
**LAW REFORM COMMISSIONER
VICTORIA**

Working Paper No. 6

**PROVOCATION AS A DEFENCE
TO MURDER**

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**MELBOURNE
1979**

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TO MURDER**

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**Views expressed in this Working Paper are provisional only
and such suggestions as are made are tentative.**

**Comment and criticism are invited
and it would be greatly appreciated
if these could be forwarded before
1st October, 1979.**

**Law Reform Commissioner
155 Queen Street,
Melbourne, Vic. 3000.**

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WORKING PAPER No. 6

PROVOCATION AS A DEFENCE TO MURDER.

Introduction

1. By letter dated the 13th day of March, 1979 The Honourable the Attorney-General acting pursuant to section 8 (b) of the Law Reform Act 1973 referred to the Law Reform Commissioner the following reference:—

“To investigate and report upon the necessity for reform of the law relating to provocation as a defence to a charge of murder.”

2. For centuries provocation has been regarded and accepted in the common law as a defence to a charge of murder. The common law is the law distilled from the decisions of courts and judges and formulated and reformulated from time to time as cases and circumstances call for its authoritative statement in the area of law under review. It is the common law which governs this area of the law in Victoria.

3. It is to be constantly borne in mind that provocation is a defence of a special kind in that if successful it does not lead to an acquittal on the charge but to a reduction from a conviction of murder to one of manslaughter. It is a defence which springs from an appreciation and understanding of the frailty of human nature and which, even in times not so long past could mean the difference between a mandatory sentence of being hanged by the neck until death and a sentence tailored to suit the moral gravity of a particular homicide.

What is provocation?

4. In ordinary speech its most common meaning could be said to be incitement to anger or irritation. At common law it has a meaning based on anger but it is a word used to denote much more than ordinary anger. To extenuate the killing of a human being provocation has always needed to be of a special kind. Throughout the cases it is seen to be something which incites immediate anger or “passion” as an older terminology has it, and which overcomes a person’s self-control to such an extent as to overpower or swamp his reason. What that something can be has been the subject of different views through the centuries, and these views have in great measure depended on the sort of person whom the law has regarded as meriting extenuating consideration when provoked to kill. In this regard the difficult concept of “the reasonable man” or “the ordinary man” has developed and with it the legal doctrine that provocation must be such as would not only cause the person accused to behave as he did but as would cause an ordinary man to so lose control of himself as to act in the same sort of way.

19th Century Views

5. Sir Edward East writing in 1803, expressed the law to be that provocation, to reduce the crime of murder to manslaughter, must be

“such a provocation as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact; so that the party may rather be considered as having acted under a temporary suspension of reason than from any deliberate malicious motive”.¹

6. In 1833 Chief Justice Tindal in charging a jury on provocation said that they must consider

“whether the mortal wound was given by the prisoner while smarting under provocation so recent and so strong, that the prisoner might not be considered at the moment the master of his own understanding; in which case the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or whether there had been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given; in which case the crime would amount to wilful murder”.²

7. In 1877 a great writer in the criminal law, Sir James Fitzjames Stephen, from his study of earlier writings and of the cases compiled his *Digest of the Criminal Law*. In this work he formulated a definition and a statement of the effect of provocation in the following terms:—

“

Article 224.

EFFECT AND DEFINITION OF PROVOCATION.

Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm.

The following acts may, subject to the provisions contained in Article 225, amount to provocation:—

- (a) An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted.
- (b) If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow.
- (c) An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders.

- (d) The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress.
- (e) The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence.
- (f) Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this Article, except (perhaps) words expressing an intention to inflict actual bodily injury, accompanied by some act which shews that such injury is intended, but words used at the time of an assault — slight in itself — may be taken into account in estimating the degree of provocation given by a blow.
- (g) The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

Article 225.

WHEN PROVOCATION DOES NOT EXTENUATE HOMICIDE.

Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to shew the state of his mind.

Article 226.

PROVOCATION TO THIRD PERSON.

Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends."³

8. Stephen's view was that by the beginning of the 18th century the moral character of homicide fell to be judged principally by the extent to which the circumstances of the case show, on the one hand, brutal ferocity, whether called into action suddenly or otherwise, on the other, inability to control natural anger excited by a serious cause.⁴

The Emergence of "The Reasonable Man" and "The Ordinary Man".

9. There is no mention of either of these paradigms in the foregoing articles — which Stephen writing in 1883 categorically stated to express the common law.⁵ In fact there had been a case in 1869 (*Regina v. Welsh*)⁶ in which in summing up to a jury the judge told them that before a defence of provocation could succeed "there must exist such an amount of provocation

as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion".⁷ As the case was one in which on any view the defence should not have succeeded it may well be that Stephen if he was aware of it thought that it established no principle of criminal law so as to merit statement in his work.

10. At the time he wrote there was considerable support for clarification and codification of the criminal law of England and many legal minds were considering its improvement and better statement. Criminal Code Commissioners were appointed in 1878 (all of them judges amongst whom Stephen was an important member) and in 1879 they presented a Report and Draft Criminal Code.⁸ It contained a section (s. 176) dealing with provocation in the following terms:

"176. Provocation.

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

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

Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be deemed to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person:

Provided also, that an arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation."

11. It will be noticed that the test of the "ordinary man" is recommended although such a test appears not to have previously been part of the common law and also that "wrongful insults" are recommended for inclusion within the ambit of provocative conduct.

12. Stephen was of the view that this section provided a clear and definite rule upon the subject of provocation and that there was then, at the time he wrote his "History of the Criminal Law" in 1883, nothing which could properly be so called.⁹ However the codification proposals never became law in England although their influence can be detected elsewhere in legislation enacted in other jurisdictions.

“The Ordinary Man” in Legislation.

