their theoretical underpinnings in the criminal law, before looking at the origins of provocation.

### 1.1 Defences Generally

Defences in criminal law are those conditions or circumstances which prevent a conviction despite the elements of an offence being present.<sup>5</sup> The negation of an element of the offence is often described as being a “failure of proof” defence.<sup>6</sup> Rather, this is a denial of an essential element of the offence which means that the prosecution fail to make out the necessary elements required for conviction.

Defences ‘defend’ against conviction for an offence which has prima facie been established; that is where the elements have been made out by the prosecution. Partial defences, by contrast, do not prevent conviction. They operate to reduce murder to a lesser crime, usually manslaughter. Partial defences available in New Zealand are infanticide,<sup>7</sup> killing pursuant to a suicide pact<sup>8</sup> and, prior to the repeal of s 169 of the Crimes Act 1961, provocation. The circumstances and conditions which give rise to defences and partial defences can generally be divided into two categories. Circumstances relating to the offender will excuse certain behaviour, while those relating to the act itself will justify it.

### 1.2 Distinguishing Justification and Excuse

While there is no longer any distinction in consequences between acquittal by way of justification and acquittal by way of excuse,<sup>9</sup> the two can be clearly differentiated morally.<sup>10</sup> Justified conduct may well cause harm. However, it is not regarded as wrong because the infliction of that harm prevents the suffering of a greater societal harm. Society is better off for the commission of the justified act because the net result is less total harm.<sup>11</sup> Conversely, for an excuse the harm that results from committing the forbidden act will be greater than had it not been committed. Exculpation of the actor is still warranted because of an inability to choose

---

<sup>5</sup> Paul Robinson “Criminal Law Defenses: A Systematic Analysis” (1982) 82 Colum L Rev 199 at 203.

<sup>6</sup> Ibid at 204.

<sup>7</sup> Crimes Act 1961, s 178.

<sup>8</sup> Crimes Act 1961, s180.

<sup>9</sup> Up until the 19<sup>th</sup> Century, an excused murderer still faced forfeiture while a justified one escaped all liability: JC Smith *Justification and Excuse in the Criminal Law* (Sweet and Maxwell, London, 1989) at 7.

<sup>10</sup> Eric Colvin “Exculpatory Defences in Criminal Law” (1990) 10 Oxford J Legal Stud 381 at 384

<sup>11</sup> Robinson, above n5 at 220; Colvin, above n10 at 387.



another course of action. In this respect it may be said that we excuse the actor, while it is the particular conduct of an actor which we justify.<sup>12</sup>

The distinction between the two is visible in the operation of defences in the law. Matters of justification and excuse are dealt with in Part 3 of the Crimes Act 1961. Self-defence, in s 48, is an example of a justificatory defence. The use of reasonable force is “justified” in defending one’s self or another. The harm caused by the use of force in defence is seen to be less than the harm that the attacker would cause if allowed to proceed.

Compulsion provides a contrasting example.<sup>13</sup> Protection from criminal responsibility for some offences is given to those who offend while under the threat of immediate death or grievous bodily harm. Here the actor is excused from liability because, although the harm is not necessarily less than otherwise would have been done, the only other course open to the accused was suffering grievous bodily harm or death.

### **1.3 A Theory of Defences**

Robinson characterises criminal defences as the product of interplay between “complex notions of fairness and morality” and other societal pressures such as utility and efficiency.<sup>14</sup> These ideas operate at both a societal and an individual level and thus criminal defences are rationalised with reference to both justice for society and fairness to the individual.

At a societal level, the criminal law is characterised by a relationship between the state and its citizens, enabling the state to ensure compliance with its programme for society.<sup>15</sup> Given the large power imbalance inherent in the relationship, “many defences spring from the need to protect citizens from abuse of their liberties by the guardians of the law and to keep the enforcement of the law humane, accurate and fair.”<sup>16</sup> In this respect defences are concerned with maintaining equilibrium in the relationship between the individual and the state.

At an individual level, defences are discussed with reference to morality and justice; blame should not be attributed to those who cannot help what they have done.<sup>17</sup> There should be an assessment of the culpability of the defendant and where there is no fault there should not be criminal liability. The law should not imply, by its censure of the defendant, that they are to blame unless that blame is deserved. Defences are also provided by the law because our morality can not countenance hypocritical law. Where standards are imposed which legislators

---

<sup>12</sup> Robinson, above n5 at 229.

<sup>13</sup> Crimes Act 1961, s24.

<sup>14</sup> HLA Hart *Punishment and Responsibility* (Oxford, Clarendon Press, 1968) at 174.

<sup>15</sup> AP Simester and GR Sullivan *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, Oxford, 2003) at 5.

<sup>16</sup> Gross, above n 3.

<sup>17</sup> Hart, above n 14 at 174.

themselves cannot match, the hypocrisy challenges our traditional notions of fairness and justice.<sup>18</sup> Providing defences to the accused attempts to remedy this deficit in our criminal law.

#### **1.4 Provocation and its Origins**

The historical origins of the partial defence of provocation can be traced to the concept of chance-medley killings. Those who killed in sudden affrays were perceived as being partially justified in responding angrily to an affront to their honour and less culpable than cold-blooded, premeditated murderers.<sup>19</sup> Consequently, they were convicted of chance-medley manslaughter, avoiding the death penalty. The provocation defence grew from chance-medley manslaughter as the courts searched for a more consistent threshold for determining mitigation.<sup>20</sup>

By the early seventeenth century, the mental element required for murder was malice aforethought, a type of premeditation or intentional wickedness.<sup>21</sup> An accused could negate the implication of malice aforethought by showing that he<sup>22</sup> had only acted under provocation and, similarly to chance-medley killings, held no evil design against the victim.<sup>23</sup> The early provocation defence was thus seen to negative the mens rea for murder.<sup>24</sup> That view persisted as recently as 1946, when the House of Lords, asserted that “the formation of an intent to kill or inflict grievous bodily harm is negated” in the case of provocation.<sup>25</sup>

Concerns about the veracity of provocation pleas saw the introduction of a more rigorous objective approach, to what had previously primarily been a subjective inquiry. By the 19th-century the objective approach had become entrenched in the common law.<sup>26</sup> The stringency of the objective test was exemplified in *Bedder v Director of Public*

---

<sup>18</sup> Herbert Packer *The Limits of Criminal Sanction* (Stanford University Press, Stanford, 1968) at 118.

<sup>19</sup> New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide* (Discussion Paper 31, 1993) at [3.9].

<sup>20</sup> Jeremy Horder *Provocation and Responsibility* (Clarendon Press, Oxford, 1992), 23.

<sup>21</sup> Andrew Ashworth “The Doctrine of Provocation” (1976) 35 CLJ 292 at 292.

<sup>22</sup> I will, for ease of reference, refer to the accused in the masculine. This shorthand, however, also reflects the fact that in 2008 94 percent of convicted murderers in New Zealand were male (see: *Statistics New Zealand*, Conviction and sentencing tables at

[http://www.stats.govt.nz/tools\\_and\\_services/tools/TableBuilder/conviction-and-sentencing-tables.aspx](http://www.stats.govt.nz/tools_and_services/tools/TableBuilder/conviction-and-sentencing-tables.aspx)

<sup>23</sup> Matthew Hale *The History of the Pleas of the Crown* (Sollom Emlyn, London, 1778) at 455; Hale, writing in the 17th century, asked “what is such provocation as will take off the presumption of malice in him that kills another?”

<sup>24</sup> *R v Mawgridge* (1707) 84 ER 1107 set out the four instances in which the partial defence could be claimed: gross insult, an attack on a friend, the wrongful imprisonment of an Englishman or adultery by one’s spouse.

<sup>25</sup> *Holmes v Director of Public Prosecutions* [1946] AC 588 (HL) at 598. See also *R v Duffy* [1949] 1 All ER 932, 932 where it was said that the application of the provocation defence was conditional on the accused being affected by passion such that he was “for the moment not master of his mind.” That contention has subsequently been discredited: *Attorney General for Ceylon v Perera* [1953] AC 200; for more recent affirmation see *Rajamani v R* [2007] NZSC 68

<sup>26</sup> *R v Welsh* (1869) 11 Cox CC 336 required that the provocation be “something which might naturally cause an ordinary and reasonably minded man to lose his self control and commit such an act.”

*Prosecutions*.<sup>27</sup> The victim was a prostitute who had taunted Bedder about his impotence. Bedder then killed her in a rage. The House of Lords held that the Bedder's impotence could not be taken into account because the ordinary man, under the objective test, would not have possessed that characteristic.

### **1.5 Partial Excuse or Partial Justification?**

Whether provocation partially excuses or partially justifies an offender's conduct remains unclear. Given its historical development from chance-medley killings, there was traditionally a significant justificatory element to the provocation plea. More recently, however, it has been expressed as a concession to human frailty.<sup>28</sup>

It has been argued that, because provocation is only a partial defence, it must be an excuse, as a justification would provide a complete defence. This, however, ignores the objective requirement of the defence. It seems more likely that provocation operates at the convergence of the two incongruous notions of justification and excuse. The justificatory element to the defence makes mitigation dependent on having killed in circumstances where the reasonable person might have done likewise.<sup>29</sup> Someone provoked to kill can be differentiated from the cold-blooded killer because of the "moral wrongs by both parties."<sup>30</sup> The subjective element on the other hand excuses the defendant's violent response to that anger. It is the anger of the accused which we justify. The excusatory element of the defence then steps in. In this sense provocation is perhaps a 'justified excuse'.

### **1.6 Conclusion**

Defences are generally provided to ensure fairness, accuracy and balance in our criminal law. The partial defence of provocation is no different, the historical development of the defence being rooted in community perceptions of the culpability of provoked killers. The exact basis on which the defence has operated has been inconsistent with it sometimes being considered as negating mens rea. Furthermore, the defence started out having justificatory elements but has more recently been expressed as a concession to human frailty. This history and theory is relevant to our consideration of the modern day defence which is perhaps better characterised as a blend of both justification and excuse.

---

<sup>27</sup> *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119.

<sup>28</sup> *Attorney-General for Jersey v Holley* [2005] UKPC 23 at [3].

<sup>29</sup> Horder, above n 20 at 111.

<sup>30</sup> Ashworth, above n 21 at 307.

## CHAPTER TWO: PROVOCATION IN ACTION

*Bedder* became representative of the severity of an objective provocation test and a catalyst for change, both in England,<sup>31</sup> and New Zealand. Section 169 of the Crimes Act 1961<sup>32</sup> altered the reasonable man test which had persisted under its 1893 and 1908 predecessors. The language of s 169 differed sharply from that of earlier Acts. Reference to the “ordinary person” was replaced with a mixed subjective-objective test which envisaged a hypothetical person with the “self-control of an ordinary person, but otherwise having the characteristics of the offender.”<sup>33</sup> Furthermore, the condition that the killing occur “in the heat of passion caused by sudden provocation”<sup>34</sup> was replaced with a requirement that the killing occur “under provocation” in subsection (1).

While, the language of the new Act provided significant change to the provocation defence,<sup>35</sup> exactly what effect these changes would have on the operation of the defence was unclear. This chapter outlines that change brought about by s 169, examining the operation of the defence in its new guise and the sentencing practices that prevailed in provocation cases.

### 2.1 The McGregor Approach

The significance of these changes came before the Court of Appeal in *R v McGregor*,<sup>36</sup> the crime in question having occurred just nine days after the Crimes Act 1961 came into force.<sup>37</sup>

The Court concluded that suddenness and heat of passion, remained relevant, despite their absence from subsection (1), because common law doctrines continued to be relevant to the jury’s decision making process.<sup>38</sup> Similarly, proportionality between the provocation and the retaliation remained pertinent as it had long been a relevant consideration at common law.<sup>39</sup>

The approach to be taken to the new construction of subsection (2) was also addressed, albeit obiter dictum. Paragraph (a) was of particular concern as it required a fusion of the two

---

<sup>31</sup> The enactment of the Homicide Act 1957 (UK) saw the partial codification of homicide law in England for the first time.

<sup>32</sup> See Appendix B

<sup>33</sup> Crimes Act 1961, s169(2)(a)

<sup>34</sup> See Appendix A

<sup>35</sup> Other changes, while not as significant or integral as those mentioned above, included the addition of subsections (6) and (7). These codified common law rules regarding mistaken provocation and parties’ liability for a provoked killing.

<sup>36</sup> *R v McGregor* [1962] NZLR 1069.

<sup>37</sup> McGregor had shot his neighbour across their fence, in the context of an ongoing feud between them, after becoming angry that his father had been disloyal by sharing a drink with the deceased.

<sup>38</sup> *R v Noel* [1960] NZLR 212.

<sup>39</sup> *McGregor*, above n36 at 1079.

discordant notions of subjectivity and objectivity.<sup>40</sup> To construct a person having “the power of self-control of an ordinary person, but otherwise having the characteristics of the offender” was considered “well-nigh impossible.”<sup>41</sup> North J, however, considered that that was exactly what Parliament had intended and that consequently it was the Court’s duty to give meaning to those words.

The Court considered that Parliament must have intended to provide some relief from the rigidity of the reasonable man test applied in *Bedder*. Consequently, “but otherwise” could not be construed to mean “in other respects” because the result would be that the power of self control of an ordinary person would remain the test.<sup>42</sup> The standard of self control to be expected of the defendant was, therefore, that of “an ordinary person who nevertheless possessed as well the special characteristics of the offender.”<sup>43</sup>

The risk of extinguishing the reasonable man by the grafting of these subjective characteristics had to be mitigated by some limitation on the traits and features of the offender that could modify the concept of the ordinary man.<sup>44</sup> Consequently, a characteristic needed to be a significant and definite thing which set the defendant apart from the rest of the population as well as something sufficiently permanent to be considered part of the defendant’s personality.<sup>45</sup>

## **2.2 Modifying McGregor**

The Court in *R v McCarthy*<sup>46</sup> disagreed with the McGregor approach.<sup>47</sup> *McCarthy* pointed out that the discussion in *McGregor* had been obiter dictum and that the observations made went “somewhat too far and add needless complexity to the application of the section.”<sup>48</sup> Citing Adams’ extensive criticism,<sup>49</sup> *McCarthy* held that the hypothetical person was to possess the defendant’s characteristics and any consequences that that characteristic may have on his personality *except* in so far as it affected his power of self control. The question was “whether a

---

<sup>40</sup> Ibid at 1081.

<sup>41</sup> Ibid at 1077.

<sup>42</sup> Ibid at 1080.

<sup>43</sup> Ibid at 1081.

<sup>44</sup> Ibid at 1081.

<sup>45</sup> Transient states such as drunkenness or depression were, therefore, considered not sufficiently permanent, while mental deficiency and feeble-mindedness were excluded on policy grounds; see *McGregor* above n 36 at 1081.

<sup>46</sup> *R v McCarthy* [1992] 2 NZLR 550.

<sup>47</sup> See also *R v Campbell* [1997] 1 NZLR 16 (CA).

<sup>48</sup> *McCarthy*, above n 46 at 558.

<sup>49</sup> Francis Boyd Adams (ed) *Criminal Law and Practice in New Zealand* (2nd ed, Sweet and Maxwell, Wellington 1971) at 345.

person with the accused's characteristics other than any lack of the ordinary power of self control could have reacted in the same way."<sup>50</sup>

The Court of Appeal again considered the application of s 169 in *R v Rongonui*.<sup>51</sup> The Court disagreed over the interpretation of s 169(2)(a). The majority affirmed the gravity/sufficiency distinction which had been drawn in *McCarthy*. The minority, however, advocated a return to *McGregor*. Elias CJ believed that when the accused had a characteristic which diminished his ability to exercise normal self control that should be taken into account in assessing whether there was sufficient provocation to cause loss of control. Where the accused was incapable of exercising ordinary self-control the statute would not hold him to that standard.<sup>52</sup> Thomas J agreed with that approach, describing the *McGregor* interpretation as "realistic and sensible."<sup>53</sup>

Subsequently, both the Court of Appeal<sup>54</sup> and the Supreme Court<sup>55</sup> declined to revisit the approach in *Rongonui* leaving the New Zealand position in line with the broad consensus across the common law jurisdictions.<sup>56</sup>

### **2.3 Sentencing Provoked Killers**

It has been said too often to require elaboration that culpability in manslaughter varies from case to case. There can be no firm sentencing guidelines that are applicable to conduct which, at one end of the scale, results in death from little more than accident or mischance to the other end where death is inflicted in circumstances which can barely be distinguished from murder.<sup>57</sup>

As Gault J notes, manslaughter inherently encompasses a large range of offending and culpability and consequently there is a large variation in the sentences handed down by the courts.<sup>58</sup> Like murder, the maximum sentence for manslaughter is life imprisonment.<sup>59</sup> Unlike

---

<sup>50</sup> *McCarthy* above n 46 at 558.

<sup>51</sup> *R v Rongonui* [2000] 2 NZLR 385. Rongonui, who had a history of substance abuse and had suffered emotional and physical abuse at the hands of her partner, stabbed her neighbour to death. Rongonui, who valued her ability to care and provide for her children, asked the victim to watch the children while she resolved a conflict with Child Youth and Family Services.

<sup>52</sup> *Ibid* at [126] per Elias CJ.

<sup>53</sup> *Ibid* at [159] per Thomas J.

<sup>54</sup> *R v Makoare* [2001] 1 NZLR 318 at [14]

<sup>55</sup> *Timoti v R* [2005] NZSC 37

<sup>56</sup> Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007) at [3.71]. The fluctuating English position was rehased in *R v Smith (Morgan)* [2001] 1 AC 146 which adopted the position of the *Rongonui* minority. Subsequently, the Privy Council came to a contrary decision, in line with the *Rongonui* majority, in *Holley*, above n28. The English Court of Appeal has elected to follow the decision of the Privy Council in *Holley*: *R v James*; *R v Karimi* [2006] QB 588 (CA) meaning that prior to appeal there was an agreement in approach between New Zealand and England.

