

# **COMPARATIVE ANALYSIS OF THE DEFENCE OF PROVOCATION**

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## DECLARATION

I, Sivakalay Pather, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements for any other degree or qualification at any other university.

Signed and dated at Durban on the 22nd day of February 2000.

A handwritten signature in cursive script, reading "Pather", is written over a horizontal line.

Sivakalay Pather

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## Introduction

' . . . Nor only tears  
Rained at their eyes, but high winds worse within  
Began to rise, high passions - anger, hate,  
Mistrust, suspicion, discord - and shook sore  
Their inward state of mind, calm region once  
And full of peace, now tost and turbulent:  
For understanding ruled not . . . '

John Milton *Paradise Lost* [IX, 1121-26]

Provocation resulting in homicide amounts to action by one person that causes another person to lose self-control and kill the victim.<sup>1</sup> It is regarded in some jurisdictions as a defence where the crime of the actor is reduced from murder to culpable homicide merely because the act was due to loss of self-control due to provocation.<sup>2</sup> In cases where the crime was committed due to provocation, the actor has been motivated to commit his or her deed by emotions such as jealousy, anger or fear. The emotion is a 'natural response' to some circumstance that has driven or 'provoked' the actor into doing what he or she does.<sup>3</sup>

The defence of provocation has been successfully used in a number of cases and this has caused the public to fear whether the law is in fact condoning violence.<sup>4</sup> It is therefore important to analyse the defence of provocation to determine whether it should make a difference, when people kill, if they argue that the victim in some manner provoked them to do so.

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<sup>1</sup> Ilson *Reader's Digest Great Illustrated Dictionary* (1984) 1364.

<sup>2</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2).

<sup>3</sup> Burchell and Milton *Principles of Criminal Law* (1997) 278.

<sup>4</sup> [Http://canada.justice.gc.ca/Consultations/rccd/partie1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/partie1p1_en.html).

The scope of the defence of provocation involves a balancing between two extremes - firstly, the recognition that individuals have different levels of tolerance to provocation and secondly, the social policy that everyone, including the provoker, should be protected from being harmed or killed.<sup>5</sup>

In South Africa homicide evolved into two distinct substantive crimes at an early stage, namely murder and culpable homicide.<sup>6</sup> The difference between the two is that intention<sup>7</sup> to kill is required in murder whereas negligence<sup>8</sup> is required in culpable homicide. This distinction created some difficulty in applying the pure Roman-Dutch law of provocation to an alleged crime of murder. The Roman<sup>9</sup> and Roman Dutch Law<sup>10</sup> did not regard anger as an excuse for criminal liability but only as a factor which might mitigate sentence if the anger was justified by provocation. This was due to the situation where the accused acted in the heat of the moment and therefore possibly did not have the required intention.<sup>11</sup> The passing of the Criminal Procedure Act in 1917 provided that the sentence for murder had to be death.<sup>12</sup> A consequence of this was that provocation could no longer be restricted to mitigation of punishment.<sup>13</sup> It appeared that the accused could no longer be found guilty of murder and have his sentence

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<sup>5</sup> Burchell and Milton *op cit* 228.

<sup>6</sup> Burchell and Hunt *South African Criminal Law and Procedure* vol II (1970) 322.

<sup>7</sup> Burchell and Hunt Vol I (1970) 119; Legal intention in respect of a consequence consists of foresight on the part of the accused that the consequence may possibly occur coupled with recklessness as to whether he does it or not.

<sup>8</sup> Burchell and Hunt Vol I *op cit* 149; The requirement of negligence is whether the reasonable man in the situation of the accused would have guarded against the consequence in question.

<sup>9</sup> Burchell and Hunt *op cit* 240 who refer to D:48.5.39(38).8; D.48.8.1.5.

<sup>10</sup> Burchell and Hunt *op cit* 240 who refer to Mathaeus, *Prol.*, 2.14; 48.5.3.4,8,9; 48.18.4.8,9.

<sup>11</sup> Burchell and Milton *op cit* 278-279.

<sup>12</sup> Burchell and Milton *op cit* 279.

<sup>13</sup> Snyman *Strafreg - Vonnisbundel: Criminal Law Case Book* (1991) 108.

reduced from death to life imprisonment since the statute provided for a specific sentence in the event of the accused being convicted of murder.

In order to resolve the manner in which the defence of provocation should be applied, the Appellate Division held in 1925 in *R v Butelezi*<sup>14</sup> that Section 141 of the Transkeian Penal Code<sup>15</sup> correctly expressed our common law on the subject of provocation. The material provisions of the Code were as follows:<sup>16</sup>

‘Homicide which would otherwise be murder may be reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation.

Any wrongful act or insult of such a nature as to be sufficient to deprive any 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.’

An objective assessment of provocation was thus applied - the test being whether a reasonable person would have lost his or her self control under the circumstances. The purpose of an objective test was to prevent people with ‘bad tempers’ from being allowed to give free rein to their emotions.<sup>17</sup>

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<sup>14</sup> 1925 AD 160 at 162.

<sup>15</sup> Act No. 24 of 1886 (C).

<sup>16</sup> See *R v Butelezi* supra at 162; See also Burchell and Milton *op cit* 279.

<sup>17</sup> Burchell and Milton *op cit* 280.

Provocation was later rejected in 1949 as a defence in *R v Thibani*.<sup>18</sup> The Appellate Division introduced a different approach to provocation which was developed in later cases and which has had a profound effect on South African law.<sup>19</sup> This new approach was evident in *Thibani's* case where the court stated:<sup>20</sup>

‘ . . . provocation seems to have assumed its proper place, not as a defence . . . but as a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt.’

Prior to the *Thibani* case, the courts' main concern was whether there had been a sufficient loss of self-control on the part of the accused in terms of section 141 to justify a verdict of culpable homicide. The emphasis then shifted to the issue of whether, taking account of the provocation, the accused had the intention to kill.<sup>21</sup> This new approach served to illustrate that provocation may be able to negate intention altogether and so the accused may be acquitted.

Recent cases have referred to provocation as well as emotional tension or stress which could assist in the accused being acquitted.<sup>22</sup> The Rumpff Commission<sup>23</sup> stated that impulsiveness (under provocation) as well as severe emotional tension should not be regarded as excluding self-control and should therefore not lead to the accused being acquitted. Despite this, the courts in South Africa took a different approach. Provocation (or emotional stress) has now been recognised by our courts as a defence

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<sup>18</sup> 1949 (4) SA 720 AD.

<sup>19</sup> Burchell and Hunt (1970) 240.

<sup>20</sup> *Supra* at 731; see also Burchell and Milton *op cit* 240.

<sup>21</sup> Burchell and Hunt (1970) 241.

<sup>22</sup> *S v Nursingh* 1995 (2) SACR 331 (D).

<sup>23</sup> Rumpff Report: Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters RP 69/1967.

capable, in certain circumstances, of excluding the voluntariness of conduct, criminal capacity or *mens rea*.<sup>24</sup> The more recent cases of *S v Van Vuuren*<sup>25</sup> and *S v Lesch*<sup>26</sup> were important judgments in that provocation and emotional stress were considered there as relevant in the determination of the respective accused's criminal capacity.<sup>27</sup> Capacity is traditionally tested by ascertaining whether the accused was able to appreciate the wrongfulness of his conduct and was he able to act in accordance with this appreciation.<sup>28</sup> Lack of criminal capacity can result from pathological as well as non-pathological incapacity,<sup>29</sup> for example severe emotional stress. Provocation or severe emotional stress may deprive a person of the capacity to appreciate the wrongfulness of his or her conduct or to act in accordance with this appreciation.<sup>30</sup> This would constitute a lack of criminal capacity.

An important point that emerged in 1994 in the case of *S v Potgieter*<sup>31</sup> is that the defence of non-pathological incapacity which can be based on provocation or emotional stress,<sup>32</sup> will be very carefully scrutinized by courts. If the facts presented by the accused are held to be unreliable, any 'psychiatric evidence based on the supposed truthfulness of the accused's version' also falls away.<sup>33</sup>

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<sup>24</sup> Burchell and Milton *op cit* 227.

<sup>25</sup> 1983 (1) SA 12 (A).

<sup>26</sup> 1983 (1) SA 814 (O).

<sup>27</sup> Burchell and Milton *op cit* 280.

<sup>28</sup> Burchell and Milton *op cit* 225.

<sup>29</sup> Illson *Readers Digest Great Illustrated Dictionary* (1984) 1248; the definition of non-pathological incapacity is where the accused's lack of capacity is due to some cause other than disease.

<sup>30</sup> Burchell and Milton *op cit* 282-283.

<sup>31</sup> 1994 (1) SACR 61 (A).

<sup>32</sup> Burchell 'Non-pathological incapacity- evaluation of psychiatric testimony' (1995) 8 *South African Journal of Criminal Justice* 37 at 41.

<sup>33</sup> Burchell and Milton *op cit* 284.

The later case in 1995 of *S v Nursingh*<sup>34</sup> illustrates the approach by the courts which results in problems with regard to the defence of non-pathological incapacity. The problems faced are firstly, whether the accused should escape liability completely and secondly, psychiatric evaluations are done before full evidence has been heard in court such that psychiatrists are unable to re-evaluate opinions after hearing all the other evidence.<sup>35</sup>

This was evident in 1978 in the case of *S v Kavin*<sup>36</sup> where one of the psychiatrists changed his opinion on the mental condition of the accused after hearing the full evidence in court.<sup>37</sup>

An important and complex issue in respect of the assessment of provocation is whether the solution would be that the test be objective rather than subjective. Or should a measure of subjectivity be included in the objective test? The expansion of the test to include a measure of subjectivity could lower the threshold level of self-control for the purposes of the defence and might no longer provide a reasonable level of protection to all members of society.

The defence of provocation is a particularly contentious issue for women's and gay and lesbian groups.<sup>38</sup> For women's groups the problem is that men are allowed to give free rein to their tempers when the defence of provocation is allowed. For gay and lesbian groups the problem lies where persons are provoked to kill when gay or lesbian advances are made toward them. For these groups, the critical issue is whether the law of provocation reflects values and morals of society that are no longer acceptable in a time when the use of violence is unacceptable.<sup>39</sup> The 'rationale for the existence'

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<sup>34</sup> *Supra*.

<sup>35</sup> Burchell and Milton *op cit* 286.

<sup>36</sup> 1978 (2) SA 73 (W).

<sup>37</sup> Burchell and Milton *op cit* 287.

<sup>38</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) at 4.

<sup>39</sup> *Ibid*.

of the provocation defence is that the law appears to have 'compassion to human infirmity' where the law acknowledges that people are sometimes subject to extreme anger which can result in violence.<sup>40</sup> However some women's groups have argued that the defence may 'excuse violence'.<sup>41</sup>

It is therefore important to assess how foreign jurisdictions have approached the defence in comparison to South African law and case law to assist in the manner in which the defence of provocation should be applied.

The circumstances under which the defence of provocation is likely to succeed will be discussed in this dissertation. The question that remains is where should the court draw the line as to whether the defence should succeed? The provocation defence appears to excuse violent behaviour and accepts the 'myth' of loss of control when often it is in fact outrage and anger. This law appears to reveal to society that violence is acceptable to control others. Does the provocation defence support society's value that people are expected to control their behaviour and actions? If the provocation defence no longer reflects the standards we expect as a society, especially if it is seen to endanger vulnerable people and groups, consideration needs to be given as to whether this defence should be disallowed or reformed.<sup>42</sup>

The early stages of how the law in South Africa approached and developed the defence of provocation will be covered in the first chapter. The second chapter will consist of International comparative law and case law. The final chapter will cover an investigation into any future developments to the defence of provocation.

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<sup>40</sup> *R v Hill* (1986) 25 CCC (3d) 322 SCC.

<sup>41</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) at 5.

<sup>42</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section2p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section2p1_en.html) at 1.

## CHAPTER 1

### **The Historical Development of the Defence of Provocation in South Africa**

In 1886 the Cape of Good Hope Legislature enacted The Native Territories Penal Code, Act 24 of 1886, which is also referred to as the Transkeian Penal Code.<sup>43</sup> Section 141 of the Transkeian Penal Code provided for a defence of provocation. Prior to the introduction of Section 141 of the Transkeian Penal Code<sup>44</sup>, there does not appear to be any other law in respect of a defence of provocation.

The Transkeian Penal Code looks at a type of 'partial excuse situation'<sup>45</sup> where it deals with the effect that provocation would have if the accused was charged with murder- 'Homicide which would otherwise be murder may be reduced to culpable homicide.'<sup>46</sup> Van den Heever JA said in *R v Hercules*<sup>47</sup> that the law recognizes 'a hybrid or middle situation where there is an intention to kill but where that intention is not entirely but to some extent excusable'.<sup>48</sup>

According to the common law definition, murder is the unlawful and intentional killing of another human being. However, in terms of the Transkeian Penal Code, if a person kills under provocation then he/she could be convicted of culpable homicide. Provocation 'negatives the intention' with the result that the accused is not acquitted

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<sup>43</sup> Louw R 'A Draft Criminal Code for South Africa' (review of CR Snyman *A Draft Criminal Code for South Africa*) *South African Journal of Criminal Justice* 1997 303 at 303.

<sup>44</sup> Act No. 24 of 1886 (C).

<sup>45</sup> Burchell and Milton *Principles of Criminal Law* (1997) 280.

<sup>46</sup> Act No 24 of 1886.

<sup>47</sup> 1954 (3) SA 826 (A).

<sup>48</sup> *Supra* 832.

but found guilty of a lesser crime than murder.<sup>49</sup> This is contradictory to the dicta in *R v Hercules* where the court stated that the intention to kill is excusable to some extent. This would mean that the provocation cannot 'negative the intention' because that would be excusing the intention to kill completely.

