
**ALTERNATIVES TO THE PARTIAL
DEFENCE OF PROVOCATION**

Charlotte Greenfield

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Introduction

At the end of 2009 the partial defence of provocation was removed from New Zealand law by the Crimes (Provocation Repeal) Amendment Act 2009. The purpose of this paper is, firstly, to explore the consequences of this for New Zealand's criminal law and, secondly, to determine whether the current legal position towards cases of reduced culpability in murder requires change.

How to accommodate reduced culpability in murder is a question that vexes criminal justice systems throughout the world. Not only must the law relating to homicide be coherent, consistent and fair, it must also attempt to deliver justice in the wake of some of the worst crimes involving a vast array of emotionally charged situations. Murder victims will always evoke sympathy, but the true test for criminal justice arises in dealing with offenders whose actions also elicit sympathy, despite their fatal consequences. In common law jurisdictions, the major way of providing for such offenders is through a series of partial defences, of which provocation is one. In light of major changes to community values over the past century, reconsideration of partial defences has occurred throughout common law jurisdictions. The aim of this paper is to find the best way to accommodate those cases of murder deserving of a partial excuse, while excluding those that are not.

Chapter 1 will explore the background to the partial defence of provocation and its abolition. The abolition is first described from political and social perspectives, followed by a consideration of the legal reasons for provocation's repeal. Chapter 1 finishes with an overview of provocation's status in other common law jurisdictions.

Chapter 2 returns to New Zealand to examine the position of the criminal law in the wake of the repeal of provocation. It identifies and evaluates sentencing as the current way of dealing with cases of reduced culpability in murder. It will first provide an overview of sentencing law for homicide, particularly in relation to how it deals with murder cases that have aspects of provocation. The next consideration is whether this is the appropriate

way of dealing with provocation. Having concluded that for many reasons it is not, it is then asked whether elements of reduced culpability in murder should be recognized by the law at all. This is followed by an analysis of whether sentencing is the appropriate way of accommodating such reduced culpability.

In light of these issues, the focus of Chapter 3 returns to the partial defence of provocation. The legal reasons behind the abolition of provocation will be reconsidered in regards to whether they show that the defence is fatally flawed. A partial defence of loss of control will then be proposed to demonstrate a successful statutory reformulation of the defence of provocation.

Chapter 4 widens the scope to consider a variety of options other than provocation for accommodating reduced culpability in murder. The partial defence of diminished responsibility is discussed followed by a number of other possible defences and ways of restructuring the laws of homicide.

The final aim of this paper is to identify the optimum way of accommodating reduced culpability in murder and it does so by concluding that this would be achieved by adopting a partial defence of loss of control alongside a partial defence of diminished responsibility.

Chapter 1

The Abolition of Provocation in New Zealand

In 2009, sections 169 and 170 of the Crimes Act 1961 were repealed by the Crimes (Provocation Repeal) Amendment Act 2009. Provocation was removed as a partial defence to murder, putting an end to a defence that had existed in New Zealand statutory law since 1893¹ and in common law prior to that time. Unless another defence² applies, juries must now return a verdict of murder in any case in which they are convinced that the elements of murder have been met.

The Crimes (Provocation Repeal) Amendment Bill passed on 26 November 2009 by 116 votes to five. The Bill was supported by parties from across the political spectrum, with only the ACT Party opposing its enactment.³ Members of Parliament were largely responding to the perception of provocation as an “anachronistic”⁴ excuse that devalued the tragic deaths of certain vulnerable murder victims. However, ACT members of Parliament argued that the repeal of the defence was “throw[ing] the baby out with the bathwater”⁵ and that Parliament, and the public outcry to which it was responding, were excessively influenced by recent unpopular cases in which provocation had been raised.

The most infamous of these was *R v Weatherston*⁶ in which the defendant stabbed his ex-girlfriend, Sophie Elliott, to death and then continued to mutilate her body. Provocation was raised as a defence at trial but rejected by the jury. The case received substantial attention in the media. Although the jury’s verdict was received with relief, the complaint

¹ Criminal Code Act 1893, s 65

² Defences to murder include self-defence, insanity, killing pursuant to a suicide pact and infanticide (although this is technically a separate offence under s 178 of the Crimes Act, it will be included in references to ‘defences’ in this paper)

³ NZPA “Provocation defence abolished” *New Zealand Herald* (New Zealand, 27 November 2009) at http://www.nzherald.co.nz/law-commission/news/article.cfm?o_id=500506&objectid=10611973

⁴ Hon Lianne Dalziel MP (17 November 2009) 659 NZPD 7755

⁵ David Garrett MP (18 August 2009) 656 NZPD 5646

⁶ *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009.

was that the partial defence should not have been available to Weatherston at all. Another concern was the fact that Sophie Elliott's family had to suffer in listening to evidence given in court in support of provocation, which focused on intimate details relating to Sophie's personal conduct⁷.

Although the rejection of provocation by the jury in the *Weatherston* case indicated that the defence would not be accepted in cases contrary to community values, the defence did succeed in *R v Ambach*⁸, another case in which the provocation alleged gained little public sympathy. This situation involved a mild homosexual advance by the victim towards the offender. *R v Ambach* attracted less attention at the time of trial (perhaps because, some would say, it involved a gay victim and a homosexual advance⁹). However, in the wake of *Weatherston*, the fact that the jury returned a verdict of manslaughter based on provocation became a cause for considerable public outcry.

The Legal Reasons for the Abolition of Provocation

While political concerns and public perception are in practical terms an important element of lawmaking, it must be underpinned by legal analysis. This was undertaken by the Law Commission in 2007 in its report, *The Partial Defence of Provocation*, which reiterated the Law Commission's previous recommendation to abolish provocation in its 2001 report, *Some Criminal Defences with Particular Reference to Battered Defendants*. While the debate in Parliament and in the media can be seen as the political and social rationale behind the abolition of provocation, the Law Commission's report can be viewed as the legal foundation for the same outcome. The Law Commission identified various issues with provocation, which fall into two categories: definitional and fundamental.

⁷ Jarrod Booker "Jury finds Weatherston guilty of murder" *New Zealand Herald* (New Zealand, 22 July 2009) at

http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10585763

⁸ *R v Ambach* HC Auckland CRI-2007-004-027374, 18 September 2009.

⁹ Editorial "Good riddance to bad justice" *Dominion Post* (New Zealand, 24 July 2009) at <http://www.stuff.co.nz/dominion-post/comment/editorials/2668928/Editorial-Good-riddance-to-bad-justice>

Provocation's Definitional Problems

The definition of provocation in the former s 169 was confusing. The test for provocation required a mixed subjective and objective approach by juries when assessing whether the defendant was acting under provocation. The defendant's 'power of self-control' was to be assessed objectively while all other 'characteristics of the offender' were assessed subjectively.

The leading case on the application of s 169 was *R v Rongonui*¹⁰. The majority, consisting of Tipping J, Richardson P and Blanchard J, held that jurors must first assess the gravity of provocation to the defendant on a scale of 1 to 10, taking account of all of his or her characteristics. Having determined gravity, the jury had to then decide whether a person with the ordinary power of self-control would have lost control in the face of provocation of that gravity.¹¹

Elias CJ and Thomas J dissented, arguing "the policy [of offering a partial defence of provocation] is not achieved by imposition of a standard impossible of attainment in the circumstances of the provocation because of the particular characteristics of the accused."¹² The dissenting judgment disagreed that the defendant's particular characteristics were only relevant to the gravity of provocation. Instead these characteristics were relevant to all stages including the assessment of whether the defendant had reduced power of self-control. The objective element of this approach was preserved by then requiring the jury to ask whether the accused ought to have restrained him or herself.¹³

The Law Commission's definitional concerns with the defence revolved around the distinction between these two approaches. The fact that courts throughout New Zealand and other common law jurisdictions vacillated between them created disharmony,

¹⁰ *R v Rongonui* [2000] 2 NZLR 385 (CA)

¹¹ Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007) at [235]

¹² *Ibid*, at [128]

¹³ *Ibid*, at [131]

confusion and continual appeals.¹⁴ Even when the correct approach, as articulated by the majority in *Rongonui*, was applied, the Law Commission believed juries struggled to understand it. This resulted in unmeritorious manslaughter convictions because of the requirement in criminal cases that defendants be given the benefit of the doubt.¹⁵

Provocation's Fundamental Flaws

The Law Commission did not believe the definitional problems above could be addressed through re-drafting the provision on provocation or developing new guidelines for juries, because the defence had underlying fundamental flaws.

The first of these normative arguments was that the defence excluded defendants who, through no fault of their own, were unable to meet the normal standard of self-control¹⁶. This would exclude vulnerable members of society from claiming the defence, such as mentally ill defendants who did not meet the requirements for the defence of insanity.

The second concern was that under the majority's approach in *Rongonui* a defendant's perception of the gravity of the provocation was treated subjectively while his or her self-control was treated objectively. Personal characteristics form the basis for both the defendant's perception of gravity and his or her capacity for self-control. The Law Commission thought it was arbitrary to distinguish between personal characteristics on the sole basis that they contributed to either self-control or perception of the gravity of provocation. Age and gender, for example, may be important in assessing self-control. The Law Commission pointed out that both personal characteristics have been recognized as legitimate modifiers of self-control¹⁷. This suggests it would be arbitrary to exclude other personal characteristics, such as race, religion and sexuality from the assessment of self-control. This would destroy the objective element of the defence, and exclude any normative assessment of whether the defence should succeed.

¹⁴ Ibid, at [71]

¹⁵ Ibid, at [75]

¹⁶ Ibid, at [81], [82]

¹⁷ Ibid, at 83

The third concern lay in two notions underpinning the defence: that loss of self-control can occur and that an ordinary person who has lost self-control will resort to homicidal violence. The Law Commission doubted both phenomena¹⁸. Perhaps modern psychiatry, psychology or common sense would suggest otherwise, although the Law Commission does not go into much detail on this point.¹⁹ Furthermore, even if such phenomena do exist, the justification of what is usually an angry resort to violence is not in accordance with society's values and should not be excused, even partially, by the law²¹.