<sup>57</sup> *R v O'Sullivan* CA340/93, 15 December 1993 per Gault J.

<sup>58</sup> For further judicial comment on this point see *R v Edwards* [2005] 2 NZLR 709 (CA)

<sup>59</sup> Crimes Act, s177. For discussion of the sentencing regime for murder in New Zealand see Chapter Five.

murder, however, there is no statutory presumption in favour of any particular term.<sup>60</sup> The large variation in circumstances involved in manslaughter sentencing means that any comparison between cases should be undertaken carefully.<sup>61</sup> For this reason too, the Court of Appeal have eschewed issuing a guideline judgment or laying down any definite guidelines for sentencing in the area.<sup>62</sup>

Affirming a sentence of nine years imprisonment in *R v Edwards*,<sup>63</sup> the Court of Appeal took the opportunity to discuss sentencing levels in provocation cases. In doing so, they referred extensively to English materials including a 2004 consultation paper produced by the English Sentencing Advisory Panel at the request of the Home Secretary.<sup>64</sup> The Court placed heavy weight on the Panel's work and while the final guideline to be submitted to the Council was not at that time available, the Court observed that "it will merit, when published, careful scrutiny in this country."<sup>65</sup> Although the English categories of sentences were not adopted in *Edwards*, the Court of Appeal approved of the suggested methodology.

The panel suggested that the sentencing range should be identified having regard to the level of provocation. The starting point within that range should then be determined by reference to the duration of the provocation. The most serious cases, those featuring a low level of provocation over a short period of time, would, therefore, attract finite sentences between nine and 15 years with a starting point of 12 years.

Where there had been a substantial degree of provocation over a significant period of time a lesser range was deemed appropriate – somewhere between four and nine years with a starting point of six years. The lowest range of seriousness would be those cases where there was a very high degree of provocation over a prolonged period. The Panel identified the upper end of this range as being four years and implied that non-custodial sentences could be appropriate at the lower end of the scale. The New Zealand Court of Appeal, however, has held that, as the violence involved in provocation cases cannot be countenanced, a non-custodial sentence will rarely be adequate deterrence.<sup>66</sup>

---

<sup>60</sup> Sentencing Act s 102 provides a presumption in favour of life imprisonment for murder.

<sup>61</sup> For judicial comment on this point see: *Edwards*, above n 58.

<sup>62</sup> The Court of Appeal has repeatedly declined the opportunity to do so: *Edwards*, above n 58; *O'Sullivan*, above n 57; *Solicitor-General v Kane* CA154/98, 23 September 1998; *R v Leuta* [2002] 1 NZLR 215 (CA)

<sup>63</sup> *Edwards*, above n 58, affirming the sentence of Frater J in *R v Edwards* HC Auckland T2003-004-025591, 16 September 2004. See below at [4.2] for further discussion of *Edwards*' sentencing

<sup>64</sup> United Kingdom Sentencing Advisory Panel *Consultation Paper on Sentencing of Manslaughter by Reason of Provocation* (11 March 2004).

<sup>65</sup> *Edwards*, above n 58 at [29]; the proposals of the Sentencing Advisory Panel, detailed in *Edwards*, were eventually adopted by the Sentencing Council in its guideline; see Sentencing Guidelines Council, *Manslaughter by Reason of Provocation – Guideline* (November 2005).

<sup>66</sup> *R v Fate* (1998) 16 CRNZ 88 (CA) at 92.

Although the analysis of the English materials in *Edwards* proved helpful in sentencing,<sup>67</sup> comprehensive implementation of the guidelines was held to be inappropriate in the absence of legislative guidance to that effect.<sup>68</sup> Consequently, while the analysis offers an indicative guide, there remains a large degree of uncertainty given the discretion afforded the sentencing judge.<sup>69</sup>

## **2.4 Conclusion**

Despite the broad agreement in recent times as to the application of the partial defence and the established practices for sentencing provoked killers, provocation was far from uncomplicated. Although there was something of a hiatus in the fluctuation of the provocation defence, the susceptibility to change remained. The vast number of appellate decisions and the inherent variation in sentencing practice between judges illustrated the fraught nature of the defence and meant that calls for reform of the “volatile” defence were manifold.<sup>70</sup> The next chapter attempts to determine why abolition was chosen as the appropriate option for reform and evaluate the arguments invoked in that regard.

---

<sup>67</sup> *Ambach*, above n 2.

<sup>68</sup> *R v King* CA71/06, 27 July 2006 at [7]

<sup>69</sup> The Law Commission, *The Partial Defence of Provocation*, above n 56 identified four successful provocation pleas in a study of 81 murder prosecutions in Wellington and Auckland between 2001 and 2005. The sentences in these four cases ranged from three to nine years imprisonment. In addition to the four cases identified by the Law Commission in their study, the author has been able to identify many other examples of sentencing in the case of manslaughter by reason of provocation verdicts. As can be seen from the appended chart (Appendix D), all of those sentences were custodial and ranged from two to fifteen years imprisonment.

<sup>70</sup> The Law Commission, *The Partial Defence of Provocation*, above n56 at [71]



## CHAPTER THREE: PROVOKING CHANGE

While *Weatherston*<sup>71</sup> and *Ambach*,<sup>72</sup> and their media coverage, brought the use of the provocation defence to the fore immediately prior to repeal, the defence had been reviewed as long ago as the mid 1970s.<sup>73</sup> Furthermore, the Law Commission had recommended repeal twice since the turn of the century.<sup>74</sup> In addition to the large amount of judicial effort which has been exerted in considering the partial defence and the intense media scrutiny that it has received, provocation has been the subject of an overwhelming volume of academic analysis and legal reform scholarship.<sup>75</sup> This chapter scrutinises the discontent with the operation of the defence and considers the policy arguments identified by these various sources to justify both repeal and retention.

### 3.1 Necessary Change?

#### *Practical difficulties*

Difficulties with the practical application of the partial defence have been cited in support of abolition, with the test for provocation being criticised as “conceptually confused, complex and difficult for juries to understand and apply.”<sup>76</sup> The discussion of the operation of the defence, in Chapter Two, highlights the “mental gymnastics”<sup>77</sup> with which judge and jury are tasked. The “potentially hazardous”<sup>78</sup> position of the Judges in these cases is emphasised by the volume and regularity of appellate decisions on the subject matter.

Judicial discontent with the practical operation of the partial defence of provocation was obvious. The Court of Appeal in *Rongonui*, divided as to the approach to the sufficiency test, was unanimous in advocating change. Blanchard J called for thorough and urgent reform of “a plainly unsatisfactory law,” questioning “whether a jury can realistically be expected to understand the instruction which the statute requires of the Judge.”<sup>79</sup> According to Thomas J, the potential for the jury to misunderstand the direction or to disregard it as nonsense could

---

<sup>71</sup> *Weatherston*, above n 1.

<sup>72</sup> *Ambach*, above n 2.

<sup>73</sup> New Zealand Criminal Law Reform Committee, *Report on Culpable Homicide* (Wellington, 1976)

<sup>74</sup> Law Commission *The Partial Defence of Provocation*, above n56; Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001).

<sup>75</sup> Appendix E provides an overview of the law reform work undertaken throughout various jurisdictions.

<sup>76</sup> Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) at [2.34].

<sup>77</sup> *Rongonui*, above n51 at [236] per Tipping J.

<sup>78</sup> Rajamani, above n 25 **Error! Bookmark not defined.** at [16].

<sup>79</sup> *Rongonui*, above n51 at [216] per Blanchard J.

mean that other directions the Judge gives are ignored, directions “which are essential to a fair trial and the attainment of justice.”<sup>80</sup>

Repeated judicial criticism in New Zealand<sup>81</sup> has been echoed abroad. Courts throughout the common law world have had a “good deal of difficulty in practice in dealing with cases where provocation is, or is claimed to be, an issue.”<sup>82</sup> The Privy Council and House of Lords have not shied away from the issue, criticising the “serious logical and moral flaws”<sup>83</sup> of the defence and opining that “[t]here is a real risk that the present law, containing as it does so many difficulties in its application may cause injustice in individual cases.”<sup>84</sup>

### *Victim on trial*

The provocation defence, it is argued, promotes a culture of blaming the victim.<sup>85</sup> The need for the accused to give evidence of some provocation by the victim means that painting the victim in a bad light becomes an inherent element of the defence case. This tarring of the victim is compounded by the ability of the defendant to tell his story largely without contradiction. Consequently, there is the potential for the accused to easily fabricate his claims.<sup>86</sup> Criticism of this aspect of the defence was particularly evident in the New Zealand media in the wake of the Weatherston and Ambach cases. The defence has been portrayed as “a perverse opportunity for a killer to continue to persecute his victim and her family after her death”<sup>87</sup> and it was said in the Weatherston case that the “[b]esmirching of [the victim] meant that she was the one in the dock.”<sup>88</sup>

That this criticism weighed heavily in the decision to repeal s 169 is evident from Parliamentary debate. Both sides of the House identified the ability of defendant’s to publicly impugn their victims and make their families and friends feel unsafe as “hallmarks of a society that we need to move away from.”<sup>89</sup>

---

<sup>80</sup> Ibid at [208] per Thomas J.

<sup>81</sup> See *Makoare*, above n54 at [14]; *Rajamani*, above n 25 at [16]; *Ferguson v R* CA594/08, 3 February 2010 at [110].

<sup>82</sup> *People (Director of Public Prosecutions) v Davis* [2001] 1 IR 146 per Hardiman J.

<sup>83</sup> *R v Smith (Morgan)*, above n 56 **Error! Bookmark not defined.** at 664 per Lord Hoffman.

<sup>84</sup> *Holley*, above n28 at [77] per Lord Carswell.

<sup>85</sup> Victorian Law Reform Commission, above n76 at [2.29].

<sup>86</sup> Ibid at [2.30].

<sup>87</sup> Edward Gay “Partial defence of provocation set to be dumped” New Zealand Herald (New Zealand, 23 July 2009) [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10586155](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10586155)

<sup>88</sup> Editorial “Provocation defence has run its course” New Zealand Herald (New Zealand, 10 August 2009) [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10589687](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10589687)

<sup>89</sup> (24 November 2009) 659 NZPD 8248

## *Gender bias*

Another criticism of the defence extensively highlighted in the media, is its gendered and heterosexist operation. The very notion of the loss of self control and the societal and historical origins of the defence are said to make it more relatable to male conduct and behaviour.<sup>90</sup> Furthermore, the continued use of the defence by men who kill in domestic and intimate circumstances sends a message that the use of anger and violence by men against women in these contexts is legitimate and excusable.<sup>91</sup> The use of the defence in these circumstances has been denounced as a double standard, “reprehensible in the extreme.”<sup>92</sup>

A further element of this criticism is the way in which provocation justifies homophobic behaviour. The use of the defence in what have been labelled “gay panic” cases has drawn heavy criticism. That label describes cases where non-violent homosexual advances have been met with lethal force. It has then been argued at trial that the homosexual advance of the victim was severe provocation for the defendant and that accordingly he should only be convicted of manslaughter. High profile examples of such cases include *Ambach*,<sup>93</sup> *Edwards*<sup>94</sup> and *Campbell*.<sup>95</sup>

## *Historical anomaly*

As discussed in Chapter One the origins of provocation are rooted in the need to mitigate the harshness of the mandatory death penalty. The introduction of a flexible sentencing regime, with the Sentencing Act 2002, means that provocation is no longer necessary in this respect. The defence is therefore an anomaly. Unlike in some jurisdictions, provocation was only a defence to murder in New Zealand.<sup>96</sup> In respect of all other criminal charges provocative conduct on the part of the victim is merely a factor that is taken into account at sentencing.<sup>97</sup> With the ability to now take provocation into account in sentencing for murder, it is argued that there is no reason for murder to be differentiated from other offences in this way. Detractors from the partial defence maintain that this point is compounded by the complexities and inconsistencies of the law highlighted above.

---

<sup>90</sup> See for example Victorian Law Reform Commission, above n 76 at [2.19].

<sup>91</sup> *Ibid* at [2.23].

<sup>92</sup> (24 November 2009) 659 NZPD 8248.

<sup>93</sup> *Ambach*, above n 67.

<sup>94</sup> *Edwards*, above n 58.

<sup>95</sup> *Campbell*, above n 47.

<sup>96</sup> In both Queensland and Western Australia provocation traditionally provided a full defence to assault as well as a partial defence of murder.

<sup>97</sup> Section 9(2)(c) of the Sentencing Act 2002 provides that the conduct of the victim must be taken into account as a mitigating factor at sentencing where it is relevant.

### **3.2 Reasons for Retention**

It is not generally argued that the operation of the defence was wholly satisfactory. Instead, the arguments in favour of retaining the partial defence are largely directed at the inadequacy of the sentencing process to compensate for the absence of the partial defence.

#### *Fair labelling*

There are two main limbs to the fair labelling argument. Firstly, it is unfair and unjust to stigmatise someone as a murderer when they are not deserving of that denunciation. Secondly, it is argued that if the criminal law regularly makes mistakes by mislabelling people, it will “lose its moral credibility.”<sup>98</sup>

The unique stigma which attaches to the label of murder means that a reduced sentence for murderers in provocation cases would not adequately acknowledge the mitigating circumstances involved.<sup>99</sup> This stigma is unique owing to the important moral boundary marked by the distinction between murder and manslaughter, a distinction exacerbated by five centuries of recognising provoked killings as manslaughter.<sup>100</sup> If society’s perception of murder was not shaped by this very considerable history, then the attribution of the term to provoked killers would perhaps be less significant. It is also argued that given the extreme circumstances in which provocation arises, the defendants who rely on the partial defence are often people of otherwise good character. The stigma of a murder conviction may, therefore, hold even greater significance for them.<sup>101</sup>

Attaching this significant stigma to people seen by the community as undeserving of that label imperils the moral credibility of the law. People are more likely to defer to the commands of the law if they see it as morally authoritative. In this respect it is important that the law reflects the perceptions of the community as to what is and is not condemnable. A distribution of liability that deviates from community perceptions of justice by labelling provoked killers as murderers could thereby undermine the law.<sup>102</sup>

---

<sup>98</sup> Simester and Sullivan, above n 15 at 25.

<sup>99</sup> Law Reform Commission (Ireland) *Defences in Criminal Law* (LRC 95, 2009) at [4.34].

<sup>100</sup> Law Reform Commission (Ireland) *The Plea of Provocation* (LRC CP27, 2003) at [7.06].

<sup>101</sup> New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide*, above n 19 at [3.130].

<sup>102</sup> Paul Robinson “The Criminal-Civil Distinction and the Utility Desert” (1996) 76 Boston ULR 201 at 212-13; although this point was made with reference to criminalisation, it applies equally to the fair labelling argument in the murder context.

## *Community assent*

The moral credibility of the law is laid in the hands of the jury in provocation cases by allowing them to assess an accused's culpability and uphold community standards of justice. The delegation of this assessment of provocation to the jury is particularly appropriate given the serious nature of a homicide charge.<sup>103</sup> Gross' rationale for defences as maintaining a balance between the state and the individual is also a relevant consideration here.<sup>104</sup> The inability of the jury to convict of a lesser offence where they perceive that the state is holding the offender to an unattainable standard, may mean that they acquit the accused altogether. This may be particularly so given the stigma of murder described above.

The representation of community involvement in manslaughter verdicts is "vitally important in terms of gaining community acceptance of reduced sentences for manslaughter rather than murder."<sup>105</sup> The imposition of a short or even non custodial sentence on a provoked killer will be more acceptable to the public, where it results from the conviction by a jury of an offence not carrying the title of murder, than if it is the result of a judge's sentencing discretion for murder.<sup>106</sup>

"Deep and abiding concern[s]" about the prejudices which manifest themselves in juries<sup>107</sup> are cited in favour of assessing the culpability of the offender at sentencing. Equally, however, there is the tendency of officials involved in the criminal justice system to grow accustomed to the court process. Juries provide a more representative view of the community in deciding these questions. As was famously observed by G K Chesterton:<sup>108</sup>

Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men.

The Law Commission contended that any perceived lack of community involvement in assessing the culpability in provoked killings could be remedied by the existence of the Sentencing Council.<sup>109</sup> The Council would draft sentencing guidelines on sentencing provoked killers in the absence of the partial defence. The consultation of the public as part of the drafting process would allow a community contribution in determining the culpability of provoked killers. This, however, ignores the fact that juries provide community involvement on a case by case basis. In contrast the Sentencing Council guidelines would only provide general indications of public

---

<sup>103</sup> Law Reform Commission (Ireland), *Defences in Criminal Law*, above n 99 at [4.37].

<sup>104</sup> See Chapter One at [1.3]

<sup>105</sup> New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997) at [2.33].

<sup>106</sup> Law Commission (England and Wales), *Partial Defences to Murder* (Final Report LC 290, 2006) at [3.37].

<sup>107</sup> (24 November 2009) 659 NZPD 8248.

<sup>108</sup> "The Twelve Men" in G. K. Chesterton *Tremendous Trifles: A Collection of Essays* (Methuen, 1909)

<sup>109</sup> Law Commission *Partial Defence of Provocation*, above n 56 at [188].

sentiment on a one-off basis. Unlike with a jury, the public input would not be amenable to review or change as community values change.