A new approach was initiated in 1949 by Schreiner JA in *R v Thibani*<sup>50</sup> where the decisive issue was whether or not, in view of the effect of the provocation, the accused had the *mens rea* (or intention) for the crime. It was, therefore, stated that there is no reason why provocation should not serve to negative intention altogether.<sup>51</sup> In *R v Tenganyika*<sup>52</sup> the Federal Supreme Court of Rhodesia, relying on the Privy Council decision in *A-G of Ceylon v Perera*<sup>53</sup>, held that provocation may assist in reducing murder to culpable homicide even where there is an intention to kill.<sup>54</sup> Yet in *R v Butelezi*<sup>55</sup> there is evidence that the reduction of murder to culpable homicide is usually grounded upon a finding that on account of provocation the accused did not intend to kill.<sup>56</sup> The court referred to the case of *R v Ncobo*<sup>57</sup> where it was laid down that:

'an intention to kill was an essential element in the crime of murder, and that

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<sup>49</sup> Burchell and Hunt 1970: 241.

<sup>50</sup> 1949 (4) SA 720 AD.

<sup>51</sup> Burchell and Hunt 1970: 242. See also *S v Johnson* 1969 (1) SA 201 AD at 205- 206 where Botha JA made it clear that had the accused's unconsciousness resulted from any other cause than voluntary drunkenness, he would have been acquitted.

<sup>52</sup> 1958 (3) SA 7 FC.

<sup>53</sup> 1953 AC 200 PC. The Privy Council recognised that acts done by a man after he has lost control of himself may still be intended. In *R v Tenganyika* the court stated that 'to suggest that provocation is only a defence when it excludes the intention to kill is to narrow its limits unwarrantably.' - at 12 E-F.

<sup>54</sup> Burchell and Hunt 1970 *op cit* 243.

<sup>55</sup> 1925 AD 160 at 161, 166, 169.

<sup>56</sup> Burchell and Hunt 1970 *op cit* 243.

<sup>57</sup> 1921 AD 94 in *R v Butelezi supra*.

'such an intention is not confined to cases where there is a definite purpose to kill: it is also present in cases where the object is to inflict grievous bodily, calculated to cause death, regardless whether death results or not'.<sup>58</sup>

Solomon JA also stated that:

'an intention to kill is an essential element in the crime of murder, so that where there is no such intention, the killing cannot amount to murder.'<sup>59</sup>

Burchell submitted that the apparent confusion in the case law would be resolved if the views of the Federal Supreme Court in *R v Tenganyika* were accepted.<sup>60</sup>

'The Federal Supreme Court took the view that provocation must be regarded *subjectively* when intention is the issue, but *objectively* when, intention being present, the possible reduction of the crime from murder to culpable homicide is being considered.'<sup>61</sup>

The doubt that existed in South African law on the point was resolved in the case of *R v Krull*<sup>62</sup> where Schreiner JA stated:

'Under our system it does not follow from the fact that the law treats intentional killing in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet intentional. Since a merely provoked killing is never justified

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<sup>58</sup> *R v Butelezi* supra at 161.

<sup>59</sup> *R v Butelezi* supra at 162.

<sup>60</sup> Burchell EM 'Provocation: Subjective or Objective' *South African Law Journal* 1958 246 at 246.

<sup>61</sup> Burchell *op cit* 248.

<sup>62</sup> 1959(3) SA 392 AD at 399.

there seems to be no good reason for holding it to be less than murder when it is intended.<sup>63</sup>

The later case of *S v Mangondo*<sup>64</sup> illustrated a similar line of thinking where Williamson JA refused to reduce murder to culpable homicide because, despite provocation, the prosecution had proved intention to kill.<sup>65</sup> Provocation may however negate both intention to kill and the negligence required for culpable homicide where for instance the provocation resulted in unconsciousness.<sup>66</sup> In *S v Johnson* the court stated that 'it is generally accepted that someone who commits a misdeed while asleep cannot be held criminally responsible for that because such a deed cannot be a voluntary act'.<sup>67</sup> An example of where a provoked killing can be justified and the accused is not convicted of murder or culpable homicide but is instead acquitted.

## **The Test for Provocation**

### **Objective Test**

The material provisions of S141 of the Transkeian Penal Code are as follows:

'Homicide which would otherwise be murder may be reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation.

Any wrongful act or insult of such a nature as to be sufficient to deprive any 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.

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<sup>63</sup> *Ibid.*

<sup>64</sup> 1963(4) SA 160 AD.

<sup>65</sup> Burchell and Hunt 1970: 244.

<sup>66</sup> Burchell and Hunt *op cit* 243.

<sup>67</sup> 1969 (1) SA (Translation) at 53.

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.<sup>68</sup>

Section 141 of the Transkeian Penal Code requires the act or insult to be sufficient to deprive 'any ordinary person' of the power of self-control. This is an objective test where the question is whether the reasonable man in the circumstances of the accused would have lost self-control. The reasonable man 'is the embodiment of all qualities which we demand of the good citizen, a device whereby to measure the [criminal's] conduct by reference to community values'.<sup>69</sup> The purpose of an objective test was to prevent people with 'bad tempers' from being allowed to give free rein to their emotions.<sup>70</sup>

Snyman<sup>71</sup> referred to the above as one of two different approaches to the effect of provocation. The first approach is seen as a 'separate doctrine' which follows specific rules. This means that the accused who relies on provocation is subject to a 'distinct set of rules' whereby his liability is assessed and he is not assessed by the ordinary principles of liability such as unlawfulness, criminal capacity and intention. This approach is termed the 'separate doctrine approach'.<sup>72</sup> This approach found its way into South African law through section 141 of the Transkeian Penal Code.<sup>73</sup>

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<sup>68</sup> See *R v Butelezi* supra at 162; See also Burchell and Milton *op cit* 279.

<sup>69</sup> Hunt *South African Criminal Law and Procedure common law crimes* : 1970 vol II: 374.

<sup>70</sup> Burchell and Milton 1997 *op cit* 280.

<sup>71</sup> Snyman 1995 *op cit* 222.

<sup>72</sup> *Ibid.*

<sup>73</sup> Snyman 1995 *op cit* 223.

In 1925 the Appellate Division held in *R v Butelezi*<sup>74</sup> that Section 141 of the Transkeian Penal Code<sup>75</sup> correctly expresses our common law on the subject of provocation. An important point to note is that this approach does not include the general principles of criminal liability for murder namely, unlawfulness, criminal capacity and intention. The accused who murdered under provocation is only tested against the set of rules in the provisions quoted from the Transkeian Penal Code above. Provocation could only be a complete defence (where the accused can be acquitted) if one of the general principles of criminal liability is not proven.<sup>76</sup> Since there is no strict adherence to the general principles in Section 141 of the Transkeian Penal Code, the provisions do not serve as a complete defence to the accused.

In 1959 in *R v Krull*<sup>77</sup>, the Appellate Division decided that provocation cannot reduce an intentional killing to culpable homicide. Schreiner JA also held that, upon a charge of murder where there is evidence of provocation, only one inquiry need be made, namely, did the accused intend to kill? If the answer is yes, the consequence would be a conviction of murder, possibly with extenuating circumstances. If the intention to kill was negated by the provocation, the conviction would at most be culpable homicide.<sup>78</sup> His view was that:

'[I]n the treatment of provocation arising from idiosyncrasies such as hotheadedness or timidity 'conformity to objective standards must, for practical reasons, be insisted on'.<sup>79</sup>

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<sup>74</sup> 1925 AD 160 at 162; See also Burchell and Milton *op cit* 279.

<sup>75</sup> Act No. 24 of 1886 (C).

<sup>76</sup> Snyman: 1995 *op cit* 223.

<sup>77</sup> 1959 (3) SA 392 AD at 399.

<sup>78</sup> Burchell and Hunt 1970 *op cit* 246.

<sup>79</sup> Burchell EM 'Provocation: Subjective or Objective' *South African Law Journal* 1964 27 at 29; *S v Krull* supra 396.

The problem with using an objective test is that it requires everyone, whether he/she be of different culture or background, to observe the same standard which would be what is 'fairly and reasonably expected of a white person of ordinary knowledge, experience and capacities'.<sup>80</sup>

'It has long been recognized that in a heterogenous society the insistence on a purely objective approach to testing liability for crimes of negligence may lead to instances of injustice. . . in such a society, it is not possible to formulate a test of the reasonable man which is appropriate to the divergent norms of the different cultural, social or ethnic groups making up the society.'<sup>81</sup>

This problem was evident in the judgment in the early case of *R v Mbombela*<sup>82</sup> where X, an African living in a rural, tribal community, killed Y because he believed that Y was the 'thikoloshe', a creature from African beliefs. The killing of such a creature was in accordance with his culture. However, the Appellate Division held that his actions were not reasonable since the reasonable man did not believe in the existence of the 'thikoloshe'. It is clear that the court had applied a 'notion of reasonableness derived from a different cultural milieu'.<sup>83</sup> Louw stated that the case of *Mbombela*:

'starkly illustrates the potential unfairness of the use of an objective reasonable man test in a heterogeneous society where the actor may be measured against an unattainable standard, culturally otherwise.'<sup>84</sup>

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<sup>80</sup> Hunt: 1970 *op cit* 374-375.

<sup>81</sup> Hunt: 1970 *op cit* 383.

<sup>82</sup> 1933 AD 269.

<sup>83</sup> Hunt: 1970 *op cit* 384 at n 197.

<sup>84</sup> Louw R 'The Reasonable Man and the Tikoloshe' *South African Journal of Criminal Justice* 1993(6) 361 at 361.

Louw noted a move away from the 'pure objective test' in the 1976 case of *S v Van As*<sup>85</sup> where the court held that the 'reasonable man was not to be viewed solely objectively' in that the test must rather be 'relative to a certain group of persons'.<sup>86</sup>

More recently the case of *S v Ngema*<sup>87</sup> illustrates that the application of a 'strictly objective approach' in cases of culpable homicide should not be followed.<sup>88</sup> Hugo J stated that:

'[I]t is clear that the days of full-blown objectivism, as exemplified by *R v Mbombela* 1933 AD 269 at 272 are past, and some evidence of subjectivizing the test for negligence is apparent . . . . One must test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and - dare I say it - race of the accused. The further individual peculiarities of the accused alone must, it seems to me, be disregarded.'<sup>89</sup>

## Subjective Test

The subjective test is usually applied for a murder charge, where the question asked is whether or not the accused had the intention to murder.<sup>90</sup> To apply a subjective test for negligence seems to suggest that the fault of the accused must be decided by the same test that is applied in relation to murder. This is misleading because, as Hunt argues, the accused is judged by his

'personal ability to conform with the standards of the reasonable man . . . it is a

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<sup>85</sup> 1976(2) SA 921 (A) in Louw *op cit* 361.

<sup>86</sup> Louw *R op cit* 361-362.

<sup>87</sup> 1992(2) SACR 651(D).

<sup>88</sup> Hunt: 1970 *op cit* 384.

<sup>89</sup> *R v Ngema supra* 651 F-I.

<sup>90</sup> Burchell and Milton 1997 *op cit* 465.

test of the extent to which X, as an individual, possesses the physical, intellectual and cognitive abilities which enable him to conduct himself in the manner of a reasonable man of his race, class, gender etc.<sup>91</sup>

The problems that may be experienced with a purely subjective test for negligence was elaborated on by PMA Hunt in the following example:

'If a hot-tempered individual loses control of himself and (lacking intent to kill) causes death, he cannot be convicted of culpable homicide, for if we are to judge him by his own characteristics he has acted predictably and in accordance with the disposition which a variety of background influences have shaped.'<sup>92</sup>

Botha JA demonstrated that:

'what the subjective test puts in issue is whether X was physically, mentally or culturally able to meet the standard of the reasonable man. If, *for reasons beyond his control*, he is not, it is manifestly unfair and unjust to inflict punishment upon him.'<sup>93</sup>

Louw submitted with respect to a subjective test that:

'if further individual peculiarities of the accused alone must . . . be disregarded' then the potential for unfairness . . . remains. . . The accused's conduct should be measured against what would be reasonable for him to do in the circumstances in terms of his own capabilities . . .'<sup>94</sup>

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<sup>91</sup> Hunt 1970 *op cit* 386.

<sup>92</sup> *Ibid.*

<sup>93</sup> Hunt 1970 *op cit* 387; JA Botha '*Culpa - A Form of Mens Rea or a Mode of Conduct*' 1977:94 *South African Law journal* 29 at 37.

<sup>94</sup> Louw R *op cit* 364.

This issue arose in 1963 in the case of *S v Mangondo*<sup>95</sup> where Williamson J.A suggested that since criminal intention is now subjective, and since earlier cases applied a degree of objectivity, it may be necessary to consider provocation afresh.<sup>96</sup> In *S v Lubbe*<sup>97</sup> it was necessary for the court to consider whether the test is subjective or objective where the accused's state of mind results from 'normal personal idiosyncrasies'.<sup>98</sup> Jansen J drew attention to the approach in the earlier case of *R v Thibani* where the Judge of Appeal said that:

'... provocation seems to have assumed its proper place, not as a defence . . . but as a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt.'<sup>99</sup>

Jansen J regarded this dictum as indicating a 'preference for the subjective test' and also said that the phrase 'excluding normal personal idiosyncrasies' from the *Krull* case did not revive the objective test but meant that in a subjective consideration of intention to kill, evidence of the accused's personal idiosyncrasies must not be taken into account.<sup>100</sup>

In 1966 in the case of *S v Dlodlo*<sup>101</sup>, the Appellate Division approved the subjective test for the intention to kill where the defence of provocation had been raised. Botha JA stated that the onus was on the prosecution to prove beyond reasonable doubt that

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<sup>95</sup> 1963(4) SA 160 AD.

<sup>96</sup> Burchell EM *South African Law Journal* 1964 27 at 27-28.

<sup>97</sup> 1963(4) SA 459 (W).

<sup>98</sup> Burchell EM *South African Law Journal* 1964 27 at 28.

<sup>99</sup> *Supra* at 731; see also Burchell and Milton *Op cit* 240; Burchell EM *South African Law Journal* 1964 27 at 28.

<sup>100</sup> Burchell EM *South African Law Journal* 1964 27 at 28-29.