13. In New South Wales in 1883 s. 370 of the Criminal Law Amendment Act of 1883 was enacted. The section with minor changes now appears as s. 23 of the Crimes Act of that State and reads as follows:

- “(1) Where, on the trial of a person for murder, it appears that the act causing death was induced by the use of grossly insulting language, or gestures, on the part of the deceased, the jury may consider the provocation offered, as in the case of provocation by a blow.
- (2) Where, on any such trial, it appears that the act or omission causing death does not amount to murder, but does amount to manslaughter, the jury may acquit the accused of murder, and find him guilty of manslaughter, and he shall be liable to punishment accordingly:
Provided always that in no case shall the crime be reduced from murder to manslaughter, by reason of provocation, unless the jury find:—
- (a) That such provocation was not intentionally caused by any word or act on the part of the accused;
- (b) That it was reasonably calculated to deprive an ordinary person of the power of self-control, and did in fact deprive the accused of such power, and,
- (c) That the act causing death was done suddenly, in the heat of passion caused by such provocation, without intent to take life.”

Here in paragraph (b) of the proviso is “the ordinary man” against whose power of self control that of the person accused of murder has to be tested. And the provocative “wrongful insult” of the Draft Code has been translated into “grossly insulting language or gestures” on the part of the deceased victim.

14. In January 1901 the Criminal Code of Queensland came into operation. It contained in s. 268 a definition of provocation in the following terms:—

“The term “provocation” used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive him of the power of self-control, and to induce him to assault the person by whom the act or insult is done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.

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

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

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality."

15. The defence of provocation in murder cases is dealt with in s. 304 which reads:

"Killing on provocation — When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool he is guilty, of manslaughter only."

There has long been a judicial division of opinion in Queensland over the applicability to a person seeking the benefit of s. 304 of the definition of provocation in s. 268 with its reliance on the loss of self-control of the "ordinary person" resulting in assault. It seems that at the present time the view prevails that s. 304 envisages a common law defence¹⁰ and that the common law "reasonable man" is the hypothetical guide to the law's treatment of the conduct of the accused (whatever attributes may be thought to be possessed by that "archetype of improbable propriety" as one writer has described him).¹¹

16. In 1902 the same Queensland sections were enacted as part of the Criminal Code of Western Australia.

17. The influence of the Draft Code of 1879 is most evident in the section of the Tasmanian Criminal Code (created by the Criminal Code Act 1924) dealing with provocation which is as follows:

- "160. (1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.
- (2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.
- (3) Whether the conditions required by subsection (2) hereof were or were not present in the particular case is a question of fact, and the question whether any matter alleged is, or is not, capable of constituting provocation is a matter of law.
- (4) No one shall be held to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide

the offender with an excuse for killing or doing bodily harm to any person.

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

"The Reasonable Man" and the Common Law.

18. There does not appear to have been any reference in the cases to the test of "the reasonable man" in provocation for some forty years after *Welsh's* case (supra, para. 9). He reappears in 1913 in the case of *Alexander*¹² and again in 1914 in the case of *Lesbini*.¹³ In the former case the accused appears to have been mentally deficient although not insane and the Court held that his conviction could not be upset on the ground of provocation because his actions were not those of the reasonable man. *Lesbini* was hot-tempered and sensitive with defective control of his emotions and some lack of mental balance. He lost control of himself and killed a young woman who had insulted him. The Court of Criminal Appeal in effect said that the law could not excuse such a person as he did not fit into the category of the reasonable man and the test was whether the provocation was sufficient to deprive a reasonable man of his self-control, a test which the accused in this case could not satisfy.

19. Again in the case of *Mancini* in 1942¹⁴ the House of Lords reiterated the proposition formulated in *Lesbini's* case and seemed to state a further restriction on the concept of the reasonable man's reaction to provocation where it is sought to reduce the offence to manslaughter. In the words of the Lord Chancellor — Viscount Simon —

"To retort in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short the mode of retaliation must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter".¹⁵

The Case of Holmes.

20. In 1946 the case of *Holmes v. Director of Public Prosecutions*¹⁶ was decided in the House of Lords. This is a case which is still frequently quoted in the courts and to a large extent still relied upon as expressing the common law with regard to provocation. As often happens important principles were pronounced apropos of a rather tawdry situation in which on any view there would not seem to have been much merit in the defence.

21. Holmes killed his wife, according to his own evidence, at some time during the night in the kitchen of the house where they lived. On the previous

evening he had telephoned a woman who lived in a different part of the country and with whom he had had sexual relations, that she might expect him on the Sunday or Monday. He travelled on the Monday to this woman's home and told her that his wife had left him. In fact his wife's dead body was discovered the next day in the room where he had killed her. Her body showed many hammer bruises but the final cause of death was manual strangulation. Holmes' story was that there had been a quarrel on the Saturday night arising from some person's winking in his wife's direction in a public house that evening and a quarrel ensued, culminating in her saying: "Well, if it will ease your mind, I have been untrue to you," and she went on, "I know I have done wrong, but I have no proof that you haven't at Mrs. X's". According to Holmes he then lost his temper, picked up a hammer and struck her with it. After her convulsive struggles he saw she was too far gone to do anything and he put both hands around her neck until she stopped breathing.