The use of the Sentencing Council to justify repeal is more fundamentally flawed, however, as the current Government has effectively abolished the Sentencing Council. While technically still in existence, the Sentencing Council receives no funding from the Government and is unable to issue any guidelines. This is especially significant given that the Law Commission's recommendation to repeal the partial defence was premised on the existence of sentencing guidelines.

### **3.3 Conclusion**

Despite these arguments against abolition, on 24 November 2009 the House of Representatives voted 116-5 to abolish the partial defence.<sup>110</sup> This left New Zealand on a precipice, about to dive into an unknown future; a legal system devoid of the partial defence of provocation for the first time in 500 years. While the issues that were raised by the plea can be considered in the sentencing of the offender, the chief arguments against abolition focus on the inadequacies of the sentencing process in key areas. Whether the equilibrium between the state and the individual has been unduly affected by this transplanting of the culpability assessment and whether the removal of the defence is an imbalance that cannot be restructured at sentencing remains to be seen.

---

<sup>110</sup> The Act Party was the only party to vote against the Crimes (Provocation Repeal) Amendment Act 2009.

## PART II

*The future is no more uncertain than the present.*

- Walt Whitman<sup>111</sup>

---

<sup>111</sup> Walt Whitman *Song of the Broad-axe* (1856)

## CHAPTER FOUR: THE SIGNIFICANCE OF SENTENCING

As discussed in the previous chapter, in the absence of s 169, the sentencing process has been nominated as the appropriate forum in which to take account of any provocative conduct of the victim. Given Gross' rationale of defences and the importance of maintaining a balance between the individual and the state,<sup>112</sup> the adequacy of the sentencing process to deal with the issues which will be raised is of vital importance. This chapter focuses on the sentencing implications of the repeal of provocation. Specifically, it assesses the application of the statutory framework for murder sentencing in New Zealand. Furthermore, it examines the likely relevance of guilty pleas in the sentencing of provoked killers, as well as considering the possible outcomes of that regime for provoked killers. This will involve analogy with Australian jurisdictions where the defence has been repealed.

### **4.1 The Sentencing Framework**

In contrast to the discretion which characterises the notoriously wide range of sentences which are imposed in manslaughter cases in New Zealand,<sup>113</sup> the framework for sentencing convicted murderers is much more rigid. Historically, a sentence of life imprisonment for murder was mandatory.<sup>114</sup> Although there is no longer such a requirement in New Zealand, a life sentence "is almost invariably" imposed<sup>115</sup> because there remains a strong presumption in favour of such a sentence.<sup>116</sup>

Sentencing for murder is governed by ss 102, 103 and 104 of the Sentencing Act 2002.<sup>117</sup> A life sentence for murder must be imposed unless it would be manifestly unjust to do so.<sup>118</sup> Where a life sentence is imposed, the judge must order that the prisoner serve a minimum period of imprisonment not less than 10 years.<sup>119</sup> The requirements of s 103 are supplemented by s 104. That section requires the imposition of a minimum period of at least 17 years where certain aggravating factors are present in the offending.<sup>120</sup> Despite the presence of one of those factors,

---

<sup>112</sup> See discussion at [1.3].

<sup>113</sup> See the discussion of sentencing in manslaughter cases at [2.3].

<sup>114</sup> Crimes Act 1961 s172 historical text: 1 January 1962 to 29 June 2002.

<sup>115</sup> *R v Hessel* [2009] NZCA 450 at [63].

<sup>116</sup> Sentencing Act 2002, s 102.

<sup>117</sup> See Appendix C.

<sup>118</sup> Sentencing Act 2002, s 102(1).

<sup>119</sup> Sentencing Act 2002, s 103. The relevant considerations in determining the length of that minimum period are set out in s 103(2). For discussion of these factors see Geoff Hall, *Sentencing: 2007 Reforms in Context* (Lexis Nexis, Wellington, 2007) at 487.

<sup>120</sup> These are the factors which the legislature has deemed characterise the worst cases of murder. See Appendix C.



the imposition of a 17 year minimum period can be avoided where such a term would be manifestly unjust.<sup>121</sup>

### *Manifest injustice*

Departure from the presumptive life sentence under s 102 is only likely to be appropriate in exceptional cases.<sup>122</sup> This is because the use of the word “manifestly” requires that the injustice be clear.<sup>123</sup> Furthermore, the presumption in favour of life imprisonment is a strong one and that a lesser sentence will only be available “where the offending is at the lowest end of the range of culpability for murder.”<sup>124</sup>

The approach to the s 102 discretion taken by Fisher J in *R v Rawiri*<sup>125</sup> was affirmed in *R v Rapira*.<sup>126</sup> It was held that it falls to the offender to demonstrate that a finite sentence is appropriate with regard to the both the circumstances of the offence and those of the offender. The assessment of manifest injustice needs to be undertaken in the context of the purposes and principles of sentencing identified in ss 7 and 8 of the Sentencing Act 2002<sup>127</sup> and the mitigating and aggravating factors outlined in s 9.<sup>128,129</sup>

In line with the dicta in *Rapira* and *Smail*, the s 102 presumption has rarely been displaced.<sup>130</sup> *R v Law*,<sup>131</sup> where the 77-year-old offender pleaded guilty to killing his wife of 50 years, is an example of where the threshold was met. Law, who was described as “a person of unblemished character who has led a blameless life,”<sup>132</sup> smothered his wife who was suffering from Alzheimer’s disease. Given the weight of the mitigating factors, including that it had been a mercy killing, the age of the offender, obvious remorse and acceptance of responsibility, Randerson J saw this as a clear example of a case where a life sentence would be manifestly

---

<sup>121</sup> Sentencing Act 2002, s 104(1).

<sup>122</sup> *R v Rapira* [2003] 3 NZLR 794 (CA) at [121] where the Chief Justice cites the legislative history of the provision in support of this statement, particularly the Minister of Justice, the Hon Phil Goff MP (see: 594 NZPD 10910).

<sup>123</sup> Ibid.

<sup>124</sup> *R v Smail* [2007] 1 NZLR 411 at [14].

<sup>125</sup> *R v Rawiri* HC Auckland T014047, 16 September 2002.

<sup>126</sup> *Rapira*, above n 122.

<sup>127</sup> Section 7 outlines the purposes of sentencing, reflecting the philosophical purposes of sentencing and codifying jurisprudential principles. Section 8 sets out principles which must be applied by the Court. Although the list is not exhaustive, the Court must consider all the principles listed when devising its sentence (see Appendix C).

<sup>128</sup> Section 9 provides aggravating and mitigating factors which the courts must take into account at sentencing if applicable (see Appendix C).

<sup>129</sup> *Rapira*, above n 122 at [121].

<sup>130</sup> To the author’s knowledge *Law* was the sole case where the presumption had been placed until the recent case of *Wihongi* (see below n 134).

<sup>131</sup> *R v Law* (2002) 19 CRNZ 500 (HC).

<sup>132</sup> Ibid at [20].

unjust.<sup>133</sup> In lieu of an indeterminate sentence, Law was sentenced to 18 months imprisonment with leave to apply for home detention.

*R v Wihongi*<sup>134</sup> provides an interesting contrast to *Law*. Wihongi was sentenced to eight years imprisonment after being found guilty of murdering her partner of 17 years. Wild J concluded that it would be manifestly unjust to sentence Wihongi to life imprisonment given the weight of the mitigating factors. Wihongi had no previous convictions for violence and had suffered a “history of victimhood.”<sup>135</sup> Furthermore, she was a good mother who could be restored as a worthwhile member of society and did not pose a threat to society given the motivation for her crime.<sup>136</sup>

*Wihongi* casts a new light on the hurdle which the s 102 presumption creates. While *Wihongi* explicitly applies *Rapira*,<sup>137</sup> it provides a distinct contrast with *Law*. Notably Wihongi did not plead guilty plea and despite the absence of this significant mitigating factor was still able to overcome the s 102 presumption. Especially relevant to this inquiry is the lengthy and ongoing provocation that was apparent in the case. While it was not an explicit factor in overcoming the presumption, it is evident from the judge’s analysis that it played a part in that decision. The psychiatric reports referred to by the judge are used to paint a background of the offender and why she might have committed the crime, much like the characteristics of a provocation offender did at trial. Although *Wihongi* may be subject to appeal and its final disposition may not be known for some time, it perhaps demonstrates that *Law* was at one extreme end of the manifestly unjust scale. *Wihongi* provides for a different type of case where life imprisonment may be inappropriate, and the first indication of where a line might be drawn in the future.

*R v Williams*<sup>138</sup> considered the manifestly unjust threshold in the context of s 104. Applying *Rapira* it was held that, ss 7, 8 and 9 were relevant to the determination, as they were in the s 102 context. However, because of the difference in the statutory contexts of s 102 and s 104 “the meaning of the term is not the same in all other respects.”<sup>139</sup> As the s 102 presumption is a long standing and strong one, it will rarely be clearly unjust to adhere to it. By contrast “manifestly unjust” in s 104 is the threshold for displacing a higher level of punishment

---

<sup>133</sup> For a contrasting finding see *R v Smail*, above n 124 where the Court of Appeal rejected a claim that the killing of tetraplegic friend was a mercy killing, imposing a life sentence with a minimum period of 13 years.

<sup>134</sup> *R v Wihongi* HC Napier CRI-2009-041-2096, 30 August 2010.

<sup>135</sup> *Ibid* at [25]. This ‘tragic history’ included substance abuse from a young age, sexual abuse, suffering of gang rapes and a history of violence at the hands of her victim during their 17 year relationship.

<sup>136</sup> *Ibid* at [45].

<sup>137</sup> *Ibid* at [3].

<sup>138</sup> *R v Williams* [2005] 2 NZLR 506

<sup>139</sup> *Ibid* at [57].

appropriate because of aggravating factors. The legislative purpose in the case of s 104 was to create a benchmark rather than the mandatory sentencing regime envisaged in s 102.<sup>140</sup>

Having highlighted contextual differences between s 104 and s 102, the Court went on to emphasise that, where applicable, the 17 year minimum period should not be departed from lightly. This was especially so given the need to give effect to legislative policy and intent. The Court then set out the process for applying s 104.<sup>141</sup> Where s 104 is engaged the sentencing judge should consider the case first with reference to the standard minimum period of ten years. Only where that hypothetical minimum period is less than 17 years should the Court go on to evaluate whether the 17 year period demanded by s 104 would be manifestly unjust.

The Court held that a guilty plea could well be relevant to that determination.<sup>142</sup> Not allowing for a guilty plea where one co-offender has pleaded guilty would create disparity and in the circumstances would be manifestly unjust. However, not every guilty plea would justify a departure from the 17 year minimum term as often the guilty plea could be taken into account in reducing the term from something higher than 17 years.<sup>143</sup>

## **4.2 Guilty Pleas**

Although *Wihongi* has demonstrated that it is not essential, a guilty plea is one of the mitigating factors which may contribute to a finding of manifest injustice. There is a clear public interest in offenders accepting guilt.<sup>144</sup> Judicial recognition that a guilty plea should weigh in favour of the offender at sentence has been long standing.<sup>145</sup> The legislature has also recognised this and the court must take account of, as a mitigating factor at sentencing, whether and when the offender pleaded guilty.<sup>146</sup>

### *Court of Appeal guideline*

In an attempt to provide greater consistency in the area, the Court of Appeal laid down guidelines in *R v Hessel*<sup>147</sup> outlining the credit offenders should be given for guilty pleas. The size of the reduction afforded the offender depends on the stage of proceedings at which the

---

<sup>140</sup> Ibid at [58].

<sup>141</sup> Ibid at [52].

<sup>142</sup> Ibid at [71].

<sup>143</sup> See *R v Baker* [2007] NZSC 76 where the imposition of a minimum term of 18 years included the recognition of the offender's guilty plea as the judge had adopted a starting point of 20 years.

<sup>144</sup> *R v Harper* [1968] 2 QB 108 at 111

<sup>145</sup> See *R v Taylor* [1968] NZLR 981 (CA); *R v Ripia* [1985] 1 NZLR 122 (CA)

<sup>146</sup> Sentencing Act 2002, s 9(2)(b)

<sup>147</sup> *R v Hessel* [2009] NZCA 450; leave to appeal to the Supreme Court has been granted: *Hessel v R* [2010] NZSC 40. Argument in the Supreme Court was heard on 9 August 2010.

offender first expresses a willingness to plead guilty.<sup>148</sup> A sliding scale of discounts, starting at a one third reduction for the earliest possible plea and decreasing to a ten percent discount for a plea three weeks before trial, was set out.

The Court went on to specifically address the issue of guilty pleas in murder cases. Since terms of life imprisonment were consistently handed down to convicted murderers, guilty pleas were unlikely to change the length of sentence, but could be relevant to the minimum period imposed. It was thought “almost inconceivable that a guilty plea on its own could render life imprisonment manifestly unjust” in terms of s 102.<sup>149</sup> The possibility that a guilty plea, when combined with other mitigating factors, could contribute to a finding of manifest injustice was explicitly left open by the Court.

The exact relevance of a guilty plea to the setting of the minimum term was not determined by the Court. It did note, however, that there were two practical reasons that prevented the application of the standard guidelines. As s 103 prevents a judge from setting a minimum period below 10 years, minimal credit could be given for a guilty plea when considering cases with a non-parole period near the minimum. Furthermore, application of the standard guideline in cases where a 17 year minimum period was necessary under s 104 would defeat the purpose of the section. The reduction of a 17 year minimum period to somewhere in the vicinity of 12 years solely on the basis of an early guilty plea could not be tolerated.<sup>150</sup> Faced with these complicating factors, the Court contemplated two alternative approaches for ensuring that appropriate credit was given.<sup>151</sup> Ultimately, they left the question open saying that the method “should very much depend on the facts of the particular case.”<sup>152</sup>

The *Hessell* decision does not provide a great deal of clarity in determining how much weight guilty pleas should be accorded in murder cases. The Court held that the exercise was one for the discretion of the sentencing judge. Unsatisfactorily, it concluded that the approach to ss 103 and 104 adopted in *Williams* should not be regarded as definitive as there was a certain degree of “unfinished business” in this area.<sup>153</sup>

---

<sup>148</sup> Ibid at [14]

<sup>149</sup> Ibid at [63]

<sup>150</sup> Ibid at [70]

<sup>151</sup> Ibid at [71]-[72] One option was to treat the 10 year minimum period required by s103 as unaffected by any guilty plea. Thus, any increase on the minimum term above that 10 year minimum would be eligible for the discount in line with the normal guideline. The second approach, that of the United Kingdom Sentencing Guidelines Council adopted a sliding scale of reductions with a maximum reduction of one sixth of the minimum term up to a maximum of five years. The sliding scale was supplemented by the discretion of judge to ensure that the sentence appropriately reflected the seriousness of the offence.

<sup>152</sup> Ibid at [68].

<sup>153</sup> Ibid at [73].

### **4.3 Application in Provocation Cases**

The adequacy of the framework outlined above to deal with the complex issues inherent in provoked killings is essential to determining whether the removal of provocation jeopardises the fairness and morality of the criminal justice system. This can be better considered with reference to cases where the partial defence was previously invoked.<sup>154</sup> The following discussion is unavoidably speculative given the unknown state of the law post-repeal. The extrapolation of the current principles and approaches to sentencing, however, can provide a suggestion as to the outcomes that may result. It bears remembering that while the defendants in these cases have the opportunity to plead guilty to murder, it is perhaps unlikely they would do so given theirs are the rare cases where provocation was successful.

#### *Edwards*

Edwards violently beat David McNee to death during a sexual encounter.<sup>155</sup> His sentence of nine years imprisonment was upheld on appeal.<sup>156</sup> The outcome for Edwards would be significantly different sentenced for murder. That a life sentence would be manifestly unjust under s 102 in these circumstances is almost unthinkable when comparing the facts to those in *Law* or *Wihongi*. Furthermore, the Crown could contend that the offending was committed with a high level of brutality and that s 104(1)(e) applies.<sup>157</sup> If that were found to be the case, the sentencing judge would be required to impose a minimum term of at least 17 years imprisonment unless such a course would be manifestly unjust. Applying the process set out in *Williams*, the offending would then have to be compared to the normal range of murders. In the absence of a guilty plea, and despite the possibility of highlighting the conduct of the victim as a relevant feature, the mitigating factors are unlikely to weigh in favour of Edwards. It seems likely therefore that a life sentence with a minimum term in the region of 17 years would be imposed.

#### *Simpson*

Simpson gave his terminally ill mother a drug overdose in, what the Court described as, a mercy killing. He was sentenced to three years imprisonment for manslaughter by reason of provocation.<sup>158</sup> The prospects of Simpson receiving such a merciful sentence if sentenced for

---

<sup>154</sup> These cases were chosen because they were identified by the Law Commission as instances where the partial defence was successfully invoked; see Law Commission, *The Partial Defence of Provocation*, above n 56)

<sup>155</sup> The attack was described by the sentencing judge Frater J as “callous and cruel”: *Edwards* (HC), above n 63 at [66]. In his police interview Edwards estimated he had hit Mr McNee around the head between 30 and 40 times: *Edwards* (CA), above n 58 at [9].

<sup>156</sup> *Edwards*, above n 58.

<sup>157</sup> Under s 104(1)(e) the 17 year minimum will be invoked where “the murder was committed with a high level of brutality, cruelty, depravity or callousness.”

<sup>158</sup> *R v Simpson* HC Auckland, T010609, 12 October 2001

murder would be radically altered. It is possible that, in such circumstances, s 104(1)(g) applies in that the victim was particularly vulnerable on account of both her old age and her deteriorated health. Overcoming the s 104 hurdle may prove easier than in *Edwards* given the merciful purpose of the killing, the previous good character of the offender, the unlikelihood of reoffending, mental impairment at the time of killing and significant remorse. These factors would also be weighed in considering whether the s 102 presumption could be displaced. While perhaps falling short of the extreme set of circumstances in *Law*, it is possible that given the similarities to that case a comparable finding could be made. A finite sentence similar to the three years imposed upon Simpson for manslaughter could be a possible outcome, albeit with a much heavier burden on Simpson to reach that position.