<sup>101</sup> 1966(2) SA 401 AD.

when the accused caused the injury he 'as a fact appreciated, *subjectively*, the possibility of death resulting therefrom'. The learned Judge continued:

'The subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from *all the circumstances* leading up to and surrounding the infliction of that injury.'<sup>102</sup>

It was submitted that 'full weight' should be given to the dictum of Botha JA that the test in provocation is subjective. The problem that remains, however, is that the learned judge did not expressly reject the dicta of the courts in *Krull and Lubbe*.<sup>103</sup>

Snyman<sup>104</sup> referred to a second approach to the effect of provocation which is referred to as the 'general principles approach'. This is where one applies the 'ordinary principles of liability' of unlawfulness, criminal capacity and intention to the facts of the situation. Two important cases illustrated that the South African courts were rejecting the 'separate doctrine approach'<sup>105</sup> in favour of the 'general principles approach'. In 1971 the Appellate Division held in the case of *S v Mokonto*<sup>106</sup> that the provisions of S141 of the Transkeian Penal Code 'had to be confined to the territory for which it had been passed'.<sup>107</sup> In terms of these provisions an objective test had to be applied to assess whether the provocation had excluded the accused's intention. However, the decision in this case made it clear that the test to determine whether the provocation

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<sup>102</sup> Dugard CJR 'Provocation: No More Rides on the Sea Point Bus' *South African Law Journal* 1966 261 at 264.

<sup>103</sup> *Ibid.*

<sup>104</sup> Snyman: *op cit* 222-223; see also Visser PJ and Mare MC *General Principles of Criminal Law through the Cases* (1990) 389.

<sup>105</sup> Snyman *op cit* 223; See also above.

<sup>106</sup> 1971(2) SA 319 (A).

<sup>107</sup> *Mokonto supra* 319, 326 in Snyman *Strafreg - Vonnis-Bundel: Criminal Law Casebook* 1991: 111.

excluded an accused's intention is subjective.<sup>108</sup> This test was referred to by Snyman in the above case as the following:

'The test is no longer how the ordinary or reasonable person would have reacted to the provocation, but how the particular accused, given his personal characteristics, such as quick temper, jealousy or a superstitious turn of mind, in fact reacted, and what his state of mind was at the crucial time.'<sup>109</sup>

The rejection of the objective test in the *Mokonto* case illustrated that what is important is not the 'nature of the provocative act' as 'its effect on X's mental abilities or state of mind'. This means that one does not have to prove that the provocative act was unlawful. For example, it would not matter how great the provocative act of the victim is, but rather how seriously it affected the accused with respect to his state of mind at the time. In other words the test is a subjective one. Therefore the provocation may exclude the criminal capacity or intention even if the provocative act was lawful.<sup>110</sup> The later case of *S v Campher*<sup>111</sup> made it clear that provocation could not only exclude the accused's intention, but also his criminal capacity. The important consequence of this is that the accused may be acquitted because if he lacks the criminal capacity, he cannot be convicted of culpable homicide or of assault.<sup>112</sup>

Louw stated that 'whatever future progressive modifications there may be, the objective test, absolute or relative, will always lead to an unsatisfactory compromise because the accused will always be judged against someone else's standards.'<sup>113</sup> However, Burchell and Hunt noted that "there has been a gradual swing in favour of subjectivity

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<sup>108</sup> Ibid; See also Snyman *Criminal Law* 1995: 223-224.

<sup>109</sup> Snyman *Criminal Law op cit* 227.

<sup>110</sup> Ibid.

<sup>111</sup> 1987(1) SA 940 (A).

<sup>112</sup> Snyman: 1995 *op cit* 224; See also Burchell and Milton *op cit* 291.

<sup>113</sup> Louw *op cit* 364.

and the only doubt is whether or not faint traces of objectivity still exist.”<sup>114</sup>

### **Non-pathological criminal incapacity**

The test for capacity is:

- ‘1) Did the accused have the capacity to appreciate the wrongfulness of his or her conduct, and
- 2) the capacity to act in accordance with this appreciation?’<sup>115</sup>

The traditional defences for capacity are:<sup>116</sup>

- ‘1) Insanity - this is in terms of S78(1) of the Criminal Procedure Act of 1977;
- 2) Youth - the court in *Weber v Santam Versekeringsmaatskappy Bpk*<sup>117</sup> laid down the criterion of capacity in the same general terms as S78(1) of the Criminal Procedure Act.’

Also, as a result of the case of *S v Chretien*<sup>118</sup> in 1981, voluntary intoxication could serve as a defence for capacity.<sup>119</sup> More recently, a general test of non-pathological incapacity has developed.<sup>120</sup> The name of this defence was formulated in the case of *S v Laubscher*<sup>121</sup> where the judge wanted to separate this defence from mental illness

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<sup>114</sup> Burchell and Hunt 1970 *op cit* 245.

<sup>115</sup> Burchell and Milton 1997 *op cit* 225.

<sup>116</sup> Burchell and Milton 1997 *op cit* 226.

<sup>117</sup> 1983(1) SA 381 (A) at 389.

<sup>118</sup> 1981(1) SA 1097 (A).

<sup>119</sup> Burchell and Milton 1997 *op cit* 227.

<sup>120</sup> Burchell and Milton 1997 *op cit* 228.

<sup>121</sup> 1988(1) SA 163 (A).

under section 78(1) of the Criminal Procedure Act.<sup>122</sup> The definition of non-pathological incapacity is where the accused's lack of capacity is due to some cause other than disease.<sup>123</sup> The cause may be due to 'emotional stress'<sup>124</sup>, 'total disintegration of the personality'<sup>125</sup>, or factors such as shock, fear, anger or tension.<sup>126</sup> The question as to whether provocation and severe emotional stress could exclude the elements of liability was answered in the obiter dictum of Diemont AJA in the 1983 case of *S v Van Vuuren*:<sup>127</sup>

'In principle there is no reason for limiting the enquiry [into criminal capacity] to the case of the man who is too drunk to know what he is doing. Other factors [such as provocation and severe mental or emotional stress] which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability.'<sup>128</sup>

This defence appears on the face of it to be problematic in that it seems easy for an accused to allege that he had become 'so enraged' or acted under 'such emotional stress' that he was not able to control his actions. Snyman submitted, however, that the courts treat defences which can be raised easily with 'great caution'.<sup>129</sup> Snyman refers to the 'uncritical codification of the concept of capacity'. He submitted that:

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<sup>122</sup> Snyman *Criminal Law op cit* 152.

<sup>123</sup> Illson *Readers Digest Great Illustrated Dictionary* (1984) 1248.

<sup>124</sup> *S v Arnold* 1985(3) SA 256 (C).

<sup>125</sup> *S v Laubscher* 1988(1) SA 163 (A) 167 G-H.

<sup>126</sup> Snyman *Criminal Law op cit* 153.

<sup>127</sup> 1983(1) SA 814 (O).

<sup>128</sup> Burchell and Milton *op cit* 281; See also *S v Bailey* 1982(3) SA 772 (A) at 796 C; Snyman *Criminal Law op cit* 224.

<sup>129</sup> Snyman *Criminal Law op cit* 154; see also *S v Potgieter* 1994(1) SACR 61 (A)[115] in Burchell and Milton *op cit* 284-285.

'largely as a consequence of this [German] influence, our courts have developed the capacity enquiry with resultantly controversial acquittals on murder charges. This has occurred via the merger of the defence of provocation with the capacity enquiry. Thus provocation, which might formally have resulted in at best a conviction of a lesser offence or have been taken into account in the sentencing stage, may now result in the 'uncontrollably' angry literally getting away with murder.'<sup>130</sup>

In the 1980s, the cases of *S v Arnold*<sup>131</sup> and *S v Campher*<sup>132</sup> illustrated how provocation and severe emotional stress were taken into account in assessing criminal liability. In *S v Arnold* a man was charged with the murder of his wife. The man had a son who suffered from a hearing disability and his wife had become hostile toward his son. For this reason he had to place his son in a special home. On the day in question the accused had a gun with him for business reasons and on encountering his wife, he claimed that he was unable to place the gun in a secure area. He was upset because his wife was staying elsewhere and refused to tell him where. She then bent forward 'displaying her bare breasts' and referred to her wish to become a stripper again. A shot was then fired and the accused claimed that he could not remember aiming the gun and pulling the trigger.<sup>133</sup>

The court in this case was prepared to accept that loss of criminal capacity could be due to other factors such as 'extreme emotional distress'.<sup>134</sup> Psychiatric evidence was lead to the effect that:

'His conscious mind was so 'flooded' by emotions that it interfered with his

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<sup>130</sup> Snyman CR *op cit* 1997: 307.

<sup>131</sup> 1985(3) SA 256 (C).

<sup>132</sup> 1987(1) SA 940 (A)

<sup>133</sup> *Arnold supra* 257-261.

<sup>134</sup> *Arnold supra* 264 at C-D; see also *South African Law Journal* 1985 240 at 242.

capacity to appreciate what was right or wrong and, because of his emotional state, he may have lost the capacity to exercise control over his actions.<sup>135</sup>

Criminal capacity on the part of the accused had not been proven and he was accordingly acquitted. In *S v Campher*<sup>136</sup>, the accused was found guilty but the majority also held that emotional stress could in principle lead to an absence of criminal capacity and therefore a complete acquittal.<sup>137</sup>

Burchell and Milton submitted that the judgment of Squires J in the recent case of *S v Nursingh*<sup>138</sup> is an illustration of the problems that can arise by the 'current judicial approach' to the defence of non-pathological incapacity.<sup>139</sup> The accused in this case had shot and killed his mother, grandmother and grandfather. The court had to decide whether or not he satisfied the two criteria under the test for capacity.

The defence submitted that the accused

'had a personality makeup which predisposed him to a violent emotional reaction. . . [If certain] circumstances occurred to trigger off this disruption of his mind, it would become so clouded by an emotional storm that seized him that he would not have the mental ability to distinguish between right and wrong and act in accordance with that insight.'<sup>140</sup>

The psychiatrist described that due to the circumstances of the accused as well as his history of sexual abuse by his mother, this 'triggered off a state of "altered

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<sup>135</sup> *Arnold* supra 263 at C-D; See also Burchell and Milton *op cit* 281-282.

<sup>136</sup> *Supra*.

<sup>137</sup> Burchell and Milton *op cit* 283.

<sup>138</sup> 1995(2) SACR 331 (D).

<sup>139</sup> Burchell and Milton 1997 *op cit* 285.

<sup>140</sup> *S v Nursingh* supra 332; See also Burchell and Milton *op cit* 285.

consciousness” which deprived him of awareness of normality’.<sup>141</sup> Squires J noted the need to ‘scrutinize defences of non-pathological incapacity carefully’ and the accused was acquitted on all three counts because there was a reasonable doubt as to whether he had the required capacity at the time of the killings.<sup>142</sup>

It is difficult to accept that a person, although under extreme emotional stress, can kill his mother and both of his grandparents. It is therefore important that the courts ‘scrutinize’ the defence of non-pathological incapacity carefully. This was introduced in the earlier case of *Potgieter* where the judge of appeal observed that the ‘facts...must therefore be closely examined to determine where the truth lies’.<sup>143</sup> The court found in this case that the factual scenario could not be ‘reasonably possibly true’ and so the defence of non-pathological incapacity could not succeed.<sup>144</sup> However, even Burchell and Milton question whether ‘Nursingh was under any more stress than Potgieter?’<sup>145</sup>

The law regarding non-pathological incapacity was summarised by Vivier JA in *S v Di Blasi*<sup>146</sup> as follows:

‘It is for the accused person to lay a factual foundation for his defence that non-pathological causes resulted in diminished criminal responsibility, and the issue is one for the Court to decide. In coming to a decision the court must have regard not only to the expert evidence but to all the facts of the case, including the nature of the accused person’s actions during the relevant period. . .

[T]his court emphasises the need to subject the evidence given by the accused person in support of a defence of non-pathological incapacity to careful

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<sup>141</sup> *Nursingh* supra at 333 C-D in Burchell and Milton *op cit* 285.

<sup>142</sup> *Nursingh* supra at 336 H-J in Burchell and Milton *op cit* 286.

<sup>143</sup> *S v Potgieter* 1994(1) SACR 61 at 74 in Burchell and Milton *op cit* 284.

<sup>144</sup> Burchell and Milton *op cit* 284.

<sup>145</sup> Burchell and Milton *op cit* 285.

<sup>146</sup> 1996(1) SACR 1 (A) in Burchell and Milton *op cit* 287.

scrutiny.<sup>147</sup>

In 1996 the important case of *S v Moses*<sup>148</sup> emerged, which illustrates further problems in applying the defence of non-pathological incapacity. In this case the accused and deceased were homosexual lovers. After the first time that the accused had penetrative intercourse with the deceased, the deceased revealed that he had AIDS. No protection was used during intercourse and the accused became extremely angry and hit the deceased twice with an ornament on the head. He then stabbed him in the side with a small knife and brought a larger knife from the kitchen with which he cut the deceased's throat and wrists. The accused testified that he was so angry that he could not stop himself.<sup>149</sup> The accused had a 'history of poor control and anger, was susceptible to anger outbursts and violence, came from a dysfunctional family and had been sexually abused by his father'.<sup>150</sup>

The court acquitted the accused on the basis that the state failed to prove beyond reasonable doubt that the accused had the required criminal capacity at the time of the killing.<sup>151</sup> The court seemed to rely on the accused's 'unstable personality' combined with the final 'provocation' of the deceased telling him that he had AIDS.<sup>152</sup>

De Vos examined:

- 1) whether the defence ought to have been successful given the fact that the accused flew into a terrible rage - which was attributed to his dysfunctional

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<sup>147</sup> At 7c-f in *Burchell and Milton op cit* 287-288.

<sup>148</sup> 1996(1) SACR 701.

<sup>149</sup> *Moses supra* at 704-705.

<sup>150</sup> *Moses supra* at 701 e-f.

<sup>151</sup> *Moses supra* at 714 l.