The Law Commission's final concern was that the defence could be raised in cases, often successfully, excusing the killing of certain vulnerable groups. The Commission believed this was due to archaic community values associated with provocation. Examples of this were men making sexual advances towards other men and women being killed as a result of a partner or ex-partner's sexual jealousy or inability to accept that a relationship had ended.²² Conversely, the defence would often fail for vulnerable defendants who arguably deserved it, mostly notably a battered woman killing a violent spouse.²³ These factors suggested an imbalance in the use of the defence in favour of heterosexual men, who are far more likely to be involved in the situations in which the defence, inappropriately, succeeds. Women and homosexual men are likely to be the victims in these cases and the defence was likely to fail in cases where women might arguably deserve its protection. Because of this, the Law Commission felt the defence was gender (and presumably sexual-orientation) biased.²⁴

Whether the arguments raised by the Law Commission constitute sufficient reason to exclude provocation, even if re-worked, from New Zealand law will be discussed in later

¹⁸ Ibid, at [79]

¹⁹ Ibid, at [89]

²⁰ Although outside the scope of this dissertation, a medical or psychological input into the discussion and understanding of the way in which people commit homicide would greatly benefit legal policy and research in partial defences.

²¹ Law Commission *The Partial Defence of Provocation*, above n 11, at [95]

²² Ibid, at [96]

²³ Ibid, at [121]

²⁴ Ibid, at [96]

chapters. Given the proximity of the report to Parliament's abolition of provocation, it can be assumed that the Law Commission's objections formed the legal basis for the abolition of provocation in 2009, as opposed to the social and political reasoning discussed above.

Provocation In Other Jurisdictions

The status of provocation in other common law jurisdictions must be seen in light of each jurisdiction's sentencing regime. Some jurisdictions retain a mandatory life sentence for murder, meaning the divide between murder and manslaughter is even more pronounced because the sentencing for manslaughter is significantly more flexible. Jurisdictions with no mandatory life sentence for murder are usually more reluctant to abolish partial defences to murder, notwithstanding their defects.

Australia

Tasmania, Victoria, New South Wales and the Australian Capital Territory have discretionary sentencing for murder. The partial defence of provocation to murder was repealed in Tasmania in 2003²⁵ and in Victoria in 2005.²⁶ New South Wales²⁷ and the Australian Capital Territory²⁸ have retained the defence. In 1997, the New South Wales Law Reform Commission recommended a subjective test for provocation with the objective element being the requirement that a jury must be satisfied that a reduction of murder to manslaughter is warranted given the circumstances of the case.²⁹ The Australian Capital Territory legislation was amended in 2004 to provide that a non-violent sexual advance cannot form the sole basis for a plea of provocation.³⁰ Given the trend to limit the scope of provocation in this way or abolish it altogether in other

²⁵ Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas), s 4(b), repealing Criminal Code (Tas), s 160

²⁶ Crimes (Homicide) Act 2005 (Vic), s 3

²⁷ Crimes Act 1900 (NSW), s 23

²⁸ Crimes Act 1900 (ACT), s 13

²⁹ at [2.23], [2.39]

³⁰ Crimes Act New South Wales Law Reform Commission *Partial Defence to Murder: Provocation and Infanticide* (Report 83, 1997) 1900 (ACT) s 13(3), inserted by Sexuality Discrimination Legislation Amendment Act 2004 (ACT), s 3, sch 2 pt 2.1

Australian states, it is likely the New South Wales Law Reform Commission's recommended subjective test would no longer be proposed in New South Wales.

There is a mandatory life sentence for murder in South Australia, Northern Territory and Queensland. In South Australia, the defence exists at common law.³¹ Northern Territory³² and Queensland³³ have retained their statutory formulations of provocation. In 2008 the Queensland Law Reform Commission undertook a comprehensive review of provocation. It considered the arguments for retaining and abolishing provocation were finely balanced but, while a mandatory life sentence murder existed, that balance was tipped in favour of retaining provocation.³⁴ The Queensland Law Reform Commission also proposed the option of switching the onus of proving provocation at trial to the defence.³⁵

Western Australia was in a similar position to Queensland until August 2008, when the defence of provocation was abolished along with the mandatory life sentence for murder.³⁶ As in New Zealand, Western Australia now has a presumption in favour of life imprisonment for murder.³⁷

Canada

There is a statutory partial defence of provocation in Canadian law that, if pleaded successfully, results in a verdict of manslaughter.³⁸ Both second and first degree murder in Canada attract a mandatory life sentence.³⁹

³¹ See, for example, *R v R* (1981) 28 SASR 321; *R v Singh* (2003) 86 SASR 473; *R v Lem* [2005] SASC 405.

³² Criminal Code (NT), s 158

³³ Criminal Code (QLD), s 304

³⁴ Queensland Law Reform Commission *A Review of the Defence of Provocation* (WP 63, 2008) at [12.41]

³⁵ *Ibid*, at [12.70]

³⁶ Criminal Law Amendment (Homicide) Act 2008 (WA)

³⁷ Criminal Code (WA), s 279

³⁸ Criminal Code R.S.C 1985 c. C-46, s 233

³⁹ Criminal Code R.S.C 1985 c. C-46, s 235

The United Kingdom

The common law defence of provocation was abolished in England and Wales in 2009⁴⁰ and replaced by a partial defence to murder of loss of control.⁴¹ This defence resembles the defence of provocation but clarifies certain aspects. The loss of control does not have to be sudden and sexual infidelity is not regarded as a basis for the defence. This amendment to the law came after considerable deliberation on the state of the law relating to homicide and partial defences to murder. Despite the flaws in the provocation defence, the Law Commission recommended the retention of the partial defence in 2003, but with certain changes to its statutory wording.⁴² While England and Wales have a mandatory sentence for murder⁴³, the Law Commission maintained that even if the mandatory sentence were abolished, provocation should remain a partial defence to murder.⁴⁴ In 2006 the Law Commission recommended a graduated hierarchy of homicide offences consisting of manslaughter, second degree murder and first degree murder.⁴⁵ Under this regime provocation would result in a charge of second degree murder with a discretionary sentence. The Ministry of Justice rejected these proposals, instead opting for the loss of control defence.⁴⁶

There is a partial defence of provocation in Scottish common law, though its grounds are limited to violent conduct and infidelity.⁴⁷ Scotland has a mandatory life sentence for murder.⁴⁸ Courts in Scotland have recently observed that the law regarding provocation is

⁴⁰ Coroners and Justice Act 2009 (UK), s 56

⁴¹ Coroners and Justice Act 2009 (UK), s 54

⁴² Law Commission (England and Wales) *Partial Defences to Murder* (Final Report, 2004), at [3.168]

⁴³ Murder (Abolition of Death Penalty) Act 1965 (UK), s 1

⁴⁴ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42, at [3.15], [3.168]

⁴⁵ Law Commission (England and Wales) *Murder, Manslaughter and Infanticide* (Law Com no 304, 2006) at [2.33]

⁴⁶ Ministry of Justice for England and Wales *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (CP19/08, 2008), at [24]

⁴⁷ Law Commission *The Partial Defence of Provocation*, above n 11, at 149

⁴⁸ Murder (Abolition of Death Penalty) Act 1965 (UK), s 1

in need of reform and that this is best addressed through legislation.⁴⁹ Although the Scottish Law Commission intended to review the law on provocation in its Seventh Programme of Law Reform⁵⁰, this has now been postponed and is to be included in a general review of the law of homicide as part of the Commission's Eighth Programme of Law Reform, which commenced in January 2010.⁵¹

Ireland

Provocation exists as a partial defence in Ireland at common law based on a predominantly subjective test as to whether provocation took place.⁵² The Irish Law Reform Commission considered many of the common criticisms of provocation, including the stance taken by the New Zealand Law Commission.⁵³ It concluded that provocation should be retained in Ireland,⁵⁴ but that a mixed objective-subject test for provocation, such as the one that existed in New Zealand, should be implemented.⁵⁵ Murder attracts a mandatory life sentence in Ireland⁵⁶. The Law Commission noted that, "jurisdictions that have abandoned the mandatory penalty for murder are more likely to recommend abolition."⁵⁷ However the Law Commission based its recommendation to retain provocation not only on sentencing principles, but also on the "important moral boundary" between murder and manslaughter.⁵⁸

Conclusion

⁴⁹Scottish Law Commission *Seventh Programme of Law Reform* (Report 198, 2005) at [2.50]

⁵⁰ *Ibid*, at [2.46]

⁵¹ Scottish Law Commission *Eighth Programme of Law Reform* (Report 220, 2010) at [2.13]

⁵² Law Reform Commission (Ireland) *Defences in Criminal Law* (LRC 95, 2009) at [4.69]

⁵³ *Ibid*, at [4.22]

⁵⁴ *Ibid*, at [4.42]

⁵⁵ *Ibid*, at [4.114] – [4.116]

⁵⁶ Criminal Justice Act 1990 (Ireland), s 2

⁵⁷ Law Reform Commission (Ireland) *Defences in Criminal Law* at [4.21]

⁵⁸ *Ibid*, at [4.40]

The defence of provocation in New Zealand was repealed due to public and political dissatisfaction with the defence, induced by certain unpopular cases in which it had been raised. Several years prior to the abolition of provocation the Law Commission had recommended its repeal, citing both definitional and fundamental problems with the defence.

While there is a trend towards the abolition of provocation as a partial defence to murder throughout common law jurisdictions that have a discretionary life sentence for murder, this is not invariably the case. Even in jurisdictions with a mandatory life sentence for murder, some law reform commissions have indicated that even if a mandatory life sentence did not exist provocation should be retained as a partial defence.

Chapter 2

The defence of provocation is one way of dealing with situations in which a defendant whose actions meet the normal requirements for murder is not considered fully morally culpable for that offence. To avoid an overly harsh approach to criminal liability, it is not possible to ignore factors that lead to such reduced culpability. Since the repeal of provocation, the current position in New Zealand is to consider such factors at sentencing. In addition to being the automatic consequence of abolishing the defence, this was the legal solution envisaged⁵⁹ by the Law Commission as the most appropriate option for dealing with murder cases that have any element of reduced culpability outside of the legally available defences.

Sentencing Law for Murder in New Zealand

In order to accommodate lower levels of culpability, a sentence would have to be adjusted accordingly. Although New Zealand does not have a mandatory life sentence for murder, the ability to adapt sentences for convicted murderers is highly limited by section 102 of the Sentencing Act 2002. This provision requires that those convicted of murder must receive a sentence of life imprisonment unless such a sentence would be “manifestly unjust”.

According to the Court of Appeal’s judgment in *R v Rapira*⁶⁰, this threshold is a high one and is likely to be met only in exceptional cases. The threshold was met in *R v Law*⁶¹ where an elderly woman suffering from Alzheimer’s disease was killed by her husband in what was described as a mercy killing. This suggests that in cases that evoke extreme sympathy and have a clear element of reduced culpability, there will be discretion in sentencing. However, cases in which the presumption in favour of life imprisonment is overcome are rare.