### *Suluape*

Suluape hacked her husband to death with an axe. The Court of Appeal substituted a sentence of five years imprisonment for the original term of seven and a half years, holding that insufficient consideration had been given to the weighty mitigating factors.<sup>159</sup> During her 24 year marriage, Suluape, a Samoan immigrant, had cared for nine children of her own, the victim's mother and eight children of her husband's deceased brother. The marriage had been characterised by physical, emotional and psychological abuse by the deceased which had included the infliction of a venereal disease in the wake of continuing infidelities. This provocative behaviour culminated with the deceased openly taking another woman to Samoa, conduct which brought great shame to Suluape and her family. Again it is possible that s 104(1)(e) would be engaged given the callousness and brutality of the axe attack which included at least nine blows to the head, shattering the skull. A minimum period of 17 years could be sought. Given the extreme nature of the provocative conduct over a prolonged period in this case, the offender's age and health and her large family responsibilities, it is likely that the s 104 presumption could be displaced. Whether the s 102 presumption could be similarly rebutted, however, is more questionable. While the facts are quite removed from those in *Law*, the circumstances in *Wihongi* are analogous. Given that decision, and the other relevant mitigating factors in Suluape's case a finite sentence seems a distinct possibility. A further point to note is that Wihongi was convicted of murder at trial and thus a guilty plea would add further weight to Suluape's argument.

As the preceding application of murder sentencing principles to provocation cases shows, it seems likely that many provoked killers will be sentenced to life imprisonment. The extent to which the sentences will be affected varies from a very significant increase in *Edwards* to the potential in *Simpson* for a similar sentence to be imposed. While *Wihongi* has perhaps pointed

---

<sup>159</sup> *R v Suluape* (2002) 19 CRNZ 492 (CA)

towards some clearer boundaries and a wider class of cases that will meet the s 102 threshold, the abolition of the partial defence is likely to result in significantly increased sentences for provoked killers, a result to which the experiences Tasmania and Victoria can testify.

#### **4.4 The Australian Experience**

The sentencing of provoked killers in the absence of the partial defence was considered by the Tasmanian Supreme Court in *Tyne v Tasmania*.<sup>160</sup> Tyne, who had killed his wife following a drunken argument and against a background of strong and lengthy provocation,<sup>161</sup> was sentenced to 16 years imprisonment after pleading guilty to murder.<sup>162</sup> On appeal it was argued that, but for the repeal of the partial defence, Tyne would have been sentenced for manslaughter by reason of provocation and, consequently, would have received a lesser sentence. This argument was rejected, it being self-evident that “provocation is no longer a defence to murder and the accused is to be sentenced for murder, not manslaughter.”<sup>163</sup> Provocation remained relevant only as an aspect of discretion at sentencing and consequently the previous disparity in sentencing alluded to in argument would be reduced.<sup>164</sup>

Following the repeal of the partial defence in Victoria in 2005,<sup>165</sup> the Victorian Sentencing Advisory Council, approved the position taken in *Tyne*.<sup>166</sup> The Council argued that abolition would result in a significant increase in the sentences for provoked killers, because of the increased maximum penalty<sup>167</sup> and the unique stigma of a murder conviction. A corollary to this was that bottom-end murder sentences could decrease to reflect the incorporation of provoked murderers.<sup>168</sup> Consideration of provocation at sentencing should focus on whether the conduct of the victim caused the offender to feel justifiably wronged rather than the previous focus on loss of self control.<sup>169</sup> This continued emphasis on the justifiability of the offender’s conduct

---

<sup>160</sup> *Tyne v Tasmania* [2005] TASSC 119 (1 December 2005). Tasmania, which has had a discretionary life sentence for murder since 1994 (see: Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994 (Tas), s4), repealed its statutory partial defence of provocation in 2003 (see: Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas))

<sup>161</sup> The deceased had abused the couple’s children, falsely claimed to have cancer and invented a rape allegation against Tyne for which he had been held in custody for six weeks. On the night of her death, the victim, who had been arguing with defendant about their children, said that the defendant would not see his children again, intimating that either he would go to prison or she would harm the children. At this, Tyne snapped and strangled his wife to death in a blind rage.

<sup>162</sup> *R v Tyne* (Unreported, Supreme Court of Tasmania, Crawford J, 7 July 2005)

<sup>163</sup> *Tyne v Tasmania*, above n 160 at [18] per Underwood CJ.

<sup>164</sup> *Ibid* at [26] per Blow J.

<sup>165</sup> Crimes (Homicide) Act 2005 (Vic), s 3.

<sup>166</sup> Sentencing Advisory Council (Vic) *Provocation in Sentencing: Research Report* (2nd ed, 2009). Crimes (Homicide) Act 2005 (Vic), s 3

<sup>167</sup> The maximum penalty for manslaughter in Victoria is 20 years imprisonment (see s 5 Crimes Act 1958 (Vic)) whereas the maximum for murder is life imprisonment (see s 3 Crimes Act 1958 (Vic))

<sup>168</sup> Sentencing Advisory Council (Vic), above n 166 at [7.3.10].

<sup>169</sup> *Ibid* at [8.9.3]

means that the offender is likely to continue to denigrate the victim as was previously the case at trial. The guidelines did hold, however, that ultimately the purposes of sentencing, such as the need for denunciation and deterrence, may override the weight of any provocation established.<sup>170</sup>

#### **4.5 Judicial Creativity?**

Faced with the marked departure in sentencing practice predicted above, sentencing judges may interpret their way out of trouble. A rethinking of the scope of, or factors relevant to, manifest injustice would not be beyond the means of the judiciary. *Wihongi* has possibly provided an indication of the direction in which the Courts could move in this regard. It seems likely also that whether the offender pleaded guilty could become critical to this determination. Rather than a guilty plea being a mitigating factor there is the potential for the absence of a guilty plea, practically at least, to become an aggravating factor in that it almost immediately rules out the prospect of a finite sentence.

#### **4.6 Further Considerations**

##### *Disputed facts hearings*

Should the presence of a guilty plea become a more highly influential factor in the process then there remains the possibility that they will become more prevalent.<sup>171</sup> Whether more murder guilty pleas are forthcoming following the repeal of the partial defence will largely depend on whether alternative avenues for excusing provoked killers are pursued at trial.<sup>172</sup> Regardless of if, or when, these arguments are developed, one of the courses open to provoked killers is going to be to plead guilty to murder in the hope that they will get a reduced sentence.

While there may be tangible benefits encouraging provoked killers to plead guilty to murder, the tendering of a guilty plea by an offender will not necessarily avoid the vilification of the victim which the repeal of s 169 sought to prevent. The Sentencing Act 2002 provides the machinery for a disputed facts hearing where there is disagreement about the facts provided to the Court.<sup>173</sup> As the parties can call evidence and witnesses as they would at trial, the defendant will be able to make quite detailed submissions and lead evidence concerning the victim's conduct. In this way, the simple fact of a guilty plea will not necessarily prevent what the media have labelled putting the victim on trial.

---

<sup>170</sup> Ibid at [10.1.15].

<sup>171</sup> Law Commission *Battered Defendants*, above n 74 at [145].

<sup>172</sup> Some of these possible alternative arguments are explored in Chapter Five.

<sup>173</sup> Sentencing Act 2002, s 24



The conduct of the victim being a potential mitigating factor under s 9(2)(c) of the Sentencing Act 2002, it will be for the offender to prove on the balance of probabilities what that conduct was.<sup>174</sup> This represents a major shift in burden of proving provocative conduct. Whereas previously the defence was for the prosecution to negate, the burden now falls on the offender on the balance of probabilities. The factual basis of the provocative conduct will thus be a lot harder for the defence to establish to the requisite standard. Where the offender fails to prove a contested fact they may well forfeit the benefit of their guilty plea, as many of the benefits for the Crown will be nullified.<sup>175</sup>

### *Three strikes*

Complicating the consideration of sentencing provoked killers is the Sentencing and Parole Reform Act 2010, which came into force on 1 June 2010.<sup>176</sup> The Act amends the Sentencing Act 2002 and the Parole Act 2002, giving effect to the policy nicknamed “three strikes and you’re out.” The object of the amendments is to impose stricter penalties on repeat offenders and make it more difficult for them to seek parole.<sup>177</sup> A three-stage warning and sentencing system is established for those convicted of serious violent offending.<sup>178</sup> Although a full critique of the policy and legislation is beyond the scope of this investigation, it is pertinent to discuss the statutory scheme in so much as it relates to the sentencing of provoked killers.

Upon the first conviction for a qualifying offence the judge must determine the sentence in the normal way. The judge must also, however, warn the offender of the consequences of further serious violent offending.<sup>179</sup> Stage-2 offenders<sup>180</sup> are required to serve the full sentence without eligibility for parole.<sup>181</sup> At the same time, offenders must be given a final warning by the judge, noting the consequences of a conviction for a third serious violent offence.

These consequences are set out in s 86D. Sentencing for stage-3 offenders must occur in the High Court and the maximum available sentence for the relevant offence must be imposed. Furthermore, that sentence must be served without the possibility of parole unless an order to that effect would be manifestly unjust. In the case of a manslaughter conviction, therefore, the maximum sentence of life imprisonment must be imposed. Furthermore, a 20 year minimum

---

<sup>174</sup> Sentencing Act 2002, s24(2)(d)

<sup>175</sup> *Hessell*, above n 147 at [47]

<sup>176</sup> Sentencing and Parole Reform Act 2010, s 2(1)

<sup>177</sup> Sentencing and Parole Reform Act 2010, s 3

<sup>178</sup> Section 86A of the Sentencing Act 2002 sets out the 40 qualifying offences. See Appendix C.

<sup>179</sup> Sentencing Act 2002, s 86B(1)(a). That warning must be entered on the offender’s record (s 86(1)(b)) and issued to the offender in writing (s 86B(4))

<sup>180</sup> Those who received a warning under s 86B before they committed the current qualifying offence

<sup>181</sup> Sentencing Act 2002, s 86C(4)

non parole period must be imposed unless it would be manifestly unjust to do so in which case a 10 year minimum period must be imposed.<sup>182</sup>

The consequences for murder as a stage-2 or stage-3 offence are separately provided for and the offender must be sentenced to life imprisonment.<sup>183</sup> The Court must order that the offender serve that sentence without parole unless to do so would be manifestly unjust.<sup>184</sup> Where there would be manifest injustice the Court must impose a minimum non-parole period of at least twenty years on a stage-3 offender unless to do so would also be manifestly unjust. In that case, or where life without parole is held to be manifestly unjust for a stage-2 offender, the non-parole period must be determined in accordance with s 103.

### *Impact of three strikes*

The potential impact of the Sentencing and Parole Reform Act 2010 on the disposition of provoked killers is considerable. Most obviously, provoked killers convicted of murder will face harsher sentences for stage-2 and stage-3 offending than would a manslaughterer. More obliquely, the use of the manifestly unjust terminology seen in ss 102 and 104 could be significant.

Whereas previously sentencing for manslaughter would have been in accordance with the authorities set out in Chapter Two, now, where the killing is a stage-2 or stage-3 offence, and a murder conviction results, a provoked killer will be sentenced to life imprisonment. Furthermore, they will serve that sentence without parole unless they can adduce evidence as to why such a sentence would be manifestly unjust. As detailed above, such evidence must relate to both the offender and the offence. While there may be seriously mitigating factors relating to the offending in the case of a provoked killer, where the offender has a lengthy record, as many stage-2 and stage-3 offenders are likely to, the manifest injustice threshold may not be met.

Thus, there may be little incentive for a stage-2 or stage-3 provoked killer to plead guilty. Although it may be possible for a guilty plea to contribute to a finding of manifest injustice, *Hessell* and *Williams* highlight that it is unlikely to produce such a finding on its own. A major consequence of this could be an increase in the number of trials and as a result the number of appeals.

A less immediate consequence of the legislation relates to the potential interpretation of the phrase manifestly unjust. Given the dicta in *Williams* it is possible that the phrase could be given

---

<sup>182</sup> Sentencing Act 2002, s 86D(4).

<sup>183</sup> Sentencing Act 2002, s 86E.

<sup>184</sup> Sentencing Act 2002, s 86E(2).

a slightly different meaning on account of the different context in which it is being considered. Whether this happens or not is likely to be largely dependent on judicial attitude towards the 'three strikes' legislation and the extent to which they are willing to temper what is a clear legislative direction.

The reconsideration of "manifestly unjust" in a new context could affect the application of the phrase in the contexts in which it already operates. That is that the height which the manifest injustice bar is set at in relation to the three strikes regime could well affect the height of the bar in the context of ss 102 and 104. The consequence of this could actually be a decrease in sentence at the bottom end of the murder scale as it becomes relatively easier to displace the presumptions in ss 102 and 104.

#### **4.7 Conclusion**

Sentencing provoked killers as murderers constitutes a major departure from the previous legal position. The sentencing regime for murder is notably less flexible than is the case with manslaughter sentencing. The immediate effect of this change will be increased sentences for those who kill under provocation. There is, however, also the potential for a judicial reinterpretation of legal language should this shift represent an unacceptable imperilling of the balance between the individual and the state in the criminal system. Complicating the matter is the fact that the potential harshness of the three strikes legislation could prove a catalyst for any judicial reconsideration of that type. If the judiciary does not move to rectify any perceived imbalance via the sentencing regime and harsher sentences result, then it may be that other aspects of the criminal process are targeted to cure the disparity. Chapter Five will map out some potential options in this regard.

## CHAPTER FIVE: TRIALS AND TRIBULATIONS

*Trial lawyers are nothing if not inventive. The abolition of provocation will simply lead to a change of focus in homicide trials where the defence of provocation would otherwise have been run.*

- Warren Brookbanks<sup>185</sup>

The abolition of the partial defence of provocation is unlikely to make the often unsavoury facts of provocation cases disappear.<sup>186</sup> As Brookbanks notes, defence counsel in these types of cases are going to continue to highlight the difference between their clients' cases and those where there has been a premeditated and cold blooded killing. This will especially be the case if the increase in sentences predicted in the previous chapter materialises. This chapter begins by considering the repeal of provocation in Victoria to provide some context for discussion in New Zealand. The remainder of this chapter analyses where the focus in provocation-type cases might shift. Options for counsel at trial include attacking the elements of the offence, whether it be the mens rea or the actus reus, or attempting to fit provoked killings under the guise of another defence. Because the repeal of s169 is a recent development this will be a novel and exploratory process; the lack of New Zealand precedent means that this is a necessarily speculative exercise.

### **5.1 The Experience in Victoria**

The Australian State of Victoria provides tangible evidence that cases which involve provocative conduct are not simply going to disappear. At the same time as the partial defence was repealed,<sup>187</sup> steps were taken to restore some of the balance between the individual and the state upon which Gross insists.<sup>188</sup> In addition to a flexible sentencing regime for murder, an offence of defensive homicide was introduced to provide for those who thought that the use of force was necessary in self-defence given the circumstances, but did not hold a reasonable belief in that regard.<sup>189</sup>

Defensive homicide has become an outlet in Victoria, both for the jury at trial and for the prosecutor in accepting guilty pleas, for cases where provocation previously would have been

---

<sup>185</sup> Warren Brookbanks, quoted in Gay, above n 87.

<sup>186</sup> Craig Sisterton "The Problem of Provocation" NZLawyer 121 (New Zealand, 18 September 2009).

<sup>187</sup> Crimes (Homicide) Act 2005 (Vic) s3

<sup>188</sup> See Chapter 1 at [1.3]

<sup>189</sup> Crimes Act 1958 (Vic) s9AD. That provision also provides that the maximum penalty for defensive homicide is 20 years imprisonment.

argued.<sup>190</sup> In *R v Spark*<sup>191</sup> a sentence of seven years imprisonment was imposed after the Crown accepted a plea of guilty to defensive homicide. Spark had beaten his grandfather to death with a baseball bat following an incident in which the victim had threatened to sexually abuse the defendant's children in the same manner in which he had abused the defendant as a child. Spark then dismembered his grandfather's body and buried the various body parts in separate wombat holes at a camping area.

In *R v Middendorp*<sup>192</sup> a jury acquitted the defendant of the murder of his girlfriend, instead finding him guilty of defensive homicide. Middendorp who had been involved in a "tempestuous even violent relationship" with the deceased, was sentenced to 12 years imprisonment after stabbing the victim and shouting at her as she lay dying that she was a dirty slut who got what she deserved.<sup>193</sup>

*Spark* and *Middendorp* provide contrasting examples of the system moving to recalibrate the imbalance left by the removal of provocation. In Victoria the outlet for the doubts and reservations of the jury on the one hand, and the fairness of the prosecutor on the other, has been the offence of defensive homicide. Defensive homicide being a statutory construction absent from the New Zealand context, any outlet in New Zealand will have to be found within the existing homicide framework.

## **5.2 The Elements of the Offence**

The elemental position of the presumption of innocence in our society<sup>194</sup> means that the Crown must prove the crime beyond reasonable doubt.<sup>195</sup> For murder this is true of both the relevant mental elements set out in s167 (the mens rea) and the physical elements (the actus reus). The mental elements for murder are either intention to kill<sup>196</sup> or intention to do grievous bodily harm with knowledge that death is likely, while being reckless as to whether death ensues.<sup>197</sup> The actus reus for murder is usually the commission of an unlawful act that causes the death.<sup>198</sup>

---

<sup>190</sup> Sarah Capper and Mary Crooks "New homicide laws have proved indefensible" Sydney Morning Herald (Australia, 23 May 2010) <http://www.smh.com.au/opinion/society-and-culture/new-homicide-laws-have-proved-indefensible-20100522-w2wr.html>.