22. Viscount Simon at the outset of his speech delivering the judgment of the House took occasion to draw the distinction between what the judge lays down as matter of law in a case and what the jury decides as matter of fact. What he said was:—

"If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of selfcontrol, to the degree and method and continuance of violence which produces the death it is the duty of the judge as matter of law to direct the jury that the evidence does not support a verdict of manslaughter. If, on the other hand, the case is one in which the view might fairly be taken (a) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (b) that the accused was in fact acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict. It is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused, if acting as a reasonable man, had 'time to cool'. The distinction, therefore, is between asking 'Could the evidence support the view that the provocation was sufficient to lead a reasonable person to do what the accused did?' (which is for the judge to rule), and, assuming that the judge's ruling is in the affirmative, asking the jury: 'Do you consider that, on the facts as you find them from the evidence, the provocation was in fact enough to lead a reasonable person to do what the accused did?' and, if so, 'Did the accused act under the stress of such provocation?' " 17

23. Subsequently Viscount Simon went on to consider whether "mere words" can ever be regarded as so provocative to a reasonable man as to reduce to manslaughter felonious homicide committed upon the speaker in

consequence of such verbal provocation. He stressed the contrast with provocation by physical attack saying that a blow may in some circumstances arouse a man of ordinary reason and control to a sudden retort in kind, but as the proverb reminds hard words break no bones, and the law expects a reasonable man to endure abuse without resorting to fatal violence. However he went on to draw a distinction between vituperative words and words used as a means of conveying information, and referred to earlier judicial views that a husband suddenly hearing from his wife that she had committed adultery might be thereupon so angered as to kill her in circumstances which might amount to only manslaughter.

24. The view which found favour with the House of Lords was that a sudden confession of adultery without more could never constitute provocation of a sort which might reduce murder to manslaughter. Whilst the House found it unnecessary to decide whether there are any conceivable circumstances accompanying the use of words without actual violence which might justify leaving the question of provocation to a jury it laid down that the duty of a judge at trial in relevant cases is to tell the jury that confession of adultery without more is never sufficient to reduce an offence which would otherwise be murder to manslaughter and that in no case could words alone except in an exceptional case so reduce the crime.

25. Two further observations made by the court in this case are relevant to this review. The first is that the application of common law principles in matters such as those under consideration must to some extent be controlled by the evolution of society. An example given by Sir William Blackstone, an eminent 18th century writer, that if a man's nose was pulled and he thereupon struck his aggressor so as to kill him this was only manslaughter may, as it was said, very well represent the natural feelings of a past time; but such a view should hardly be taken in 1946. In the same way it could be imagined in 1946 that words of a vile character might be calculated to deprive a reasonable man of his customary self-control even more than would an act of physical violence but as society advances it ought to call for a higher measure of self-control in all cases.

26. The second observation was a repetition of what had often been said before that in the case of felonious homicide the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty — a difficult and important matter because the sentence for murder is fixed and automatic. (In England in 1946 the death penalty for murder still existed.)

27. The insistence in *Holmes'* case on the power of the Court to decide what are the limits of the reasonable man's thinking and doing and the continued use of the words "reasonable man" illustrate the extent to which the concept of the reasonable man had entered this area of the criminal law.

More of "The Reasonable Person".

28. This heterosexual being appears again in the course of a charge to the jury by the then Mr. Justice Devlin in 1949¹⁸ using language that the Lord

Chief Justice of England — (Lord Goddard) described as being as good a definition of the doctrine of provocation as it had ever been his lot to read. "Provocation", said the judge,

"is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind".¹⁹

The case was one in which a woman was charged with the murder of her husband after being subjected to brutal treatment and the striking of blows on the night of the murder.

29. The final judicial restriction on the ambit of "the reasonable man" came in 1954 with the case of *Bedder v. Director of Public Prosecutions*.²⁰ Bedder was an eighteen-year-old youth who was sexually impotent and miserably conscious of his shortcoming. He unsuccessfully attempted to have intercourse with a prostitute who jeered at him and when he tried to hold her she slapped him in the face, punched him and either kneed or kicked him in the groin. He lost complete control of himself and stabbed her with a knife inflicting a mortal injury. The judge at his trial for murder directed the jury that a man who was sexually impotent was not entitled to rely on provocation which would not have led an ordinary person to have acted in the way which was in fact done in this case.

30. This direction was approved ultimately in the House of Lords and it was there laid down that the hypothetical reasonable man was not to be invested notionally with the physical peculiarities of the accused. The Lord Chancellor (Lord Simonds) referring to the argument on behalf of the accused that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and this could not be fairly done unless he was also invested with his peculiar characteristics, said that such an argument made nonsense of the test.

He went on to say:

"If the reasonable man is then deprived in whole or in part of his reason or the normal man endowed with abnormal characteristics the test ceases to have any value."²¹

31. As Brown put it in the article to which reference has been made,²² after this decision the personal equation in provocation had been almost completely eliminated. It appeared in effect that the defence was denied to the accused if he was rendered unusually susceptible to the provocation by reason of his temperamental or physical idiosyncrasies and that he was only permitted to respond to a list of legally recognized provocations which had been drastically reduced to three entries, viz, the actual finding of his spouse in the act of adultery, a serious physical assault, and "mere" words in circumstances of the most extreme and exceptional character. One may be permitted to

wonder how even 25 years ago it was thought possible and right for five Law Lords whose ages ranged from 64 to 79 to pontificate on the reasonableness of the fears and stresses of an immature adolescent.

Legislative Change.

32. In 1957 the Homicide Act 1957 was enacted in England. Section 3 of that Act provides:

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

It is at once obvious that whilst the section does not define the nature and scope of provocation it does alter the common law rules and cuts away a great deal of the effect of what was said in *Holmes’* case (supra, paras 20-27). It is now clear that in England mere words can amount to provocation and the judge can no longer determine whether or not the provocation was such as could provoke a reasonable man. That is now entirely a matter for the jury.

33. The overworked “reasonable man” has been given a new exposition in a recent case in the House of Lords, (*Director of Public Prosecutions v. Camplin*)²³. Camplin was a youth aged 15 who killed and was charged with the murder of a middle-aged man. He was made the victim of a forcible sexual assault and subsequently jeered at by his attacker. This led him to lose his self-control and to his striking the man two fatal blows on the head with a heavy kitchen utensil. The trial judge, following what he took to be the effect of the law as laid down in *Bedder’s* case instructed the jury to consider whether an ordinary adult man would have been provoked to do as Camplin did.