⁵⁹ Law Commission *The Partial Defence of Provocation*, above n 11, at 13

⁶⁰ *R v Rapira* [2003] 3 NZLR 794; (2003) 20 CRNZ 396 (CA), at p 828

⁶¹ *R v Law* (2002) 19 CRNZ 500

In considering sentencing for murder, the term ‘life imprisonment’ is misleading in many cases. After a sentence of life imprisonment is imposed, a minimum term of imprisonment is then established. This must be at least ten years.⁶² If any of the factors listed in s 104(1) were present in the commission of the offence, the minimum period of imprisonment must be at least 17 years unless it would be manifestly unjust for it to be so. In identifying the minimum period of imprisonment, the court must consider the optimum length of time that would satisfy the goals of holding the offender to account, denouncing his or her conduct, deterring such conduct, and protecting the community from the offender.⁶³ Once the minimum period of imprisonment has been served, the decision as to whether and when to release the offender becomes that of the Parole Board and the guiding principle in assessing this is the protection of the community.⁶⁴

The Sentencing and Parole Reform Act 2010 amended the Sentencing Act 2002 so that if an offender has had a warning under s 86B(1) or s 86B(2) for a previous offence that is listed as a serious violent offence under s 86A, a life sentence without parole will be imposed unless it would be manifestly unjust to do so. In such a situation a minimum period of imprisonment of at least 20 years must be imposed unless that would be manifestly unjust, in which case there must be a minimum period of at least ten years. This scheme will apply to any serious violent offences, including murder, committed after the Act came into force on 1 June 2010.

Provocation as a Consideration at Sentencing

Due to the fact that the partial defence of provocation was abolished for homicides committed after 7 December 2009, there are few cases to indicate how courts view the statutory provisions on sentencing for murder following abolition of provocation. The little case law there is suggests that courts will maintain the high threshold in overcoming the presumption in favour of life imprisonment for murder.

⁶² Sentencing Act 2002, s 102

⁶³ Sentencing Act 2002, s103

⁶⁴ Bruce Robertson (ed) *Adams in Criminal Law* (looseleaf ed, Brookers) at [SA103.01A]

*R v Gempton*⁶⁵

Provocation was available as a defence to murder at the time of the offender's trial. The offender's counsel alleged that the defence was extremely unpopular at the time due to the *Weatherston* case and it was not raised on the assumption that it would instead be relevant at sentencing. Because of this, the reasoning of the Court of Appeal in this case may be indicative of the position the court would have taken even if the defence had not been legally available.

In the High Court, Chisholm J held that provocation could be taken into account in determining whether a life sentence would be manifestly unjust and that in this case there had been elements of provocation. Despite this, it was held that imposing a life sentence would not be manifestly unjust in this case. The Court of Appeal upheld this decision.

The victim, Mr Constable, was known to the offender. The offender had seen evidence that Mr Constable had a propensity for violence and he had also expressed anger that Mr Constable had 'narked' on a friend. Mr Constable arrived at the house where the offender and others were drinking with Mr Constable's estranged partner, Ms Coombes. She went out to see him and he tried to get her inside his car. Those present at the house thought Mr Constable was trying to abduct her and chaos broke out as they tried to stop this occurring. During the altercation, the offender stabbed Mr Constable to death.

Although the offender claimed he was acting in response to his impression that Ms Coombes was being abducted and that his own partner had been kicked by Mr Constable, Chisholm J placed weight on the offender's premeditation, evidenced by him arming himself, as well as his verbal threats towards the deceased and the multiple stab wounds he had inflicted in addition to the fatal blow. Agreeing that these circumstances made it impossible to displace the presumption in favour of life imprisonment, the Court of Appeal also observed that defence counsel should have raised provocation at trial, with the role of the trial judge being to ensure that the jury assessed provocation free from any prejudice against the defence. Both the sentencing judge and the Court of Appeal were

⁶⁵ *R v Gempton* [2011] NZCA 349

influenced by the fact that provocation was not raised at trial when it could have been, suggesting defence counsel did not have confidence the elements of the defence would have been met in this case. Consequently, *Gempton* may not be entirely analogous to the current situation of offenders who are unable to raise provocation at trial.

*R v Hamidzadeh*⁶⁶

The murder committed in this case took place after provocation was abolished. In the High Court, Courtney J held that provocation factors can be taken into account in determining whether the presumption in favour of life imprisonment is displaced and on the appropriate minimum term of imprisonment if the presumption is not displaced.

Provocation factors were found to exist in this case. The offender had suspected his wife, from whom he was separated, of having a sexual relationship with his friend. He was living with them both and recorded evidence of them having sex. On hearing the recording, the offender stabbed his friend to death. Courtney J rejected defence counsel's submissions that the case should be treated comparably to a case in which the offender had a murder conviction reduced to manslaughter due to provocation. Sentencing in this way would undermine the fact that the defence had been abolished. Courtney J reinforced the point that the presumption in favour of life imprisonment is a strong one and in this case the offender's shock at finding out about the affair and his isolation as a new refugee to New Zealand did not overcome the presumption.

Nevertheless, it was held that provocation made it manifestly unjust to impose a minimum term of imprisonment of 17 years or more, as required by the fact that the murder was 'brutal and callous' under s 104. The intense emotional pressure caused by the offender's discovery of his wife and best friend's sexual relationship, as well as his isolation in New Zealand, combined to displace the presumption in favour of a minimum term of at least 17 years. Together with the offender's remorse and early guilty plea, these factors resulted in a sentence of life imprisonment with a minimum term of 12 and a half years in prison.

⁶⁶ *R v Hamidzadeh*. HC Auckland, CRI-2010-004-19353, 25 August 2011

Implications of *Gempton* and *Hamidzadeh*

Limited though the case law is at this stage, *Gempton* and *Hamidzadeh* suggest that the threshold for assessing whether a life sentence is manifestly unjust will remain high. It is relevant that in *Hamidzadeh* the judge was confronted with a set of facts characterized by a feature the defence of provocation was criticized for excusing, notably sexual jealousy. If confronted with a set of facts outside this context, it is possible that a court would view the manifestly unjust threshold differently. However, this is unlikely given the lack of precedent, other than in the case of a mercy killing attracting considerable sympathy. It seems that courts may be more willing to use provocation factors in assessing the minimum term of imprisonment and these factors will more easily displace the presumption in favour of a minimum term of 17 or more years imprisonment in cases in which s 104 applies.

*R v Taueki*⁶⁷

If a sentence of life imprisonment for murder were to be rejected, *R v Taueki* gives an indication of how provocation might be taken into account. In sentencing for grievous bodily harm, the first stage is classifying the offence in one of three bands, each with a different range of sentencing starting points. The sentencing starting point is then determined. The personal circumstances of the offender, with reference to the factors mentioned in ss 8 and 9 of the Sentencing Act, are then considered to determine whether the end sentence should be higher, lower or the same as the starting point.

In *Taueki* the Court of Appeal identified certain aggravating and mitigating factors to guide the determination of the appropriate band and the sentencing starting point. Mitigating factors are provocation and excessive self-defence. Neither of these factors was present in the offending by the three offenders in *Taueki*. In *R v Edwards*⁶⁸ and *R v Moa*⁶⁹ provocation was found to be a mitigating factor at sentencing. Both offences were

⁶⁷ *R v Taueki* [2005] 3 NZLR 372

⁶⁸ *R v Edwards* DC Tauranga CRI-2009-070-1721 22 July 2010

⁶⁹ *R v Moa* HC Auckland CRI 2008-092-001318 23 April 2009

found to fall within band two, meaning the starting point was between five and ten years imprisonment. While the starting point in *Edwards* would have been seven years, it was reduced by six months due to provocation. Provocation in *Moa* also reduced the starting point by six months, although the starting point in this case would otherwise have been six years.

If this process were to be followed for murder it would operate in the following way. If the presumption in favour of life imprisonment were overcome, starting points would have to be identified for murder sentencing. These starting points would be reduced by a little less than ten percent in cases where provocation was considered to be a mitigating factor.

There are two reasons that suggest that the threshold for overcoming the presumption in favour of life imprisonment would have to be lower than it is currently interpreted before a similar process to sentencing for grievous bodily harm could exist for murder. First, a number of cases would have to be considered to establish starting points for murder sentences that do not require a sentence of life imprisonment. The strong presumption in favour of life imprisonment means not enough cases will succeed for the courts to consider this issue. Secondly, cases that will currently overcome the presumption in favour of life imprisonment consist of sets of facts with highly mitigating factors. The extent of these mitigating factors will usually mean that a very low sentence will be imposed. This would constitute a far greater reduction than the ten percent reduction that typically applies in sentencing for grievous bodily harm.

The Repercussions of Assessing Provocation at Sentencing

The following arguments rest on the assumption that the current trends in sentencing for murder will continue. There is potential for flexibility in New Zealand that is not available in jurisdictions that have a mandatory life sentence for murder, due to the possibility of courts applying the elements of s 102 more leniently and increasing the instances in which a departure from a sentence of life imprisonment is possible. While

the two cases discussed above indicate a reluctance to do so, it is early days and when faced with facts that induce more sympathy, it is possible the abolition of provocation could contribute to a new approach to the application of s 102.

One of the major repercussions of assessing provocation at sentencing is that offenders will gain higher sentences than they would if provocation were treated as a partial defence. For example, in comparison to the sentence of life imprisonment with a minimum term of twelve and a half years in *Hamidzadeh*, the offender in *R v Boyles*⁷⁰ was found guilty of manslaughter due to provocation and received a sentence of nine years imprisonment on relatively similar facts. The Law Commission's comments on this issue were that "if provocation is repealed on the policy basis that the defendants who rely upon it are not inherently more deserving of favourable treatment than many others who are presently convicted of murder, then it would make no sense to endorse and take steps to ensure an ongoing lower tariff simply for provocation."⁷¹

Despite this, the Law Commission acknowledged that a more flexible approach to murder sentencing would be desirable but "that is a different issue".⁷² Although it is a different issue, it is a crucial in the evaluation of whether sentencing is the appropriate option for dealing with reduced culpability in murder. The Commission's desire for flexibility implies that there may be mitigating aspects to murder that should result in lower sentences. These cases currently fall under an inflexible sentencing regime. If flexible sentencing is desired, a verdict of manslaughter can provide this because there is no mandatory life sentence attached to this offence.

Instead, the Law Commission believed a solution lay in guidelines for murder sentencing. The Commission had previously recommended that a Sentencing Council be established to draft guidelines for sentencing judges.⁷³ At the time the report on provocation was

⁷⁰ Boyles found out his wife, from whom he was separated, was having a sexual relationship with another man. He stabbed both his wife and her new partner to death.