<sup>191</sup> *R v Spark* [2009] VSC 374

<sup>192</sup> *R v Middendorp* [2010] VSC 202.

<sup>193</sup> *Ibid* at [3].

<sup>194</sup> This fundamental importance of this concept is emphasised by its inclusion in s25 of the New Zealand Bill of Rights Act 1990.

<sup>195</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL).

<sup>196</sup> Crimes Act 1961, s 167(a)

<sup>197</sup> Crimes Act 1961, s 167(b); Sections 167(d) and s168 of the Crimes Act 1961 also provide for alternative mental elements for murder premised on the historical felony murder rule at common law. For commentary on their use see Adams at ??

<sup>198</sup> Crimes Act 1961, s 160(2)(a); although murder is possible where other paragraphs of s 160(2) are engaged.

### 5.3 Mens Rea

The partial defence of provocation reduced “[c]ulpable homicide that would otherwise be murder” to manslaughter.<sup>199</sup> Consideration of the defence, therefore, only occurred after the existence of the requisite mental elements for murder had been established. The theory behind this was that the relevant murderous intent was only formed because of a loss of self control precipitated by provocation.

In the absence of the partial defence, the accused could shift this argument, arguing instead that his loss of self control is relevant to the formation of the specific intent required for murder. Rather than establishing s 169 provocation after mens rea has been ascertained, this would involve using the provocative conduct to raise a doubt as to whether the mental element existed. Counsel could argue that the accused lost self control to the extent that he did not contemplate the consequences of his actions or that he did not intend to bring about those consequences. Given the prosecution’s burden of proof, the accused’s provocation would only have to raise a reasonable doubt as to whether he did in fact form the requisite intent.

As with the provocation plea, the result of successfully attacking the mens rea in this manner would be a manslaughter conviction. This is because the accused will have caused the death of the victim by an unlawful act under s160(2) and thus will remain liable for manslaughter.<sup>200</sup>

#### *The Canadian approach*

Support for this type of argument can be found in Canadian jurisprudence which has considered the effect that provocation and consequent anger may have on mens rea. Canada’s homicide law is similar to New Zealand’s. Murder in Canada is defined by s229 of the Canadian Criminal Code, which mirrors the New Zealand legislation in providing for both intentional and reckless killings, as well as incorporating the old felony murder rule.<sup>201</sup> Furthermore, Canada has a statutory partial defence of provocation<sup>202</sup> which has been approached similarly to provisions in New Zealand and England.<sup>203</sup>

The genesis of the proposition that anger may affect mens rea can be traced to the decision of the Ontario Court of Appeal in *R v Campbell*.<sup>204</sup> Martin JA commented that:<sup>205</sup>

---

<sup>199</sup> Crimes Act 1961, s 169(1)(a)

<sup>200</sup> See relevantly ss 160, 171 Crimes Act 1961

<sup>201</sup> Provided for in New Zealand by ss 167(d), 168 of the Crimes Act 1961

<sup>202</sup> Canadian Criminal Code, s232.

<sup>203</sup> See *R v Thibert* [1996] 1 SCR 37 which also adopted the gravity/sufficiency dichotomy.

<sup>204</sup> *R v Campbell* (1977), 17 OR (2d) 673 (CA).

<sup>205</sup> Ibid, 683.

The accused's intent must be inferred from his conduct and the surrounding circumstances, and in some cases the provocation afforded by the victim, when considered in relation to the totality of the evidence, might create a reasonable doubt in the mind of the jury whether the accused had the requisite intent...Provocation in that respect, however, does not operate as a "defence," but rather as a relevant item of evidence on the issue of intent.

This point was again made in *R v Wade*<sup>206</sup> where the Court drew heavily on the *Campbell* analysis. Doherty JA pointed out that while anger can often motivate purposeful conduct, it can also cause people to act without thinking or considering the consequences of their actions; "[r]age may precipitate or negate the intention required for the crime of murder. Its effect in any given case is a question for the jury."<sup>207</sup>

On appeal, the Canadian Supreme Court held that there was no basis for putting manslaughter to the jury in this case.<sup>208</sup> They did so, however, without elaborating more generally on whether rage is capable of negating the specific intent required for murder.

It was against this background that the trial judge in *R v Parent* gave the jury an instruction giving effect to the comments of Martin JA in *Campbell*, outlined above. The accused in *Parent* killed his ex-wife during drawn-out litigation to divide their relationship property. Speaking privately the victim purportedly taunted the accused, saying "I told you I was going to ruin you." The accused then shot the victim six times. At trial he claimed that at the time he had felt a hot flush and gone into a blind rage such that he did not know what he was doing when he fired the fatal shots and did not intend to kill his wife. While the initial Crown appeal was rejected by the Quebec Court of Appeal, the Crown appealed to the Supreme Court arguing that such an instruction was improper. Although the brevity of the judgment has attracted some comment,<sup>209</sup> the *Parent* decision clearly rejects the *Campbell* analysis, holding that anger is not relevant to determining whether the accused had the necessary mental element.<sup>210</sup>

### *The 'rolled-up charge'*

Complicating the Canadian contemplation of the relationship between mens rea and provocation are 'rolled-up charge' or 'cumulative effect' cases. These are cases where a number of issues relevant to determining intent arise.<sup>211</sup> Although the evidence in relation to an

---

<sup>206</sup> *R v Wade* (1994) 18 O.R. (3d) 33 (Ont CA)

<sup>207</sup> Ibid at 51-2.

<sup>208</sup> *R v Wade* [1995] 2 SCR 737

<sup>209</sup> See: Alan Mewett "Murder and Intent: Self-defence and provocation" (1984-1985) 27 Crim LQ 433; Todd Archibald "The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-control" (1985-1986) 28 Crim LQ 454; Gary Trotter "Anger, Provocation and the Intent for Murder: A comment on *R v Parent*" (2002) 47 McGill LJ 669.

<sup>210</sup> *R v Parent* [2001] 1 SCR 761 at [9]

<sup>211</sup> Such issues could include but are not limited to provocation, intoxication, anger and brain damage.

individual factor may fail to raise a reasonable doubt, such a doubt may exist when the jury views that evidence cumulatively with the impact of other factors. On this view the judge should charge the jury with the question of whether, when all the factors are ‘rolled-up’, they remained convinced of intent beyond a reasonable doubt. The Supreme Court recognised the relevance of such directions in *Robinson*,<sup>212</sup> Chief Justice Lamer noting that:<sup>213</sup>

...while the jury may have rejected each individual defence, they may have had a reasonable doubt about intent had they been instructed that they could still consider the evidence of intoxication, provocation and self defence cumulatively on that issue.

The validity of the ‘rolled-up charge’ has been called into question following the decision in *Parent*. As Trotter notes, if the cumulative effect theory assumes that a cluster of factors operating simultaneously may affect the intent for murder, there is no basis on which you can deny that any two of those factors operating together, or even any single factor, could also affect the intent for murder.<sup>214</sup> The decision in *Parent*, however, purports to do precisely that, ruling that anger is not relevant to considering whether mens rea has been proven. Whether anger, when considered in combination with any other factors, could still be relevant in a ‘rolled-up charge’ remains to be seen. The Court in *Parent* perhaps left the door to the cumulative effect plea ajar when it commented that “[i]ntense anger *alone* is insufficient to reduce murder to manslaughter”<sup>215</sup> (emphasis added).

#### *The New Zealand position*

New Zealand courts are yet to encounter arguments regarding the effect of anger on mens rea or the appropriateness of the ‘rolled-up charge’. The recent case of *Simpson v R*,<sup>216</sup> however, demonstrates some receptiveness to the latter. Simpson was attempting to raise self defence in circumstances where he was intoxicated and had suffered a blow to the head. The Court of Appeal acknowledged the appropriateness of the “rolled-up charge” in the circumstances, thinking it “dangerous for the Jury to rely on [his] actions as showing intent” given the combination of factors at work. The consideration of further factors, such as anger precipitated by provocation, could easily be incorporated in this approach.

The finding in *Simpson* was reflected in the recent murder trial of Wilson Apatu.<sup>217</sup> The jury was charged with considering what the accused knew and intended at the time of offending with

---

<sup>212</sup> *R v Robinson* [1996] 1 SCR 683

<sup>213</sup> *Ibid* at [59].

<sup>214</sup> Trotter, above n 209 at 683.

<sup>215</sup> *Parent*, above n 210 at [8]

<sup>216</sup> *Simpson v R* [2010] NZCA 140

<sup>217</sup> Wilson Apatu was charged with the murder of his neighbour after he entered the house with a gun and one man died and a boy was injured. At trial argument touched on both mens rea and actus reus as well as the partial defence of provocation (see below n 218). On 21 September 2010 Apatu received a complete acquittal



reference to his intoxication combined with any effects he was suffering from a kick to the head. Significantly, provocation was argued at trial<sup>218</sup> and thus Miller J went on to address provocation as a separate issue to be considered if murder was established. In the absence of provocation the evidence will not simply have disappeared. The same issues will arise and it could be that the judge includes them in this mens rea instruction to the jury.<sup>219</sup>

### *Back to the future?*

The Canadian approach hints at reverting to the historical view of provocative conduct as negating mens rea discussed above.<sup>220</sup> The tension between provocation being considered *ex post facto* the establishment of the offence of murder and a somewhat natural feeling that the loss of self control points to a lack of mens rea has been more recently expressed in *Holmes*<sup>221</sup> and *Duffy*.<sup>222</sup> Consequently, such a judicial shift would not be an unnatural step.

Furthermore, given the similarity between New Zealand and Canadian criminal law and the observations of the Court in *Simpson* as well as the instruction to the jury in the Apatu trial, such a move would not be a large leap for the judiciary to make. Were the matter to arise in New Zealand, the courts would be faced with practically identical statutes to those in Canada, with the obvious difference being that the Crimes Act 1961 no longer includes the partial defence of provocation. This is a factor that could weigh heavily in favour of a judicial recalibration in the law given that the Canadian decisions were made in a jurisdiction where the provocation defence was available. Furthermore, its availability seems to have played a decisive part in the Court's reasoning to deny the consideration of provocation in the formation of mens rea.<sup>223</sup>

While such a move would arguably be reasonable in murder cases in the absence of provocation, there could be more fundamental consequences for the criminal law. As Archibald points out, a denial of mens rea is not limited to homicide cases as the partial defence was.<sup>224</sup>

---

on the murder charge he was facing. The author would like to express his gratitude to Justice Miller for releasing a copy of the "Jury Memorandum" and "Jury Questions" documents prepared for the jury, as well as his Honour's answers to questions posed by the jury.

<sup>218</sup> The commission of the acts charged in Apatu's case being prior to the repeal of s 169, the ability to plead the partial defence remained open to Apatu at trial.

<sup>219</sup> On 14 October 2010 Dale Wickham was convicted of the manslaughter of her husband in October 2009. At trial her defence to the murder charge she faced had proceeded on the basis of self-defence which would have resulted in a complete acquittal. Speculation as to the basis of the jury verdict is unwarranted here, but further investigation could shed further light on the issues raised in this chapter. Given some of the serious mitigating factors raised at trial, Wickham's sentence when handed down may also warrant examination.

<sup>220</sup> See Chapter One at [1.4]

<sup>221</sup> *Holmes*, above n 25.

<sup>222</sup> *Duffy*, above n 25.

<sup>223</sup> *Parent*, above n 210 at [10].

<sup>224</sup> Archibald, above n 209 at 463.

Consequently, an expansion of the factors relevant to mens rea in homicide cases could have implications for criminal trials across the calendar of offences.

#### **5.4 Actus Reus**

It is a fundamental requirement of the criminal law that the prosecution must prove that the defendant was responsible for the actus reus.<sup>225</sup> The principle that involuntary conduct will not be punished by the criminal law is reflected in the availability of the defence of automatism where the act of the accused is unwilled, unconscious or involuntary.<sup>226</sup> It may be possible for the accused to direct the evidence of provocation and loss of self control at this element of the offence. His argument would be that his loss of self control was such that he lost control of his bodily functions and the action that occurred was instinctive or impulsive or, alternatively, that he was unconscious of his actions.

The argument for the defendant in this respect could proceed in one of two ways. The accused could argue that the provocative conduct was such that it made him react instantaneously and reflexively and that thus his actions were not voluntary. Alternatively, the accused could argue that the provocation was such that it sent him into a dissociative state. Thus, while his actions may not have been reflexive, he should not be held responsible for them because he was not conscious of what was being done. Whereas the former may be especially arguable in cases where there is a single wound inflicted, the latter could nonetheless be viable in cases where there has been an extended and violent assault. The advantage of using the provocative conduct to cast doubt on the actus reus is that if successful the accused will be entitled to a full acquittal.

The former approach can perhaps be seen in the aforementioned Apatu case. There the judge instructed the jury to consider whether the fatal shots were consciously fired. Here the judge discussed the idea of conscious intent which he seems to equate with the actus reus of the crime. The jury was instructed that the accused's intoxication and blow to the head were relevant to this inquiry too. The jury acquitted Apatu of both murder and manslaughter with questions asked of the judge indicating that the consciousness of Apatu's act was a key consideration for them.<sup>227</sup> As previously alluded to this verdict was returned in a case where provocation was canvassed as a separate issue under s 169. In the absence of that section the inquiry could well change.

---

<sup>225</sup> Simester and Sullivan, above n 15 at 108.

<sup>226</sup> *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 (HL) per Denning LJ

<sup>227</sup> This supposition has been drawn questions posed by the jury to the judge at trial.

## *Automatism*

The latter approach is commonly found in claims of automatism. Automatism is characterised as action without conscious volition<sup>228</sup> or “action without any knowledge of acting, or action with no consciousness of doing what was being done.”<sup>229</sup> Acceptance of automatism by the jury can have two results. “Insane automatism” occurs where the eclipse of the consciousness is caused by natural imbecility or a disease of the mind.<sup>230</sup> In those cases a verdict of not guilty by reason of insanity will be the result. In cases of “sane automatism” the accused will be entitled to a full acquittal, as he will be held not to have ‘caused’ the death of the victim. The High Court of Australia summarised the matter in the following manner:<sup>231</sup>

The accused is entitled to an acquittal if the prosecution cannot prove that his acts were voluntary...if on the evidence an accused’s acts may have been involuntary as a result of the operation of events upon a sound mind – as a result of sane automatism – then a reasonable doubt about the voluntariness of those acts will be sufficient to entitle him to an acquittal.

“Sane automatism” has been held to include acts committed while sleepwalking, during an epileptic fit,<sup>232</sup> as the result of an adverse reaction to insulin<sup>233</sup> and consequent on a blow to the head or concussion.<sup>234</sup> Psychological injury and extreme anger consequent on some sort of provocation have also been included in this category.<sup>235</sup> It is this sort of ‘psychological blow’ automatism that would be most capable supposition of filling the void left by the repeal of s169, defence counsel being able to argue that the provocation constituted a psychological blow which sent the defendant into a dissociative state.

### *Psychological blow automatism*

At the same time as the use of anger to negate mens rea was discounted in *Parent*, the Canadian Supreme Court endorsed the decision in *R v Stone*,<sup>236</sup> acknowledging that anger could “cause someone to enter a state of automatism in which that person does not know what they are doing, thus negating the voluntary component of the actus reus.”<sup>237</sup>

---

<sup>228</sup> *R v Cottle* [1958] NZLR 999 (CA) at 1007.

<sup>229</sup> *Ibid* at 1020.

<sup>230</sup> *Ibid* at 1011; c.f. also s23 Crimes Act 1961.

<sup>231</sup> *R v Falconer* (1990) 171 CLR 30 (HCA) at 63.

<sup>232</sup> *Bratty*, above n 226.

<sup>233</sup> *R v Quick* [1973] 1 QB 910 (CA).

<sup>234</sup> *Police v Pratt* [1993] DCR 627.

<sup>235</sup> *R v Stone* [1999] 2 SCR 290.

<sup>236</sup> *Ibid*.

<sup>237</sup> *Parent*, above n 210 at [9].

In *R v Rabey*<sup>238</sup> the Canadian Supreme Court had affirmed the reasoning of the Court of Appeal for Ontario.<sup>239</sup> Martin JA intimated that psychological blow automatism may be available in cases of exceptional provocative shock where an ordinary person would have reacted similarly. The ordinary person criteria was justified on the basis that if an ordinary person would not have been similarly induced into a dissociative state then the actual cause must have been a “peculiar idiosyncrasy” of the accused. The cause, therefore, being internal rather than external, the appropriate verdict would be one of not guilty by reason of insanity.<sup>240</sup> This would particularly be the case where the blow was “no more than part of the ordinary stresses and disappointments of life.”<sup>241</sup>

*Stone* too recognised the possibility of psychological blow automatism. Bastarache J commented on the ordinary person criteria in *Rabey*, pointing out that when considering how an ordinary person would have dealt with the psychological blow the circumstances of the accused must be taken into account.<sup>242</sup> For this purpose he approved the contextual objective test outlined by the High Court of Australia in *R v Falconer*<sup>243</sup> which required the circumstances to be taken into account in that “the accused’s automatistic reaction to the alleged trigger must be assessed from the perspective of a similarly situated individual”<sup>244</sup>

These types of arguments were recognised in New Zealand by the Court of Appeal in *Campbell*:<sup>245</sup>

It is sane automatism if he lacks the ability to control his actions because of the operation of some outside events on a sound mind, what has been described as a psychological blow resulting from external events.