34. When the matter eventually came before the House of Lords it was held that “the reasonable man” was in this case equivalent to the reasonable youth. It was stressed in the judgments that provocation exists as a defence to enable the law to show its “compassion to human infirmity” and to exclude consideration of an accused’s characteristics (in this case his youth) could result in that compassion being wrongly withheld.

35. Lord Diplock suggested that the trial judge should explain to the jury that the reasonable man referred to in the section is a person having the power of self-control to be expected in an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they think would effect the gravity of the provocation to him. He should also explain that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also

whether he would react to the provocation as the accused did. This suggestion was approved by the other members of the House taking part in the hearing of the appeal.

36. Lord Simon of Glaisdale thought the law in England to be substantially the same as that enacted in the New Zealand Crimes Act 1961 as explained by the Court of Appeal of New Zealand in the case of *Regina v. McGregor*²⁴. To that legislation and that case it is thought helpful to now refer.

The New Zealand Crimes Act 1961.

37. The relevant section is section 169 which reads:—

- “S.169 (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.”

The New Zealand Case.

38. The Court of Appeal in New Zealand made it clear that the trial judge must still instruct the jury that the deprivation of self-control implies a sudden

transition to a state, necessarily temporarily, during which the power of self-control is absent and that for the moment the accused is not master of his mind. The court went on to consider the meaning of the expression "an ordinary person but otherwise having the characteristics of the offender". The judges thought that this new expression of the ordinary man must have been to give some relief from the rigidity of the purely objective test of the reactions of a reasonable man and they interpreted the legislature's intention as being to provide a defence for a person with the power of self-control of an ordinary person but nevertheless having some personal characteristics of his own. So that his reaction to provocation is to be judged on the basis whether the provocation was sufficient to bring about loss of self-control in an ordinary person who nevertheless possessed as well the special characteristics of the offender.

39. The Court recognised the difficulty in explaining such a being to a jury. As the judges said the section requires a fusion of two discordant notions (the objective and the subjective). The difficulty can be no better stated than by quoting (necessarily at some length) from the judgment of the Court. It reads:—

"The offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possessed by him. It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristics must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality. A disposition to be unduly suspicious or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are either not of sufficient significance or not of sufficient permanency to be regarded as 'characteristics' which would enable the offender to be distinguished from the ordinary man. The "unusually excitable or pugnacious individual" spoken of in *R. v. Lesbini* is no more entitled to special consideration under the new section than he was when that case was decided. Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor.

The word 'characteristics' in the context of this section is wide enough to apply not only to physical qualities but also to mental qualities and such more indeterminate attributes as colour, race and creed. It is to be emphasised that of whatever nature the characteristics may be, it must be such that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community. Moreover, it is to be equally emphasised that there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words

or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be some direct connection between the provocative words or conduct and the characteristic sought to be invoked as warranting some departure from the ordinary man test. Such a connection may be seen readily enough where the offender possesses some unusual physical peculiarity. Though he might in all other respects be an ordinary man, provocative words alluding for example to some infirmity or deformity from which he was suffering might well bring about a loss of self-control. So too, if the colour, race or creed of the offender be relied on as constituting a characteristic, it is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon. Thus, it would not be sufficient, for instance, for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again, the provocative act or words require to be directed at the particular characteristic before it can be relied upon.

Special difficulties, however, arise when it becomes necessary to consider what purely mental peculiarities may be allowed as characteristics. In our opinion it is not enough to constitute a characteristic that the offender should merely in some general way be mentally deficient or weak-minded. To allow this to be said would, deny any real operation to the reference made in the section to the ordinary man, and it would, moreover, go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it. There must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers. Beyond that, we do not think it is advisable that we should attempt to go."²⁵

40. It may well be thought that if the foregoing qualifications and nuances of the "ordinary man" are to be explained it would not be surprising if jury confusion were to be the end result.

Victoria Today.

41. In the area under discussion, today can be said to have begun 20 years ago when the Full Court of Victoria²⁶ decided that the "reasonable man" should give way to the "ordinary man". "That expression", said the Court "points to the fact that he is brought into the doctrine for the purpose of denying the benefits of it, not to all those who act unreasonably to provocation, but only to those whose reactions show a lack of self control falling outside the ordinary or common range of human temperaments."²⁷

42. A man named Enright was convicted of murder. He had been a horse-breaker, a stationhand, a road worker, and at the time of the murder was a shearers' cook. He had learnt as a boy of 10 or 12 years that he was illegitimate and had developed an obsessive aversion to the use of the term "bastard". Prior to the killing which led to his conviction he had had an

argument with the victim who (knowing that it would irritate him) kept referring to him as a bastard. The repetition of this word caused him to lose his self-control and he battered the victim to death with a stick which happened to be at hand. The Full Court in 1959 decided that in these circumstances it was not open to any reasonable jury to give effect to the defence of provocation. In its view it was not open to the jury to take the view that any ordinary man could have been provoked by such slight means to lose his self-control so far as to commit such an act.