⁷¹ Law Commission *The Partial Defence of Provocation*, above n 11, at [196]

⁷² Ibid

⁷³ Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006)

published, the Sentencing Council had recently been established by the Sentencing Council Act 2007. The Law Commission recommended that guidelines be drafted by the Council to address how provocation and other mitigating factors in murder should affect sentencing and, in particular, by clarifying when a departure from the presumption of life imprisonment should take place.⁷⁴ These guidelines did not eventuate and the Sentencing Council was abolished by the National Government in 2008.

With the loss of the Sentencing Council, the Law Commission's proposed solution to provide more flexibility in murder sentencing has not come to pass. Instead of accommodating cases of reduced culpability in murder, sentencing now excludes such reduced culpability, except in extreme cases that can fall under the 'manifestly unjust' threshold.

It would have been helpful if the Law Commission had addressed this further. The Commission relied on the fact that many cases of provocation recognized reduced culpability in situations in which the Commission argued it should not be recognized⁷⁵, such as situations of sexual jealousy as in *Hamidzadeh* and *Boyles*. The Commission also mentioned situations, notably battered women and mercy killings, where reduced culpability might justifiably exist⁷⁶. Apart from recommending Sentencing Council guidelines, the Commission did not address how these cases would be adequately accommodated at sentencing, nor whether there are any other situations in which reduced culpability should be recognized.

Should Criminal Law Recognize Elements of Reduced Culpability in Murder?

A difference in culpability is recognized in homicide in the distinction between murder and manslaughter. In addition, there is no culpability for murder in cases of self-defence and insanity. The next dilemma is whether the criminal justice system will accommodate

⁷⁴ Law Commission *The Partial Defence of Provocation*, above n 11, at [208]

⁷⁵ *Ibid*, at [96]

⁷⁶ *Ibid*, at [105]

situations in which culpability in murder is reduced but not entirely excused or justified. New Zealand law does recognize such reduced culpability if a woman has killed her child due to the balance of her mind being disturbed as a consequence of childbirth or breastfeeding.⁷⁷ In such a situation a charge of murder may result in a conviction for manslaughter or infanticide. For infanticide the maximum sentence is three years imprisonment. Instances of killing pursuant to a suicide pact result in a conviction for manslaughter⁷⁸. Thus the criminal justice system does accommodate aspects of reduced culpability, raising the question of whether there are other situations that warrant a legal recognition of reduced culpability.

Because this issue is mired with complex moral and social policy considerations, it is difficult to conclude with any certainty that particular situations warrant a lesser degree of criminal liability. Despite this, empirical and anecdotal evidence confirm different social perceptions of culpability for murder. As part of its project on Partial Defences to Murder⁷⁹, the Law Commission of England and Wales commissioned a study by Barry Mitchell to assess public perceptions of murder.⁸⁰ While the study was considered ‘empirical’ due to its small sample size⁸¹, it does indicate that respondents recognized marked variations in the seriousness of different hypothetical homicide scenarios⁸².

The scenario that was consistently identified as least serious among respondents was a mercy killing. The hypothetical facts described a murder in which a man smothers his terminally ill wife with a pillow after years of her requesting him to put her out of her misery.⁸³

⁷⁷ Crimes Act 1961, s 178

⁷⁸ Crimes Act 1961, s 180

⁷⁹ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42

⁸⁰ *Ibid*, at 110

⁸¹ 62 people were interviewed, though a wide range of backgrounds were represented, including 15 relatives of murder victims.

⁸² *Ibid*, at 195

⁸³ *Ibid*, at 191

Of the other cases that received sympathy from respondents, ranked by perceived seriousness, the scenario that on average was viewed as the second least serious was that in which an Asian woman returns home to find two white men raping her daughter. She grabs a kitchen knife and the two men shout racist abuse at her and begin to run away. She chases them and stabs them.⁸⁴

The next scenario was based on the English case of *Camplin*⁸⁵ where, after having consensual sex with the male victim, the 15-year-old male offender was ridiculed by the victim and felt ashamed. He picks up a frying pan and hits the deceased over the head with it repeatedly.⁸⁶

Taking the further scenario of a battered wife, the hypothetical facts were that a woman had been abused physically and verbally by her husband for many years. After one such assault, she decides she can ‘take no more’ and kills him after he falls asleep.⁸⁷

At the other end of the spectrum of perceived seriousness, situations that were viewed with much less sympathy included a contract killing⁸⁸, a husband killing his wife after finding out she had committed adultery⁸⁹ or was about to leave him for another man⁹⁰, and the killing of a crying baby⁹¹.

Even within these findings a broad range of opinions could be found on each scenario.⁹² More sympathy was expressed towards those killers who reacted emotionally due to

⁸⁴ Ibid, at 185

⁸⁵ *R v Camplin* [1978] AC 705

⁸⁶ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42, at 185

⁸⁷ Ibid, at 182

⁸⁸ Ibid, at 188

⁸⁹ Ibid, at 192

⁹⁰ Ibid, at 191

⁹¹ Ibid, at 187

⁹² Ibid, at 195

anger, fear or ongoing stress.⁹³ The existence of a mental abnormality in the killer also tended to lead to a reduction in perceived culpability.⁹⁴

Scenarios based on New Zealand case law exhibit elements attracting considerable sympathy and, arguably, reduced culpability. *R v King*⁹⁵ has similar facts to the battered woman scenario in Mitchell's empirical study. The offender's partner had been physically and emotionally abusive towards the offender and her daughters for eight years. One night after they had had an argument, during which he had threatened violence, she put 30 sleeping pills in his meal and watched him eat it, knowing this dosage would likely result in his death.

It is not only women who can be subjected to considerable domestic violence. In *R v Erstich*⁹⁶, the accused was a 14-year-old boy who had been subjected to ten years of serious physical abuse by his father. He had run away from home and was living with his grandparents when his father visited their house to find his brother who had also run away from home. The offender's father gave him a look that reminded him of the violence to which he had been subjected. The following day, the offender took a gun, went to his father's house and fatally shot him to 'get him out of his head'.

*R v Simpson*⁹⁷ has many of the elements of the mercy killing scenario in Mitchell's empirical study. The accused's mother was in considerable pain due to her terminal cancer. The offender, a doctor, had previously been told by his mother that she did not want to die a drawn out death. After her condition worsened, he went to his mother's house where he showed signs of being in a hypomanic state as a result of his bipolar disorder. His relatives encouraged him to alleviate his mother's pain and he gave her what he thought would be a fatal dose of drugs. This did not kill her so he gave her a different combination of drugs, which continued to have no lethal effect. After

⁹³ *Ibid*, at 195

⁹⁴ *Ibid*, at 196

⁹⁵ *R v King* (1987) 7 CRNZ 591 (CA)

⁹⁶ *R v Erstich* (2002) 19 CRNZ 419 (CA)

⁹⁷ *R v Simpson* HC Auckland T010609 12 October 2001

smothering his mother with a pillow failed to kill her, he strangled her with the cord of her morphine pump.

*R v Bourke*⁹⁸ also has elements of a mercy killing, though the illness involved was mental, rather than physical, and was not terminal. The accused, who shared an extremely close relationship with his brother, was begged continuously by his severely depressed brother to kill him. The accused resisted at first but finally gave in and fatally shot him.

In *R v Tamatea*⁹⁹, the killing was initiated in response to sexual assault committed against the daughter of one of the three offenders. The deceased had been drinking with the three offenders and had sexually assaulted the female offender's daughter. The female offender had confronted him and attacked him. He left, after which the three offenders made the decision to find a babysitter for the children and pursue him. They went to his home, made him get into their car and drove him around for an hour before stopping and beating him to death with a hammer. Because the female offender did not take part in the fatal beating, the manslaughter verdict she received could have been based on either the finding that she did not have a common intention with the other offenders to kill the deceased or that the partial defence of provocation applied.

There are also cases where offenders may attract considerable sympathy, even where the actions of the victim involved no serious wrongdoing. In *R v Rongonui*¹⁰⁰, the victim's only act was to refuse to babysit the offender's children, though there were a number of other factors partially excusing the offender stabbing the victim to death. In the previous 24 hours the offender had been sexually assaulted, had discovered her partner in bed with another woman, had then been hit by her boyfriend, and had received a letter from Child, Youth and Family Services, which indicated to her that her children would be taken away from her. She asked her neighbour to babysit her children in order to resolve the situation with Child, Youth and Family Services. In addition to these factors, the offender was

⁹⁸ *R v Bourke* HC Palmerstone North CRI-2009-054-4180, 14 December 2010

⁹⁹ *R v Tamatea* 24/10/08, Miller J, HC Palmerston North CRI-2007-054-3683

¹⁰⁰ *R v Rongonui*, above n 10

brain damaged due to previous drug use and functioned at the mental age of a child or young person.

Another example of background factors reducing culpability is *R v Campbell*¹⁰¹. In this case, the deceased, a family friend, had smiled and put his hand on the offender's thigh. While a non-violent intimate advance by one man towards another should not normally partially excuse a violent response, the offender had been sexually abused as a child by another family friend. He had also been seriously burned by a falling jug of boiling water as a toddler. Expert witness given at trial had indicated that these two traumatic events had created post-traumatic stress disorder in the offender and that when reminded of the sexual assault by the victim's expression and action, he had lost all sense on control and beat the victim to death with a poker.

These New Zealand cases, combined with the scenarios and results of Mitchell's empirical study, show that there are examples of murders that attract considerable sympathy, suggesting it is appropriate to recognize reduced culpability at law in some situations. The difficult question remains of how to recognize such reduced culpability.

Is Sentencing the Most Appropriate Stage to Deal With Elements of Reduced Culpability in Murder?

Assuming that reduced culpability is an element that should be incorporated into the law relating to murder, there are a number of considerations that indicate that sentencing is not the ideal forum for addressing reduced culpability. In the choice of whether reduced culpability should be addressed by a sentencing judge or at trial with in the input of the jury, the latter option is more appropriate on several grounds.