The approach of the Canadian Supreme Court in *Stone* was explicitly adopted in New Zealand in *R v Yesler*.<sup>246</sup> In ruling that non-insane automatism should not be left to the jury, Lang J held that no reasonable jury could conclude that the circumstances amounted to a psychological blow sufficient to send an ordinary person into an automatistic state.<sup>247</sup> Adopting the terminology of Martin JA in *Rabey*,<sup>248</sup> he concluded that “these factors amount to no more than the stresses

---

<sup>238</sup> *R v Rabey* [1980] 2 SCR 513.

<sup>239</sup> *R v Rabey* (1978), 37 CCC (2d) 461.

<sup>240</sup> The internal/external distinction

<sup>241</sup> *Rabey*, above n 239 at 482.

<sup>242</sup> *Stone*, above n 235 at [209]

<sup>243</sup> *Falconer*, above n 231.

<sup>244</sup> *Stone*, above n 235 at [210].

<sup>245</sup> *R v Campbell* (1997) 15 CRNZ 138 (CA)

<sup>246</sup> *R v Yesler* [2007] 1 NZLR 240. Yesler, who had a complex about his inability to provide adequately for his wife, killed her after she had made comments to the effect that she should become a prostitute while they were watching a documentary on the subject.

<sup>247</sup> *Ibid* at [43].

<sup>248</sup> *Rabey*, above n 239.

and disappointments that can ordinarily be expected in life.”<sup>249</sup> Consequently, Lang J ruled that if Yesler had been acting as an automaton when he killed his wife it was as a result of a disease of the mind.<sup>250</sup> In the same judgment, Lang J went on to find that there was a credible narrative for the provocation defence to be left to the jury.

While the judgment in *Yesler* does not provide us with any great detail as to what level of psychological blow could bring about an automatistic state, it is noteworthy in that it acknowledges the phenomenon in New Zealand. The consideration of provocation in the same judgment is significant. The decision to keep the defence of non-insane automatism from the jury was made in the context of provocation being left for their consideration. With provocation no longer available in these types of cases, part of any recalibration that is required could involve a shift in the assessment undertaken by Lang J, whether it be deliberate or subconscious on the part of the judiciary. Regardless of whether such a shift occurs, *Yesler* offers provoked killers a viable avenue for defending a murder charge in the absence of the partial defence.

### *The half-way house approach*

While the *Yesler* argument may be open to provoked killers, the risk of a finding of insane automatism, and a consequent verdict of not guilty by reason of insanity. This may mean that such a line of argument is not always attractive.<sup>251</sup> It may have been this factor that motivated counsel in *R v Campbell*<sup>252</sup> to assert a third category of involuntary behaviour where, although the conduct does not amount to sane or insane automatism, the defendant is not responsible for his actions because he cannot control them.

Campbell, who had been sexually abused as a child, beat the victim to death with a fire poker and an axe after the victim touched him on the thigh. Campbell maintained that when the victim touched him, it had triggered a flashback to his abuse as a child and that as a result of overwhelming emotion, while he may have known what he was doing; he had been unable to control his actions. It was acknowledged that neither automatism in the classical sense nor insanity were available to Campbell. It was argued instead that a complete defence should be put to the jury on the basis that Campbell had been unable to exercise any control over his acts; that he acted involuntarily and consequently should not be held responsible for his acts.

---

<sup>249</sup> *Yesler*, above n 246 at [43].

<sup>250</sup> *Ibid* at [59].

<sup>251</sup> Sections 24 and 25 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 provide for the disposition of those acquitted by reason of insanity, one of the options being that the defendant is committed to the mental health system.

<sup>252</sup> *Campbell*, above n 245.

Faced with this novel contention at trial, McGechan J held that, beyond the provocation defence (which was left to the jury), defendants could argue that their conduct had been the result of automatism or insanity but that the law in New Zealand did not recognise any further defences. Consequently, the 'third category defence' proposed by Campbell was not put to the jury and they were instructed that the only verdicts open to them were guilty of murder or guilty of manslaughter. Campbell was convicted of manslaughter and sentenced to five years imprisonment.

On appeal, the Court of Appeal affirmed the reasoning of McGechan J, holding that where conduct fell outside the boundaries of automatism and the defendant was not legally insane he will be responsible for his acts except where provocation applied.<sup>253</sup> Although the Court of Appeal rejected the 'third category defence', the decision in *Campbell* remains relevant for provoked killers in the absence of s 169. Significantly, as in *Yesler*, scrutiny of the argument in both the High Court and the Court of Appeal was inextricably linked to the availability of other defences including provocation. With the removal of provocation from that matrix of defences, the analysis of the issues canvassed in *Campbell* could be different in the future.<sup>254</sup>

## **5.5 Other Defences**

Other defences generally available to murder accused may be increasingly relied upon by defence counsel following the repeal of the provocation defence. The application of discrete defences, however, is largely fact-specific. Consequently, their incorporation of elements of provocation will depend on the circumstances of the case, whereas attacking the elements of the offence is more universally applicable. In addition to self defence, considered below, insanity<sup>255</sup> and intoxication<sup>256</sup> are other potential pleas for provoked killers.

### *Self defence*

Arguing self-defence at the trial of a provoked killer has always been an option for defence counsel as the defences were not mutually exclusive. In practice, however, the loss of self

---

<sup>253</sup> Ibid.

<sup>254</sup> It should be noted that s 20 of the Crimes Act 1961 preserved all common law defences already extant and that consequently the courts cannot construct new common law defences in New Zealand. This objection could, however, be overcome by the argument that the *Campbell* type argument is a denial of the physical element of the offence rather than a 'defence' per se.

<sup>255</sup> See preceding discussion regarding findings of insane automatism. Insanity could be argued in its own right: see Crimes Act 1961, s23.

<sup>256</sup> The law in this area was laid down in *R v Kamipeli* [1975] 2 NZLR 610 (CA). See also the above discussion of intoxication in relation to mens rea: *Simpson v R*, above n 216 discussed above at [5.3] where intoxication was relevant to the subjective inquiry under s 48.

control required for provocation was not always readily reconcilable with self-defence and counsel were often forced to make a tactical decision as to which of the defences to pursue.<sup>257</sup>

In the absence of provocation, murder accused will no longer be faced with that tactical choice. Self-defence could, therefore, be an attractive alternative argument for provoked killers given that it provides a complete acquittal. It will be relevant where the provocative conduct of the deceased involves violence or threatened violence and may be particularly pertinent where the provocative threats or violence have continued over a prolonged period. To this end self-defence has previously been linked to the partial defence of provocation in cases where battered women kill their abusers.<sup>258</sup>

## **5.6 Conclusion**

The experience in Victoria has shown us that provocation type cases are not simply going to disappear. Furthermore, there are some cases where society will simply not tolerate, or will doubt the appropriateness, of a murder verdict, in spite of a flexible murder sentencing regime.

The existence of similar attitudes in New Zealand will dictate the extent to which the possible avenues outlined above are pursued by defence counsel. It could be contended that these arguments are unlikely to be successful. However, there is a notable difference between the extent to which these arguments will actually work and the extent to which they will continue to offer a platform, as provocation did, for the vilification of the victim. These are separate issues. While the former may depend on the judicial attitude to these arguments should they be adopted by counsel, the latter merely rests on the fact that such arguments can be constructed at all.

Whether the abolition of the partial defence is likely to achieve one of its political aims is therefore debatable. It is arguable that there could be an increased focus, especially in the mens rea or actus reus cases discussed above, on whether the accused lost self-control or was acting as an automaton. Equally, however, the same vilification of the victim could be deemed necessary in order to gain the sympathy of the jury in asking them to form such a view of the accused's self control loss.

---

<sup>257</sup> *R v Pita* (1989) 4 CRNZ 660 at 664; For the current approach to self-defence in New Zealand see *Shortland v Police* HC Invercargill AP74/95, 23 April 1996 endorsed by the Court of Appeal in *R v Li* CA140/00, 28 June 2000; *R v Sarich* CA407/04, 16 May 2005.

<sup>258</sup> For the interpretation of self-defence in this regard see *R v Wang* [1990] 2 NZLR 529 (CA); *R v Oakes* [1995] 2 NZLR 673 (CA); Law Commission *Battered Defendants*, above n 74

The fissure left by the provocation defence is not an onerously large one. Despite the high profile of the defence, juries took their job seriously and defence was rarely successful.<sup>259</sup> Consequently, while significant in individual cases, the gap which the alternative arguments outlined above need to fill in the criminal system is not large. Accordingly, any shift by the system, or acceptance of these arguments would not be expected to occur in a large proportion of cases. Their failure in individual cases does not mean that such defences do not exist or will not continue to be argued but merely that on the specified facts they are not applicable.

---

<sup>259</sup> 4 out of 81 cases identified in Law Commission, *The Partial Defence of Provocation*, above n 56.



## CHAPTER SIX: WHERE TO FROM HERE?

*It is more honourable to repair a wrong than to persist in it.*

- Thomas Jefferson<sup>260</sup>

Having examined the potential operation of the law in the wake of the repeal of provocation it is pertinent to ask whether this state of affairs is satisfactory. The recency of repeal has necessitated that the inquiry in Part II be characterised by speculation and supposition. Extrapolation and expansion of domestic and international practices has attempted to forecast some of the likely consequences of the repeal. The accuracy of these predictions will be borne out in time and a more exact picture of the ramifications of repeal will be painted in the coming months and years as provoked killers are indicted for their crimes. Even after the practical effects of abolishing provocation become more apparent, whether an imbalance in our criminal system has been created may not be immediately evident.

If (or when) considerable injustice and unfairness does result from the repeal of s 169 and the morality of the law is undermined, or culpability is not accurately reflected, should such a mistake be persisted with? It is important to reflect on what, if anything, should be done about the potential imbalance in our criminal system now that provocation has been repealed. The options in this regard are threefold; revert to the previous prevailing position, try something new or alternatively do nothing at all.

### **6.1 Resurrection**

Resurrecting the partial defence of provocation and reverting to the pre-repeal position is not a desirable option. The re-enactment of a flawed provision which has been the subject of such extensive criticism<sup>261</sup> defies logic. There is the potential for some of the criticisms of the partial defence to be alleviated by simple changes to the defence. The raising of the evidentiary burden and the exclusion of certain types of conduct as the basis for provocation are two possible options in this regard. These changes could potentially lessen the ability of the defence to operate in a gendered manner and prevent the accused from putting the victim on trial.

The prevailing evidential test for leaving provocation to the jury was that there be a “credible narrative” of causative provocation.<sup>262</sup> Admittedly, any change to that standard would be contrary to the long established rule laid down in *Woolmington* that the burden of proving a

---

<sup>260</sup> Thomas Jefferson, *Address to the Chiefs of the Cherokee Nation* (10 January 1806)

<sup>261</sup> See Chapter Three

<sup>262</sup> *R v Anderson* [1965] NZLR 29 (CA).

murder charge falls on the prosecution.<sup>263</sup> However, increasing the discretion for the trial judge to remove the defence from the jury's consideration could stop the use of the plea in spurious or marginal cases.<sup>264</sup>

Excluding certain defined conduct from the ambit of the partial defence has been considered as an option for reform.<sup>265</sup> A bar on the invocation of the defence in situations of sexual intimacy or in response to a non-violent homosexual advance could respond to criticisms of provocation as gendered and heterosexist.<sup>266</sup> More generally, denying the use of the defence in cases which involve intentional killings has also been considered.<sup>267</sup>

Leaving aside definitional criticisms, the Victorian Law Reform Commission has attacked such a reform as raising questions about the purpose of the defence:<sup>268</sup>

If the defence is justified as a concession to human frailty, it should be recognised that this frailty seems to most readily manifest itself in men who kill their partners in the context of sexual intimacy.

This criticism, however, ignores the amalgam between justification and excuse that provocation represents.<sup>269</sup> To that end, the justificatory element of provocation is evident in the recognition that there are moral wrongs on both sides. Labelling certain scenarios as being incapable of amounting to provocation would be a legitimate decision by the legislature that there is no moral wrong on the part of the victim in the proscribed circumstances; for example that an angry reaction could not be justified when an intimate relationship is brought to an end.

In spite of this, such exclusions would seem to be of limited value. Although they may prevent some of the bias in the operation of the defence and they may reduce the ability of the accused to put the victim on trial, the "mental gymnastics" required of the judge and jury in applying the provocation test would remain a difficulty. This difficulty could actually be compounded if the judge or jury were required to determine whether one of the specified exclusions mooted above applied.

Reinstatement of s169 is thus undesirable and, as the following discussion demonstrates, probably unnecessary.

---

<sup>263</sup> *Woolmington*, above n 195.

<sup>264</sup> As highlighted in Chapter Four this may just lead to a new platform being sought for the same evidence to be led.

<sup>265</sup> Victorian Law Reform Commission, above n76; Law Commission (England and Wales) *Partial Defences to Murder* (Consultation Paper 173, 2003)

<sup>266</sup> See Chapter Three at [3.1]

<sup>267</sup> Law Commission (England and Wales), above n 265 at 237

<sup>268</sup> Victorian Law Reform Commission, above n 76 at 45.

<sup>269</sup> See Chapter One at [1.5]

## 6.2 Reformation

In lieu of reinstating the partial defence, alternative legislative action could be considered. While a thorough examination of the options available for such action is beyond the scope of this investigation, potential avenues can be canvassed.

The Victorian regime, described above,<sup>270</sup> provides an example of legislative countermeasures taken to mitigate abolition of the partial defence. The introduction of the offence of defensive homicide in s 9AD of the Crimes Act 1958 (Vic) partially recreated the former common-law rule of excessive self-defence.<sup>271</sup> Furthermore, s 9AH was inserted in an attempt to ameliorate concerns that the position of battered women who kill could be jeopardised. Section 9AH, entitled “family violence,” seeks to elaborate on the application of self defence and defensive homicide where they occur “in circumstances where family violence is alleged.”<sup>272</sup> The aims of the section are two-fold, to affirm that a lack of immediacy will not always mean that the accused did not believe their actions necessary, and secondly to “highlight the types of relationship and social context evidence that may be relevant in such cases.”<sup>273</sup> While defensive homicide could prove a worthy expansion of our criminal law, the significance of a 9AH-type provision may be lessened in New Zealand as ‘pre-emptive strike’ cases are not excluded from the scope of self-defence.<sup>274</sup>

England continues to have a mandatory life sentence for murder and that perhaps explains why, in addition to the partial defence of provocation, England also has the partial defence of diminished responsibility. Diminished responsibility applies where mental responsibility for the death is substantially impaired by an abnormality of the mind.<sup>275</sup> The rationale being that if total mental incapacity absolves all blame then serious mental incapacity should reduce culpability. Unlike provocation, the burden falls on the defence on the balance of probabilities to prove that the defence should apply in the circumstances. The defence, however, has also suffered from some of the same pitfalls as provocation<sup>276</sup> and consequently may merely replicate the partial defence in that sense.

---

<sup>270</sup> See Chapter Five at [5.1]

<sup>271</sup> (6 October 2005) Victorian PD, Legislative Assembly 1350.

<sup>272</sup> Crimes Act 1958 (Vic), s 9AH.

<sup>273</sup> Crimes (Homicide) Bill debate, Thursday 6 October, 2005, Victorian Assembly at 1350.

<sup>274</sup> See *Wang*, above n 258.

<sup>275</sup> Homicide Act 1957 (UK), s 2(1) for a discussion of the operation of diminished responsibility in the English context see Simester and Sullivan, above n 15 at 583.

<sup>276</sup> Law Commission, *Battered Defendants*, above n 74 at [46].

### **6.3 Redemption**

In the absence of legislative intervention it may be left to the system to right itself. Just as Victoria found a legislative outlet for fairness and accuracy in its defensive homicide provision, the New Zealand system could adjust to allow find its own means of ensuring justice. This adjustment could occur at any of the various stages of the criminal process.

As suggested in Chapter Four, judicial creativity in the interpretation of manifest injustice could mitigate the impact of the repeal in an attempt to ensure that provoked killers are not unfairly sentenced. Similarly the acceptance of arguments of the type formulated in Chapter Five could mitigate the abolition of the partial defence. In this sense it could be that the system simply starts recognising provocation in other guises.

Other options not investigated in this study also exist. Jury nullification, where a jury simply refuses to convict, or an increase in the exercise of prosecutorial discretion, through the offering of plea bargains or staying of prosecutions, are also potential opportunities for change internal to the system.<sup>277</sup>

In light of these potentially natural shifts in the operation of our murder regime it could well be that further radical change or another knee-jerk reaction is not necessary. In this sense it is possible that the keeling ship will right itself...eventually.

### **6.4 Conclusion**

When it does become clear what the practical and moral consequences of the repeal of s 169 are going to be, it may be that the system is left in an unsatisfactory condition given the imperatives of fairness and morality in the law and the need to protect the liberties of the individual. In such a situation, reviving s 169 would be neither desirable, given its inherent flaws, nor necessary, given other options for reform in the area. The most desirable option, however, may be that, at the price of short-term injustice, the system is left to resolve any resulting imbalance internally using avenues such as those set out in the second part of this dissertation.

---

<sup>277</sup> For a review of jury nullification in the American context see Jack B Weinstein "Considering Jury "Nullification": When May and Should a Jury Reject the Law and Do Justice" (1992-1993) 30 Am Crim L Rev 239; Alan Scheflin and Jon Van Dyke "Jury Nullification: The Contours of a Controversy" (1980) 43 LCP 51. For more information on the exercise of prosecutorial discretion see Kenneth Melilli "Prosecutorial Discretion in an Adversary System" (1992) BYU L Rev 669.

