

Culpable Homicide and the Provocation Defence in English Law: An Historical and Contemporary Analysis

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Introduction

In England and other common law jurisdictions provocation operates as a mitigatory or partial defence to murder aimed at the reduction of that crime to the lesser offence of voluntary (or intentional) manslaughter. For a plea of provocation to succeed the jury must be satisfied that the accused was deprived of her self-control at the time of the killing (the subjective test) and that this was the result of wrongful conduct serious enough to provoke an ordinary or reasonable person (the objective test). If there is no evidence to support a finding of provocation, the defence will fail, whether the accused lost her self-control or not. Moreover, even if the victim's conduct was such as to amount to provocation in law, the defence cannot be relied upon if evidence shows that the accused did not lose self-control as a result. Determining the threshold of legal provocation presupposes a moral judgment about what sort of offensive conduct is capable of arousing in a person such a degree of justified anger or indignation that might defeat her capacity for self-control. Although legal wrongdoings of a significant nature should for the most part provide a sufficient basis for the defence, non-legal, moral wrongdoings may also be considered serious enough to pass the threshold of provocation in law. Over this threshold, provocations

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may vary from the less serious ones (e.g. verbal provocations) to those involving very serious wrongdoings (e.g. provocations involving physical violence). Provocations involving different forms and degrees of wrongdoing may equally support a partial defence to murder, provided that the requirement of loss of self-control is also satisfied.¹

1 In England provocation is governed by s. 3 of the Homicide Act 1957. The English Law Commission recently published a detailed Consultation Paper reviewing the present law and proposing a series of possible options for reform. See Law Commission Consultation Paper No 177, *A New Homicide Act for England and Wales?* (2005), 171-176, and Law Commission Report No 290, *Partial Defences to Murder* (2004), 30-72. Several other common law jurisdictions have recognized the provocation defence. For example, s. 232 of the Canadian Criminal Code states: "(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. (2) A wrongful act or an insult that is of such nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool. (3) For the purposes of this section, the questions (a) whether a particular wrongful act or insult amounted to provocation, and (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being." On the function of the provocation defence in other common law jurisdictions see, also: s. 169 of the New Zealand Crimes Act 1961; s. 23 of the New South Wales Crimes Act 1900; s. 304 of the Queensland Criminal Code; ss. 281 and 245 of the Criminal Code of Western Australia. Jurisdictions not belonging to the common law family also recognise provocation as a partial or mitigatory defence to homicide. For example, Para 213 of the German Penal Code creates a less serious offence of manslaughter for killings committed under provocation: "If the person committing manslaughter, through no fault of his own, had been aroused to anger by the abuse of his own person or of a relative of his by the grossly insulting conduct of the victim, and committed the homicide under the influence of passion, or the circumstances otherwise indicate the existence of a less serious case, the imprisonment to be imposed shall be from six months to five years". See also Article 321 of the French Penal Code (under this article provocation is treated as a mitigatory defence to murder as well as to offences involving the application of physical

The emergence of provocation as a partial defence to murder in the 17th century had much to do with the fact that, in English law, a conviction of murder entailed a mandatory death penalty. Indeed, some modern commentators have argued that the category of partial defences would be superfluous if the fixed penalty for murder — presently life imprisonment — was abolished.² A reply to this argument has been that what justifies the role of partial defences in the criminal law is not the mandatory penalty as such but the special gravity of the crime of murder and the moral stigma which a conviction of that crime entails.³ Following an examination of the distinction between murder and manslaughter and its history, this paper discusses the origins of the provocation defence and the main problems surrounding its application in modern law. Although the paper draws largely upon the doctrine of provocation as it operates in English law, it is hoped that the analysis offered has relevance to all systems where similar defences are recognized (or proposed to be introduced), and can make a useful contribution to the continuing moral debate that the partial defences to murder generate.

Murder, Manslaughter and the Origins of the Provocation Defence

At the earliest stages of English law a distinction was drawn between the worst kinds of killing, such as killing by stealth, which were punishable by death, and other forms of homicide not subject to state

violence) ; Articles 62 (applying to all offences) and 587 (Homicide or Personal Injury for Reasons of Honour) of the Italian Penal Code; and Article 299 (2) of the Greek Penal Code (covering all cases of homicide committed in the heat of passion).

2 See, e.g., G. Williams, *Textbook of Criminal Law*, (Stevens and Sons, London, 1978), 477 and 501; D. A. Thomas, "Form and Function in Criminal Law", in P. R. Glazebrook (ed) *Reshaping the Criminal Law*, (Stevens and Sons, London, 1978), 21 and 28-29.

3 For a defence of the role of partial defences see M. Wasik, "Partial Excuses in the Criminal Law", (1982) 45 *The Modern Law Review*, 516.

punishment, such as killing resulting from an open fight, which were considered remediable through compensation to the victim's family.⁴ But the distinction between killings in open fight and hidden or concealed killings had disappeared in the 13th century and almost all killings were subsumed under a single capital offence of culpable homicide. The term murder (*murdrum*) was used to denote the special fine imposed on the hundred for the killing of a Norman by one of its members when the killer could not be found.⁵ In popular usage, however, the term "murder" signified those most reprehensible killings, thought of as deserving the ultimate punishment, especially secret killings. For a conviction of culpable homicide it was required that the accused had an intention to kill, or to cause serious bodily harm to the person killed. The typical example of culpable homicide was the killing of another 'upon a sudden occasion'. During this period, the term 'premeditated malice', as a legal term, did not mean anything more than 'deliberately' or 'wickedly'. In 1278 the Statute of Gloucester was enacted, which provided that if the accused had killed in self-preservation (*se defendendo*), or by misadventure (*per infortunium*), the trial judge was to report the matter to the king who could grant pardon, 'if he pleased'. But the excused killer still incurred a forfeiture of his chattels, for his act was regarded as tort depriving the king of a subject.⁶ Later, when the king's pardon became a matter of course, the juries were allowed to find the accused not guilty in such cases.⁷

4 See T. A. Green, "The Jury and the English Law of Homicide, 1200-1600", (1976) 74 *Michigan Law Review*, 413 at 420.

5 The term *Hundreds* referred to the larger administrative units in which local communities were organised under the Normans for purposes of local government and judicial administration. This fine was abolished by statute in the 14th century (14 Edward III, st. 1, ch. 4). See on this J. M. Kaye, "The Early History of Murder and Manslaughter", (1967) 83 *The Law Quarterly Review*, 365 and 569.