These issues can be seen in light of the underlying doctrine of criminal law. While "it is sentencing, largely, that gives criminal law its bite"¹⁰², convictions themselves are one of criminal law's most distinctive elements, and a conviction is regarded as a penalty in its

¹⁰¹ *R v Campbell* [1997] 1 NZLR 16

¹⁰² Andrew Ashworth *Principles of Criminal Law* (5th ed, Oxford University Press, New York, 2006), at 19

own right.¹⁰³ Thus in assessing criminal liability the correct conviction as well as the correct sentence must be sought. While manslaughter and murder are both forms of culpable homicide, manslaughter has less moral stigma attached to it. If a killing deserves less moral stigma because of circumstances that reduce the offender's culpability, the offender should accordingly be convicted of manslaughter. This has been called an issue of 'fair labeling'¹⁰⁴. The role of defences is to ensure that the appropriate label and level of censure is applied where a person's conduct "does not exhibit sufficient culpability for conviction for that offence."¹⁰⁵

Another effect of relying solely on sentencing is to exclude the jury from the process of assessing reduced culpability. Although the question of whether juries are the optimum method of assessing criminal liability is outside the scope of this dissertation, juries play an important role in New Zealand's criminal law system and the Law Commission's arguments have been criticized for underplaying this role.¹⁰⁶

Decisions made by judges alone lack the injection of community values and representation of society as a whole that the juries provide¹⁰⁷. Juries are also the 'fact finders'¹⁰⁸ of criminal law. The determination of whether reduced culpability exists for murder involves fact finding and the consideration of community values in determining whether society should recognize a particular offender as partially excused. Arguable, therefore, a finding of reduced culpability falls naturally within the role of the jury and not that of a sole sentencing judge. If the ability of juries to undertake this task is doubted, this implies doubt of the role of juries in assessing any form of criminal liability.

¹⁰³ AP Simester and GR Sullivan *Criminal Law Theory and Doctrine* (Hart Publishing, Oregon, 2000), at 4

¹⁰⁴ For example, by Elisabeth McDonald "Comparative Homicide" [2008] NZLJ 283 at 284

¹⁰⁵ AP Simester and GR Sullivan, above n 103, at 638

¹⁰⁶ Charles Cato and Meredith Connell "Criminal defences and battered defendants" [2002] NZLJ 35 at 43

¹⁰⁷ *Ibid*

¹⁰⁸ *Ibid*

There is no indication in the Law Commission's report, nor any other commentary on partial defences to murder, of any a desire to overhaul the jury system in New Zealand.

There is also a pragmatic reason for allowing partial defences to homicide. Without such defences, juries are confronted with two extreme alternatives: a conviction for murder that is likely to attract a life sentence, or an acquittal. In cases in which sympathy arises for the accused it is possible that juries will refuse to convict offenders for whom some criminal responsibility should attach¹⁰⁹. For example, most would have great sympathy for battered women who kill their partners, or a parent who lashes out at someone who has been found abusing their child. Nevertheless, the law must deter resort to violence in such situations. While the community may sympathize with such offenders, it is more appropriate for their situations to be dealt with by recourse to the appropriate authorities and the criminal law.¹¹⁰ It is also possible that juries would convict defendants for manslaughter rather than murder on the basis of their sympathy for the defendant rather than on any rational ground¹¹¹.

Conclusion

Sentencing for murder in New Zealand is inflexible as a result of the presumption in favour of life imprisonment in s 102 and its interpretation by sentencing judges. The Law Commission has acknowledged that sentencing for murder is rigid and that a more flexible approach would be desirable. Its solution - sentencing guidelines produced by a sentencing council - has not come to pass. Therefore there is very limited scope in sentencing for reflecting any reduced culpability in murder. Example of murder cases in New Zealand, in addition to Mitchell's empirical study in England and Wales, suggest there are cases that invoke considerable sympathy deserving recognition of lessened culpability in criminal law.

¹⁰⁹ Queensland Law Reform Commission, above n 34, at [7.131]

¹¹⁰ Charles Cato and Meredith Connell, above n 106, at 41

¹¹¹ Letter from the Criminal Law Committee of the New Zealand Law Society to Dr Warren Young, Commissioner at the Law Commission (20 December 2004)

Not only does the rigidity of sentencing law mean that sentencing is not an appropriate setting for dealing with such reduced culpability, there are other considerations which support reduced culpability being considered at trial. Convictions play as important a role in criminal law as sentences and so it is important that offenders are convicted accordingly, with a conviction entailing less moral stigma if less moral stigma exists. The role of juries in New Zealand's criminal justice system is to act as 'fact finders' and to bring community values into play. Assessing reduced culpability involves both of these roles. There is also the risk that if faced with a case that invokes considerable sympathy juries will acquit a defendant or return a conviction of manslaughter on arbitrary grounds.

Chapter 3

The partial defence of provocation has attracted a number of criticisms. This part will consider the criticisms raised by the New Zealand Law Commission and whether they are fatal to the defence as an option for accommodating reduced culpability in murder. It may be that statutory reformulation of provocation is possible to address its flaws.

The Law Commission's Criticism of Provocation

The Law Commission's Normative Criticism of Provocation

The Law Commission argued that provocation does not include defendants who are unable to meet the normal standard of self-control through no fault of their own¹¹². This results in mentally ill defendants being unable to raise the defence. Rather than being a fatal flaw in provocation, this problem indicates that there are situations in addition to those that fall under provocation that need to be recognized as attracting reduced culpability. A possible way of addressing this is to introduce a partial defence of diminished responsibility, which will be discussed in Chapter 4.

The Law Commission's further criticism concerns the difference in treatment of personal characteristics as they relate to the perception of gravity and as they relate to the defendant's capacity for self-control¹¹³. Gravity is treated subjectively, so personal characteristics can be taken into account, while self-control is treated objectively, meaning the defendant's personal characteristics cannot be taken into account. The Commission thought that the difference in treatment of personal characteristics based on whether they related to gravity or self-control was arbitrary and was not in fact applied in practice, because the personal characteristics of age and gender had been used to assess the required standard of self-control in some cases¹¹⁴. The Commission did not see it as a solution to simply allow all personal characteristics to be taken into account when

¹¹² Law Commission *The Partial Defence of Provocation*, above n 11, at [81], [82]

¹¹³ *Ibid*, at [83]

¹¹⁴ *Ibid*, at [85]

assessing self-control because the objective element of the defence would then be destroyed¹¹⁵.

There may be personal characteristics, such as age and gender, which are relevant to an assessment of the standard of self-control expected of the defendant. This may partly diminish the objective element of the defence, but it does not eliminate it altogether. So long as consideration of personal characteristics related to self-control remains limited, an objective element will exist. Furthermore, objectivity in relation to self-control is not the only way of providing an objective component for provocation. As an alternative, under the test proposed by the New South Wales Law Reform Commission, which is similar to the minority approach in *Rongonui*, provocation would be assessed entirely subjectively, but the defence would only succeed if the jury was satisfied that the murder warranted a reduction to manslaughter.¹¹⁶

While the Law Commission's concerns about the differing treatment of personal characteristics raise relevant points concerning the optimal way of incorporating an objective element in provocation, they do not show that the defence is fatally flawed. It is unlikely that the Irish Law Commission would have recommended the same objective-subjective test that existed in New Zealand¹¹⁷ if this were the case.

The Law Commission also doubted whether a person can lose self-control and, if they can, whether an ordinary person who has lost self-control will resort to homicidal violence¹¹⁸. For example, the Law Commission pointed out that many relationships break down and only a small percentage of them result in murder¹¹⁹. While it is outside the scope of this dissertation to explore the psychological processes of those committing homicide, it is submitted that the concept of 'loss of self-control' can fit comfortably in a legal context. In the United Kingdom, the Ministry of Justice commented that the concept

¹¹⁵ *Ibid*, at 86

¹¹⁶ New South Wales Law Reform Commission, above n 29, at [2.23], [2.39]

¹¹⁷ Law Reform Commission (Ireland), above n 52, at [4.114] – [4.116]

¹¹⁸ Law Commission *The Partial Defence of Provocation*, above n 11, at [79]

¹¹⁹ *Ibid*, at [89]

of ‘loss of self-control’ simply exists to exclude cold-blooded, considered killings¹²⁰. On a pragmatic approach, the case law speaks for itself. As discussed above, there are many cases in which the offender’s conduct falls within the notion of a loss of self-control that result in homicidal violence.

The second limb of the Commission’s argument on this point was that, even if such phenomena exist, an angry resort to violence is not in accordance with society’s values and should not be partially excused¹²¹. Cases such as *R v Rongonui*, *R v Erstich* and *R v Bourke* suggest otherwise. The offenders in these cases did demonstrate an emotional, though not always angry, resort to violence yet their actions can be seen in a sympathetic light, suggesting there are some situations in which such killings should be partially excused.

Relatedly, the Law Commission’s final criticism of provocation was that the defence was used to partially excuse the killing of certain vulnerable groups and suffered from a gender imbalance favouring heterosexual men¹²². The prime examples of this were cases where the defence was raised in killings provoked by a non-violent homosexual advance, an inability of a male partner to accept his female partner leaving their relationship, or sexual jealousy by men whose female partner or ex-partner had entered a new sexual relationship. As decided cases illustrate, such situations have resulted in successful pleas of provocation.¹²³

¹²⁰ Ministry of Justice for England and Wales *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, above n 46, at [36]

¹²¹ Law Commission *The Partial Defence of Provocation*, above n 11, at [95]

¹²² *Ibid*, a [96]

¹²³ Examples include: *R v Ambach*, above n 8 and *R v Ross* (1992) 9 CRNZ 557 where the offender killed his ex-partner after an argument. He had thought reconciliation between them was possible and then discovered she was living with another man.

Although there could be some meritorious cases that would fall into these situations¹²⁴, most cases of killing due to sexual jealousy or a non-violent homosexual advance are not in accordance with society's values and should not be partially excused. This is a flaw in the partial defence of provocation, though not fatal. The social and legal context in which the defence of provocation has operated has changed dramatically since the 18th century¹²⁵, when the sight of a man in adultery with the accused's wife was sufficient to sustain the defence¹²⁶. The defence will remain appropriate in a modern context so long as it is interpreted in accordance with modern community values, rather than discarded.

The scope of provocation can be limited so that it does not succeed in cases that historically attracted provocation but which should not be excused in contemporary New Zealand society. Statutory provisions on provocation can expressly exclude certain grounds for provocation. For instance, in the Australian Capital Territory s 13 of the Crimes Act excludes non-violent sexual advances as the sole basis for a plea of provocation. In England and Wales, sexual infidelity cannot form the sole basis for the defence.¹²⁷ In addition to such statutory provisions, the role of the judge as gatekeeper in determining when the defence can be raised at trial is also a check on the availability of the defence in unmeritorious cases. In *R v Zhou*¹²⁸ the Court of Appeal upheld the trial judge's finding that there was no credible narrative to support a claim of provocation in circumstances where the accused had stabbed his wife to death after she said she wanted a divorce and allegedly had a new partner.