## CONCLUSION

The partial defence of provocation is an ancient defence. Its evolution can be traced through five centuries of legal history. Those five hundred years of jurisprudence have been struck from the statute book in New Zealand. Currently, the legal system is in a state of flux. While the defence can no longer be raised, the use of the defence at trials for crimes committed prior to repeal means that the past and the future are, at present, overlapping.

New Zealand is embarking on a new and uncharted course for dealing with provoked killers, leaving all questions of mitigation to sentencing. Although other jurisdictions have repealed the partial defence, few have left sentencing to shoulder so much responsibility. Given New Zealand's sentencing regime, the adequacy of sentencing to appropriately take account of provocative conduct will come under serious scrutiny.

The second part of this dissertation has employed a comparative approach in an attempt to elucidate the vagaries of the sentencing process and its ability to provide for provoked killers. Premised on the theory that cases of provoked killing are going to continue to appear following repeal, Chapter Five, contemplated the implications that repeal may have for the trial process. This analysis highlighted the possibility that the repeal of provocation may represent a serious challenge to the humanity, accuracy and fairness of the criminal justice system.

Curing any prejudice which does occur may, in light of the alternatives, best be left to the internalities of the criminal justice system to develop solutions over time. Resolution in this way, however, could well come at the expense of justice and fairness in individual cases, as the the judiciary slowly strike a new balance in the system.

Whether any prejudice will be borne out in practice remains to be seen. It is often said that hard cases make bad law. In this instance, whether hard cases have made for bad law-change will be determined in the coming years as provoked killers enter the criminal justice system without the partial defence of provocation as part of their armoury for the first time in more than five centuries.

## BIBLIOGRAPHY

### **PRIMARY SOURCES**

#### Legislation: New Zealand

Crimes Act 1908 (Repealed)

Crimes Act 1961

Crimes (Provocation Repeal) Amendment Act 2009

Criminal Code Act 1893 (Repealed)

Criminal Procedure (Mentally Impaired Persons) Act 2003

New Zealand Bill of Rights Act 1990

Parole Act 2002

Sentencing Act 2002

Sentencing and Parole Reform Act 2010

#### Legislation: Australia

Crimes (Homicide) Act 2005 (Vic)

Crimes Act 1958 (Vic)

Criminal Code Act 1924 (Tas)

Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas)

Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994 (Tas)

#### Legislation: United Kingdom

Homicide Act 1957

#### Legislation: Canada

Criminal Code RSC 1985 c C-46

Cases: New Zealand

*Bannin v Police* [1991] 2 NZLR 237 (HC)

*Ferguson v R*, CA594/08 3 February 2010

*Hessell v R* [2010] NZSC 40

*Police v Pratt* [1993] DCR 627

*R v Ali* HC Auckland CRI2003-292-1224, 19 August 2004

*R v Ambach* HC Auckland CRI-2007-004-27374, 10 July 2009

*R v Ambach* HC Auckland CRI-2007-004-027374, 18 September 2009

*R v Anderson* [1965] NZLR 29 (CA)

*R v Baker* [2007] NZSC 76

*R v Burr* [1969] NZLR 736 (CA)

*R v Campbell* (1997) 15 CRNZ 138 (CA)

*R v Campbell* [1997] 1 NZLR 16 (CA)

*R v Cottle* [1958] NZLR 999 (CA)

*R v Edwards* [2005] 2 NZLR 709 (CA)

*R v Edwards* HC Auckland T2003-004-025591, 16 September 2004

*R v Fate* (1998) 16 CRNZ 88 (CA)

*R v Hessell* [2009] NZCA 450

*R v Kamipeli* [1975] 2 NZLR 610 (CA)

*R v King* CA71/06, 27 July 2006

*R v Law* (2002) 19 CRNZ 500 (HC)

*R v Leuta* [2002] 1 NZLR 215 (CA)

*R v Li* CA140/00, 28 June 2000

*R v Makoare* [2001] 1 NZLR 318 (CA)

*R v McCarthy* [1992] 2 NZLR 550 (CA)

*R v McGregor* [1962] NZLR 1069 (CA)

*R v Noel* [1960] NZLR 212 (CA)  
*R v Oakes* [1995] 2 NZLR 673 (CA)  
*R v O'Sullivan* CA340/93, 15 December 1993  
*R v Pita* (1989) 4 CRNZ 660  
*R v Rapira* [2003] 3 NZLR 794 (CA)  
*R v Rawiri* HC Auckland, T014047, 16 September 2002  
*R v Ripia* [1985] 1 NZLR 122 (CA)  
*R v Rongonui* [2000] 2 NZLR 385 (CA)  
*R v Sarich* CA407/04, 16 May 2005  
*R v Simpson* HC Auckland, T010609, 12 October 2001  
*R v Slade* [2005] 2 NZLR 526 (CA)  
*R v Smail* [2007] 1 NZLR 411 (CA)  
*R v Suluape* (2002) 19 CRNZ 492 (CA)  
*R v Taylor* [1968] NZLR 981 (CA)  
*R v Wang* [1990] 2 NZLR 529 (CA)  
*R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009.  
*R v Wihongi* HC Napier CRI-2009-041-0002096 30 August 2010  
*R v Williams* [2005] 2 NZLR 506 (CA)  
*R v Yesler* [2007] 1 NZLR 240 (HC)  
*Rajamani v R* [2007] NZSC 68  
*Shortland v Police* HC Invercargill AP74/95 23 April 1996  
*Simpson v R* [2010] NZCA 140  
*Solicitor General v Kane* CA154/98, 23 September 1998  
*Timoti v R* [2005] NZSC 37

#### Cases: Australia

*R v Falconer* (1990) 171 CLR 30 (HCA)



*R v Middendorp* [2010] VSC 202

*R v Spark* [2009] VSC 374

*R v Tyne* (Unreported, Supreme Court of Tasmania, Crawford J, 7 July 2005)

*Tyne v Tasmania* [2005] TASSC 119 (1 December 2005)

#### Cases: Canada

*R v Campbell* (1977), 17 OR (2d) 673 (CA)

*R v Parent* [2001] 1 SCR 761

*R v Rabey* (1978) 37 CCC (2d) 461

*R v Rabey* [1980] 2 SCR 513

*R v Robinson* [1996] 1 SCR 683

*R v Stone* [1999] 2 SCR 290

*R v Thibert* [1996] 1 SCR 37

*R v Wade* (1994) 18 OR (3d) 33 (CA)

*R v Wade* [1995] 2 SCR 737

#### Cases: United Kingdom

*Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119

*Bratty v Attorney-General for Northern Ireland* [1963] AC 386 (HL)

*Director of Public Prosecutions v Camplin* [1978] AC 705

*Holmes v Director of Public Prosecutions* [1946] AC 588 (HL)

*Parker v R* [1964] AC 1369

*R v Ahluwalia* [1992] 4 All ER 889 (CA)

*R v Dryden* [1995] 4 All ER 987 (CA)

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

*R v Harper* [1968] 2 QB 108

*R v Humphreys* [1995] 4 All ER 1008 (CA)

*R v James; R v Karimi* [2006] QB 588 (CA)

*R v Martindale* [1986] 1 WLR 1564

*R v Mawgridge* (1707) 84 ER 1107

*R v Quick* [1973] 1 QB 910 (CA)

*R v Smith (Morgan)* [2001] 1 AC 146

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

*Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL)

#### Cases: International

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

*Attorney-General for Jersey v Holley* [2005] UKPC 23

*People (Director of Public Prosecutions) v Davis* [2001] 1 IR 146 (Ireland)

#### Court Materials

With the permission of Justice Miller: “Jury Memorandum”, “Jury questions” and “Answers to Jury’s Questions” Documents from the trial of Wilson Apatu HC Napier, September 2010.

## **SECONDARY SOURCES**

#### Texts

Adams, FB (ed.) *Criminal Law and Practice in New Zealand* (2nd ed, Sweet and Maxwell, Wellington, 1971)

Ashworth, Andrew *Principles of Criminal Law* (Oxford University Press, Oxford, 2009)

Chesterton, GK *Tremendous Trifles: A Collection of Essays* (Metheun, 1909)

Coleman, Jules and Shapiro, Scott (eds.) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002)

Fletcher, George *Rethinking Criminal Law* (Little, Brown and Company, Boston, 1978)

Gross, Hyman A *Theory of Criminal Justice* (Oxford University Press, New York, 1979)

Hale, Matthew *The History of the Pleas of the Crown* (Sollom Emlyn, London, 1778)

Hall, Geoff *Sentencing: 2007 Reforms in Context* (Lexis Nexis, Wellington, 2007) at 487.

Hart, H L A *Punishment and Responsibility: Essays in the Philosophy of the Law* (Clarendon Press, Oxford, 1968)

Horder, Jeremy *Excusing Crime* (Oxford University Press, Oxford, 2004)

Horder, Jeremy *Provocation and Responsibility* (Clarendon Press, Oxford, 1992)

Ingram, David *Law: Key Concepts in Philosophy* (Continuum, London, 2006)

Packer, Herbert *The Limits of the Criminal Sanction* (Stanford University Press, Stanford, 1968)

Robinson, Paul *Fundamentals of Criminal Law* (Little Brown and Company, Boston, 1988)

Simester, AP and Sullivan, GR *Criminal Law: Theory and Doctrine* (2nd ed, Hart Publishing, Oxford, 2003)

Simester, AP and Brookbanks, WJ *Principles of Criminal Law* (3rd ed, Thomson Brookers, Wellington, 2007)

Smith, J C *Justification and Excuse in the Criminal Law* (Sweet and Maxwell, London, 1989)

### Articles

Archibald, Todd "The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-control" (1985-1986) 28 Crim LQ 454

Ashworth, Andrew "Reforming the Law of Murder" (1990) Crim LR 75

Ashworth, Andrew "The Doctrine of Provocation" (1976) 35 CLJ 292

Bazelon, David "The Morality of the Criminal Law" (1975-1976) 49 S. Cal. L. Rev. 385

Berger, Ronald L "Provocation and the Involuntary Act" (1966-67) 12 McGill LJ 202

Colvin, Eric "Exculpatory Defences in Criminal Law" (1990) 10 Oxford J. Legal Stud. 381

Dawson, John "Production of Therapeutic Records to the Defence: Emerging Principles" (1998) 5 Psychiatry, Psychology and Law 63

Hart, Henry "The Aims of the Criminal Law" (1958) 23 Law & Contemp. Probs. 401

Klineberg, Joanne "Anger and Intent for Murder: The Supreme Court Decision in *R v Parent*" (2002) 41 Osgoode Hall LJ 37.

McAuley, Finbarr "Anticipating the Past: The Defence of Provocation in Irish Law" (1987) 50 Modern Law Review 133

Melilli, Kenneth "Prosecutorial Discretion in an Adversary System" (1992) *BYU L Rev* 669.

Mewett, Alan "Murder and Intent: Self-defence and Provocation" (1984-1985) 27 *Crim LQ* 433

Power, Helen "Provocation and Culture" (2006) *Crim LR* 871

Robinson, Paul "Criminal Law Defenses: A Systematic Analysis" (1982) 82 *Colum L Rev* 199

Robinson, Paul "The Criminal-Civil Distinction and the Utility Desert" (1996) 76 *Boston ULR* 201

Schefflin, Alan and Van Dyke, Jon "Jury Nullification: The Contours of a Controversy" (1980) 43 *LCP* 51.

Trotter, Gary "Anger, Provocation and the Intent for Murder: A Comment on *R v Parent*" (2002) 47 *McGill L.J.* 669

Weinstein, Jack B "Considering Jury "Nullification": When May and Should a Jury Reject the Law and Do Justice" (1992-1993) 30 *Am Crim L Rev* 239

#### Law Reform Reports

Law Commission (England and Wales) *Murder, Manslaughter and Infanticide* (Law Com no 304, 2006)

Law Commission (England and Wales) *Partial Defences to Murder* (Consultation Paper 173, 2003)

Law Commission (England and Wales) *Partial Defences to Murder* (Final Report, 2006)

Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001)

Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007)

Law Reform Commission (Ireland) *Defences in Criminal Law* (LRC95 2009)

Law Reform Commission (Ireland) *Homicide: The Plea of Provocation* (LRC CP27 2003)

New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide* (Discussion Paper 31, 1993)

New South Wales Law Reform Commission *Partial Defences to Murder: Provocation and Infanticide* (Report 83, 1997)

Queensland Law Reform Commission *A Review of the Defence of Provocation* (QLRC WP 63, 2008)

Sentencing Guidelines Council, *Manslaughter by reason of provocation*

Sentencing Advisory Council (Vic) *Provocation in Sentencing: Research Report* (2nd ed, 2009)

UK Sentencing Advisory Panel, Consultation Paper on Sentencing of Manslaughter...

Victorian Law Reform Commission *Defences to Homicide: Final Report* (2004)

### Media Articles

Gay, Edward "Partial defence of provocation set to be dumped" New Zealand Herald (New Zealand, 23 July 2009)

[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10586155](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10586155)

Editorial "Provocation defence has run its course" New Zealand Herald (New Zealand, 10 August 2009) [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10589687](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10589687)

Sisterton, Craig "The Problem of Provocation" NZLawyer 121 (New Zealand, 18 September 2009).

Sharpe, Marty "Eight years for murder 'brave and right'" The Dominion Post (New Zealand 31 August 2010) <http://www.stuff.co.nz/national/crime/4077214/Eight-years-for-murder-brave-and-right>

Capper, Sarah and Crooks, Mary "New homicide laws have proved indefensible" Sydney Morning Herald (Australia, 23 May 2010) <http://www.smh.com.au/opinion/society-and-culture/new-homicide-laws-have-proved-indefensible-20100522-w2wr.html>.

### Other

Jefferson, Thomas *Address to the Chiefs of the Cherokee Nation* (10 January 1806).

McMullin, Duncan "Submission to the Justice and Electoral Law Committee regarding the retention of the partial defence of provocation" (30 September 2009).

Ministry of Justice *Departmental Report for Justice and Electoral Committee – Crimes (Provocation Repeal) Amendment Bill* (Crime Prevention and Criminal Justice Group, 17 September 2009)

Advice from Ministry of Justice to Chester Burrows, Chairperson, Justice and Electoral Committee regarding additional information on the Crimes (Provocation Repeal) Amendment Bill (21 September 2009).

New Zealand Law Society "Submission to the Justice and Electoral Law Committee on the Crimes (Provocation Repeal) Amendment Bill" (31 August 2009).

Whitman, Walt *Song of the Broad-axe* (1856).

## APPENDICES

### Appendix A: Historical Statutes

#### Criminal Code Act 1893

##### **165 Provocation**

- (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 may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.
- (3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact.
- (4) No one shall be held to give provocation to another 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 harm to any person.
- (5) An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal; but if the illegality was known to the offender it may be evidence of provocation.

#### Crimes Act 1908

##### **184 Provocation**

- (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 may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.
- (3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact.
- (4) No one shall be held to give provocation to another 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.

## **Appendix B: Crimes Act 1961, s 169.**

### **169 Provocation**

- (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.

## **Appendix C: Selected Provisions from the Sentencing Act 2002**

### *Purposes and principles of sentencing*

#### **7 Purposes of sentencing or otherwise dealing with offenders**

- (1) The purposes for which a court may sentence or otherwise deal with an offender are—
- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
  - (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
  - (c) to provide for the interests of the victim of the offence; or
  - (d) to provide reparation for harm done by the offending; or
  - (e) to denounce the conduct in which the offender was involved; or
  - (f) to deter the offender or other persons from committing the same or a similar offence; or
  - (g) to protect the community from the offender; or
  - (h) to assist in the offender's rehabilitation and reintegration; or
  - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

#### **8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court—

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and



- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

## **9 Aggravating and mitigating factors**

- (1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:
  - (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
  - (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
  - (c) that the offence was committed while the offender was on bail or still subject to a sentence:
  - (d) the extent of any loss, damage, or harm resulting from the offence:
  - (e) particular cruelty in the commission of the offence:
  - (f) that the offender was abusing a position of trust or authority in relation to the victim:
  - (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
  - (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
    - (i) the hostility is because of the common characteristic; and
    - (ii) the offender believed that the victim has that characteristic:
  - (ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):
  - (hb) the nature and extent of any connection between the offending and the offender's—
    - (i) participation in an organised criminal group (within the meaning of section 98A of the Crimes Act 1961); or
    - (ii) involvement in any other form of organised criminal association:
  - (i) premeditation on the part of the offender and, if so, the level of premeditation involved:
  - (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

- (2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:
  - (a) the age of the offender:
  - (b) whether and when the offender pleaded guilty:
  - (c) the conduct of the victim:
  - (d) that there was a limited involvement in the offence on the offender's part:
  - (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
  - (f) any remorse shown by the offender, or anything as described in section 10:
  - (g) any evidence of the offender's previous good character.
- (3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).
- (4) Nothing in subsection (1) or subsection (2)—
  - (a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
  - (b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

...