43. The "ordinary person" was again considered by the Full Court in 1966.²⁶ The two members of the majority of the Court were of the view that it was right to invite the jury to consider what such a person *would* have done in the circumstances in which the accused woman found herself. Mr. Justice Smith who dissented thought that the jury should be asked to consider what the ordinary man (or woman) *might* have done in such circumstances. In his opinion the true view is that the limitation imposed on the doctrine of provocation by the objective test is that it must be held inadequate to extenuate the killing if no ordinary man could ever have been provoked by it to do what the accused did. "Accordingly", he said, "if ordinary men subjected to the same provocation as was inflicted on the accused *might* sometimes so far lose self-control as to do what the accused did, the objective test does not stand in the way of the doctrine of provocation."²⁹

44. It is worth noting that in the same case the late Mr. Justice Barry, a judge of great experience in the criminal law, expressed the view that the objective test may be so unreal that it is unlikely to be applied by a jury who, he said "are more likely to have regard to the limitations of the accused on trial than to the capacity for self-control of a mythical ordinary person."³⁰

45. A conviction for murder in New South Wales which went on appeal from the High Court to the Privy Council led to the latter body expanding the matters which could come within the ambit of provocation.³¹ A man named Parker killed his wife's paramour after a series of events which included incidents kindling his growing suspicion of the paramour's alienation of his wife's affections, a confrontation between the parties concerned, a scornful reference by the paramour to Parker's sexual inadequacies, a notification by the wife of her decision to leave Parker and their children, and her physical departure. Some time later and some distance away Parker in a car ran down both his wife and the paramour and whilst in a state of high emotional disturbance and lack of self-control he battered the man to death with an iron instrument. The Privy Council upheld the view of Sir Owen Dixon and Mr. Justice Windeyer in the High Court that all the circumstances had to be taken into account and consequently the whole of the events of the day before and the day of the fatality were relevant in considering whether the accused was acting under the cumulative and continuing stress of provocation at the time he fatally struck the deceased. In the result a conviction of manslaughter was substituted for one of murder.

46. South Australia, like Victoria, has made no legislative incursion on the doctrine of provocation and the common law prevails so far as it can now be said to contain a clear or coherent principle. In 1977 the High Court³² was called upon to consider the case from South Australia of one Moffa who killed his wife in circumstances which were said to have been legally provocative.

47. Moffa was an Italian husband aged 50. He killed his Australian wife who was 15 years his junior after a night of growing emotional tension consequent upon her informing him that she was leaving him and upon a number of insulting remarks during the course of his pleading with her to remain with himself and their 3 children. Amongst her statements was one that she had been unfaithful to him with every man in the street. Members of the Court pointed out that there was no unqualified rule of an absolute nature applicable in all cases that a confession of adultery can never afford ground for the conclusion that an ordinary man would thereby be led to lose his self-control to the point of forming an intent to murder or to do grievous bodily harm as was postulated in *Holmes'* case (supra, paras 20-27).

48. It was also said that there is no absolute rule against words founding a case of provocation although a claim by an accused of provocation by words rather than by conduct would require close scrutiny. Several members of the Court thought that the deceased's scornful references to Moffa's sexual inadequacy and to her conduct with other males in their street could be classed as grossly provocative language and so could be "violently provocative" which the House of Lords in *Holmes'* case would allow to justify a verdict of manslaughter. In the result the Court thought that the defence of provocation should succeed.

It would seem both from this case and *Parker's* case that what is now to be looked at is the whole of the circumstances including words and conduct leading up to the fatal act.

49. In 1935 authoritative expression was given by the House of Lords³³ to what is called "the golden thread of English criminal law". That thread is the ever-present duty of the prosecution to prove the prisoner's guilt (except in the case of insanity and any exceptions clearly stated in a statute). As was said by the Lord Chancellor, Viscount Sankey —

"No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."³⁴

What this means in respect of provocation is that where there is evidence from which it can be inferred that the accused person was (and an ordinary man could be) provoked to kill, then the prosecution must negative that evidence and prove beyond reasonable doubt that the death was unprovoked.

50. The principle just stated has long been the law in Victoria and it was reiterated by all the members of the Court in *Moffa's* case. However the Chief

Justice in the course of his reasons for judgment in that case, whilst acknowledging that the onus lay upon the Crown to negative provocation, expressed the view that it would not be unjust or unfair to place upon the accused to prove to the satisfaction of a jury, not beyond reasonable doubt but on a balance of probabilities, all the elements necessary to warrant a refusal to find murder and a finding of manslaughter.

51. The latest words on the doctrine of provocation in Victoria have been uttered by the Full Court in 1978.³⁵ This was in a case in which a youth was convicted of the murder of his father. There had been some evidence of ill-treatment but nothing in the evidence to show any sign of provocative conduct on the father's part on the day of the shooting. The Court had no difficulty in coming to the conclusion that there was no evidence of provocation fit to be submitted to the jury.

52. In the course of his reasons for judgment Mr. Justice Gillard (with whom Mr. Justice McInerney agreed) restated the functions of the trial judge in these terms:—

“ . . . before a trial judge is justified in withdrawing provocation from the jury a question he should ask himself and which should be answered by him may be regarded as of a three-fold character. He should decide for himself that no reasonable jury acting on the evidence could, either inferentially or directly, come to a conclusion

- (a) that the accused person committed the intentional killing of the victim while he was suffering from sudden passion with a consequential temporary loss of his self-control;
- (b) that the accused person suddenly and temporarily was so overcome by passion as to lose his self-control as a result of the conduct or violently provocative words of the victim, sufficiently close in time to the act of killing so as to be reasonably related thereto;
- (c) that an ordinary person standing in the shoes of the accused could have in the circumstances proved been guilty of the act committed by the accused person in the killing of his victim.”³⁶

Their Honours' reasons show also the conformity of the Victorian view of the common law with that in the South Australian and the English cases with regard to the ability of the jury to take into consideration not only the acts immediately surrounding the killing, including what might be called the proportionality of the accused's reaction to provocation but also any other evidence which could be properly thought to throw light on the condition of mind of the accused.