6 6 Edward I, c. 9. For a fuller discussion see T. A. Green, "Societal Concepts of Criminal Liability for Homicide in Medieval England", (1972) 47 *Speculum*, 669, 675 ff.; *Verdict According to Conscience – Perspectives on the English Criminal Trial Jury, 1200-1800*, (University of Chicago Press, Chicago, 1985), 86-93 and 123-125.

7 See J. F. Stephen, *A History of the Criminal Law of England*, III, (MacMillan,

Towards the end of the 14th century the term 'murder' began to be used by justices commissions in reference to killings committed by stealth or from ambush. In 1390 a statute was enacted which sought to restrict the granting of pardons in such cases. Under this statute, a pardon could not be granted for "murder, killing by lying in wait, assault or malice aforethought".⁸ After the introduction of this statute the jury's task became more complex, for they now had to determine whether or not the accused had killed with malice aforethought. Thus, for a first time, a distinction was recognised between premeditated killings (killings '*par malice devant pourpense*' or with malice aforethought) and hot-blooded killings on the spur of the moment (killings '*par chaude melle*' or by sudden chance). In the 15th century, however, the judges returned to treating felonious homicide as a single, undivided offence, in much the same way as it was treated in the 13th and early 14th centuries. At the same time the distinction was maintained between culpable homicide and those killings deemed excusable on the grounds of self-defence and misadventure. By the early 16th century the law had also recognised felonious homicides based on wanton negligence.

The distinction between murder and manslaughter began to emerge in the early years of the 16th century. At first, the distinction was introduced to deal with problems resulting from the practice known as 'the benefit of clergy'. This related to the right of all clerks in holy orders accused of crimes before lay courts to seek to be tried by ecclesiastical courts. If the accused's claim of clergy was successful, the case came under the jurisdiction of the ecclesiastical courts where the accused had a much better chance of avoiding conviction and punishment. However, frequent resort to the benefit of clergy by persons accused of serious crimes tended to undermine the credibility of the secular criminal law and, in the early 16th century, a number of statutes were enacted which removed benefit of clergy from those charged with 'murder of malice prepensed'.⁹ Through these statutes a tripartite classification of homicide was introduced: homicides committed with

London, 1883), 76-77.

8 Stat. 13 Ric. II, stat. 2, c. 1. And see Green, *supra* note 4, 432.

9 4 Hen. VIII, c.2; 23 Hen. VIII, c.1, s.3.

malice aforethought, punishable by death; homicides committed without prior malice, known by 1510 as ‘chance medley manslaughter’ ; and excusable homicides, i.e. homicides *per infortunium* or *se defendendo*, which were subject to royal pardon. To these one may add, as a fourth category, those homicides considered justifiable and entitling the accused to full acquittal. Manslaughter, or chance medley, at first referred to an accidental killing that occurred in the course of a fight involving acts of violence not directed at the person killed or anyone close to him. The only difference between chance medley manslaughter and homicide *per infortunium*, or by accident, was that the former took place in the course of an unlawful act. The distinction between murder and manslaughter was redefined, however, following the enactment of a statute in 1547, which clearly excluded the benefit of clergy from those found guilty of ‘wilful murder of malice prepensed’, but not from those found guilty of manslaughter.¹⁰ After the passing of that statute, murder was distinguished from manslaughter on the basis of the presence or absence of premeditation.¹¹ From that time the term manslaughter came to mean a deliberate killing on the spur of the moment, as understood by Edward Coke and other leading commentators of the 16th and 17th centuries.¹² Basis of the distinction was the assumption that a premeditated killing,

10 1 Edw. 6, c. 12. And see Green, *supra* note 4, 483 n. 251.

11 See *Salisbury's Case* (1553) Plowd Comm 100.

12 See W. Lambarde, *Eirenarcha*, (1607), 235-236, 245-248; E. Coke, *The Third Part of the Institutes*, (1660), 47, 55-56. According to Coke, “Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in *rerum natura* under the king’s peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same.” (p. 47) Coke defined malice aforethought as follows: “Malice prepensed is, when one compasseth to kill, wound, or beat another, and doth it sedato animo. This is said in law to be malice forethought, prepensed, malitia praecogitata.” (p. 51) On this basis, Coke defined manslaughter as a voluntary killing “not of malice forethought, [but] upon some sudden falling out... There is no difference between murder and manslaughter, but that the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called chance medley.” (p. 55) And see M. Dalton, *Countrey Justice*, (1619), 217.

or a killing in cold blood, was more reprehensible than a killing that, although deliberate, took place in the course of a sudden fight at a time when the accused had been overwhelmed by anger.¹³ The punishment for manslaughter was forfeiture of goods, burning in the hand and one year imprisonment. But the distinction between killing with malice aforethought and chance medley manslaughter proved unsatisfactory, for malice was difficult to define precisely and even more difficult to prove. So, in many cases, malice had to be implied from the circumstances surrounding the killing. For example, malice was presumed or implied in those cases where the accused killed the victim without apparent provocation on the victim's part, or where the accused killed an officer of justice in execution of his duty, or where the accused killed another while doing an unlawful act involving violence.¹⁴ In all these cases the accused was found guilty of murder, despite the absence of evidence or premeditation of his part.¹⁵ Gradually, the doctrine of chance medley

13 It is important to note that only if the fight in the course of which the killing took place was a sudden one a finding of manslaughter was justified. As Coke pointed out: "if two men fall out upon a sudden occasion, and agree to fight in such a field, and each of them go and fetch their weapon, and go in the field, and therein fight, the one killeth the other: here is no malice prepensed, for the fetching of the weapon and going into the field, is but a continuance of the sudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is malice prepensed." Third Part of the Institutes, p. 51.