*Additional consequences for repeated serious violent offending*

#### **86A Interpretation**

In this section and in sections 86B to 86I, unless the context otherwise requires,—

**record of final warning**, in relation to an offender, means a record of a warning that the offender has under section 86C(3) or 86E(8)

**record of first warning**, in relation to an offender, means a record of a warning that the offender has under section 86B(3)

**serious violent offence** means an offence against any of the following provisions of the Crimes Act 1961:

- (1) section 128B (sexual violation):
- (2) section 129 (attempted sexual violation and assault with intent to commit sexual violation):
- (3) section 129A(1) (sexual connection with consent induced by threat):
- (4) section 131(1) (sexual connection with dependent family member under 18 years):
- (5) section 131(2) (attempted sexual connection with dependent family member under 18 years):
- (6) section 132(1) (sexual connection with child):
- (7) section 132(2) (attempted sexual connection with child):
- (8) section 132(3) (indecent act on child):
- (9) section 134(1) (sexual connection with young person):
- (10) section 134(2) (attempted sexual connection with young person):
- (11) section 134(3) (indecent act on young person):
- (12) section 135 (indecent assault):

- (13) section 138(1) (exploitative sexual connection with person with significant impairment):
- (14) section 138(2) (attempted exploitative sexual connection with person with significant impairment):
- (15) section 142A (compelling indecent act with animal):
- (16) section 144A (sexual conduct with children and young people outside New Zealand):
- (17) section 172 (murder):
- (18) section 173 (attempted murder):
- (19) section 174 (counselling or attempting to procure murder):
- (20) section 175 (conspiracy to murder):
- (21) section 177 (manslaughter):
- (22) section 188(1) (wounding with intent to cause grievous bodily harm):
- (23) section 188(2) (wounding with intent to injure):
- (24) section 189(1) (injuring with intent to cause grievous bodily harm):
- (25) section 191(1) (aggravated wounding):
- (26) section 191(2) (aggravated injury):
- (27) section 198(1) (discharging firearm or doing dangerous act with intent to do grievous bodily harm):
- (28) section 198(2) (discharging firearm or doing dangerous act with intent to injure):
- (29) section 198A(1) (using firearm against law enforcement officer, etc):
- (30) section 198A(2) (using firearm with intent to resist arrest or detention):
- (31) section 198B (commission of crime with firearm):
- (32) section 200(1) (poisoning with intent to cause grievous bodily harm):
- (33) section 201 (infecting with disease):
- (34) section 208 (abduction for purposes of marriage or sexual connection):
- (35) section 209 (kidnapping):
- (36) section 232(1) (aggravated burglary):
- (37) section 234 (robbery):
- (38) section 235 (aggravated robbery):
- (39) section 236(1) (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances):
- (40) section 236(2) (assault with intent to rob)

**stage-1 offence** means an offence that—

- (a) is a serious violent offence; and
- (b) was committed by an offender at a time when the offender—
  - (i) did not have a record of first warning given under section 86B; and
  - (ii) was 18 years of age or over

**stage-2 offence** means an offence that—

- (a) is a serious violent offence; and
- (b) was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences) but did not have a record of final warning

**stage-3 offence** means an offence that—

- (a) is a serious violent offence; and

- (b) was committed by an offender at a time when the offender had a record of final warning (in relation to 1 or more offences).

**86B Stage-1 offence: offender given first warning**

- (1) When a court, on any occasion, convicts an offender of 1 or more stage-1 offences, the court must at the same time—
  - (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-1 offence for which the offender is being convicted); and
  - (b) record, in relation to each stage-1 offence, that the offender has been warned in accordance with paragraph (a).
- (2) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-1 offence (for which a record is entered), a record of first warning.
- (4) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

**86C Stage-2 offence other than murder: offender given final warning and must serve full term of imprisonment**

- (1) When, on any occasion, a court convicts an offender of 1 or more stage-2 offences other than murder, the court must at the same time—
  - (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-2 offence for which the offender is being convicted); and
  - (b) record, in relation to each stage-2 offence, that the offender has been warned in accordance with paragraph (a).
- (2) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-2 offence for which a record is entered, a record of a final warning.
- (4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—
  - (a) in the case of a long-term sentence (within the meaning of the Parole Act 2002), serve the sentence without parole; and
  - (b) in the case of a short-term sentence (within the meaning of the Parole Act 2002), not be released before the expiry of the sentence.
- (5) If the sentence imposed on the offender for 1 or more stage-2 offences is a short-term sentence (within the meaning of the Parole Act 2002) and any conditions are imposed on the offender under section 93, then, despite anything in that section, those conditions take effect on the sentence expiry date (within the meaning of the Parole Act 2002).

- (6) If, but for the application of this section, the court would have ordered, under section 86, that the offender serve a minimum period of imprisonment, the court must state, with reasons, the period that it would have imposed.
- (7) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

**86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment**

- (1) Despite any other enactment,—
  - (a) a defendant who is committed for trial for a stage-3 offence must be committed to the High Court for that trial; and
  - (b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.
- (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
- (3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.
- (4) Despite subsection (3), if the court sentences the offender for manslaughter, the court must order that the offender serve a minimum period of imprisonment of not less than 20 years unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be manifestly unjust, in which case the court must order that the offender serve a minimum period of imprisonment of not less than 10 years.
- (5) If the court does not make an order under subsection (3) or, where subsection (4) applies, does not order a minimum period of not less than 20 years under subsection (4), the court must give written reasons for not doing so.
- (6) If the court imposes a sentence under subsection (2), any other sentence of imprisonment imposed on the same occasion (whether for a stage-3 offence or for any other kind of offence) must be imposed concurrently.
- (7) Despite subsection (2), this section does not preclude the court from imposing, under section 87, a sentence of preventive detention on the offender, and if the court imposes such a sentence on the offender,—
  - (a) subsections (2) to (5) do not apply; and
  - (b) the minimum period of imprisonment that the court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the court would have imposed under subsection (2), unless the court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be manifestly unjust.
- (8) If, in reliance on subsection (7)(b), the court imposes a minimum period of imprisonment that is less than the term of imprisonment that the court would have imposed under subsection (2), the court must give written reasons for doing so.

**86E When murder is a stage-2 or stage-3 offence**

- (1) This section applies if—
  - (a) an offender is convicted of murder; and
  - (b) that murder is a stage-2 offence or a stage-3 offence.
- (2) If this section applies, the court must—
  - (a) sentence the offender to imprisonment for life for that murder; and
  - (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.
- (3) If the court does not make an order under subsection (2)(b), the court must give written reasons for not doing so.
- (4) If the court does not make an order under subsection (2)(b), the court must,—
  - (a) if that murder is a stage-3 offence, impose a minimum period of imprisonment of not less than 20 years unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so; and
  - (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.
- (5) If, in the case of a stage-3 offence, the court imposes under subsection (4)(a) a minimum period of imprisonment of less than 20 years, the court must give written reasons for doing so.
- (6) If, in the case of a stage-2 offence, the court makes an order under subsection (4)(b) and the offender does not, at the time of sentencing, have a record of final warning, the court must—
  - (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning; and
  - (b) record that the offender has been warned in accordance with paragraph (a).
- (7) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (8) On the entry of a record under subsection (6)(b), the offender has a record of final warning.
- (9) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (6)(a).

**86F Continuing effect of warnings**

- (1) An offender continues to have a record of first warning or a record of final warning regardless of whether the offender has served or otherwise completed the sentence imposed on the offender for the offence (including, without limitation, any sentence imposed under section 86D or 86E) to which the record relates.
- (2) However, an offender ceases to have a record of first warning or a record of final warning if, on an appeal, an appellate court—
  - (a) quashes all the convictions to which the relevant record relates; and

- (b) does not replace 1 or more of those quashed convictions with a conviction for another serious violent offence.
- (3) If the appellate court quashes a conviction to which a record of first warning or a record of final warning relates, the appellate court must order that the record of the warning be cancelled in respect of that conviction.
- (4) If the appellate court replaces a conviction (the quashed conviction) to which a record of first warning or a record of final warning relates with a conviction for another serious violent offence (the substituted conviction), then any record of first warning or final warning that previously related to the quashed conviction is deemed—
  - (a) to relate to the substituted conviction; and
  - (b) to have taken effect on the date on which the record that related to the quashed conviction took effect.
- (5) If, in accordance with subsection (2), an offender has ceased to have a record of first warning but continues to have a record of final warning, then—
  - (a) the appellate court must order that a record of first warning replace that record of final warning; and
  - (b) that replacement record of first warning is deemed to have taken effect on the date on which the record of final warning took effect.
- (6) Subsection (3) is subject to subsection (4).

**86G Consequences of cancellation of record on later sentences**

- (1) This section applies where,—
  - (a) in accordance with section 86F(2), an offender ceases to have a record of first warning or a record of final warning or both (the previous record); and
  - (b) the offender continues to be subject to a sentence (a later sentence) that was imposed on the offender under any of sections 86C, 86D, or 86E for serious violent offences committed when the offender had the previous record.
- (2) The appellate court must take the actions described in this section that are applicable to the case or remit the matter to the court that sentenced the offender with a direction to take those actions.
- (3) The appropriate court must take the following actions:
  - (a) if the later sentence would not have been imposed but for the previous record, the court must set aside the later sentence and replace it with a sentence that the court would have imposed had the offender not been subject to the previous record;
  - (b) if any order relating to the later sentence would not have been made but for the previous record, the court must cancel the order and, where appropriate, replace it with an order that the court would have made had the offender not been subject to the previous record;
  - (c) if the court considers it just to make any consequential orders, the court must make those orders.
- (4) Without limiting the generality of subsection (3), if an offender who continues to be subject to a later sentence for 1 or more stage-2 offences ceases, in accordance with section 86F(2), to have a record of first warning, the appropriate court must—

- (a) cancel any order imposed on the offender in respect of those stage-2 offences under section 86C(4); and
  - (b) if the court considers it appropriate to do so, impose a minimum period of imprisonment under section 86 in respect of those stage-2 offences, taking into account any indication given by the sentencing court under section 86C(6); and
  - (c) in the case of a stage-2 offence that is murder, cancel any sentence or order imposed on the offender under section 86E(2) and re-sentence the offender under subpart 4 of this Part.
- (5) Without limiting the generality of subsection (3), if an offender who continues to be subject to a later sentence for stage-3 offences ceases, in accordance with section 86F(2), to have either a record of first warning or a record of final warning, the appropriate court must,—
  - (a) if the offender has been sentenced under section 86D, re-sentence the offender for the offence concerned by applying section 86C; and
  - (b) in the case of a stage-3 offence that is murder, cancel any order made under section 86E(4)(a) and replace it with an order under section 86E(4)(b).
- (6) Without limiting the generality of subsection (3), if an offender who continues to be subject to a later sentence for stage-3 convictions ceases, in accordance with section 86F(2), to have both a record of first warning and a record of final warning, the court must,—
  - (a) if the offender has been sentenced under section 86D, re-sentence the offender for the offence concerned:
  - (b) in the case of a stage-3 offence that is murder, cancel any sentence or order imposed on the offender under section 86E(2) and any order under section 86E(4) and re-sentence the offender under subpart 4 of this Part:
  - (c) administer a first warning to the offender by taking the action described in section 86B(1).

**86H Appeal against orders relating to imprisonment**

For the purposes of Part 13 of the Crimes Act 1961, an order under section 86D(3) or (4), or 86E(2)(b) or (4)(a), is a sentence.

**86I Sections 86B to 86E prevail over inconsistent provisions**

A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

...

*Presumption in relation to sentence for murder*

**102 Presumption in favour of life imprisonment for murder**

- (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.
- (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.



- (3) This section is subject to section 86E(2).

**103 Imposition of minimum period of imprisonment or imprisonment without parole if life imprisonment imposed for murder**

- (1) If a court sentences an offender convicted of murder to imprisonment for life it must,—
- (a) if section 86E(1) does not apply to the conviction,—
    - (i) order that the offender serve a minimum period of imprisonment under that sentence; or
    - (ii) if subsection (2A) applies, make an order under that subsection; or
  - (b) in any case where section 86E(1) applies to the conviction, take the action prescribed by that section.
- (2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:
- (a) holding the offender accountable for the harm done to the victim and the community by the offending;
  - (b) denouncing the conduct in which the offender was involved;
  - (c) deterring the offender or other persons from committing the same or a similar offence;
  - (d) protecting the community from the offender.
- (2A) If the court that sentences an offender convicted of murder to imprisonment for life is satisfied that no minimum term of imprisonment would be sufficient to satisfy 1 or more of the purposes stated in subsection (2), the court may order that the offender serve the sentence without parole.
- (2B) The court may not make an order under subsection (2A) unless the offender was 18 years of age or over at the time that the offender committed the murder.
- (3) [Repealed]
- (4) [Repealed]
- (5) [Repealed]
- (6) [Repealed]
- (7) Subsection (2) is subject to section 104.

**104 Imposition of minimum period of imprisonment of 17 years or more**

- (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
- (a) if the murder was committed in an attempt to avoid the detection, prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
  - (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
  - (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
  - (d) if the murder was committed in the course of another serious offence; or

- (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
  - (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or
  - (f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or
  - (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or
  - (h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or
  - (i) in any other exceptional circumstances.
- (2) This section does not apply to an offender in respect of whom an order under section 86E(2)(b) or (4)(a) or 103(2A) is made.

#### **Appendix D: Sentencing Trends in Provocation Cases**

The author encountered several sentencing decisions for manslaughter by reason of provocation in researching this dissertation. The following table provides a brief summary of the features of those cases and the sentences handed down for manslaughter on account of provocation.

<b>Case</b>	<b>Year</b>	<b>Court</b>	<b>Features of Provocation</b>	<b>Cause of death</b>	<b>Sentence</b>
<i>R v King</i>	2006	CA	Battered woman	Sleeping pills	4 years 3 months
<i>R v Boyles</i>	1981	CA	End of intimate relationship	Extreme Violence	9 years
<i>R v Ali</i>	2004	HC	Homosexual panic, offender 17 yrs old	Stabbing with knife	3 years
<i>R v Waho</i>	1989	HC	Fraternal dispute	Stabbing with knife	5 years
<i>R v Blackmore</i>	2005	CA	End of intimate relationship	Stabbing with knife	11 years (2/3 MP)
<i>R v Fallow</i>	2009	HC	End of intimate relationship	Frenzied stabbing	8 years (2/3 MP)
<i>R v Fate</i>	1999	CA	Infidelity by husband with sister	Stabbing with knife	2 years
<i>R v Jarman</i>	2003	HC	End of intimate relationship	Multiple gunshots	9 years (2/3 MP)
<i>R v Narayan Singh</i>	2001	HC	Previous fight with victim	Stabbing with knife	7 years
<i>R v Southon</i>	2006	HC	Previous rape and continued intimidation	Gunshot	7 years (1/2 MP)
<i>R v Suluape</i>	2002	CA	Battered woman	Axe	5 years
<i>R v Ambach</i>	2009	HC	Homosexual panic	Extreme Violence	8 years (2/3 MP)
<i>R v Simpson</i>	2001	HC	Mercy killing	Drug overdose	3 years
<i>R v O'Sullivan</i>	1993	CA	Intimidation	Sniper shot	10 years
<i>R v Edwards</i>	2005	CA	Homosexual panic	Extreme Violence	9 years (1/2 MP)
<i>R v Wang</i>	1989	CA	Battered woman	Stabbing with knife	5 years

## **Appendix E: Comparative Chart**

The following table details the position of various Commonwealth jurisdictions on provocation. The table was devised by the author as a research tool for reference during the formative stages of this inquiry and consequently does not contain a large amount of detail.

Jurisdiction	Nature	Historical position on provocation	Historical sentence	Law Reform Body Investigation	Current murder sentence	Current position on provocation	Counter measures	Position on Diminished Responsibility
<i>New Zealand</i>	Partial	Provided for by statute since 1893, most recently by s169 of the Crimes Act 1961	Death until 1961 and then mandatory life sentence	Recommended to abolish 2007	Presumption in favour of life sentence since 2002	Abolished: Crimes (Provocation Repeal) Act 2009	None	No defence lesser than insanity
<i>Australia</i>								
> <i>NSW</i>	Partial	Statutory defence: s23 Crimes Act 1900 (NSW)	Life imprisonment	1993, 1997 recommend to keep the defence	Discretionary life sentence since 1989	Partial statutory defence		Partial statutory defence
> <i>WA</i>	Partial	Statutory defence: s281 Criminal Code (WA)	Mandatory Life sentence	Recommended to abolish 2007	Presumption in favour of life, minimum 20 yr.	Abolished: 2008 Criminal Law Amendment (Homicide) Act	Widen self defence, introduce excessive self defence	
> <i>Queensland</i>	Partial	Common law defence incorporated by statute: s304 Queensland Criminal Code	Mandatory life sentence	Working paper 2008	Mandatory life sentence	Partial common law defence supplemented by statute	S304B Killing in an abusive domestic relationship	Partial statutory defence
> <i>South Australia</i>	Partial	Common law defence				Partial common law defence		
> <i>Northern Territory</i>	Partial	Statutory defence: s34(2) Criminal Code (NT)			Mandatory life sentence			Partial statutory defence
> <i>Victoria</i>	Partial	Common law defence		Recommended to abolish 2004	Discretionary life sentence	Abolished: Crimes (Homicide) Act 2005	Widening of self defence, excessive self defence	No defence lesser than insanity
> <i>ACT</i>	Partial	Statutory defence						Partial statutory defence
> <i>Tasmania</i>	Partial	Statutory defence: s160 Criminal Code (Tas)	Mandatory life sentence	None	Discretionary life sentence (since 1994)	Abolished 2003	None	No defence lesser than insanity
<i>Canada</i>	Partial	s232 Canadian Criminal Code (largely unchanged since 1892)	Mandatory life sentence	Law Comm has been dis-established	Mandatory life sentence	Partial statutory defence		Any mental impairment less than insanity can only be used to attack M/R
<i>United Kingdom</i>	Partial	Common law defence supplemented by statute (s3 Homicide Act 1957)	Death, mandatory life sentence since 1965	2004, 2006 recommended reform	Mandatory life sentence	Partial common law defence		Partial statutory defence
<i>Ireland</i>	Partial	English common law up until 1978		Recommended to keep 2003				No defence lesser than insanity
<i>Scotland</i>	Partial	Common law defence			Mandatory life sentence			Common law partial defence