53. Mr. Justice Gillard was troubled by the verbal difficulties in which judges had found themselves in explaining the doctrine of provocation to a jury particularly in avoiding the danger when dealing with the accused person's reaction of appearing to convey that there was some onus on the accused to convince a jury of his defence—a danger often associated with the difficulty of explaining the necessity of proof of a negative proposition. The judge spoke of juries being bedevilled by the variations in verbiage

adopted in different judicial formulations of the doctrine, and expressed the strong view that legislative action is urgently needed to remove semantic difficulties experienced by the trial judges in directing juries on provocation. Although he did not specifically say so it would seem that most of these difficulties arise in asking a jury to consider what the ordinary man would or could or might do in such circumstances as were before them. Mr. Justice Gillard referred to the existence of legislation in the United Kingdom, New South Wales and other parts of the Commonwealth, and drew the attention of the Attorney-General to the need for urgent reform of the law in this field — hence this reference to the Law Reform Commissioner.

54. So what does all this amount to? In broad terms it is still proper to say as Lord Devlin said in 1963³⁷ that there are three main elements comprising provocation in law — the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other — particularly in point of time, where there was time for passion to cool — is of the first importance.

55. That they are interrelated is obvious when one comes to consider what can be the provocative act. It seems that the major limitations placed on such an act must be that it be such as could provoke the ordinary man to retaliate to the extent of killing. In considering whether the ordinary man might so retaliate the judge should, and if the matter is left in the jury's hands the jury should be advised to measure the degree of retaliation against the gravity of the act.

56. The act may consist of the finding of a wife by her spouse in the act of adultery, serious physical assault or possibly threatened assault, or "violently" or "grossly" provocative words. Or again words accompanying acts may aggravate provocative conduct and provocation can operate cumulatively. An accused person is entitled to ascribe loss of self-control to the cumulative effect or as Sir Owen Dixon described it in *Parker's* case (supra, para. 45) "unalleviated pressure" of a series of provocative incidents.

57. The reactive loss of self-control must, it still appears, be able to be regarded as "sudden" in relation to the provocative conduct or to the last of the series of incidents comprising that conduct. Lord Devlin's reference to reasonable loss of self-control refers now to the loss of self-control which might be thought possible in the case of an ordinary man in the circumstances before the Court.

58. It seems to have been accepted without question for centuries that a husband coming upon his wife in adultery and killing either the wife or the adulterer can avail himself of the defence. It might be thought that this is an archaic relic of a husband's right of possession and that instead of forming a separate and legal category of acts it should be relegated to a place amongst

the circumstances surrounding the killing. No court has yet decided that a wife is entitled to the same consideration in the case of sudden discovery of her husband in like situation.

Ever the Problem of the "Ordinary Man".

59. Trial judges and Courts of Appeal are still the arbiters of the limits of tolerance to provocation of the ordinary man. It is dependent upon their views as to these limits whether or not a person accused of murder can have a defence of provocation considered by a jury.

There is little guidance as to who is the ordinary man (or woman). The case of *Camplin*, (supra, para. 33), it is thought, will probably cause the judges of Victoria to regard this individual as being a person of the same sex and age as the accused, but it is impossible to say whether and to what extent racial characteristics can be imported into the concept or what objective guide can be formulated in cases for example of an illiterate non-English-speaking Greek peasant woman or for that matter how the highly strong or phlegmatic homosexual is to fare.

60. A typical example of the difficulty appears in *Moffa's* case (supra, paras 46-48) where amongst other incidents in the course of the long night the Australian wife in the course of her provocative words referred to her Italian husband as a "black bastard". By what standard was the reaction to this epithet to be tested — by that of the native-born Australian of English stock, by that of a Northern Italian or a Southern Italian, or by any of these when allied to marriage with an Australian woman?

61. In this case the "reasonable" or "ordinary" man test was strongly criticised by Mr. Justice Murphy. He pointed out that this test is a comparatively recent invention in the law. It could not in his view withstand critical examination. It is not clear whether if he was subjected to the same provocation the ordinary man would (or might) have lost control, or would have lost control to the extent of killing the deceased, or would have lost control to the extent of killing in the manner he did. "Is he a complete stranger", he said, "subjected to the provocative conduct of a person in the same circumstances as the accused?"

He went on:—

"To be in the same circumstances, he should be taken to be in the same relationship with the deceased (in this case, a marital relationship) and must have experienced the relationship. In a case such as this, he should have lived the life of the accused, or it would be impractical to speak of what a reasonable or ordinary man would do in the circumstances. For example, it might have been an unbearable insult to a person of the accused's origin to be called a "black bastard". Once the full circumstances are taken into account, the objective test disappears because it adds nothing to the subjective test. For this reason, those who adhere to the objective test have rigidly excluded individual peculiarities of the accused (for example, low intelligence, impotence, pugnacity).

The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances".³⁸

62. In this State where there is a considerable cultural mix and where it has been asserted, for example, that Melbourne has the largest Greek population of any city outside Athens, it would seem an insoluble problem to pinpoint the qualities or characteristics of the ordinary man when considering such a man's (or woman's) ability or propensity to lose his (or her) self-control.

63. The New Zealand Court of Appeal³⁹ in considering a case of a Samoan charged with murder was prepared to assume that the anger of Samoan people takes longer to reach its peak than is the case with Europeans and it referred to a "tendency towards a slow build-up of passion". In Papua—New Guinea the Court has dealt with many a case of provocation on the assumption that it is a characteristic of many Papua-New Guineans to react much more quickly to insult than people of European origin. If a Samoan or a Papua—New Guinean comes to trial in Victoria on a charge of murder, there is grave doubt in the present state of the common law as to whether these characteristics can be considered in mitigation of his offence.

A Climate of Reform.

(a) Eire.

64. Mr. Justice Murphy's words bore fruit in Ireland in April 1978 when the Court of Criminal Appeal⁴⁰ in that country held that the "objective test in cases of provocation should be declared to be no longer part of the law". The Court in relying on and commenting on the cogency of Mr. Justice Murphy's reasoning quoted a large portion of the passage appearing above (supra para. 61).