14 According to Coke, malice aforethought "is implied in three cases: (1) If one kills another without any provocation on the part of him that is slain. (2) If a magistrate, or known officer, or any other that hath lawful warrant, and in doing or offering to do his office, or to execute his warrant, is slain, this is murder by malice implied by law. (3) In respect of the person killing. If A assault B to rob him, and in resisting A killeth B, this is murder by malice implied, albeit he (A) never saw or knew him (B) before. If a prisoner by the duress of the gaoler cometh to an untimely death, this is murder in the gaoler, and the law implieth malice in respect of the cruelty." Third Part of the Institutes, 50-51. And see Young's Case (1586) 4 Co Rep 40a.

15 According to Lambarde, "Many times the law doth by the sequel judge of that malice which lurked before within the party, and doth accordingly make imputation of it. And therefore if one (suddenly and without any outward show of present quarrel or offence) draw his weapon and therewith kill another

was abandoned and the test of manslaughter came to be the presence or absence of provocation rather than the absence of premeditation as such. This development was facilitated by the enactment, in 1604, of the Statute of Stabbing, which removed the benefit of clergy from those who killed another by stabbing, where the victim had not drawn his weapon, even though the killing was committed without premeditation.¹⁶

The narrow scope of the Statute of Stabbing made its application problematic in certain cases, however, as, for example, in the case where the accused stabbed and killed another caught in the act of adultery with his wife. To deal with these cases, judges of the late 17th and 18th centuries began to lay down criteria for determining what sorts of conduct could amount to provocation in law. At the same time, it was re-confirmed that provocation could provide no defence to those who killed in cold blood out of revenge.¹⁷ It is at that time that provocation, as a distinct defence reducing murder to manslaughter, clearly emerged.¹⁸

that standeth by him, the law judgeth it to have proceeded of former malice, meditated within his own mind, however it be kept secret from the sight of other men.” *Eirenarcha*, p. 205. And see Crompton, *L’Office et Auctorité de Justices de Peace*, (1606), fo. 21a, e.g. 2.

16 Stat. 2 Jac. VI, c.8 (1604). The Statute stated: “Every person ...which shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party, which shall so stab or thrust so as the person so stabbed or thrust shall thereof die within the space of six months then following, although it cannot be proved that the same was done of malice forethought, ... shall be excluded from the benefit of his clergy, and suffer death as in case of wilful murder.” And see Stephen, *A History of the Criminal Law of England*, supra note 8, 47-48.

17 As W. Hawkins remarked: “It also seems, that he who upon a sudden provocation executeth his revenge in such a cruel manner, as shews a cool and deliberate intent to do mischief, is guilty of murder, if death ensue.” *A Treatise of the Pleas of the Crown*, I (1716), 83.

18 See M. Hale, *Pleas of the Crown*, (1678), 43, 48-50, 56. In his *Commentaries on the Laws of England* IV (1769) W. Blackstone explains: “Manslaughter is ... the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. As to the first, or *voluntary* branch: ... if a man be greatly provoked, as by pulling his nose, or other great indignity, and

Forms of conduct amounting to provocation included grave assaults;¹⁹ attacking one's relative, friend or master;²⁰ unlawfully depriving a man of his liberty;²¹ and seeing a man in the act of adultery with one's wife.²² The emphasis on the wrongfulness of the provocative conduct exercised a considerable influence on the subsequent development of the provocation defence. However, the real basis of the defence, as many commentators observed, was the law's compassion to human frailty.²³ It was believed that, as a result of provocation, the accused becomes so subject to passion that his ability to reason and exercise judgment is temporarily suspended. At the same time, it was recognised that if the accused's response was out of all proportion to the provocation received, the presumption of malice would not be negated.²⁴ This approach to

immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter. But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder." (p. 191)

19 See *Lanure's Case* (1642), described by Hale, 1 *Pleas of the Crown* (1678), 455; *Mawgridge* (1707) Kel 119; *Lord Morley's Case* (1666) 6 St Tr 770.

20 See *Royley's Case* (1612) 12 Co Rep 87 and (1612) Cro Jac 296; *Cary's Case* (1616) mentioned by Stephen, *A History of the Criminal Law of England*, supra note 7, 221.

21 *Hopkin Huggett* (1666) Kel 59; *Tooley* (1709) Holt KB 485; and see *Mawgridge* (1707) Kel 119, 136-7.

22 *Manning's Case* (1617) 1 Vent 158 and 83 Eng Rep 112 (KB 1683-84) ; *Mawgridge* (1707) Kel 119, 137. And see W. Blackstone, *Commentaries on the Laws of England* (1769), IV, 191-192; W. Hawkins, *A Treatise of the Pleas of the Crown*, I (1716), 82-83.

23 According to E. H. East, "[T]o have received such provocation as the law presumes might in human frailty heat the blood to a proportionate degree of resentment, and keep it boiling to the moment of the fact: so that the part may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive." *A Treatise of the Pleas of the Crown*, (1803), 238. And see W. Hawkins, I *Pleas of the Crown*, (1716), 97, s. 28; M. Foster, *Crown Cases*, (1762), 296.

24 In East's words, where the accused's retaliation "is outrageous in its nature,

provocation is reflected in a number of cases decided in the 18th and 19th centuries.²⁵ During this period, there appears to be a gradual shift in emphasis from the wrongfulness of the provocative conduct to the requirement of loss of self-control, although the courts continued to recognise and apply the categories of legal provocation as laid down by 17th and early 18th century authorities.²⁶

An important step towards the formation of the modern doctrine of provocation was the emergence, in the late 19th century, of the concept of the 'reasonable person', as providing a universal standard of self-control by which the accused's response to provocation was to be assessed. One of the earliest cases in which the reasonable person was referred to was *Welsh*,²⁷ a case that many modern commentators regard as the starting-point in the development of the modern law of provocation.²⁸ There was no immediate recognition of the role of the reasonable person in the law of provocation, however, as manifested by the fact that the objective standard is not mentioned by Sir James Fitzjames Stephen in his influential works *Digest of the Criminal Law* (1877) and *A History of the Criminal Law of England* (1883). Stephen simply lays down the different forms of conduct that were taken to amount to provocation in law, pointing out that the success of the accused's plea in such cases depended, firstly, on whether the victim's conduct came under one of the established categories of legal provocation and, secondly,

either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty." *A Treatise of the Pleas of the Crown*, (1803), 234.