<sup>152</sup> De Vos P 'Criminal capacity, Provocation and HIV' *South African Journal of Criminal Justice* 1996(9) 354 at 356.

personality and not to a long-term, progressive build-up of emotional stress in the accused, and

2) the correctness of the judgment in acquitting the accused, whose criminal capacity had been diminished by extreme provocation.<sup>153</sup>

De Vos referred to the distinction between the 'conative' and 'affective' aspects of criminal incapacity as was illustrated in the Report of the Rumpff Commission:

'The conative leg of the test consists in a person's ability to control his or her behaviour in accordance with his or her insights - which means that a person is able to make a decision. . . resist impulses or desires to act contrary to what his or her insight into right and wrong reveals to the person.

. . . the affective function of the mind does not automatically have any influence on criminal capacity of the perpetrator. The latter refers to . . . most intense emotions of hatred, fury and jealousy.'<sup>154</sup>

He concluded that the affective function of the mind may be impaired by provocation but this is not sufficient to make a finding of a lack of criminal capacity. He went on to state that the 'issue is whether the accused could control his actions or not and that the court failed to make a distinction between uncontrollable actions and actions which are controllable.<sup>155</sup> He then referred to the Rumpff Commission where it was stated:

'When a man kills his friend in a fit of rage, his behaviour does not spring from any blind, impulsive drive or uncontrollable emotion. He is performing a goal directed act. In his (momentary) rage he has not controlled himself, but his

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<sup>153</sup> De Vos *op cit* 354.

<sup>154</sup> *Report of the Commission into the Responsibility of Mentally Deranged Persons* (RP 78/1976) in De Vos *op cit* 357.

<sup>155</sup> De Vos *op cit* 358.

action was by no means uncontrollable, as in cases of automatism.<sup>156</sup>

The *Moses* case can clearly be distinguished from the *Nursingh* case. In *Nursingh* the act of killing his mother and grandparent was 'preceded by a very long period in which his level of emotional stress increased progressively'.<sup>157</sup> The main reason why an objective test was initially used to determine criminal liability under provocation was to prevent individuals with 'bad tempers' from being allowed to give 'free rein to their emotions'.<sup>158</sup> De Vos stated that if the *Moses* decision is accepted, then there is a danger that the non-pathological criminal incapacity defence could be abused by persons who are 'quick-tempered'.<sup>159</sup>

Another important point raised by De Vos is that the court erred in its finding of an acquittal on the basis that the 'control of the accused was not significantly impaired'<sup>160</sup> or because of his 'diminished criminal incapacity'.<sup>161</sup> In other words, Moses was acquitted because his control over his actions was significantly impaired and not because it was completely absent.<sup>162</sup> Provocation or emotional stress may constitute a factor which 'diminishes the accused's responsibility and leads to a reduction in sentence or punishment'.<sup>163</sup> Therefore, Moses should have been convicted and the 'significant impairment of his control' should have been used to reduce his sentence.<sup>164</sup>

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<sup>156</sup> *Report* para 926 in De Vos *op cit* 358.

<sup>157</sup> De Vos *op cit* 358; See also *Arnold, Campher and Wiid*.

<sup>158</sup> *Burchell and Milton op cit* 280.

<sup>159</sup> De Vos *op cit* 358.

<sup>160</sup> *Moses supra* 701 g-h.

<sup>161</sup> De Vos *op cit* 359.

<sup>162</sup> *Ibid*.

<sup>163</sup> *Burchell and Milton op cit* 295; See also *S v Laubscher supra* and *S v Di Blasi supra* in *Burchell and Milton* at fn 111.

<sup>164</sup> See De Vos *op cit* 359.

The problem can only be solved if the courts make it a point to note that they must be 'satisfied that the conduct of the accused was indeed brought about by a genuine breakdown of the conative capacity and not mere anger'.<sup>165</sup>

### **A Combination of the Subjective and Objective Tests**

An early approach which involved both the objective and subjective tests was adopted by the Federal Supreme Court in *R v Tenganyika*.<sup>166</sup> Where the charge is one of murder and there is evidence of provocation, it was held that two separate inquiries must be made.

'The first inquiry is whether intention to kill was present. In making this inquiry account must be taken of all the facts - provocation, intoxication and any other eccentricity or abnormality the accused may have had. Since the test for intention is subjective, at this stage provocation will be considered subjectively. If the court is left in doubt as to whether the intention to kill was present, the accused could at most be convicted of culpable homicide. If the court is satisfied that the intent to kill was proved, the Federal Supreme Court took the view that a second inquiry must be made, namely whether the provocation which the accused received was sufficient to warrant a verdict of culpable homicide despite the fact that the killing was intentional.'<sup>167</sup>

On this point Tredgold CJ held the test to be objective - 'whether the accused was so provoked that, in the circumstances, a reasonable man would have lost his self-control'.<sup>168</sup>

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<sup>165</sup> De Vos *op cit* 360.

<sup>166</sup> 1958(3) SA 7 FC.

<sup>167</sup> *R v Tenganyika supra* 11G-H.

<sup>168</sup> Burchell and Hunt 1970: 245; *R v Tenganyika supra* 11 H; See also Burchell *South African Law Journal* 1958 246-248.

It is submitted that this approach is an appropriate one in that it can eliminate the problems evident when the test is only objective or only subjective. Here the personal characteristics of the accused are considered so that he is not forced to conform to an unattainable standard, and also the reasonable man test is used to prevent persons with merely quick tempers to escape liability.

There does not appear to be any further development in South African law with regards to a combination of the subjective and objective tests.

## CHAPTER 2

### International Comparative law and case law

A comparison of South African law to the law in foreign jurisdictions will provide a good insight as to how the law on provocation could be considered in terms of the reformation or elimination of it as a defence, or allowance for it only in mitigation of sentence. The foreign jurisdictions that will be covered are Australia, Canada and England. These countries are being referred to since the law in these countries is similar to South Africa. An example would be that these countries use the objective test of the reasonable man to determine the liability of the accused just as South African law does.

#### Canada

The defence of provocation first developed in the 1800s in *R v Hayward*<sup>169</sup> where the court acknowledged that criminal liability should be lessened because human beings are subject to outbursts of passion and anger that are uncontrollable and which may lead them to do violent acts.<sup>170</sup> By the 19th century an objective test was introduced in *R v Welsh*<sup>171</sup>:

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

In 1972 the task of reform of the criminal law was borne by the Law Reform

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<sup>169</sup> (1833) 6 Car & P 157 at 159, 172 ER 1188.

<sup>170</sup> Saunders *Saunders & Mitchell - An Introduction to Criminal Law in Context* (1996): 719.

<sup>171</sup> (1869) 11 Cox CC 336 at 338 in Saunders RP *ibid*.

Commission of Canada.<sup>172</sup> It was established as a permanent body to review the laws of Canada on a “continuing and systematic basis”.<sup>173</sup> This Commission excludes provocation as even a partial defence. It would rather permit provocation to be weighed as a mitigating factor at sentencing.<sup>174</sup>

However, Canadian law now refers to the doctrine of provocation or ‘heat of passion’ as involving a justification and an excuse whereby murder is partially excused. This is due to the fact that provocation is a ‘statutory partial defence’.<sup>175</sup> This was codified in 1892<sup>176</sup> in the Criminal Code under s215 which listed three requirements for the defence of provocation:<sup>177</sup>

- ‘a) the provoking wrongful act or insult must be of such a nature that it would deprive an ordinary person of the power of self-control;
- b) the accused must actually have been provoked;
- c) the accused must have acted on the provocation on the sudden and before there was time for his or her passion to cool.’

The aim here was to ensure that the ‘calculating revenge killer (however sorely provoked)’ would not be able to take advantage of the defence.<sup>178</sup> The reason for the objective test was to prevent people from relying on their ill-temper and to give ‘free rein to their emotions’ and then escape liability.<sup>179</sup> Society’s concern is that reasonable

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<sup>172</sup> Stuart 1982 *op cit* 3.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Recodifying Criminal Law* Volume 1: 1986 in Saunders 1996: 716.

<sup>175</sup> Saunders 1996 *op cit* 715.

<sup>176</sup> Stuart *Canadian Criminal Law - A Treatise* (1982) : 436.

<sup>177</sup> Saunders RP 1996 *op cit* 719

<sup>178</sup> Colvin E *Principles of Criminal Law* (1986) 221.

<sup>179</sup> Burchell and Milton *op cit* 280.

and non-violent behaviour be encouraged.<sup>180</sup> The Canadian courts<sup>181</sup> have defined a 'wrongful act or insult' as :

'an act, or action, of attacking or assailing; an open or sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.'

The case law in Canada has provided guidance on the ordinary person standard for provocation. In *Taylor v The King*<sup>182</sup>, where the accused was drunk at the time of the alleged provocation, the court made it clear that for the purposes of the objective test of provocation, 'the jury is not entitled to take into consideration any alleged drunkenness on the part of the accused'. In the later case of *Salamon v The Queen*<sup>183</sup>, the jury was instructed not to consider 'the character, background, temperament or condition of the accused' in relation to the objective test of provocation.<sup>184</sup> The circumstances of the offence and the character of the accused are only referred to for an appropriate sentence.<sup>185</sup>

In 1969 in *Wright v The Queen*<sup>186</sup>, a son was charged with shooting and killing his father. The relationship was a difficult one in that the father was a bad-tempered and violent man who had mistreated his son on numerous occasions. The court rejected the relevance of the quality of the accused's relationship with his father, the mentality

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<sup>180</sup> Saunders 1996 *op cit* 720.

<sup>181</sup> *R v Taylor* citing the *Oxford English Dictionary*,  
[http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 2

<sup>182</sup> (1947) 89 CCC 209 at 217-8; (1948) 1 DLR 545 at 552-3; (1947) SCR 462 at 471.

<sup>183</sup> (1959) 123 CCC 1, 17 DLR (2d) 685; (1959) SCR 404.

<sup>184</sup> Saunders 1996 *op cit* 720.

<sup>185</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 1.

<sup>186</sup> (1969) 3 CCC 258, 2 DLR (3d) 529, (1969) SCR 335.

of the accused or his possible drunkenness.<sup>187</sup> The court relied on the words of Lord Simonds in the House of Lords decision in *Bedder v Director of Public Prosecutions*.<sup>188</sup>

‘[T]he hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test . . . 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.’<sup>189</sup>

Saunders submits that the ‘courts ruling seems to narrow unduly the conception of the ordinary person and rigidly prohibit a consideration of the physical characteristics of the accused’.<sup>190</sup> Stuart further submits that the decisions in *Wright* and *Bedder* are ‘ludicrously strict applications of the objective standard’.<sup>191</sup>

The *Bedder* case was no longer authoritative in England since the 1978 case of *Camplin*.<sup>192</sup> The court stated that the trial judge should explain to the jury:

‘that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him, and the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused

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<sup>187</sup> Saunders 1996 *op cit* 720.

<sup>188</sup> [1954] 2 ALL ER 801 (HL) in Stuart 1982 *op cit* 439.

<sup>189</sup> At 804.

<sup>190</sup> 1996 *op cit* 721.

<sup>191</sup> Stuart 1982 *op cit* 440.

<sup>192</sup> [1978] A.C. 705 (HL) in Stuart 1982 *op cit* 440.

did.<sup>193</sup>

The reasoning was that the gravity of the provocation can depend on the characteristics of the person to whom it is directed.<sup>194</sup> Stuart submitted that section 215's reference to the "ordinary person" should possibly allow room for adopting the *Camplin* approach.<sup>195</sup> Colvin submitted that:

'*Camplin* has tempered but has far from eliminated the objective test. The hard core of that test lies in its refusal to countenance the defence for persons who lose self-control merely because they have abnormally poor self-control or have impaired their self-control through intoxication. This hard core remains undisturbed by *Camplin*. The development of the variable "ordinary person" has been designed to remove some of the unfortunate side-effects of the objective test rather than to undermine its central rationale.'<sup>196</sup>

In 1986 the majority of the Supreme Court of Canada in *R v Hill*<sup>197</sup> held that while the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness, the jury should take into account general characteristics relevant to the specific provocation.<sup>198</sup> The trial judge said:<sup>199</sup>

'Provocation may come from actual words . . . the actual words must be such as would deprive an ordinary person of self-control. In considering this part of the defence you are not to consider the particular mental make-up of the accused;

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<sup>193</sup> At 718 in Stuart 1982 *op cit* 441; See also Colvin 1986 *op cit* 222-223.

<sup>194</sup> Colvin 1986 *op cit* 223.

<sup>195</sup> Stuart 1982 *op cit* 442.

<sup>196</sup> Colvin 1986 *op cit* 225.

<sup>197</sup> (1986) 25 CCC (3d) 322 SCC.

<sup>198</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 2.

<sup>199</sup> Gool AD *Annual Review of Criminal Law* (1983) 161.

rather the standard is that of the ordinary person. . . you will then secondly consider whether the accused acted on the provocation on the sudden before there was time for his passion to cool. In deciding this question you are not restricted to the standard of the ordinary person. You will take into account the mental, the emotional, the physical characteristics and the age of the accused.'

In 1977 in the case of *Moffa*,<sup>200</sup> the court gave minority support for a purely subjective test allowing for personal idiosyncrasies, mental or physical, including such factors as excitability and low intelligence.<sup>201</sup>

A move toward a subjective test was evident in 1996 in the case of *R v Thibert*<sup>202</sup> where the court of Canada held that the past history of the relationship between the accused and the deceased could be considered in establishing whether the act or insult would provoke the 'ordinary person'.<sup>203</sup> Once the jury decides if the provocation was sufficient to deprive an ordinary person of the power of self-control, it must then decide if this applies to the accused. Here the jury can take into consideration the mental state of the accused, as well as the psychological temperament to determine if he was in fact acting in response to provocation.<sup>204</sup>

Stuart submits that the removal of the reasonable man test would provide the advantage that it would no longer be necessary to decide which individual factors should be taken into account.<sup>205</sup> He further submits that the only alternative to a purely subjective test would be that the test be initially subjective, but at some point objectivity

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<sup>200</sup> (1976-77) 13 ALR 225 (Aus. HC) in Stuart 1982: 444.

<sup>201</sup> *Ibid.*

<sup>202</sup> (1996) 131 DLR 4th 675 at 683.