The Law Commission's Definitional Criticism of Provocation

The Law Commission observed that there was considerable vacillation in the case law between the different approaches to provocation, as represented in the majority and minority judgments in *R v Rongonui*. This created confusion and led to many appeals. If

¹²⁴ For example, *R v Campbell*, above n 101. Despite the victim's conduct being a non-violent physical touch (it is not clear it was enough to constitute a homosexual advance), the offender's personal history of sexual abuse and the pos-traumatic stress he suffered

¹²⁵ Queensland Law Reform Commission, above n 34 at [3.17]

¹²⁶ *R v Mawgridge*. (1707) Kel. 119

¹²⁷ Coroners and Justice Act 2009 (UK), s 54

¹²⁸ *R v Zhou* [2007] NZCA 104

provocation were to be reinstated, the relevant provision would have to clearly identify the correct approach. A possible provision that does so will be discussed below.

In addition, the Law Commission was concerned that, even using the correct majority approach in *Rongonui*, juries struggled to apply it. It has been suggested that the Law Commission's criticism on this point was exaggerated¹²⁹. As Sir Robin Cooke had earlier said on this point, "I am not aware that any Judge now serving complains that summing up in provocation is too hard."¹³⁰ Similarly, from the perspective of defence counsel, it has been claimed that, "the test is not beyond the wit of a jury and there is little evidence that the jury has struggled to apply s 169 criteria or that it has led to aberrant results."¹³¹ Aaron Perkins summarized the views of the Criminal Law Committee of the New Zealand Law Society on the role of the jury in this context: "no one disputes that section 169 is a complex provision but juries are assumed to cope with other complex provisions."¹³² An example given was s 48 of the Crimes Act, which involves a mixed objective-subjective test for self-defence.

Based on these observations, it would seem provocation is not unduly difficult for juries to apply when it is explained clearly to them. One way of doing so is to ask three questions¹³³:

1. Was there provocation?
2. If so, was the accused so moved by it as to lose the power of self-control?
3. Would the provocation have possibly caused us as ordinary members of the community to lose the power of self-control?

If the jury considers that the answer to all three questions is yes, the partial defence of provocation will succeed. In addition, statutory reformulation of provocation would clarify the application of provocation.

¹²⁹ Charles Cato and Meredith Connell, above n 106, at 39

¹³⁰ Sir Robin Cooke "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235, at 239

¹³¹ Charles Cato and Meredith Connell, above n 106, at 39

¹³² Letter from the Criminal Law Committee of the New Zealand Law Society, above n 111

¹³³ Charles Cato and Meredith Connell, above n 106, at 39

Possible Reformulation of Provocation

Given the current political climate, it is unlikely provocation will be reinstated as a partial defence to murder. If the defence were reinstated, a new provision could be developed to address some of the issues raised above. One option is the ‘loss of control’ defence that replaced provocation in England and Wales under ss 54 and 55 of the Coroners and Justice Act 2009.

Section 54 stipulates that the partial defence will apply if the defendant’s conduct in killing the victim resulted from a loss of self-control. The loss of self-control must have had a qualifying trigger and a person of the same age and sex of the defendant, with a normal degree of tolerance and self-restraint, might have reacted in a similar way to the defendant in the same circumstances. Section 55 establishes what can constitute a qualifying trigger. The loss of self-control must be attributable to the defendant’s fear of serious violence by the victim against the defendant or any other person. Alternatively, the loss of self-control must be attributable to things said or done by the victim, which constituted circumstances of a very grave character and caused the defendant to have a justifiable sense of being seriously wronged. According to the Ministry of Justice in the United Kingdom, the strength of this defence is that it provides for meritorious instances in which a partial defence should succeed but limits the scope of the defence to ensure that it would be difficult for the defence to succeed in unmeritorious cases.

Section 55 explicitly provides for excessive self-defence as constituting a qualifying trigger. This singles out one of the main situations in which the Ministry of Justice thought murder could be partially excused. However, the Ministry of Justice did not want to limit the defence to cases of excessive self-defence at the risk of excluding “situations which go far beyond what anyone could be reasonably be expected to deal appropriately with.”¹³⁴ While other situations may constitute a qualifying trigger, non-violent words

¹³⁴ Ministry of Justice for England and Wales *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, above n 46, at 33

and conduct can only form the basis for the loss of control defence in circumstances ‘of an extremely grave character’. This requirement was added to ensure that the many circumstances in which passions run high and result in murder are not partially excused. The Ministry of Justice considered that “such situations, however devastating for the individuals concerned, are essentially commonplace and people need to be able to deal with them without resorting to violence.”¹³⁵

The new loss of control defence was further limited by the express exclusion of sexual infidelity as a qualifying trigger. In addition, any reference to ‘provocation’ was removed to ensure that historical connotations related to the defence, such as sexual infidelity being a basis for the defence, were eliminated.

The English provision takes a similar approach to the judge’s gatekeeping role as illustrated in New Zealand by *R v Zhou*. Prior to this provision, any evidence, no matter how trivial, that a defendant was provoked to lose self-control meant that the judge had to leave the defence to the jury. Under s 54(6) the judge is not required to leave the defence to the jury unless there is evidence that a reasonable jury, properly directed, could conclude the defence might apply. This will ensure that clearly unmeritorious cases have no chance of success and, further, the victim’s family does not have to sit through evidence relating to the alleged conduct of the victim.

As well as decreasing the instances of provocation being raised or succeeding in unmeritorious cases, the English provision resolves ambiguities that formerly existed in New Zealand. The majority approach in *Rongonui* is confirmed, with the qualification that age and gender are relevant in assessing the defendant’s loss of control. The English provision also provides that the loss of control need not be sudden, meaning that certain vulnerable defendants, notably battered women, fall within its scope.

A possible shortcoming of the English provision is that it does not accommodate mercy killings because of the requirement in s 55 (4) (b) that the defendant has a justifiable

¹³⁵ Ibid, at 31

sense of being seriously wronged. If a defence based on the English provision were enacted in New Zealand, it could expressly include mercy killings as a qualifying trigger. Such a defence could also expressly exclude non-violent homosexual advances and sexual infidelity as the sole basis for the defence. This would exclude cases such as *Campbell*, in which the defendant's personal history led to an extreme response to an intimate advance by another man. However, such situations are better incorporated in a partial defence of diminished responsibility, as discussed in Chapter 4.

Conclusion

The Law Commission's normative critique of provocation raises many issues in relation to the former partial defence of provocation. Although the criticisms reveal defects in provocation, on examination, none is fatal. These problems, along with the Law Commission's definitional concerns, can be addressed by statutory reformulation of the defence. A successful reformulation could be based on the loss of control defence enacted in England and Wales. A few amendments have been identified that should be incorporated in the defence if it were reinstated in New Zealand.

Chapter 4

Whether or not provocation is reinstated in New Zealand, there are a number of other possible options for recognising reduced culpability in murder. Each of these options will be discussed in turn, with an indication of whether they are appropriate for New Zealand's criminal justice system.

Diminished Responsibility

Diminished responsibility operates as a partial defence to murder in a number of common law jurisdictions. It was first introduced in English law in s 2 of the Homicide Act 1957. The defence provides for defendants who have the relevant intent for murder but are so mentally impaired at the time of the killing that they should not be held fully accountable for it. As with provocation, a successful plea of diminished responsibility results in a manslaughter conviction.

While the defence has a statutory basis in England and Wales, diminished responsibility has been recognised in Scotland at common law since the early 20th century.¹³⁶ Diminished responsibility is a partial defence to murder in Ireland under s 6 of the Criminal Law (Insanity) Act 2006. Although there is no specific diminished responsibility defence in Canada, the tendency in some cases to find a lack of intent for murder on the grounds of a mental disorder not amounting to insanity has led to a 'de facto' diminished responsibility defence at Canadian law.¹³⁷ In Australia, New South Wales¹³⁸, Queensland¹³⁹, the Northern Territory¹⁴⁰ and the Australian Capital Territory¹⁴¹ recognise a partial defence of diminished responsibility.

¹³⁶ Scottish Law Commission *Discussion Paper on Insanity and Diminished Responsibility* (Discussion Paper No 122, 2003), at 33

¹³⁷ New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997), at [4.61]

¹³⁸ Crimes Act 1900 (NSW), s 23A(1)

¹³⁹ Criminal Code 1899 (Qld), s 304A

¹⁴⁰ Criminal Code 1983 (NT) s 159

¹⁴¹ Criminal Act 1900 (ACT), s 14

Should Diminished Responsibility Be a Partial Defence to Murder in New Zealand?

Regardless of whether provocation is reinstated, New Zealand should adopt a partial defence of diminished responsibility. A fundamental presumption in criminal liability is that the defendant is able to function within the normal range of mental and physical capabilities¹⁴². Diminished responsibility partially excuses any defendant who cannot function within the normal range of mental capability due to a mental abnormality that falls short of insanity.

The Criminal Law Society strongly supports the introduction of diminished responsibility in New Zealand¹⁴³. While the Law Commission acknowledged that the legal fraternity has often argued for a defence of diminished responsibility, the Commission rejected the adoption of the defence. Although the defences of provocation and diminished responsibility are based on entirely different moral grounds, the Commission suspected that the proponents of diminished responsibility were merely arguing for the defence in the hope its scope would be broadened so as to include many cases of provocation¹⁴⁴.

This is not necessarily the case. It is likely those advocating for diminished responsibility regard it as a defence in its own right. While diminished responsibility could be raised in cases in which provocation could also be raised, this does not prevent the jury from “understand[ing] the difference and apply[ing] them separately.”¹⁴⁵

There are a number of aspects of diminished responsibility that make it a good option for New Zealand. The defence does not focus on the victim’s conduct, one of the major

¹⁴² Andrew Ashworth, above n 102, at 203

¹⁴³ Letter from the Criminal Law Committee of the New Zealand Law Society, above n 111

¹⁴⁴ Law Commission *The Partial Defence of Provocation*, above n 11, at [15]

¹⁴⁵ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42, at [5.99]

criticisms of provocation in the public outcry that resulted in its abolition¹⁴⁶. Instead, the focus in diminished responsibility is on the defendant's state of mind, which eliminates the prospect of blame being imputed to the victim in trial proceedings.

Diminished responsibility has been successfully raised in cases of battered women and mercy killings¹⁴⁷, suggesting it would be an effective way of accommodating killings that are usually viewed in a sympathetic light. Many other homicide cases would also fall within the ambit of diminished responsibility. In some of these cases it would not normally be viewed as appropriate to partially excuse the defendant. Examples of this are men killing their ex-partners¹⁴⁸ and parents killing their children¹⁴⁹ (outside situations of legal infanticide). Mitchell's empirical study indicated that killers acting under mental conditions attract considerably more sympathy than killers acting within the normal parameters of mental functioning¹⁵⁰. This suggests that partially excusing defendants acting under a mental abnormality is appropriate, despite the fact that the killings might have elicited less sympathy in normal circumstances.