25 See, e.g., *Ayes* (1810) R & R 166; *Lynch* (1832) 5 C & P 324, 325; *Hayward* (1833) 6 C & P 157, 159; *Fisher* (1837) 8 C & P 182; *Kelly* (1848) 2 C & K 814.

26 J. Horder, *Provocation and Responsibility*, (Clarendon Press, Oxford, 1992), Chapters 1-5. And see A. Ashworth, "The Doctrine of Provocation", (1976) 35 *Cambridge Law Journal*, 292, 292-297.

27 *Welsh* (1869) 2 Cox CC 336.

28 In that case Keating J. stated: "in law it is necessary that there should be 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." (p. 338)

on whether the accused actually lost his self-control as a result.²⁹ Only

29 Articles 224-226 of Stephen's *Digest* reflect the common law position on the defence of provocation as it was in the late 19th century. "224. Homicide, which would otherwise be murder, is not murder but manslaughter if the act by which death is caused is done in the heat of passion caused by provocation as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm. The following acts, subject to the provisions contained in Article 225, amount to provocation: (a) An assault and battery of such nature as to inflict actual bodily harm or great insult is a provocation to the person assaulted. (b) If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel and whichever strikes the first blow. (c) An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest made by officers of justice whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders. (d) The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part of both the adulterer and of the adulteress. (e) The sight of the act of sodomy committed on a man's son is provocation to the father on the part of the person committing the offence. (f) Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this article, except (perhaps) words expressing an intention to inflict actual bodily injury, accompanied by some act which shows that such injury is intended; but words used at the time of an assault – slight in itself – may be taken into account in estimating the degree of provocation given by a blow. (g) The employment of lawful force against the person of another is not a provocation to the person against whom it is employed. 225. Provocation does not extenuate the guilt of homicide unless the person provoked is, at the time when he does the act, deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during the interval, and all the circumstances tending to show the state of his mind. 226. Provocation to a person by an actual assault, or by a mutual combat, or by a false imprisonment,

where these conditions were met the offence of murder was reduced to manslaughter. In *Welsh* provocation was said to negate the malice element of murder which, according to law, is implied when a killing is committed intentionally. In that case it was stated: “*Malice aforethought* means intention to kill. Whenever one person kills another intentionally, he does it with *malice aforethought*. In point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear, the malice aforethought implied in the intention remains”.³⁰

In the early 20th century the role of the reasonable person standard in the law of provocation received full recognition. In *Lesbini*³¹ the court rejected the argument that a lower standard of provocation should apply with regard to those suffering from some form of mental disability, pointing out that in all cases the provocation must be serious enough to affect the mind of a reasonable person. In those and subsequent cases it was confirmed that for the defence of provocation to succeed two conditions must be satisfied, namely, (a) the accused must have actually been deprived of his self-control at the time of the killing, and (b) the victim’s provocation, which caused the accused to lose his self-control, must have been such as to be likely to have the same effect on any reasonable or ordinary person. However, before the introduction of the Homicide Act 1957, the question of whether the victim’s conduct amounted to provocation or not was a question of law and, as such, it was for the judge, not for the jury, to decide.

The Modern Doctrine of Provocation

The provocation defence has been described as a ‘failure-of-proof’

is, in some cases, provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends.”

30 *Supra* note 27.

31 [1914] 3 KB 1116. See also *Alexander* (1913) 109 LT 745.

defence and as an 'offence modification'.³² As a failure-of-proof defence, it is understood to negate the mental or fault element of murder, without affecting the mental element of the lesser offence.³³ In early law, provocation was taken to negate the element of malice that an intentional killing implied and, as such, it operated as a failure-of-proof defence. Describing provocation as a failure-of-proof defence reflects the so-called 'capacities' model of criminal responsibility, which centres on the actor's capacity to exercise control over his conduct and on whether the actor has the opportunity to exercise such control. Proponents of the capacities theory argue that the subjective element in crime should be viewed as broad enough to encompass requirements pertaining to both cognition and control. According to Fletcher,

The spectrum of culpability teaches us that culpability is not only a matter of cognitive foresight, but also of self-control. The issue of self-control, we learn, requires subtle judgments of degree. In some cases of intentional homicide the actor exercises greater control, and in others, lesser. The grading of homicide disabuses us of the view that voluntariness and freedom of the will are black-and-white issues. Rather the shading develops by perceptible degrees from total dependence on circumstances to total independence of external influence.³⁴

From the viewpoint of the capacities theory, provocation may be said to operate as a failure-of-proof defence by negating the degree of control over one's actions required for his or her conviction as a murderer. In other words, describing provocation as a failure-of-proof defence would

32 See, e.g., P. Robinson, "Criminal Law Defenses: A Systematic Analysis", (1982) 82 *Columbia Law Review* 199, 232-3.

33 In Robinson's words, "[the failure of proof defense of provocation] is said to negate the required malice of murder, and thereby reduces the defendant's liability to manslaughter." Ibid, 205-6.