<sup>203</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 2.

<sup>204</sup> [Http://canada.justice.gc.ca](http://canada.justice.gc.ca) - 3.

<sup>205</sup> Stuart 1982 *op cit* 444.

should prevail.<sup>206</sup>

## Australia

In terms of the common law in South Australia and Victoria, there is an ancient doctrine that applies, namely, that a killing which would otherwise be murder amounts only to manslaughter if the accused acted under the influence of provocation.<sup>207</sup> Statutory law applies in the other four states, namely, s23 of the Crimes Act 1900 in New South Wales, s268 of the Queensland Code, s245 of the Western Australian Code and s160 of the Tasmanian Code.<sup>208</sup>

The issue of provocation has two aspects:<sup>209</sup>

- 'a) there must be some evidence that the accused was in fact acting under provocation and in the heat of passion. Here provocation is tested subjectively;
- b) the provocation must be such as could or might have moved an ordinary person, standing in the accused's shoes, to act as the accused did. Here provocation is tested objectively.'

The law of provocation had provided for an objective standard to which the entire community had to conform, a standard which was 'sovereign'.<sup>210</sup> The nature of the

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<sup>206</sup> Stuart 1982 *op cit* 444-445.

<sup>207</sup> Howard C *Australian Criminal Law* 1970: 83.

<sup>208</sup> *Ibid.*

<sup>209</sup> Brett P, Waller L & Williams CR *Criminal Law - Text and Cases* 1993: 221.

<sup>210</sup> Detmold MJ 'Provocation to Murder: Sovereignty and Multiculture' *Sydney Law Review* 1997 (vol 19) 5 at 7.

'ordinary person' test has been altered in a series of cases. In 1946 in *Holmes v R*<sup>211</sup>, the House of Lords held that while the actual sight of adultery being committed by one's wife would constitute provocation, a verbal confession of adultery could not.<sup>212</sup> In 1967 in *R v Duffy*<sup>213</sup>, the Court of Appeal held that the existence of time between the provocation and the retaliation, during which the accused's temper could have cooled (even if it did not) meant that the defence was unavailable.<sup>214</sup>

Wilson J in *Stingel*<sup>215</sup> stated what the rationale for the objective test was:

'The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.'<sup>216</sup>

Another rationale for the test is the need for 'society to maintain objective standards of human behaviour for the protection of human life'.<sup>217</sup> The test therefore appears to 'restrict the scope of provocation rather than to reflect the rationales underlying the defence'.<sup>218</sup>

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<sup>211</sup> [1946] AC 588.

<sup>212</sup> Brett, Waller & Williams 1993 *op cit* 222.

<sup>213</sup> [1967] 1 QB 63.

<sup>214</sup> Brett, Waller & Williams 1993 *op cit* 222.

<sup>215</sup> [1990] 171 CLR 312 at 343; 345 in Heilpern & Yeo *Cases on Criminal Law* (1995) 109.

<sup>216</sup> Heilpern & Yeo 1995 *op cit* 109.

<sup>217</sup> *Johnson v The Queen* (1976) 136 CLR 619 at 656 in Yeo SMH 'Power of Self-Control in Provocation and Automatism' *Sydney Law Review* 1992 (vol 14) 3 at 4.

<sup>218</sup> *Ibid.*

Goode and Leader-Elliott noted the object of the test as explained by Smith J in cases in the Victorian Court of Criminal Appeal:<sup>219</sup>

‘The object is to exclude those individuals whose reactions to provocation “show a lack of self control falling outside the ordinary or common range of human temperaments”. Provocation partially excuses the extraordinary reactions of ordinary individuals driven beyond their limits. It is not available, however, when no ordinary person, subjected to the same stress, could have reacted as the accused reacted.’

The objective aspect of provocation has given rise to the question of who the reasonable or ordinary man or woman is.<sup>220</sup> In 1914 in *R v Lesbini*<sup>221</sup> where the accused was ‘hot-tempered and sensitive, with defective control and want of balance’, it was argued that the reasonable man should be given similar characteristics by the jury in applying the objective test.<sup>222</sup> This was however rejected by the Court of Criminal Appeal where after this rejection was approved by the House of Lords in 1942 in *Mancini v Director of Public Prosecutions*.<sup>223</sup>

Various states have been excluded from consideration of the ‘ordinary person’ test. Some of these are ‘sensitiveness about sexual impotence,<sup>224</sup> self-induced

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<sup>219</sup> Goode & Leader Elliot ‘Duress, Provocation and Ordinary People’ *Annual Survey of Australian Law* 1992 216 at 219.

<sup>220</sup> *Ibid.*

<sup>221</sup> [1914] 3 KB 1116 in Brett, Waller & Williams 1993 *op cit* 222.

<sup>222</sup> Brett, Waller & Williams 1993 *op cit* 222.

<sup>223</sup> [1942] AC 1 in Brett, Waller & Williams 1993 *op cit* 222.

<sup>224</sup> *Bedder v DPP* [1954] 1 WLR 1119 in Howard C *Criminal Law* 1982 *op cit* 80.

intoxication,<sup>225</sup> and an obsession about the use of the word 'bastard'.<sup>226</sup> However, in 1978 the House of Lords chose to overrule itself on the issue of sensitivity to sexual impotence,<sup>227</sup> and this was followed by the Supreme Court of South Australia in 1979.<sup>228</sup> An important point was introduced in 1961 in the case of *R v Enright*<sup>229</sup> where the court put forth the view that the jury should be told to consider an 'ordinary' rather than a 'reasonable' man. This would prevent the jury from considering how a 'reasoning' person might behave since a person acting under provocation might be 'ordinary' though not 'reasonable'.<sup>230</sup>

In 1986 in *Hill*<sup>231</sup>, it was suggested that the jury should "be instructed to put themselves, as the embodiment of the ordinary person, in the accused's shoes" to determine the effect of the wrongful act or insult upon the power of self-control of the ordinary person.<sup>232</sup> Heilpern and Yeo suggest that this should be avoided because each of the jurors may substitute himself, with his individual strengths and weaknesses, for the ordinary person.<sup>233</sup>

In terms of Section 370 of the Act of 1883, a jury could hold that if an act causing death was due to insulting language or gestures by the deceased, it could be held to have

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<sup>225</sup> *McCarthy* [1954] 2 QB 105; *Perrault v The Queen* [1970] 12 DLR (3d) 480 in Howard C - Ibid.

<sup>226</sup> *Enright* supra 663,669 in Howard C - Ibid.

<sup>227</sup> *Camplin* [1978] AC 705 in Howard C 1982 *op cit* 81; See also Brett, Waller & Williams 1993 *op cit* 222.

<sup>228</sup> *Dutton* [1979] 21 SASR 356 in Howard C - Ibid.

<sup>229</sup> [1961] VR 663; See also *R v Johnson* [1976] 11 ALR 23.

<sup>230</sup> Brett, Waller & Williams 1993: 223; See also *R v Stingel* [1986] 1 SCR 313; (1986) 25 CCC (3d) 322 in Heilpern & Yeo 1995 *op cit* 111.

<sup>231</sup> [1986] 1 SCR 313 at 347; (1986) 25 CCC (3d) 322 at 348 in Heilpern & Yeo 1995 *op cit* 111.

<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

provoked just as a blow could be held to have provoked.<sup>234</sup> However, Mason J in the 1977 case of *Moffa v R*<sup>235</sup> stated:

‘Violent acts, rather than violent words, are more likely to induce an ordinary person to lose his self-control. And a case of provocation by words may be more easily invented than a case of provocation by conduct, particularly when the victim was the wife of the accused. There is, therefore, an element of public policy as well as common sense in requiring the close scrutiny of claims of provocation rounded in words, rather than conduct.

The observations of Blackburn J and Viscount Simon . . . are salutary warnings against a too ready acceptance of claims of provocation based on words alone. They emphasise the necessity of compliance with the demanding requirements which underlie the concept of provocation.’<sup>236</sup>

In terms of the common law in South Australia,<sup>237</sup> the law of provocation is not bound by statutory directions. It is a defence to murder where the accused killed because the provocative conduct of the accused lead to him losing his self-control. The provocative conduct could be by words, but the rulings of the courts have differed. This is evident where a sudden confession of adultery was sufficient in 1871 in *R v Rothwell*<sup>238</sup> but not in *Holmes v Director of Public Prosecutions*.<sup>239</sup>

Brett, Waller and Williams indicated an objection to the objective test. They stated that those who keep strictly to the objective test have rigidly excluded ‘individual

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<sup>234</sup> *Parker v R* [1963] 111 CLR 610, 665; [1963] ALR 524 [1964] ALR 1153 in Brett, Waller and Williams 1993 *op cit* 235.

<sup>235</sup> [1977] 13 ALR 225; See also Howard C 1982 *op cit* 83.

<sup>236</sup> Brett, Waller & Williams 1993 *op cit* 244.

<sup>237</sup> Brett, Waller & Williams *op cit* 245.

<sup>238</sup> [1871] 12 Cox CC 145 - *Ibid*.

<sup>239</sup> [1946] AC 588; 2 All ER 124 - in Brett, Waller & Williams *op cit* 245.

peculiarities' of the accused. They stated further that:

'The objective test is not suitable even for a superficially homogeneous society. . . 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 African Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under certain circumstances.'<sup>240</sup>

In 1994 in the case of *Chhay*<sup>241</sup>, the court showed a 'tendency to abandon the rigidities of the objective test which is apparent in other jurisdictions' such as England.<sup>242</sup> In 1995 in *Masciantonio v The Queen*<sup>243</sup> McHugh J took a different approach to the position he had supported previously in *R v Stingel*<sup>244</sup> and agreed with Yeo's view that 'serious consideration be given by our judges to the recognition of ethnicity as a qualification. . . of the ordinary person's power of self-control'.<sup>245</sup> He stated:

'The ordinary person standard would not become meaningless, however, if it incorporated the general characteristics of an ordinary person of the same age, race, culture and background as the accused on the self-control issue. Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the

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<sup>240</sup> *Op cit* 246.

<sup>241</sup> (1994) 72 A Crim R 1 in Goode & Leader-Elliot 'Provocation, Experts and Ordinary Killers' *Annual Survey of Australian Law* (1994) 180 at 181.

<sup>242</sup> Goode and Leader-Elliot *Annual Survey of Australian Law* (1994) 180 at 181.

<sup>243</sup> (1995) 69 ALJR 598 in Detmold MJ 'Provocation to Murder: Sovereignty and Multiculture' *Sydney Law Review* 1997 (vol 19) 5 at 6.

<sup>244</sup> (1990) 69 ALJR 141 in Detmold MJ *Sydney Law Review* 1997 (vol 19) 5 at 5.

<sup>245</sup> Yeo S *Sydney Law Review* 1992 (vol 14) 4 at 22 in Yeo S 'Sex, Ethnicity, Power of Self-control and Provocation Revisited' *Sydney Law Review* 1996 (vol 18) 304 at 304-305.

notion of an ordinary person is pure fiction.<sup>246</sup>

However, Detmold submitted that provocation as a partial defence to murder is 'misconceived when it is thought to involve an issue of subjective self-control'.<sup>247</sup> The issue, he said, for provocation is of 'objective self-control'.

There is no requirement in the law of South Australia that the act of the accused be proportionate to the act of provocation.<sup>248</sup> There is also no requirement that there must not have been time to cool off or regain self-control.<sup>249</sup>

In 1988 the Law Reform Commission of Victoria's Discussion paper No 13<sup>250</sup> addressed the issues as to whether provocation should be altogether abolished or relevant only in sentencing. In a later report of the Commission,<sup>251</sup> majority of the Commission recommended the retention of the provocation defence.<sup>252</sup>

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<sup>246</sup> (1995) 69 ALJR 598 at 606 in Detmold MJ *Sydney Law Review* 1997 (vol 19) 5 at 6.

<sup>247</sup> Detmold MJ *Sydney Law Review* 1997 (vol 19) 5 at 5.

<sup>248</sup> *Johnson v R* [1976] 11 ALR 23 in Brett, Waller & Williams *op cit* 246.

<sup>249</sup> Brett, Waller & Williams *op cit* 247.

<sup>250</sup> *Homicide* 1988: 53-57 in Brett, Waller and Williams *op cit* 223.

<sup>251</sup> Report No 40 *Homicide* 1991 in Brett, Waller and Williams *op cit* 223.

<sup>252</sup> Brett, Waller & Williams *op cit*: 223.

## England

The defence of provocation first began to 'assume a recognisable form and function' in the seventeenth century.<sup>253</sup> Evidence of provocation began to be accepted in the courts to negate the 'malice' of the accused and:<sup>254</sup>

'this evidence showed that the cause of the killing lay not in some secret hatred or design in the breast of the slayer but rather in provocation given by the deceased which inflamed the slayer's passions.'

Lord Holt CJ summarised in his judgement in *Mawgridge*<sup>255</sup> the different categories of provocation. It was agreed that striking of the accused would be sufficient provocation and Lord Holt discussed four further types as being sufficient provocation:<sup>256</sup>

1. Angry words followed by an assault;
2. The sight of a friend or relative being beaten;
3. The sight of a citizen being unlawfully deprived of his liberty and;
4. The sight of a man in adultery with the accused's wife.'

In English law, provocation is regarded as a mitigating factor in sentencing and not as an excuse.<sup>257</sup> The defence of provocation operates to 'reduce to manslaughter a killing which would otherwise be murder.'<sup>258</sup> The partial defence of provocation existed at

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<sup>253</sup> Ashworth AJ 'The Doctrine of Provocation' *Cambridge Law Journal* 1976-1977 (vol 35-36) 292 at 292.

<sup>254</sup> *Ibid.*

<sup>255</sup> (1707) Kel. 119 in Ashworth AJ 'The Doctrine of Provocation' *Cambridge Law Journal* 1976-1977 (vol 35-36) 292 at 293.

<sup>256</sup> *Ibid.*

<sup>257</sup> Cross R and Jones PA *An Introduction to Criminal Law* (1968) 140.