(b) England.

65. The Criminal Law Revision Committee of England has for some time been conducting a review of the law relating to, and the penalties for, offences against the person including homicide. In August 1976 it published a Working Paper⁴¹ which dealt amongst other things with the defence of provocation as a defence to the offence of murder. It is accepted that to raise the defence there must be evidence that the killing must have been done while the accused had lost his self-control and he must have lost his self-control to such an extent as to mitigate the killing. It also had in mind that in deciding whether a person had so lost his self-control the jury should be able to take into account the mode of killing.

66. A majority of this very strong Committee took the tentative view that it should propose a test of reasonable excuse applicable only to the accused's loss of self-control and not to what the accused did by way of reaction to the provocation except to the extent that this was a factor to be considered in deciding whether the accused had in fact lost his self-control. In the Committee's view the test of provocation should be reformulated so that the accused is judged with due regard to any disability, physical or mental, from which he suffers and in place of the reasonable man test there should be a requirement that provocation is sufficient if on the facts as they appeared to the accused it constitutes a reasonable excuse for the loss of self-control on his part.

67. It is anticipated that the Committee's final Report when it appears will adhere to the provisional view expressed in its Working Paper.

(c) U.S.A. — The Model Penal Code.

68. The Model Penal Code drafted by the prestigious American Law Institute deals with provocation in a much wider setting.

Section 210.3 of the Code provides:—

“Criminal homicide constitutes manslaughter when:

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

In the Institute's Commentary on this section it is pointed out that the draft reframes entirely the former test for provocation. It extends to situations where the provocative circumstance is something other than an injury inflicted on the deceased by the actor but nonetheless is an event calculated to arouse extreme mental or emotional disturbance. The objective test has virtually disappeared, save for the requirement of a reasonable explanation or excuse. The section is intended to cover cases presently excluded on any view of the law — for example the case where the actor strikes at the victim in blind distress. The section is also the result of the view taken by its drafters of the absurdity of a rule requiring that the provocation be enough to make a reasonable man do as the defendant did; for such a man quite plainly never kills. They thought it essential for the law to provide a middle ground between a standard which ignores all individual peculiarities and one which makes emotional distress decisive regardless of the nature of its cause. Surely (they argued) if the actor had just suffered a traumatic injury, if he were blind or were distraught with grief, if he were experiencing an unanticipated reaction to a therapeutic drug, it would be deemed atrocious to appraise his crime for purposes of sentence without reference to any of these matters. The question in the end is whether the actor's loss of self-control can be understood in terms that arouse sympathy enough to call for mitigation in the sentence and this was the issue which the framers of the Code saw as the one to be faced.

69. In assessing the reality of the mental or emotional disturbance there would be room for the consideration of the means and degree of violence used and of the lapse of time between the event triggering the disturbance leading to homicidal action and that action. But these matters would be considered not as a requirement of rigid legal rules but by way of assistance in deciding whether or not in fact self-control had been lost to such a degree as to permit the formation and execution of an intent to kill or whether the apparent loss could rather have been used as a cloak for premeditated action.

70. It is thought that provocation as has been discussed in this Paper would provide by far the greatest number of defences raised under such an enactment. Undoubtedly other situations than those which at present are regarded as constituting provocation would be embraced by the new formulation. But it can be argued that such a result is consonant with a greater awareness and tolerance of "human frailty" which is a characteristic of the age and society in which we live.

71. On the other hand it can be objected that the use of the words "reasonable explanation or excuse" could lead to the same difficulties as have been dealt with at such length in this Paper. It can also be said that such a section would not be an amendment or reform of the present law of provocation but that it would create an altogether new basis for holding intentional killing to be manslaughter only and not murder. Upon this basis there would be no requirement of provocation and no requirement of any loss of the power of self-control and there would be none of the policy safeguards which surround the present doctrine of provocation.

(d) South Australia.

72. In 1971 the Criminal Law and Penal Methods Reform Committee was set up in South Australia to examine and make recommendations to the Attorney-General in relation to the Criminal Law in force in that State. In July 1977 the Committee presented its final Report. This deals comprehensively with the substantive Criminal Law and includes the following five recommendations for amendment of the law relating to provocation as a defence to a charge of murder.

73. The Committee's actual recommendations were as follows:—

- (a) that subject to recommendation (e) below, the question whether the defendant who relies on provocation was in fact provoked be an entirely subjective inquiry, directed in all aspects at ascertaining the defendant's actual state of mind at the relevant time;
- (b) in consequence the abolition of any rules of law importing objective tests, of which the ordinary man test, the rule of proportion and the requirement of an absence of cooling time may be instances;
- (c) that if when the defendant killed he was in such a state of excitement as not to have been able to form a rational intention

- to kill or be reckless as to causing death, he be acquitted of unlawful homicide, but that if he had such an intention, or was sufficiently rational to be reckless as to causing death, he be guilty of manslaughter;
- (d) that if the defendant formed only an intention to assault another, he be guilty only of a non-homicidal assault;
- (e) that no conduct, whether blameworthy or innocent, whether lawful or unlawful, be incapable as a matter of law of amounting to provocation but that conduct innocent in the sense of performed without intent to provoke or reckless provocation be not a ground for complete acquittal of unlawful homicide;

74. As can be seen the Committee was of the view that not only should the ordinary or reasonable man test be abolished but that the jury should be given a wider range of alternative verdicts from which to choose. It felt that as the circumstances under which cases of provocation appear vary widely, so too the law should reflect such variation. Thus whilst still retaining the verdict of manslaughter for killing under provocation it would give the jury power to convict of an appropriate non-homicidal assault offence where they considered that the accused though intending to assault his victim lacked the intention to kill. Further if the jury were to find that there was actual provocation and that the accused's state of mind was so confused as to not properly appreciate what he was doing at all the Committee would allow an outright acquittal.