34 G. Fletcher, *Rethinking Criminal Law*, (Little, Brown & Co, Boston & Toronto, 1978), 353. And see C. Simester, *Responsibility and Criminal Liability*, (Kluwer, Dordrecht, 1989), 18-19.

presuppose a broader interpretation of the fault or *mens rea* element in murder — an interpretation that would encompass all morally relevant considerations bearing on culpability. However, this interpretation of the defence does not appear to accord with the current definition of malice in murder as an intention to kill or to cause grievous bodily harm.³⁵

On the other hand, under the formulation ‘offence modification’, provocation is portrayed as a defence capable of reducing culpability without affecting the *mens rea* of murder.³⁶ This latter approach to provocation captures better the present understanding of the defence in English law. According to Wasik,

The generally accepted view in English criminal law is that both provocation and diminished responsibility are seen as operating outside *mens rea* and *actus reus*. Thus it makes it easier to accept a reduction in offence category without questioning liability for that lesser offence, given that if the partial excuse negates *mens rea* for the most serious crime it would also affect the *mens rea* required for the lesser offence.³⁷

This approach reflects what is termed as the ‘cognitive’ model of criminal responsibility, which focuses upon the issues of knowledge, intention and foresight of consequences as the main ingredients of legal culpability.³⁸ Pleading provocation presupposes that the prosecution has

35 As R. Goff has noted “The mental element in the crime of murder is either (1) an intent to kill or (2) an intent to cause grievous bodily harm. Foresight of the consequences is not the same as intent, but is material from which the jury may, having regard to all the circumstances of the case, infer that the defendant actually had the relevant intent”. “The Mental Element in Murder”, (1988) 104 *Law Quarterly Review* 30, 48. And see *Vickers* (1957) 2 All ER 741 and [1957] 2 QB 664; *Moloney* [1985] AC 905; *Hancock and Shankland* [1986] AC 455; *Nedrick* (1986) 3 All ER 1.

36 See T. Archibald, “The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-Control”, (1985-86) 28 *Criminal Law Quarterly* 454, 456-7.

37 M. Wasik, “Partial Excuses in Criminal Law”, (1982) 45 *Modern Law Review* 516, 528-529.

38 See, e.g., G. Hughes, “Criminal Responsibility”, (1964) 16 *Stanford Law Review*

provided sufficient evidence to justify the jury's returning a verdict of guilty of murder. If the jury are not satisfied beyond reasonable doubt that the accused had the *mens rea* of murder – i.e. an intention to kill or to cause grievous bodily harm – they must find the accused not guilty of murder and, necessarily, of voluntary manslaughter. But if the jury conclude that the accused had the requisite intention for murder, they must convict him of manslaughter if they find that he was provoked.³⁹ Reference may also be made in this connection to the distinction between 'informal' and 'formal' mitigation proposed by Professor Hart. Hart speaks of informal mitigation in those cases where it is left to the sentencer judge to impose a penalty below the maximum level provided by the law, by taking into account certain mitigating factors. Formal mitigation, on the other hand, pertains to those cases where, according to law, the presence of certain mitigating factors should always remove the crime into a lower offence category. Provocation, when pleaded as a partial defence to murder, offers the typical example of formal mitigation.⁴⁰

The definition of provocative behaviour offered by Devlin J. in *Duffy*, although now somewhat out of date, is still taken to provide a useful starting-point in the discussion of the modern doctrine of provocation:

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for

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39 One might envisage a case in which the accused is provoked to lose his self-control to such a degree that he is no longer aware of what he is doing. In such a case the accused may be able to rely on a lack of mens rea defence, but not on provocation. See on this A. Ashworth, "Reason, Logic and Criminal Liability", (1975) 91 *Law Quarterly Review* 102, 128-9; T. Archibald, "The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-Control", (1985-1986) 28 *Criminal Law Quarterly* 454, 456-7.

40 H.L.A. Hart, "Prolegomenon to the Principles of Punishment", in *Punishment and Responsibility*, (Clarendon Press, Oxford, 1968), 15.

the moment not master of his mind.⁴¹

Lord Devlin's definition admits the application of an objective test relied upon to determine whether the provocation offered was serious enough to overcome the capacity for self-control of a reasonable person. In addition to this, for the defence of provocation to succeed, what is referred to as the 'subjective test' must also be met: it must be established that the accused himself did in fact lose his self-control as a result of the provocation he received.

The common law definition of the provocation defence has been amended by s. 3 of the Homicide Act 1957. According to this section:

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

This provision affirms the application of a dual test in provocation, comprising the subjective question of whether the accused was in fact provoked to lose his self control, and the objective one of whether the provocation was serious enough to make a reasonable person do as the accused did. At the same time, however, it adopts an approach broader than had previously been accepted to the question of what may constitute provocation in law, for it includes not only 'things done' but also 'things said' into its definition of provocation. At common law, the traditional position was that verbal insults did not amount to provocation sufficient to reduce murder to manslaughter.⁴² Some form

41 *Duffy* (1949) 1 All E.R. 932n.

42 As G. Fletcher has remarked: "Though it is generally recognized that proof of a serious physical blow is sufficient to submit the issue of provocation to the jury, the general rule [at common law] is that insults and abusive language are

of physical aggression, either against the accused himself or someone close to him, was necessary, with one notable exception, namely, seeing a man in the act of adultery with one's wife. With regard to this latter case, the authorities provide no clear answer to the question of whether a lawful marriage had to be proved before the accused could rely on the provocation defence.⁴³ Furthermore, it was recognised that an unexpected confession of adultery may constitute sufficient provocation in law.⁴⁴ Under s. 3 of the Homicide Act 1957, there is no restriction as to what may constitute provocation in law other than that the alleged provocation must have been serious enough to provoke a reasonable or ordinary person. As Lord Diplock stated in *Camplin*:

[s.3] abolishes all previous rules of law as to what can or cannot amount to provocation... The judge is entitled, if he thinks it helpful, to suggest considerations which may influence the jury in forming their own opinion as to whether the test [of provocation] is satisfied; but he should make it clear that these are not instructions which they are required to follow; it is for them and no one else to decide what weight, if any, ought to be given to them.⁴⁵

insufficient. The premise obviously is that though 'sticks and stones may break our bones', we are all expected to maintain a stiff upper lip in the face of verbal aggression." *Rethinking Criminal Law*, (Little, Brown & Co, Boston & Toronto, 1978), 244. See, e.g., *Rothwell* (1871) 12 Cox CC 145; *Ellor* (1920) 15 Cr App R 41. And see Viscount Simon's position in *Holmes v DPP* [1946] AC 588. This view was adopted in some recent cases in Scotland, although it was recognised that there may be cases where verbal provocation could, exceptionally, be accepted. See, e.g., *Thomson v HM Adv* (1986) SLT 281; *Cosgrove v HM Adv* (1991) SLT 25; *Berry v HM Adv* (1976) SCCR Supp 156; *Stobbs v HM Adv* (1983) SCCR 190.