<sup>258</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 (vol 35-36) *op cit* 292.

common law.<sup>259</sup> The early cases showed that the unlawfulness of the deceased's conduct was a factor in determining whether the provocation was sufficient or not and therefore 'accord with the theory of partial justification'.<sup>260</sup> The case law refers to three conditions that have to be satisfied for a successful plea of provocation:<sup>261</sup>

- 'a) The accused must have been provoked;
- b) the provocation must have been enough to cause a reasonable man to lose control of himself;
- c) the mode of resentment must bear a reasonable resemblance to the provocation.'

Cross and Jones submit that it is possible that there was a fourth condition at common law for the defence of provocation:

'There must not have been sufficient time between the occurrence of the provocation and the killing for the accused's 'blood to cool and for reason to resume its seat.'<sup>262</sup>

However it was held in *Mancini v Director of Public Prosecutions*<sup>263</sup> that provocation may extend over a long period of time provided it culminates in a sudden explosion, sparked off by some relatively trivial incident.<sup>264</sup>

The common law was found to be unsatisfactory in three principal respects. Firstly, it

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<sup>259</sup> Lacey & Wells *Reconstructing Criminal Law* (1998) 590.

<sup>260</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 (vol 35-36) *op cit* 294.

<sup>261</sup> Cross and Jones *op cit* 140-141.

<sup>262</sup> Cross and Jones *op cit* 141.

<sup>263</sup> [1942] AC 1, [1941] 3 All ER 272.

<sup>264</sup> Smith and Hogan *op cit* 335.

was decided in *Holmes v The Director of Public Prosecutions*<sup>265</sup> that a confession of adultery by one spouse to another was insufficient provocation to justify a verdict of manslaughter if the accused killed his spouse or the adulterer.<sup>266</sup> If a husband caught his wife in the act of adultery, his instant killing of his wife or partner under the provocation would be manslaughter. However the person who killed his mistress or fiancée detected in intercourse had to be convicted of murder.<sup>267</sup> Secondly, although it has been recognised that the detection of a spouse in the act of adultery is sufficient provocation,<sup>268</sup> the courts have not shown a move toward extending this to the general rule that ‘nothing short of physical violence could amount to provocation in law’.<sup>269</sup> Lastly, the judges powers of being able to withdraw an issue of provocation from the jury was thought to be ‘excessive’.<sup>270</sup>

In 1957 Section 3 of the Homicide Act provided that:

‘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 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

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<sup>265</sup> [1946] AC 588; [1946] 2 All ER 124.

<sup>266</sup> Cross and Jones *op cit* 142; See also Ashworth AJ ‘The Doctrine of Provocation’ *Cambridge Law Journal* 1976-1977 (vol 35-36) 292 at 293 where Lord Holt CJ in *Mawgridge* ((1707) Kel. 119) discusses categories of provocation which are insufficient to reduce murder to manslaughter such as ‘words alone’. It would however be sufficient provocation if the words were followed by an assault.

<sup>267</sup> *R v Greening* [1913] 3 KB 846; *R v Palmer* [1913] 2 KB 29 in Cross and Jones *Ibid*.

<sup>268</sup> *R v Maddy* [1671] 2 Keb 829 in Cross and Jones *op cit* 142.

<sup>269</sup> Cross and Jones *op cit* 142.

<sup>270</sup> *Ibid*.

would have on a reasonable man.<sup>271</sup>

If the judge finds there is sufficient evidence that the accused was provoked, he must leave the issue of provocation to be determined by the jury and he has to direct that the jury only return a verdict of manslaughter due to provocation:<sup>272</sup>

- 'a) if they think that the provocation was enough to cause a reasonable man to lose control of himself and;
- b) if they think that the provocation was enough to cause a reasonable man to do what the accused did.'

Smith and Hogan submitted that if the jury is not satisfied that the accused had the necessary mens rea or intention, then they should acquit the accused. If they do decide that he did have *mens rea*, provocation may still be a defence to a charge of murder at common law where the accused may be convicted of manslaughter.<sup>273</sup> Ashworth submitted that provocation is regarded as a matter in mitigation of sentence in that it is 'insufficiently fundamental to qualify as a complete defence.'<sup>274</sup>

Smith and Hogan submitted that Section 3 of the Homicide Act 1957 assumes the existence of the 'dual test' of the common law:<sup>275</sup>

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<sup>271</sup> Cross and Jones *op cit* 142-143; See also Smith JC and Hogan B *Criminal Law* 1988: 331-332.

<sup>272</sup> Cross and Jones *op cit* 143.

<sup>273</sup> Smith and Hogan *op cit* 331.

<sup>274</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 (vol 35-36) *op cit* 292.

<sup>275</sup> Smith and Hogan *op cit* 332; See *R v Camplin* [1978] AC 705 in Elliot and Woods *Casebook on Criminal Law* (1982) 391; See also Lacey and Wells 1998 *op cit* 590; Ashworth AJ *Cambridge Law Journal* 1976-1977 (vol 35-36) *op cit* 298 where the test for provocation 'telescopes two requirements: the first being the standard of the reasonable man, which functions as a means of assessing the gravity of the provocation, and the second is the proportionality requirement.

- 'a) Was the defendant provoked to lose his self-control? - a subjective question;  
and  
b) was the provocation enough to make a reasonable man do as he did? - an objective question.'

Under the subjective question, the jury is entitled to take into account all the relevant circumstances, the nature of the provocative act and all the relevant conditions in which it took place, the sensitivity or otherwise of the accused at the time between the provocation and the act which caused death.<sup>276</sup>

Cross and Jones submitted that words as well as deeds may constitute provocation and that the decision in *Holmes v The Director of Public Prosecutions*<sup>277</sup> no longer represents the law. In *Holmes* the House of Lords held that, as a matter of law, a confession of adultery was insufficient provocation where a husband killed his wife; and added that 'in no case could words alone, save in circumstances of a most extreme and exceptional character', reduce the crime to manslaughter.<sup>278</sup> It would all depend on whether the reasonable man in the circumstances of the accused would have lost self control.<sup>279</sup>

Under the objective question, the jury considers the conduct of a reasonable man in the circumstances of the accused. The reference to the 'reasonable man' first occurred in 1869 in the case of *Welsh*<sup>280</sup> where Keating J explained the law:<sup>281</sup>

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<sup>276</sup> Smith and Hogan *op cit* 334.

<sup>277</sup> *Supra*.

<sup>278</sup> Smith and Hogan *op cit* 336.

<sup>279</sup> Cross and Jones *op cit* 143.

<sup>280</sup> [1869] 11 Cox CC 336 in Smith and Hogan *op cit* 336.

<sup>281</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 (vol 35-36) *op cit* 298 in *Welsh supra* 339.

‘... in law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonable-minded person to lose his self-control and commit such an act.’

Ashworth submitted that if the purpose of the ‘reasonable man’ test is to determine whether the accused had reasonable self-control when faced with the provocation, then ‘individual deficiencies of temperament and mentality must be left out of account’.<sup>282</sup>

In 1954 in the case of *Bedder v Director of Public Prosecutions*,<sup>283</sup> the House of Lords held that the jury had been correctly directed to consider what effect P’s acts would have on an ordinary person, not a man who is sexually impotent.<sup>284</sup> In 1976 the Criminal Law Revision Committee proposed:<sup>285</sup>

‘to replace the reasonable man test with a requirement that the provocation is sufficient if “it constitutes a reasonable excuse for the loss of self-control”. In the Working Paper they state that this would enable “any physical characteristics of the accused to be taken into account” but they also say that the accused should be “judged with due regard to any disability, physical or mental, from which he suffered.”’

This would therefore allow for the consideration of sexual impotence (in contrast to *Bedder*) as a factor to be considered in assessing the gravity of the provocation. The

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<sup>282</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 *op cit* 299.

<sup>283</sup> [1954] 2 All ER 801, [1954] 1 WLR 1119.

<sup>284</sup> Smith and Hogan *op cit* 337; See also Donnelly, Goldstein and Schwartz *Criminal law* 1969: 692.

<sup>285</sup> Criminal Law Revision Committee’s “Working Paper on Offences against the Person” (dated August 1976) at para 54 in Ashworth AJ *Cambridge Law Journal* 1976-1977 *op cit* 300 at fn 44a.

court of Appeal in *Camplin*<sup>286</sup> distinguished from *Bedder* on the ground that youth is not a personal idiosyncrasy and not a physical disability like *Bedder*'s impotence.<sup>287</sup>

Section 3 of the 1957 Act directed that the jury take into account 'everything both done and said' according to the effect of which, 'in their opinion' it would have on a reasonable man.<sup>288</sup> This is inconsistent with *Bedder* since 'everything' would include a 'taunt of impotence' where it in fact provoked the accused and the effect of it on a reasonable man depends on the opinion of the jury.<sup>289</sup>

Lord Simon pointed out in *Mcgregor*<sup>290</sup> that the result in the case of *Camplin* is to 'bring the common law, as modified by the Homicide Act, into line with the New Zealand Crimes Act 1961 where S169(2) provides that:

'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.<sup>291</sup>

Ashworth submitted that.<sup>292</sup>

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<sup>286</sup> [1978] AC 705, [1978] 2 All ER 168, SHC 321.

<sup>287</sup> Smith and Hogan *op cit* 338.

<sup>288</sup> *Ibid.*

<sup>289</sup> *Ibid.*

<sup>290</sup> [1962] NZLR 1069 in Smith and Hogan *op cit* 338 at fn 20.

<sup>291</sup> Smith and Hogan *op cit* 338.

<sup>292</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 *op cit* 300.

‘. . . the “gravity” of provocation must be expressed in relation to persons in a particular situation or group. For this reason it is essential and inevitable that the accused’s personal characteristics should be considered by the court. The proper distinction, it is submitted, is that individual peculiarities which bear on the gravity of the provocation should be taken into account whereas individual peculiarities bearing on the accused’s level of self-control should not.’

In 1980, in the case of *Newell*<sup>293</sup> North J stated what is meant by ‘characteristics’:

‘The characteristic 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 and personality. . . 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.’<sup>294</sup>

Ashworth submitted that *Bedder* made ‘bad law’ because it is difficult to assess the gravity of the provocation without reference to the characteristic of the accused at which led to the provocation.<sup>295</sup> He said further that if personal characteristics were considered then the ‘objective standard would evaporate’ but to exclude personal characteristics entirely is to ‘throw out the baby with the bath water’.<sup>296</sup>

Inclusion of the ‘characteristics’ of the accused in the ordinary person test is evidence of a move toward a subjective test.

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<sup>293</sup> [1980] 71 Cr App Rep 331, [1980] Crim LR 576, CA, SHC 325 in Smith and Hogan *op cit* 339.

<sup>294</sup> Smith and Hogan *op cit* 339.

<sup>295</sup> Ashworth AJ *Cambridge Law Journal* 1976-1977 *op cit* 301.

<sup>296</sup> *Ibid.*

## CHAPTER THREE

### Future Developments to the defence of Provocation

‘. . . people who kill with reduced culpability as a result of loss of self-control under provocation [should not be] misleadingly and unfairly stigmatised by the label ‘murderer’.’

These words are the recommendation by the Law Reform Commission of New South Wales.<sup>297</sup> This chapter will therefore seek to cover issues as to why the defence of provocation should continue to exist in our law and if it should, what the test should be to assess the criminal liability of the accused. Reference will be made to various jurisdictions besides South Africa such as, New South Wales, Australia and England as they are similar in their developments and will therefore assist in arriving at future developments to the defence of provocation.

Williams suggested that the use of the reasonable man in the test in the law of provocation is ‘strange’. He says that this is due to the fact that the reasonable man is ‘careful, moral, prudent, calculating and law-abiding’ and it would therefore be ‘absurd to imagine that he is capable of losing all control of himself and committing a crime punishable with imprisonment for life’.<sup>298</sup>

Brett, Waller and Williams submitted in respect of Australian law that the objective test should be done away with. They state that the law of provocation is concerned with ‘unreasonable behaviour’ and killing due to loss of self-control and it therefore refers to the accused as ‘temporarily deserting the standard of civilised conduct’. The standards are lowered if a reasonable man is constructed and then given a characteristic that under provocation he would kill the person who provoked him.<sup>299</sup>

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<sup>297</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 7.

<sup>298</sup> Williams G *Textbook of Criminal Law* 1983: 536.

<sup>299</sup> *Criminal Law - Text and Cases* 1993: 246-247.

Professor Peter Brett submitted that the ordinary man test in the defence of provocation provides a specific view on human behaviour and that this view is contradicted by physiological research.<sup>300</sup> He also stressed that the important point to be noted is that 'the degree of response to a stress situation varies considerably from one individual to another.'<sup>301</sup> He stated:<sup>302</sup>

'Plainly we cannot sensibly talk of the ordinary man in any meaningful way. There is a whole range of types of men, and it would be pointless and cruel to penalize a particular man merely because his type occurs nearer to one or other end of the range than to the centre of it. The all-or-none quality of the reaction makes it alike pointless to draw distinctions of nicety between different types of provocative act. So, too, it demonstrates the folly of demanding a reasonable proportion between the provocative act and the reaction. To fire four shots rather than one, breaking the gun each time, can of course show malignity of heart, *if done in cold blood*; but if done in heat, it shows at best that the firer was endowed with a system of strong responses rather than weakish ones.'

The Law Reform Commission of New South Wales submitted that the 'ordinary person' test is unworkable because it does not consider the personal characteristics of the accused in assessing criminal liability.<sup>303</sup> The Commonwealth Model Criminal Code Officers Committee in Australia proposed the use of the objective standard to assess the culpability of the accused but they have also recognised that it is 'unfair and contrary to fundamental principles of criminal responsibility' to judge a person for a serious offence by an objective standard.<sup>304</sup>

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<sup>300</sup> 'The Physiology of Provocation' *Criminal Law Review* 1970: 634 in Waller and Williams *op cit* 272.

<sup>301</sup> *Ibid.*

<sup>302</sup> Professor Brett quoted in Brett, Waller and Williams *op cit* 273.

<sup>303</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 5.

<sup>304</sup> -[Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 10.