There is a further factor that indicates the defence of diminished responsibility is the next step for New Zealand's criminal law. Infanticide effectively provides a defence of diminished responsibility in a limited context: the victim must be a child of the defendant and the mental abnormality must be caused by childbirth or lactation. By extension, the same concept can be applied to other contexts. This was the course the law took in the United Kingdom. Infanticide was introduced to the United Kingdom in 1922¹⁵¹ and diminished responsibility followed in 1957¹⁵². Infanticide was introduced to New

¹⁴⁶ NZPA "Weatherston trial: call to abolish provocation defence" *The Press* (New Zealand, 22 July 2009) at <http://www.stuff.co.nz/national/2663064/Weatherston-trial-Call-to-abolish-provocation-defence>

¹⁴⁷ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42, at 157, 158, 162, 168, 177

¹⁴⁸ *Ibid*, 157

¹⁴⁹ *Ibid*, 159

¹⁵⁰ *Ibid*, 196

¹⁵¹ Infanticide Act 1922 (UK)

¹⁵² Homicide Act 1957 (UK)

Zealand law in 1961. Accordingly, it would be an appropriate next step for New Zealand to follow the United Kingdom's lead.

One of the major criticisms of diminished responsibility is that it is overly reliant on expert testimony from psychologists and psychiatrists. Diagnosing a mental disorder is often not a straightforward process. Contradictory opinions can exist among different expert witnesses in regards to the same defendant and this can make it difficult for juries to understand the evidence as to whether there is a relevant mental condition. It has been suggested these problems may be overstated.¹⁵³ Although more recent research would be beneficial on this issue, a 1982 English study found medical experts disagreed in only 13% of diminished responsibility cases¹⁵⁴. Furthermore, much of this criticism has been based on the traditional statutory formulation of diminished responsibility. More modern provisions, as discussed below, have been drafted to ensure that the assessment required by expert witnesses would be simpler, and less directed at identifying one specific mental condition, which can result in controversy among experts¹⁵⁵.

Another concern with diminished responsibility is that it can include people with psychopathic or other personality disorders¹⁵⁶. Again, statutory drafting can address this issue. Two options exist. One is prescription of an objective element that requires the jury to consider whether the reduction from murder to manslaughter is warranted. Another is to explicitly exclude psychopathic or other personality disorders.

Statutory Formulation of Diminished Responsibility

¹⁵³ New South Wales Law Reform Commission *Provocation, Diminished Responsibility and Infanticide* (Discussion Paper 31, 1993) at [4.28]

¹⁵⁴ S Dell "Diminished Responsibility Reconsidered" (1982) *Criminal Law Review* 809. The study considered the period 1976-1977.

¹⁵⁵ New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility*, above n 137, at [3.49]

¹⁵⁶ These are characterized by "...a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood". American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders Fourth edition Text Revision (DSM-IV-TR)* (2000), at 645

Calls for reform of the original English provision, s 2 of the Homicide Act 1957, have been made since its enactment¹⁵⁷. The terms of this provision - ‘abnormality of the mind’ and ‘substantial impairment of mental responsibility’ - were thought to be vague and inadequate for medical diagnosis. Reformulation of the statutory definition of diminished responsibility has occurred in England and Wales and in New South Wales by rewording both these elements.

The phrase “abnormality of the mind” is found in New South Wales’ legislation¹⁵⁸, while the English provision¹⁵⁹ refers to “abnormality of mental functioning”. The meaning of these phrases is clarified by describing the way such mental abnormality must operate. It must “substantially impair” the defendant’s ability to understand, judge events, or exercise self-control. The mental abnormality must arise from a “recognised mental condition” in England and Wales, and an “underlying condition” in New South Wales, which is further defined as “a pre-existing mental or physiological condition, other than a condition of a transitory kind”.

The requirement that the mental abnormality substantially impair capacity to understand, judge or control, and the stipulation that it must be a pre-existing or recognised mental condition, provide statutory clarification of the type of mental states to which diminished responsibility applies. In addition to this clarification, the statutory wording found in England and New South Wales will direct expert evidence in such a way as to reduce uncertainty and disagreement. The reason is that the reformulation of diminished responsibility avoids any requirement for the experts or jury to diagnose the defendant’s mental condition. Although an underlying condition must exist, the focus is not on diagnosing this, but on assessing the effect the condition had on the defendant’s mind to understand, form judgements or exercise self-control at the time of the killing. The New South Wales Law Reform Commission hoped that “by removing the requirement to

¹⁵⁷ Louise Kennefick “Introducing a New Diminished Responsibility Defence for England and Wales” (2011) 74(5) MLR 750, at 750

¹⁵⁸ Crimes Act 1900(NSW), s 23A

¹⁵⁹ Coroners and Justice Act (UK), s 52

diagnose a specific cause, a great deal of disagreement and uncertainty will be avoided in the expert evidence which is presented at diminished responsibility trials.”¹⁶⁰

Other commentators have pointed out that the additional new wording will simply result in new complications of its own¹⁶¹. Only “time will tell” whether this is the case.¹⁶² As they did with s 2 of the Homicide Act, it is likely that judges and juries will take a pragmatic approach to any ambiguities arising from the wording of diminished responsibility¹⁶³. The clarification of what constitutes a mental abnormality will hopefully reduce the instances in which such ambiguities arise.

The New South Wales provision has an important qualifying factor that does not appear explicitly in the current English provision. Section 23A(2) of the Crimes Act 1900 (NSW) requires that the mental impairment be so substantial as to ‘warrant’ liability for murder being reduced to manslaughter. Section 52(1)(c) of the Coroners and Justice Act (UK) merely requires that the impairment provide an explanation for the defendant’s actions in the killing. This replaces the previous requirement that the defendant’s ‘mental responsibility’ was substantially impaired by his or her abnormality of the mind. The term ‘mental responsibility’ was criticised as being overly ambiguous and difficult for juries to apply,¹⁶⁴ leading to its exclusion in the current English provision. The New South Wales Law Reform Commission acknowledged this criticism, but believed that, after establishing a relevant mental condition, the jury’s primary task was to make a value judgment as to the defendant’s blameworthiness and decide whether it was sufficient to reduce to murder to manslaughter. As a result, the New South Wales provision ensures that a normative element is retained in the defence with the aim of preventing undeserving cases from succeeding. Examples of such cases are defendants who base

¹⁶⁰ New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility*, above n 137, at [3.55]

¹⁶¹ R. D. Mackay ‘The Coroners and Justice Act 2009 - Partial Defences to Murder (2) The New Diminished Responsibility Plea’ [2010] Crim L R 290, at 293.

¹⁶² Louise Kennefick, above n 158, at 759

¹⁶³ Andrew Ashworth, above n 102, at 203

¹⁶⁴ New South Wales Law Reform Commission *Partial Defences to Murder: Diminished Responsibility*, above n 137, at [3.57]

their claim on a psychopathic or similar personality disorder.¹⁶⁵ The fact that the onus is on the defendant to prove diminished responsibility¹⁶⁶ will also lessen the chances of success in undeserving cases.

The New South Wales provision also specifically excludes self-induced intoxication as a ground for the defence¹⁶⁷. In New Zealand intoxication in itself is never a defence¹⁶⁸ and intoxication alone cannot support a defence of insanity.¹⁶⁹ On parity of reasoning, a specific statutory exclusion of intoxication should be included if diminished responsibility were to be introduced in New Zealand. If it is feared that the requirement that a successful plea of diminished responsibility be ‘warranted’ is not enough to exclude cases of psychopathic or other personality disorders, these could also be specifically excluded in a similar way to intoxication.

Extreme Mental or Emotional Disturbance

Extreme mental or emotional disturbance (EMED) is recognised as a partial defence to murder in the American Model Penal Code. What would otherwise be murder is reduced to manslaughter where it ‘is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse’¹⁷⁰. The reasonable explanation is determined from the viewpoint of a person in the defendant’s situation as he or she believes it to be.

The EMED provision has not been widely adopted. Thirty four states have revised their criminal law in response to the American Penal Code. Five of these states have adopted

¹⁶⁶ Crimes Act 1900 (NSW), s 23A (5). This exists in England in common law, see for example *Lambert, Ali and Jordan* [2002] QB 1112

¹⁶⁷ While no specific statutory exclusion exists in England, cases such as *R v Dietschmann* [2003] 1 AC 1209 indicate the defence will not be available in cases of self-induced intoxication.

¹⁶⁸ *R v Kamipeli* [1975] 2 NZLR 610 (CA)

¹⁶⁹ *R v Hughes* [2007] SASC 318, at [25]

¹⁷⁰ American Model Penal Code, Clause 210.3(1)(b)

the EMED provision with the omission of the word ‘mental.’ Twelve other states have adopted the defence with significant variation¹⁷¹. No American state has adopted the provision relating to EMED in its entirety, although it has been adopted in American Samoa and Guam¹⁷².

There has been some debate over whether EMED constitutes the merging of diminished responsibility and provocation to form a hybrid defence¹⁷³, or whether it is a different defence altogether that most closely resembles a more liberal defence of provocation¹⁷⁴. If the former is the case, it is better to assess diminished responsibility and provocation separately. The two defences, though sometimes capable of being raised on the same set of facts, share fundamentally different principles. Provocation is a concession to human frailty and focuses on the circumstances that have pushed the person to the point of losing self-control. Diminished responsibility is a recognition that some people are permanently or temporarily dispossessed of their ability to reason, with the focus mainly on the defendant’s state of mind and the mental abnormality influencing it.

Whether or not EMED is seen as a hybrid defence, its flaws mean that it is not an ideal way of accommodating reduced culpability for murder when a defence of loss of control and a defence of diminished responsibility are better able to do so. EMED is often criticised as being overly vague¹⁷⁵ and its objective element of ‘reasonable explanation or excuse’ may not be enough to exclude undeserving cases. In particular, the ‘reason’ for the extreme mental or emotional disturbance does not need to be in response to a grave wrong (as it must for a successful defence of loss of control) or an underlying mental condition that warrants reducing murder to manslaughter (as it must for a successful plea

¹⁷¹ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42, at 41

¹⁷² James Chalmers “Merging provocation and diminished responsibility: some reasons for skepticism” [2004] Crim L R 198 at 208

¹⁷³ R. D. Mackay and B. J. Mitchell “Provoking Diminished Responsibility: Two Pleas Merging into One?” [2003] Crim L R 745 at 758

¹⁷⁴ James Chalmers, above n 172 at 200

¹⁷⁵ Law Commission (England and Wales) *Partial Defences to Murder*, above n 42, at [3.49]

of diminished responsibility)¹⁷⁶. This increases the chance of less compelling ‘reasons’, such as sexual infidelity or the end of a relationship, forming the basis for a successful defence of EMED to murder¹⁷⁷.