43 See, e.g., *Palmer* [1913] 2 KB 29 and *Greening* [1913] 3 KB 846, where it was stated that a plea of provocation involving an allegation of adultery presupposed the existence of a lawful marriage. In other cases, however, the courts adopted the view that adultery may be admitted as provocation notwithstanding the absence of a lawful marriage. See, e.g., *Kelly* (1848) 2 C & K 814; *Alexander* (1913) 9 Cr App R 139; *Gauthier* (1943) 29 Cr App R 113; *Larkin* [1943] KB 174.

44 But this approach was rejected in *Holmes v DPP* [1946] AC 588.

45 *Camplin* (1978) AC 705 at 716.

As this suggests, it is social convention, rather than law, that now determines the standard of adequate provocation. From this point of view, it is accepted that an accused may be able to rely on provocation, even if the victim's conduct by which he was provoked was not unlawful.⁴⁶ But mere circumstances or naturally occurring events cannot amount to provocation for, under s. 3, only human conduct could constitute provocation. However, if the circumstances have been brought about by a human agent, then they might be regarded as potential provocation.⁴⁷

If there is some evidence raising the possibility that the accused was provoked, the judge must put the defence to the jury.⁴⁸ It is for the judge

46 As G. Williams has noted, "[T]he Homicide Act, in allowing insults as provocation, inevitably alters the position, because an insult uttered in private is neither a crime nor even a tort. Section 3 contains no restriction to unlawful acts, and the courts seem to be ready to allow any provocative conduct to be taken into consideration, even though that conduct was itself provoked by the defendant", *Textbook of Criminal Law*, (Stevens and Sons, London, 1983), 534-535. As stated by Lowry LCJ in Browne [1973] NI 96: "I should prefer to say that provocation is something unwarranted which is likely to make a reasonable person angry or indignant" (at 108). And see *Doughty* (1986) 83 Cr App R 319, where it was held that the crying of a baby may constitute adequate provocation for purposes of mitigation. See on this J. Horder, "The Problem of Provocative Children" [1987] *Criminal Law Review* 655. However, other common law jurisdictions have adopted a different approach to the question of what may constitute provocation in law – one closer to the traditional common law position – excluding acts that a person has a legal right to do from the scope of legal provocation. See e.g. s. 215 (3) of the Canadian Criminal Code.

47 For example, finding one's house damaged by a landslide could not be relied upon as provocation, if the accused lost his self-control and killed as a result. On the other hand, finding one's house damaged by thieves might amount to provocation in law.

48 See *Acott* [1997] 1 All ER 706, where it was held that, for the defence of provocation to be put to the jury, there must be evidence of some identifiable words or actions of another likely to have provoked the accused into losing his self-control. It is not sufficient that the accused's loss of self-control may possibly have been caused by some unidentified conduct of another. And see

to decide, as a matter of law, whether there is any such evidence, even though the accused himself may not wish to raise the issue, e.g. because raising provocation may be inconsistent with another defence relied upon by the accused.⁴⁹ If no evidence of provocation appears in the case, as presented by the prosecution, then the accused will bear the burden of introducing some evidence of provocation.⁵⁰ It is not required, as it was the case in the past, that the judge should first be satisfied that the alleged provocation was serious enough to provoke a reasonable person, or that the accused had lost his self-control as a result.⁵¹ Once the defence is put to the jury, it is for them to decide whether, as a matter of fact, the accused was provoked to lose his self-control (this is often

relevant comment in *The Independent*, Tuesday, 11 March 1997. In *Clarke* [1991] Crim LR 383, the accused lost his self-control and killed his girlfriend when she told him that she was pregnant and that she was planning to have an abortion; the defence was left to the jury and was rejected. In *Cocker* [1989] Crim LR 740 the accused killed his wife, who was suffering from a painful and incurable disease, after she had repeatedly begged him to kill her. The trial judge refused to put the issue of provocation to the jury, as there was no evidence that the accused was provoked. See also *Wellington* [1993] Crim LR 616. In some cases evidence given by a pathologist relating to the nature of the victim's injuries may be crucial, as such evidence may suggest that the victim was subjected to a frenzied attack – an indication that the accused had lost his self-control. See, e.g., *Rossiter* (1992) 95 Cr App R 326.

49 Where an accused charged with murder pleads self-defence – a defence leading to full acquittal – he may be unwilling to raise the issue of provocation, for evidence of provocation might be detrimental to his plea of self-defence. In such cases the courts have recognised that the accused has a tactical reason for not raising provocation, notwithstanding the fact that such a defence may be supported by existing evidence. See *Bullard v R* [1957] AC 635, [1961] 3 All ER 470n; *Rolle v R* [1965] 3 All ER 582; *Lee Chun-Chuen v R* [1963] AC 220, [1963] 1 All ER 73; *Johnson* [1989] 1 WLR 740.

50 Similarly, in Canada it is accepted that, with regard to the provocation defence, the accused bears an evidentiary burden and that the judge should not put the defence to the jury unless this burden is discharged. See, e.g., *Parnerkar* [1974] SCR 449, 21 CRNS 129.

51 But this position has been challenged by the Criminal Law Revision Committee (see CLRC/OAP/R, para. 88).

referred to as ‘the factual question’ in provocation). And it is upon the prosecution to prove, beyond reasonable doubt, that the accused was not in fact provoked or did not lose his self-control at the time of the killing.⁵² However, once the defence has been raised, the judge may still seek to advise the jury on the question of whether the alleged provocation should be considered serious, or on whether a reasonable person may have responded to the provocation offered the way the accused did. The judge’s opinion may still affect the final outcome of the case, although not as decisively as before the introduction of the 1957 legislation. If the jury are left with a reasonable doubt as to whether all the conditions of the defence were met, they must find the accused guilty of manslaughter only.