It should be noted that it is difficult to apply the standards of an 'ordinary person' in the context of a 'multicultural society' where the different groups may not share the same 'values, standards and modes of behaviour'.<sup>305</sup> The test is even more 'complex' on the basis that consideration of the accused's characteristics is done only to assess the extent or magnitude of the provocation and these must be ignored when determining the accused's power of self-control.<sup>306</sup>

A further difficulty is for the courts or the jury to determine what the specific characteristics of the 'ordinary person' are, and they have to 'speculate' about how the ordinary person would react in 'extraordinary situations' which may be outside the experience of the jury or judges on the bench.<sup>307</sup> This would result in them making an 'educated guess' or taking 'a shot in the dark'.<sup>308</sup>

The Law Reform Commission has not overlooked the arguments raised in support of the 'ordinary person' test. They have noted that juries need to consider whether the actions of the accused in the circumstances 'invokes empathy and calls for compassion to the extent of reducing liability to manslaughter' and therefore those who act after losing self-control are treated as murderers if their reaction does not invoke the 'community's empathy'.<sup>309</sup>

With regards to cultural differences, they are relevant in assessing the gravity of the provocation and not the accused's power of self-control because to say that different cultural groups have different capacities for self-control is 'speculative'.<sup>310</sup>

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<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 11.

<sup>308</sup> Ibid.

<sup>309</sup> See I Leader-Elliot 'Sex, Race and Provocation: In Defence of Stingel' 1996: 20 *Criminal Law Journal* 72 at 85-86 at [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 11.

<sup>310</sup> See Leader-Elliot 1996: 90-91 at [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 11.

Lastly, the 'ordinary person' test is required to distinguish between the defence of provocation and the 'mental illness' defences where the defence of provocation refers to a 'mentally normal' person and the others apply to 'mentally abnormal' persons.<sup>311</sup> The problem was evident under the American Law Institute's Model Penal Code where the drafters recognised that if the objective standard were eliminated, 'some offenders suffering from abnormality of mind' would rely on the defence of provocation or emotional stress.<sup>312</sup>

Brett, Waller and Williams suggested two ways in which the law of provocation in Australia should be changed.<sup>313</sup> Firstly, it should be made clear that words alone can, in some cases, constitute provocation.<sup>314</sup> Secondly, the power of the trial judge to remove the issue of provocation from the jury in cases where, in his opinion an ordinary person might have acted differently in comparison to the accused, should be removed.<sup>315</sup> This has been brought into effect in England in terms of Section 3 of the Homicide Act 1957.<sup>316</sup>

In terms of English law, the objective test was construed as the following in *Phillips v R*:<sup>317</sup>

'... the question ... is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did.' It should therefore be considered whether the reasonable man is

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<sup>311</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 11.

<sup>312</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) at fn 91.

<sup>313</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) at fn 91.

<sup>314</sup> *Ibid.*

<sup>315</sup> Brett, Waller and Williams *op cit* 273-274.

<sup>316</sup> *Ibid.*; See also Smith and Hogan *Criminal Law* 1988: 332; Williams GA *op cit* 532.

<sup>317</sup> Smith and Hogan *op cit* 342.

capable of losing self-control in the circumstances of the accused rather than a reasonable man being considered as one who does not lose self-control, since this could prejudice the accused.

Louw in respect of South Africa submitted with regard to the test for negligence that:<sup>318</sup>  
‘whatever future progressive modifications there may be, the objective test, absolute or relative, will always be judged against someone else’s standards. The only logical, fair and legally sound conclusion is that a wholly subjective test for negligence should be applied. The accused’s conduct should be measured against what would be reasonable for him in terms of his own capabilities . . .’

In other words, this could mean that the personal characteristics of the accused should be taken into account in assessing whether the accused is liable. However, in Canada the law of provocation is ‘designed to ensure that the standard of self-control to be expected from the accused is that of the “ordinary person”’.<sup>319</sup> It has also been argued that the move toward a subjective test would lead to a ‘significant decrease in the threshold level of self-control’ required by the accused under the defence of provocation and therefore the test would not provide a ‘an appropriate or reasonable level of safety to all members of society’.<sup>320</sup>

A criticism in New South Wales of the defence of provocation is that ‘it has no clear and consistent rationale’ and this is because the defence is described as a ‘partial excuse’ on the one hand and a ‘partial justification’ on the other.<sup>321</sup> ‘Partial excuse’ refers to the situation where the accused’s ‘mental state’ is impaired by a loss of self-control and the ‘justification’ refers to the victim’s conduct which contributed to the actions of the accused and the problem here is that the court has not been consistent in applying

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<sup>318</sup> Louw R ‘The reasonable man and the tikoloshe’ *South African Journal of Criminal Justice* 1993(6) 361 at 364.

<sup>319</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 6.

<sup>320</sup> *Ibid.*

<sup>321</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 4.

these rationales.<sup>322</sup> The 'justification' approach refers to an 'external trigger' that causes the accused to lose self-control.<sup>323</sup>

The Law Reform Commission submitted that a 'contemporary model of provocation' should refer more to the accused's lack of self-control than to the victim's provoking actions and their recommendation is that the defence of provocation be retained as a 'partial defence' to murder in New South Wales.<sup>324</sup>

The Commission viewed a subjective test as being appropriate for the defence of provocation since they stated that:

'[since]. . . culpability for serious offences is assessed according to an accused's mental state in committing that offence, factors which significantly affect that mental state should be recognised as reducing the accused's responsibility for his or her actions.'<sup>325</sup>

However, it has been argued that the defence should be abolished on the basis that it 'condones violence in the community' and it should be abolished as a 'legal anachronism which perpetuates excuses for violence'.<sup>326</sup> However, as was stated at the beginning of this chapter, a person should not be labeled as a murderer if he lacks the self-control or culpability. It is due to this that the Commission's view is that the defence should not be considered as one that condones violence in the community since it does recognise that the action of the accused was 'wrongful' and the accused is convicted of manslaughter and not acquitted.<sup>327</sup>

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<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 5.

<sup>325</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 6.

<sup>326</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 7.

<sup>327</sup> Ibid.

On the contrary, in South Africa, the courts have permitted the accused who acted under provocation to be acquitted because he was under extreme emotional stress due to an extensive history of abuse.<sup>328</sup> Since the accused was acquitted, it appears that the law is condoning violence under these circumstances. The South African courts apply a 'subjective criterion' where provocation and emotional stress are regarded in the same way as the defence of youth, insanity or intoxication are regarded, therefore resulting in the possibility of 'excluding the voluntariness of conduct or criminal capacity'.<sup>329</sup> This was evident in the cases of *Arnold*,<sup>330</sup> *Campher*<sup>331</sup> and *Nursingh*<sup>332</sup>.

An evident problem is the distinction between the proving of intoxication and insanity on the one hand and that of provocation or emotional stress on the other hand. If one is found guilty of insanity, once the accused proves a mental illness on a balance of probabilities, he is institutionalized.<sup>333</sup> However, if the defence of non-pathological incapacity or emotional stress succeeds, the accused is acquitted and he merely has to raise a reasonable doubt to be acquitted.<sup>334</sup> This would result in those who are mentally insane relying on the defence of provocation because they would merely have to raise a reasonable doubt for acquittal. If they relied on the defence of insanity, even if it succeeds, they would be institutionalized.

Burchell and Milton submitted three different approaches as possible solutions to the above problems:<sup>335</sup>

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<sup>328</sup> See for example *Arnold*, *Campher* and *Nursingh* supra.

<sup>329</sup> Burchell and Milton *op cit* 291.

<sup>330</sup> Supra in Burchell and Milton *op cit* 291.

<sup>331</sup> Supra.

<sup>332</sup> Supra.

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> *Op cit* 292 - 295.

'1) the provocation or emotional stress should become a partial defence resulting in a conviction for culpable homicide rather than murder. Here the accused would have to use a subjective standard so as to exclude the intention to kill required for a murder conviction but would have to conform to the objective standard to exclude a conviction for culpable homicide;

2) only provocation or emotional stress which would have induced a reasonable person to succumb to the pressure will excuse killing. One of the consequences of this approach is that it may lead to some of the fine distinctions which are drawn in the English, Australian and Canadian law in order to determine the reaction of a reasonable person placed in the circumstances of the accused. The English courts<sup>336</sup> have held that the reasonable person must be endowed with the accused's characteristics which affect the gravity of the provocation;

3) the South African courts have treated provocation and emotional stress under the principles governing the test for capacity where if a finding is made that the accused lacks the capacity it will lead to an acquittal.'

Burchell and Milton submitted that the third approach is a more 'viable defence' to the battered and abused who kill but the defence does lack 'definable, objective bounds'.<sup>337</sup> They also submit that to eliminate the inequality between the treatment of persons suffering from pathological (caused by disease) as opposed to non-pathological incapacity, the burden on the person claiming pathological incapacity should be to give evidence of the condition and not to prove it on a balance of probabilities.<sup>338</sup>

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<sup>336</sup> See also Smith and Hogan *op cit* 334.

<sup>337</sup> *Op cit* 294.

<sup>338</sup> Burchell and Milton *op cit* 294-295.

Options for reform were considered in terms of the 'pros' and 'cons' in adopting different approaches to the provocation defence in Canada.<sup>339</sup> With regards to the abolition of the defence, it was found that the 'pros' would be that it would acknowledge that society does not condone violence under provocation or otherwise and it would eliminate the 'historic anomaly in the law that excuses killings based on anger.'<sup>340</sup> The 'cons' would be that the defence is useful for women in situations of domestic violence and there would be an increase in acquittals because juries no longer have 'an alternative to murder where they view the accused as morally less worthy of blame.'<sup>341</sup>

If reformation of the defence of provocation were to be considered, an option would be to remove the words 'in the heat of passion' because this is often viewed as 'rage' rather than fear or terror. However, the 'cons' are that a suitable expression is required to illustrate the concepts of 'human frailty' and 'extreme emotion'.<sup>342</sup>

Another option for reform would be to replace 'wrongful act or insult' with 'unlawful act'.<sup>343</sup> The advantage of this would be that an accused would not be able to rely on this defence due to his 'partner's infidelity or to a non-violent homosexual advance' whereas the disadvantage would be that the defence could not be used by abused persons who kill in response to an insult which 'triggers'<sup>344</sup> off rage that has built up over the years due to abuse.<sup>345</sup>

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<sup>339</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 1-2.

<sup>340</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 2.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> See *S v Nursingh* supra.

<sup>345</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 3.

A third option for reform would be to 'reform the "ordinary person" test to reflect a mixed subjective-objective test'.<sup>346</sup> This means that the defence should be reformed 'to codify the incorporation of subjective elements into the "ordinary person" test'.<sup>347</sup> The position in England in 1957 in terms of the *British Homicide Act* was to allow the jury to decide on the adequacy of the provocation where individual characteristics would be considered but these were not considered when assessing the accused's level of self-control.<sup>348</sup> The problem with this approach would be that it could lower the 'threshold level of self-control' and might no longer provide a 'reasonable level of protection' to society and the use of subjective factors would lead to the acceptance of 'cultural practices that define "gender roles" that justifies violent behavior towards women and homosexuals'.<sup>349</sup>

Should the time factor play an important role as to whether or not the accused was provoked under the circumstances? The extension of the time element would be to take into account the 'slow-burning effects of prolonged and severe abuse'<sup>350</sup> as was illustrated in the *Nursingh*<sup>351</sup> case. The ambit of the defence should also extend from anger to include situations where the accused acted out of 'emotion' because of prolonged abuse by the victim.<sup>352</sup> The phrase 'on the sudden' should be removed so as to 'retain the causal link between the provocative act or insult and the reaction' since the 'lapse of time sometimes heats, rather than cools, passions'.<sup>353</sup> This would make

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<sup>346</sup> Ibid.

<sup>347</sup> Ibid; See also *S v Mangondo* 1963(4) SA 160 AD; *R v Tenganyika* 1958(3) SA 7 FC.

<sup>348</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 3.

<sup>349</sup> Ibid.

<sup>350</sup> Ibid.

<sup>351</sup> 1995(2) SACR 331 (D).

<sup>352</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 7.

<sup>353</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html) - 3.

the defence more accessible to women who kill after a history of abuse though it might result in a likeliness that the response to the provocation was calculated.<sup>354</sup>

The Law Reform Commission of New South Wales has considered three options for reform of the 'ordinary person' test.<sup>355</sup>

- 'a) an expanded version of the ordinary person test;
- b) abolition of the ordinary test in favour of a purely subjective test; and
- c) abolition of the ordinary person test in favour of a subjective test qualified by the application of community standards of blameworthiness.'

Expansion of the ordinary person test could be to include ethnicity and/or gender when assessing the power of self-control. This is because there may be differences in 'capacities for self-control' amongst the different groups and this would avoid any 'injustice and discrimination'.<sup>356</sup> An objection to this however, is that it is not clear how it would be established with certainty that members of one group would have less power of self-control than others.<sup>357</sup> The main person, who suggested the taking into account of ethnicity, Professor Stanley Yeo, has 'resiled from his position' for this reason.<sup>358</sup> He submitted that:<sup>359</sup>

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<sup>354</sup> Ibid.

<sup>355</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 12.

<sup>356</sup> Ibid.

<sup>357</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 12.

<sup>358</sup> See Yeo S 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' 1996: 18 *Sydney Law Review* 304 at [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 12 at fn 98.

<sup>359</sup> Yeo S 1996 *Sydney Law Review* at 305.

‘... the relevance of ethnicity is not to assert that a particular race has a lower capacity for self-control than other races. Rather, ethnicity instructs the jury on the type of reaction which may be expected of an ordinary person belonging to the particular ethnic community.’