Excessive Self-Defence

A partial defence could be adopted that is based on the use of excessive force in self-defence. This has been considered in England and Wales,¹⁷⁸ both in relation to creating a specific partial defence for cases of excessive self-defence and in relation to whether the new loss of control defence should be limited to defendants who lose their self-control in cases of fear of serious violence.

While cases of excessive self-defence should be accommodated at law, it is unnecessary to introduce a defence of excessive self-defence for two reasons. The complete defence of self-defence is sufficiently broad so as to include most deserving cases. The objective element of self-defence requiring that the force used be ‘reasonable’ is mitigated by the fact that the circumstances are assessed from the subjective viewpoint of the defendant. If the defendant believes they are in serious danger, it is likely that even a very violent response will be ‘reasonable’, even if the defendant were not, objectively, in a dangerous position. Consequently, the scope of self-defence is wide, suggesting there is no pressing need to create a specific defence for cases of excessive self-defence. Instead, cases of excessive self-defence will fall within the loss of control defence, or, in some situations, under diminished responsibility. These defences enable excessive self-defence to be accommodated, alongside other deserving situations.

¹⁷⁶ Ibid, at [3.50]

¹⁷⁷ Victoria Nourse “Passion’s Progress: Model Law Reform and the Provocation Defense” (1997) 106 Yale LJ 1331, at 1332

¹⁷⁸ Law Commission (England and Wales) *Murder, Manslaughter and Infanticide*, above 9 45, at [5.61]

Special Defences

Some criminal lawyers have proposed that special defences or separate offences be created in a similar manner to infanticide. The situations identified as warranting such a defence are mercy killings and defendants who kill perpetrators of serious domestic violence against them¹⁷⁹. A defence for battered defendants has been considered by the New Zealand Law Commission.¹⁸⁰

While battered defendants and those who kill in mercy attract special sympathy, there should not be specific defences for such defendants. There are other deserving cases that could also warrant a reduction of murder to manslaughter. If special defences were created for every potential deserving situation, there would be a multitude of defences. Although there is nothing inherently wrong with this, the law could become unorderedly and confusing if there were too many special defences. It would also be difficult to draft such defence because every potentially deserving fact scenario would have to be foreseen and it would have to be ensured that there were no loopholes in each which would exclude deserving scenarios and include undeserving ones. Defences of loss of control and diminished responsibility can accommodate cases of battered defendants and mercy killings as well as many other deserving fact scenarios.

A Generic Partial Defence

It may be possible to create a generic partial defence that would succeed in any murder case in which the jury were convinced that, in the circumstances, the defendant should instead be convicted of manslaughter. Although this would avoid the difficulty of drafting provisions that do not exclude deserving cases, the general consensus is that juries do need some guidance for the types of cases that should be reduced to

¹⁷⁹ Charles Cato and Meredith Connell, above n 106, at 42-43

¹⁸⁰ Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001), at 70

manslaughter¹⁸¹ and the Law Commission fears that the law of homicide might become too unpredictable if there were a generic partial defence.

Degrees of Murder

In 2006 the Law Commission of England and Wales proposed a three-tier structure consisting of, in descending order of seriousness, first degree murder, second degree murder and manslaughter¹⁸². Successful pleas of provocation or diminished responsibility would result in a verdict of second degree murder¹⁸³. Second degree murder would attract a maximum sentence of life imprisonment and guidelines would be developed to determine appropriate periods of imprisonment for the homicides within this tier¹⁸⁴.

This three-tier structure gained widespread support amongst legal and community groups in England and Wales¹⁸⁵. The Law Commission considered that degrees of murder would “bring greater order, fairness and clarity to the law of homicide. The scope of and distinctions between individual homicide offences [would] be made clearer and more intelligible, as well as being morally more defensible.”¹⁸⁶

As yet, this three-tier structure has not been implemented. The Ministry of Justice in England and Wales did not raise any criticism of the proposed structure for homicide and said that it would consider it “in due course” in light of the changes to provocation and diminished responsibility¹⁸⁷.

¹⁸¹ Law Commission *The Partial Defence of Provocation*, above n 11, at [166]

¹⁸² Law Commission (England and Wales) *Murder, Manslaughter and Infanticide*, above 9 45, at [2.1]

¹⁸³ *Ibid*, at [2.70]

¹⁸⁴ *Ibid*, at [2.71]

¹⁸⁵ *Ibid*, at [2.2]

¹⁸⁶ *Ibid*, at [2.4]

¹⁸⁷ Ministry of Justice for England and Wales *Murder, manslaughter and infanticide: proposals for reform of the law. Summary of Responses and Government Position* (CP(R) 19/08, 2009) at 120

The New Zealand Law Commission called the three-tier structure “a gloss on the partial defence framework, rather than an alternative to it”¹⁸⁸ This is true, but so long as suitable partial defences are identified and well drafted, a three-tier structure in homicide would provide a good way of incorporating these defences into criminal law. A verdict of second degree murder for provocation or diminished responsibility would retain the seriousness of a murder conviction but imply some reduced culpability and so would provide a good solution to the issue of fair labelling. The presumption in favour of life imprisonment could apply to most cases of murder, while second degree murder would allow more flexible sentencing in cases of diminished responsibility and provocation.

Despite these benefits, establishing a three-tier structure would involve a substantial overhaul of the law of homicide. Many issues besides partial defences would need to be considered. Much political will, academic and legal consultation, and resources would be required to do this. It is probably not worth this effort solely to accommodate partial defences, which can operate within the current murder-manslaughter framework.

Conclusion

Many options have been proposed in common law jurisdictions for accommodating reduced culpability in murder. Diminished responsibility should be adopted as a partial defence to provide a manslaughter conviction for killers who are substantially mentally impaired. Other options considered include extreme mental and emotional disturbance, excessive self-defence, special defences and a generic partial defence. Each of these defences has flaws that can be better addressed through the recognition of the partial defences of loss of control and diminished responsibility. A final consideration is whether these defences should operate within a three-tier structure for homicide consisting of first degree murder, second degree murder and manslaughter. While this may be a good course of action, it is unnecessary and would require considerable political will and effort to achieve.

¹⁸⁸ Law Commission *The Partial Defence of Provocation*, above n 11, at 173

Conclusion

According to Lord Mustill, “the law of homicide is permeated by anomaly, fiction, and obsolete legal reasoning.”¹⁸⁹ Perhaps Lord Mustill’s frustration was heightened by the complexity of the moral considerations and emotions involved in the most serious of crimes. Abolishing provocation did not solve this problem. The kinds of cases the defence attracted will continue to arise and it is inevitable that culpable killings will not always fall easily into black and white categories. In light of this, the best way of accommodating these cases must be considered to ensure that the law of homicide avoids, as much as possible, the anomalies, fictions and obsolete legal reasoning Lord Mustill complained of.

Cases in which provocation was raised were a cause for genuine concern to the public and politicians, culminating in the defence’s abolition. While it is important to ensure that partial defences do not succeed in undeserving cases, a close scrutiny of the legal reasons for repealing the defence is required before it can be concluded that the defence is fatally flawed. This is a problem that is being grappled with in many common law jurisdictions, with varying conclusions being reached by law and policy makers on the appropriate way of accommodating reduced culpability in murder.

In New Zealand, instances of provocation and other elements of reduced culpability in murder must be dealt with at sentencing. However, discretion in murder sentencing is considerably restricted because of the presumption in favour of life imprisonment. This means that in the vast majority of cases a sentence of life imprisonment must be imposed for murder. This lack of discretion means that most instances of reduced culpability in murder cannot be accommodated in New Zealand’s current sentencing regime.

While all homicide results in tragic consequences, studies and previous New Zealand cases suggest that there is marked variation in the seriousness of different killings,

¹⁸⁹ *Attorney General’s Reference (No. 3 of 1994)* [1998] AC 245, 250, *per* Lord Mustill

depending on the circumstances they are committed in. People who experience “situations which go far beyond what anyone could be reasonably be expected to deal appropriately with”¹⁹⁰ deserve to be accommodated by the law. A number of options have been considered and, while it is recognised that there is no easy or perfect solution, the concept of partial defences is not so defective as to warrant eliminating them altogether.

It is possible to introduce a loss of control defence that is based on provocation, but has been reworked to avoid many of the problems that arose from provocation. Whether or not this loss of control defence is introduced in New Zealand, a partial defence of diminished responsibility should be instated to accommodate those who are unable to act appropriately because of a mental condition. Together, these defences will provide a fairer set of laws relating to homicide that validate decisions by juries to partially excuse deserving offenders. Careful drafting must take place to ensure that undeserving offenders are unable to succeed under these partial defences. If there is the political will and resources to do so, a restructuring of the law of homicide into three tiers of culpable homicide could create an improved framework for these defences to operate in.

¹⁹⁰ Ministry of Justice for England and Wales *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, above n 46, at [33]

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Appendix 1

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 2

Sentencing Act 2002, ss 102 and 103

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.

Appendix 3

Coroners and Justice Act 2009 (UK) ss 54 and 55

54 Partial defence to murder: loss of control

- (1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—
 - (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,
 - (b) the loss of self-control had a qualifying trigger, and
 - (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
- (2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.
- (3) In subsection (1)(c) the reference to “the circumstances of D” is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.
- (4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.
- (5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
- (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.
- (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.(8)The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.

55 Meaning of “qualifying trigger”

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—
 - (a) constituted circumstances of an extremely grave character, and
 - (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
- (6) In determining whether a loss of self-control had a qualifying trigger—
 - (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;
 - (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;
 - (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.
- (7) In this section references to “D” and “V” are to be construed in accordance with section 54.

Appendix 4

Provisions on Diminished Responsibility

Coroners and Justice Act 2009 (UK), s 52

52 Persons suffering from diminished responsibility (England and Wales)

- (1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—“
- (1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
- (a) arose from a recognised medical condition,
 - (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
 - (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
- (1A) Those things are—
- (a) to understand the nature of D's conduct;
 - (b) to form a rational judgment;
 - (c) to exercise self-control.
- (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.”
- (2) In section 6 of the Criminal Procedure (Insanity) Act 1964 (c. 84) (evidence by prosecution of insanity or diminished responsibility), in paragraph (b) for “mind” substitute “mental functioning”.

Crimes Act 1900 (NSW), s 23A

23A Substantial impairment by abnormality of mind

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

- (b) that the person is not liable to be convicted of murder by virtue of this section, evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.
- (8) In this section: "underlying condition" means a pre-existing mental or physiological condition, other than a condition of a transitory kind.

Appendix 5

American Law Institute Model Penal Code, Clause 210.3(a)(b)

A homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.