The requirement of loss of self-control

As already noted, in dealing with a plea of provocation the jury have to consider, first, the subjective or factual question of whether the accused was actually provoked to lose his or her self-control.⁵³ If they are not satisfied, beyond reasonable doubt, that the accused was in fact deprived of his self-control at the time of the killing they will have to find the accused guilty of murder, without considering how a reasonable person would have reacted to the provocation received. Thus, if the accused has an unusually phlegmatic temperament and did not lose his self-control his defence will fail, even though the provocation may have been serious enough to provoke a reasonable person to lose his self-control. In dealing with the subjective question the jury are entitled to consider the immediate act that caused death as well as all the relevant circumstances preceding or surrounding that act. The nature of the alleged provocation, the manner in which the accused reacted, the time which elapsed between the provocation and the accused’s response, previous relations between the parties, the sensitivity or otherwise of the accused are considerations relevant to answering the subjective question in provocation. As Widgery CJ said in *Davies*, considering the relevant

52 See, e.g., *Cascoe* [1970] 2 All ER 833.

53 See *Brown* [1972] 2 All ER 1328 at 1333; *Cocker* [1989] Crim LR 740.

background “is material to the provocation as the setting in which the state of mind of the defendant must be judged”.⁵⁴

In a number of cases the courts have confirmed the position, expressed in *Duffy*, that for the defence of provocation to be accepted there must be “a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind”.⁵⁵ According to the current formulation of the provocation defence, a killing that has been planned, or over which the actor has had control, cannot be reduced to manslaughter, for planning or premeditation is inconsistent with the requirement of loss of self-control. In provocation the intention to kill is expected to have been formed immediately after the provocation was received. If the provocation was received some time before the time of killing, it is assumed that the accused had enough time to regain his self-control. A clear distinction is thus drawn between a person who loses his self-control and kills, immediately upon receiving provocation, and one who retaliates after brooding over past wrongs he suffered at the victim’s hands. As was stated in *Duffy*

[C]ircumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden and temporary loss of self-control, which is of the essence of provocation.⁵⁶

54 *Davies* [1975] QB 691 at 702. Similarly, in the New Zealand case of *McGregor* [1962] NZLR 1069 it was held that background circumstances, such as earlier provocations, “could be taken into account in determining whether a subsequent comparatively trivial act of provocation... could cause slumbering fires of passion to burst into flame” (at 1080).

55 *Duffy* [1949] 1 All ER 932n, In *McGregor* [1962] NZLR 1069 North J pointed out: “[I]t is of the essence of the defence of provocation that the acts or words of the dead man have caused the accused a sudden and temporary loss of self-control, rendering him so subject to passion as to make him for the moment not master of his mind” (at p. 1078).

56 *Ibid.* See also *Ibrams* (1981) 74 Cr. App. Rep. 154.

In *Thornton*,⁵⁷ the Court of Appeal took the view that loss of self-control following immediately after the provocative conduct of the deceased remained an essential element of the provocation defence. The same position was adopted in *Ahluwalia*,⁵⁸ where the loss of self-control requirement was described as an essential ingredient of the provocation defence, serving to underline that the defence is concerned with the actions of an individual who is not, at the moment when she acts violently, master of her own mind.⁵⁹ It was pointed out in that case that a sudden and temporary loss of self-control at the time of the killing is vital to the defence.⁶⁰

The above approach has been criticised on the grounds that it overlooks the important requirement that a conviction of murder

57 *Thornton* [1992] 1 All ER 306. In this case a woman suffering from 'battered woman syndrome' went to the kitchen, took and sharpened a knife, and returned to stab her husband. She was convicted of murder and appealed on the grounds that instead of considering the final provocative incident, the jury should have been directed to consider the events over the years leading up to the killing. This argument was rejected, however, on the grounds that "in every such case the question for the jury is whether at the moment the fatal blow was struck the accused had been deprived for that moment of the self-control which previously he or she had been able to exercise" (per Beldam L J.). But in *Thornton* (No 2) (1996) 2 AER 1023 after examining new medical evidence, a retrial was ordered and the accused was convicted of manslaughter on the ground of diminished responsibility.

58 *Ahluwalia* [1992] 4 All ER 889. As in *Thornton*, following the accused's conviction of murder at first instance, a retrial was ordered and, when the defence of diminished responsibility was put, the accused was convicted of manslaughter.

59 Lord Taylor said in that case: "Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained control. The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation. In some cases, such an interval may wholly undermine the defence of provocation; that, however, depends entirely on the facts of the individual case and is not a principle of law" (at pp. 897-898).

60 And see CLRC, 14th Rep (1980), para 84.

should be avoided unless the accused fully deserves to be stigmatised as a murderer. In some cases of provocation, such as cases involving a prolonged period of maltreatment of the accused at the victim's hands (cumulative provocation), evidence of planning and deliberation may not be sufficient to warrant, morally, the accused's conviction of murder.⁶¹ It is pointed out that the position that the scope of the crime of murder should be narrowed down to include only those killings which deserve to be stigmatised as murders militates against the outright rejection of the provocation defence where the immediacy requirement is not met. Strict adherence to this requirement may lead, in some cases of cumulative provocation, to convictions of murder that may be regarded as morally questionable.⁶² Since *Ahluwalia*, in certain cases a lapse of time of itself is no longer sufficient to negate provocation. It is now recognized that where the provocation is cumulative, especially in those circumstances where the accused is found to have suffered domestic violence from the victim over a long period of time, the required loss of self-control may not be sudden as some persons experience a 'slow-burn' reaction and appear calm.⁶³

61 According to M. Wasik, "in defining the ambit of the defence [of provocation] a balance has to be struck between the reflection of contemporary attitudes of sympathy towards the defendants in such cases and the duty of self-control upon every citizen by the law." "Cumulative Provocation and Domestic Killing", [1982] *Criminal Law Review* 29, 34-5.

62 See Wasik, *ibid* at p. 37. And see CLRC, 14th Rep (1980), paras 15,19,84.

63 Similarly, in Canada the strictness of the suddenness requirement appears to have been relaxed in recent years. See, e.g., *Thibert* [1996] 1 SCR 37 (in this case the Supreme Court accepted that the provocation defence was a viable one despite the fact that the accused's behaviour prior to the killing did not preclude a degree of forethought). It has been suggested by some commentators, however, that the recent decision of the Supreme Court in *Parent* points towards a return to a stricter suddenness requirement. See D. Stuart, "Annotation – *R. v. Parent*" (2001) 41 CR (5th) 200; W. Gorman, "Comment: *R. v. Parent*" (2002) 45 Crim. LQ 412.