75. It may be that the recommendations are too widely expressed and that to ask a judge to direct a jury on the availability of a descending scale of offences could lead to undesirable complexity and resultant confusion. The recommendations make no mention of the loss of the power of self-control of an accused.

Reform for Victoria.

76. Forty years ago the late Sir Owen Dixon explained the basis of the power residing in the Court to decide whether any matter was capable of constituting provocation as being . . . "principally the necessity of applying an over-riding or controlling standard for the mitigation allowed by law."⁴² This explanation as did the statement of the power by the House of Lords in *Holmes'* case (supra, paras 20-27) must rest in part on the assumption that judges are best qualified to discover the mind or the psychology or perhaps indeed the physiology of the reasonable or ordinary man. That judges are particularly endowed with such a qualification seems a debatable proposition. It can be well argued that the longer a judge sits on the bench the less is he likely to become or remain acquainted with ordinary men or women in their daily activities and their patterns of thought and behaviour.

77. In the sphere of negligent homicide the standard of conduct to merit criminal punishment is left squarely in the hands of the jury. In the last few years the trend in the criminal law to take the defendant as he is has gained ground. It seems consonant with this trend to expand the oft-stated "concession to human frailty" by concentrating on the frailty of the individual

identifiable human being rather than continuing to speculate on the behaviour of the mythical composite "ordinary man". In arguing thus it must be stressed again that provocation as a defence to murder does no more than reduce the offence to one of manslaughter. Except for the recommendations of the South Australian Committee in none of the reforms effected or proposed and dealt with in this Paper has it been suggested that any other verdict should be open.

In Victoria the punishment for murder is a mandatory sentence of imprisonment for the term of the prisoner's natural life. The judge has no discretion in the imposition of this sentence. For manslaughter the maximum sentence is 15 years imprisonment but in imposing sentence the judge can take all the circumstances into account and impose a punishment consistent with the moral gravity of the offence.

78. Whilst it will not be difficult to discern in this Working Paper a present aversion to the objective test in provocation it is not proposed to make any provisional recommendations beyond expressing the view that reform is necessary. There are a number of options open concerning which it is the purpose of this Paper to stimulate discussion and suggestion so that as wide a variety of views as possible can be considered in submitting a Report on this very vexed corner of the law.

79. What are seen to be the main options are set out hereunder:—

A. To abolish the objective tests without more.

A statutory formulation for this abolition might be along the following lines:

"1. Any rule of law whereby provocation is insufficient to reduce murder to manslaughter unless it would or could have caused a reasonable person or an ordinary person or someone with some of the characteristics of such a person to lose the power of self-control and, in consequence, to act as the accused acted in causing the death, and any rule of law requiring proportionality of response to provocation, or limiting the time which may elapse between provocation and response, are hereby abrogated.

2. Nothing in the preceding section shall limit in any way the matters which may be taken into account in determining any issue of fact."

B. To abolish the objective tests and to formulate the law of provocation in statutory form. A form of enactment to add to that in A above has been suggested in the following terms:

"1. Homicide which would otherwise be murder is not murder but manslaughter if —

(a) there was provocation of the offender
and

(b) this deprived him for the time being of the power of self-control and

(c) this loss, while it continued, caused him to commit the crime.

2. For the purposes of section 1 provocation may be by things done or by things said or by both together, but it does not include
 - (a) anything said or done which was incited or sought by the offender to provide himself with what might appear to be an excuse or justification for killing or doing bodily injury to or assaulting any person, nor
 - (b) any lawful arrest or imprisonment, or any lawful application of force to any person or any other lawful exercise of a legal right or power, unless in cases in which the offender believed that what was so done was unlawful, nor
 - (c) any assistance given to the police or any other law enforcement authority to discover evidence, or to arrest or prove the guilt of any person, in respect of any offence, nor
 - (d) anything said or done by any other person than the deceased, unless in cases in which
 - (i) that other person, in doing or saying what he did, was acting at the instigation of, or in concert with the deceased, or else the offender believed this to be so, or
 - (ii) the offender caused the death accidentally by action directed against that other person or mistook the deceased for that other person.
3. Section 1 shall have no application where the offender, when the provocation occurred, had already determined to kill or do grievous bodily harm to the deceased or, if the provocation was given by a person other than the deceased, that other person.
4. Where there is evidence sufficient
 - (a) to support a finding that the facts were such that, by reason of section 1, a homicide was not murder but manslaughter, or
 - (b) to raise a reasonable doubt as to whether this was not the case the burden shall rest upon the Crown to satisfy the jury beyond reasonable doubt that in some respect or respects the facts did not not satisfy the requirements of Section 1.
5. The fact that, by virtue of Section 1, a party to a homicide is not guilty of murder but of manslaughter shall not affect the question whether the homicide constituted murder by any other party to it."

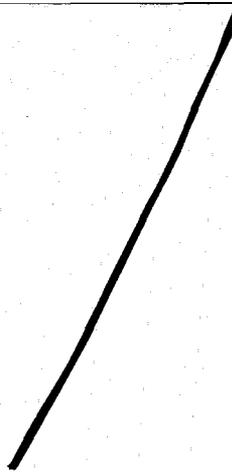
Such a formulation would leave room for the courts and juries to give effect to changes in public feeling as to what kind of acts and words amount to provocation.

- C. To abolish the present law of provocation and enact a provision along the lines of Section 210.3 (d) of the Model Penal Code (supra, paras 68-71).

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- D. To amend the present law of provocation in the manner suggested in the English Working Paper or in some similar manner (supra, paras 65-67).
 - E. To enact provisions based on the South Australian Report (supra, paras 72-75).

REFERENCES

- 1 East, "Pleas of the Crown" I, 238.
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