If the ordinary person test were to be abolished in favour of a purely subjective test, the main question for the courts or the jury to decide would be ‘whether the accused did in fact kill while provoked and after losing self-control’.<sup>360</sup>

The third option for reform is to replace the ordinary person test with a subjective test together with the application of community standards. Here the courts, after having established that the accused did lose self-control, must assess whether he should be convicted of manslaughter instead of murder.<sup>361</sup> The advantage of this approach is that it ‘avoids the complexities of the ordinary person test while still allowing the jury to make a value judgment’ as to whether the accused should be convicted of murder or manslaughter ‘in light of the mitigating circumstances of the provocation and the accused’s blameworthiness’.<sup>362</sup>

The Law Reform Commission concluded that the third option should be incorporated into the defence of provocation since it allows for the ‘personal characteristics of the accused to be considered and straightforward means for the jury to evaluate the degree of culpability involved’.<sup>363</sup>

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<sup>360</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 13.

<sup>361</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 13.

<sup>362</sup> [Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2) - 14.

<sup>363</sup> Ibid.

## Conclusion

My submission is that the defence of provocation should remain in our law as a defence to a conviction of murder. This is due to the fact that an accused should not be held liable for his actions if at the time of acting he was provoked to the extent that he did not have the 'capacity to appreciate the wrongfulness of his conduct or to act in accordance with that appreciation'.<sup>364</sup>

The problem evident in the courts has been what test should be applied to assess criminal liability of the accused. Lacey and Wells submitted that most commentators agree that the provocation defence is applied inconsistently by juries and judges.<sup>365</sup> The objective test is not appropriate in that 'the degree of response to a stress situation varies considerably from one individual to another'.<sup>366</sup> Even the Law Reform Commission of New South Wales submitted that the 'ordinary person' test is unworkable since it does not consider the personal characteristics of the accused in assessing criminal liability.<sup>367</sup> Louw indicated the problems that lie if the objective test is applied:

'when values change the reasonable man changes. The apparently objective test carries the real danger of imposing dominant cultural values on others. . . each case of reasonableness must be determined taking into account all relevant facts regarding the accused's capabilities.'<sup>368</sup>

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<sup>364</sup> Burchell and Milton 1997: 278.

<sup>365</sup> *Reconstructing Criminal Law* (1998): 592.

<sup>366</sup> Brett, Waller & Williams *op cit* 272.

<sup>367</sup> <http://www.lawlink.nsw.gov.au/lrc/nsf/pages/R83CHP2> - 5.

<sup>368</sup> Louw *South African Journal of Criminal Justice* 1993 *op cit* 363.

The critical issue therefore is whether the law of provocation reflects values and morals of society that are no longer acceptable in a time when the use of violence is unacceptable.<sup>369</sup> But if someone is not capable of self-control when provoked, should he still be held responsible for his actions? Therefore the objective test should include a measure of subjectivity as was applied in the South African case of *Tenganyika*.<sup>370</sup> The courts in South Africa<sup>371</sup> as well as in foreign jurisdictions<sup>372</sup> have indicated a move from the objective test toward a subjective test. The Law Reform Commission of New South Wales views the use of a subjective test as being appropriate where 'factors which significantly affect the mental state [of the accused] should be recognised as reducing the accused's responsibility for his actions'.<sup>373</sup>

However, although South Africa and the foreign jurisdictions both refer to the use of a subjective test being applied for the defence of provocation, a successful defence in foreign jurisdictions results in a conviction of manslaughter whereas in South African courts the accused may be acquitted.<sup>374</sup> The South African courts have not applied the defence of provocation consistently as was evident in *Moses*. There the court acquitted the accused who had killed in a fit of rage.

I therefore submit that although the courts should apply a subjective test, if the defence proves successful then the accused should not be acquitted but instead be convicted of culpable homicide. This is in line with the first approach referred to by Burchell and Milton:

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<sup>369</sup> [Http://canada.justice.gc.ca/Consultations/rccd/section\\_1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section_1p1_en.html) - 4.

<sup>370</sup> 1958 (3) SA 7 FC.

<sup>371</sup> *Tenganyika, Arnold, Campher, Nursingh and Moses* supra.

<sup>372</sup> *Enright, Camplin, Newell, Hill and Thibert* supra.

<sup>373</sup> [Http://www.lawlink.nsw.gov.au/lrc/nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc/nsf/pages/R83CHP2) - 6.

<sup>374</sup> See for example *Campher, Nursingh and Moses* supra.

'The provocation or emotional stress should become a partial defence resulting in a conviction of culpable homicide rather than murder. Here the accused would have to use a subjective standard so as to exclude the intention to kill required for a murder conviction but would have to conform to the objective standard to exclude a conviction of culpable homicide.'<sup>375</sup>

The Legislature should in fact formulate law to deal specifically with the law of provocation. It is submitted that reference be made also to the Law Reform Commissions of New South Wales's reformulation of the law of provocation as recommended for amendment.<sup>376</sup>

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<sup>375</sup> Burchell and Milton *op cit* 292.

<sup>376</sup> [Http://www.lawlink.nsw.gov.au/lrc/nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc/nsf/pages/R83CHP2) - 22 - 23.

## REFERENCES

### BOOKS

Ashworth A: *Principles of Criminal Law* Clarendon Press, Oxford, 1991.

Brett P, Waller L and Williams CR: *Criminal Law - Text and Cases* Butterworths, Sydney, 1993.

Burchell EM and Hunt PMA: *South African Criminal Law and Procedure* Volume 1, Juta & Co Ltd, Cape Town, 1970.

Burchell EM & Hunt PMA: *South African Criminal Law and Procedure* third edition, Juta & Co, Ltd, 1997.

Burchell J and Milton J: *Principles of Criminal Law* Juta & Co, Ltd, Kenwyn, 1997.

Colvin E: *Principles of Criminal Law* The Carswell Company Limited, Toronto, 1986.

Cross R and Jones PA: *An Introduction to Criminal Law* Butterworths, London, 1968.

Donnelly RC, Goldstein J and Schwartz RD: *Criminal Law* The Free Press, New York, 1962.

Elliot DW and Wells C: *Casebook on Criminal Law* Sweet and Maxwell, 1982.

Gool AD: *Annual Review of Criminal Law* The Carswell Company Limited, Toronto, 1983.

Heilpern DM and Yeo SMH: *Cases on Criminal Law* The Law Book Company Limited, 1995.

Howard C: *Australian Criminal Law* second edition, The Law Book Company Limited, Melbourne, 1970.

Howard C: *Criminal Law* fourth edition, The Law Book Company Limited, Sydney, 1982.

Lacey N and Wells C: *Reconstructing Criminal Law* Butterworths, London, 1998.

Milton J and Burchell: *J Principles of Criminal Law* Juta & Co Ltd, Kenwyn, 1997.

Saunders RP: *An Introduction to Criminal Law in Context* third edition, Thompson Canada Limited, 1996.

Snyman CR: *Criminal Law* third edition, Butterworths, Durban, 1995.

Snyman CR: *Strafreg- Vonnisbundel - Criminal Law Casebook* first edition, Juta & Co Ltd, Kenwyn, 1991.

Stuart D: *Canadian Criminal Law* The Carswell Company Limited, Canada, 1982.

Vorster JP and Visser PJ: *General Principles of Criminal Law through the Cases* Butterworths, Durban, 1990.

Williams G: *Textbook of Criminal Law* Stevens & Sons, London, 1983.

## JOURNAL ARTICLES

Ashworth AJ: 'The Doctrine of Provocation' *Cambridge Law Journal* Volume 35-36, 1976-1977, 292-320.

Burchell EM: ' "Emotional Storm": Onus of Proof' *The South African Law Journal* 1952, 15-16.

Burchell EM: 'Provocation: Subjective or Objective' *The South African Law Journal* 1958, 246-248.

Burchell EM: 'Provocation: Subjective or Objective' *The South African Law Journal* 1964, 27-29.

Burchell J: 'Non-pathological incapacity - evaluation of psychiatric testimony' *South African Journal of Criminal Justice* 1995, 37-42.

Detmold MJ: 'Provocation to Murder: Sovereignty and Multiculture' *Sydney Law Review* Volume 19, 1997, 5-30.

De Vos P: 'Criminal capacity, provocation and HIV' *South African Journal of Criminal Justice* Volume 9, 1996, 354-360.

Dlamini CRM: 'The changing face of provocation' *South African Journal of Criminal Justice* 1990, 130-139.

Du Plessis JR: 'The extension of the ambit of toekeningvatbaarheid to the defence of provocation' *South African law journal* 1987, 539-550.

Dugard CJR: 'Provocation: No more Rides on the Sea Point Bus' *The South African Law Journal* 1966, 261-266.

Goode & Leader Elliot: 'Duress, Provocation and Ordinary People' *Annual Survey of Australian Law* 1991, 269 - 276.

Goode & Leader Elliot: 'Duress, Provocation and Ordinary People' *Annual Survey of Australian Law* 1992, 216 - 221.

Goode & Leader Elliot: 'Duress, Provocation, Experts and Ordinary Killers' *Annual Survey of Australian Law* 1994, 180-183.

Louw R: 'The reasonable man and the tikoloshe' *South African Journal of Criminal Justice* Volume 6, 1993, 361-364.

Perk D: 'A Psychiatrist's view of the "Irresistible Impulse"' *The South African Law Journal* 1960, 177-186.

Snyman CR: 'Is there such a defence in our Criminal Law as "Emotional Stress"?' *South African Law Journal* 1985, 240-251.

Yeo S: 'Sex, Ethnicity, Power of Self-control and Provocation Revisited' *Sydney Law Review* Volume 18, 1996, 304 - 322.

Yeo SMH: 'Power of Self-Control in Provocation and Automatism' *Sydney Law Review* Volume 14, 1992, 3-22.

## **Book Reviews**

Louw R: 'A Draft Criminal Code for South Africa' *South African Journal of Criminal Justice* Volume 10, 1997, 303-309.

## **Internet Sites**

Lawlink New South Wales - The Defence of Provocation.

[Http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2](http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R83CHP2)

Department of Justice - Canada - The Defence of Provocation.

[Http://canada.justice.gc.ca/Consultations/rccd/section1p1\\_en.html](http://canada.justice.gc.ca/Consultations/rccd/section1p1_en.html)

## Table of Cases

### South Africa

*A-G of Ceylon v Perera* 1953 AC 200 PC

*R v Butelezi* 1925 AD 160

*R v Hercules* 1954 (3) SA 826 (A)

*R v Krull* 1959 (3) SA 392 AD

*R v Mbombela* 1933 AD 269

*R v Ncobo* 1921 AD 94

*R v Tenganyika* 1958 (3) SA FC

*R v Thibani* 1949 (4) SA 720 AD

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

*S v Bailey* 1982 (3) SA 772 (A)

*S v Campher* 1987 (1) SA 940 (A)

*S v Chretien* 1981 (1) SA 1097 (A)

*S v Di Blasi* 1996 (1) SACR 1 (A)

*S v Dlodlo* 1966 (2) SA 401 AD

*S v Johnson* 1969 (1) SA 201 AD

*S v Kavin* 1978 (2) SA 73 (W)

*S v Laubscher* 1988 (1) SA 163 (A)

*S v Lesch* 1983 (1) SA 814 (O)

*S v Lubbe* 1963 (4) SA 459 (W)

*S v Mangondo* 1963 (4) SA 160 AD

*S v Mokonto* 1971 (2) SA 319 (A)

*S v Moses* 1996 (1) SACR 701

*S v Ngema* 1992 (2) SACR 651 (D)

*S v Nursingh* 1995 (2) SACR 331 (D)

*S v Potgieter* 1994 (1) SACR 61 (A)

*S v Van Vuuren* 1983 (1) SA 12 (A)

*Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A)

## Canada

*Bedder v Director of Public Prosecutions* [1954] 2 ALL ER 801 (HL)  
*R v Camplin* [1978] AC 705 (HL)  
*R v Hayward* (1833) 6 Car. & P 157, 172 ER 1188  
*R v Hill* (1986) 25 CCC (3d) 322 SCC  
*R v Moffa* (1976-1977) 13 ALR 225 (Aus HC)  
*R v Thibert* (1996) 131 DLR 4<sup>th</sup> 675  
*R v Welsh* (1869) 11 Cox CC 336  
*Salamon v The Queen* (1959) 123 CCC 1, 17 DLR (2d) 685; (1959) SCR 404  
*Taylor v The King* (1947) 89 CCC 209; (1948) 1 DLR 545; (1947) SCR 462  
*Wright v The Queen* (1969) 3 CCC 258, 2 DLR (3d) 529, (1969) SCR 335

## Australia

*Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119  
*Holmes v Director of Public Prosecutions* [1946] AC 588  
*Johnson v The Queen* (1976) 136 CLR 619  
*Mancini v Director of Public Prosecutions* [1942] AC 1  
*Masciantonio v The Queen* (1995) 69 ALJR 598  
*Moffa v R* [1977] 13 ALR 225  
*Parker v R* [1963] 111 CLR 610; [1963] ALR 524; [1964] ALR 1153  
*Perrault v The Queen* [1970] 12 DLR (3d) 480  
*R v Camplin* [1978] AC 705  
*R v Chhay* (1994) 72 A Crim R 1  
*R v Duffy* [1967] 1 QB 63  
*R v Dutton* [1979] 21 SASR 356  
*R v Enright* [1961] VR 663  
*R v Hill* [1986] 1 SCR 313; (1986) 25 CCC (3d) 322  
*R v Lesbini* [1914] 3 KB 1116  
*R v Rothwell* [1871] 12 Cox CC 145  
*R v Johnson* [1976] 11 ALR 23  
*R v Stingel* [1990] 171 CLR 312

## England

*Bedder v Director of Public Prosecutions* [1954] 2 ALL ER 801, [1954] 1 WLR 1119

*Holmes v The Director of Public Prosecutions* [1946] AC 588; [1946] 2 ALL ER 124

*R v Camplin* [1978] AC 705, [1978] 2 ALL ER 168

*R v Greening* [1913] 3 KB 846

*R v Maddy* [1671] 2 Keb 829

*R v Mawgridge* (1707) Kel 119

*R v McGregor* [1962] NZLR 1069

*R v Newell* [1980] 71 Cr App Rep 331, [1980] Crim LR 576

*R v Palmer* [1913] 2 KB 29

*R v Welsh* [1869] 11 Cox CC 336

*Mancini v Director of Public Prosecutions* [1942] AC 1, [1941] 3 ALL ER 272.