The objective test in provocation

After the question of loss of self-control has been addressed, the next question the jury has to answer is whether the accused's judgment of the actions or words that caused him or her to lose self-control and kill as gravely provocative was, objectively, a warranted one (this is sometimes referred to as the 'evaluative question' in provocation). In the past, what was capable of amounting to provocation was limited to certain forms of conduct that, as a matter of law, were deemed sufficiently offensive. These included grossly insulting assaults; seeing a friend, relative or kinsman being attacked; seeing a fellow-citizen unlawfully deprived of his liberty; discovering a man in the act of adultery with one's wife; and finding a man committing sodomy with one's son.⁶⁴ In *Holmes*,⁶⁵ the House of Lords stated that, "in no case could words alone, save in circumstances of a most extreme and exceptional character", amount to provocation in law. The House held, moreover, that an accused could not rely on a confession of adultery as provocation sufficient to reduce his offence to manslaughter. The modern approach is to leave open the forms of conduct capable of amounting to provocation in law, but to limit the class by asking whether the relevant conduct was likely to provoke a hypothetical reasonable or ordinary person. Only if the jury feel that the provocation offered was likely to provoke a reasonable person to lose his or her self-control and do as the accused did, the accused's plea of provocation could be accepted. The introduction of the objective test in provocation has been justified on public policy grounds. As stated in *Camplin*, "The public policy... was to reduce the incidence of fatal violence by preventing a person relying upon his own exceptional pugnacity or excitability as an excuse for loss of self-control".⁶⁶

Before the introduction of the Homicide Act 1957, it rested upon the judge to instruct the jury as to the attributes of the reasonable person

64 See, e.g., Hawkins 1 *Pleas of the Crown* c. 13, s. 36; East, 1 *Pleas of the Crown* 233; Stephen, *A Digest of the Criminal Law*, Article 224. And see *Fisher* (1837) 8 C & P 182.

65 *Holmes v DPP* [1946] AC 588, [1946] 2 All ER 124.

66 *Camplin* [1978] AC 705 at 716.

and the way in which a reasonable person should be expected to react when provoked. The reasonable person was defined as an adult person with normal mental and physical attributes. This way of looking at the matter caused problems, however, for often what renders certain conduct provocative was precisely the fact that the accused is not, in some crucial respect, an 'ordinary person'. And yet, for a number of years, the courts refused to modify the standard to allow for certain individual characteristics of the accused to be taken into account on the grounds that such an approach would undermine the purported objectivity of the standard.⁶⁷ It was not until the decision of the House of Lords in *Camplin*,⁶⁸ a case decided more than 20 years after the Act, that the effect of s.3 on the issue of characteristics was fully recognised.

In *Camplin* the House of Lords took the view that as, under s. 3, words as well as acts may constitute provocation in law, mental or physical peculiarities cannot be ignored, for it is by reference to those peculiarities that the gravity of verbal provocation will in most cases depend. From this point of view, it was pointed out that "[t]he effect of an insult will often depend entirely on a characteristic of the person to whom the insult is directed".⁶⁹ Lord Diplock, in explaining how the jury should be directed in provocation cases, stated

The judge should state what the question is, using the terms of the section. He should then explain to them 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 that the question is not merely whether such a person in like circumstances would be provoked to lose his self-control but also whether he would react to the provocation as the accused did.⁷⁰

67 See, e.g., *Alexander* (1913) 9 Cr App Rep 139; *Smith* (1915) 11 Cr App Rep 81; *Bedder v DPP* [1954] 2 All ER 801, [1954] 1 WLR 1119.

68 *Camplin* [1978] AC 705, [1978] 2 All ER 168.

69 [1978] AC 705 at 726.

70 [1978] AC 705 at 718.

But, notwithstanding the importance of the accused's age as a factor to be taken into account in determining the gravity of the provocation, the judge may draw the jury's attention to the accused's age only if, in his opinion, such a consideration is relevant to explaining the accused's response to the provocation.

The opening up of the objective test in provocation to some degree of individualisation was deemed necessary in order to avoid the morally controversial decisions to which the rigid application of the test has led in the past. Nonetheless, this more liberal interpretation of the objective test, although a significant improvement over the previous position, has not been without difficulties. Problems have arisen, for example, about how to distinguish those individual characteristics bearing upon the gravity of the provocation from those character traits relating, rather, to the accused's capacity for self-control. Although, in theory, it is admitted that the latter are not relevant to the defence (except, perhaps, with regard to proving loss of self-control), drawing the line between the two has been a matter of dispute. On the assumption that the defence of provocation pertains to 'normal' people, it has been questioned whether certain characteristics should be seen as modifying the applicable test or, rather, as rendering the test inapplicable by removing the accused from the category of normal or ordinary persons. In the latter case, however, the accused should be able to rely on diminished responsibility, or some other defence based on the concept of abnormality of mind, rather than on provocation.

When the jury are directed to imagine themselves in the place of the provoked person, they are asked to consider what it would be like for a person with the particular qualities or attributes of the accused to have been the target of the relevant insulting behaviour or comment. If no connection between the relevant attributes of the accused and the provocation can be established, then these attributes are not relevant to the gravity of the provocation offered. But how far is a jury to go in taking into consideration the cultural values of an accused — values that may, on occasion, be repugnant to them? An accused might claim that his or her cultural values were so different from those of the majority that the gravity of a provocation to which he or she was subjected

should be assessed in the light of those values. Horder's answer is that "it must be made clear that jurors need not invest themselves with the defendant's characteristics where to do so would entail a morally or politically unacceptable compromise of liberal values such as freedom of expression and racial or religious tolerance".⁷¹ Others have argued, however, that such characteristics should be taken into consideration in assessing the gravity of the provocation. Taking into account cultural characteristics should be viewed as a vindication of the principles of individualised justice in a society characterised by cultural pluralism.⁷²

The reasonable person provides a basis for answering the question of whether the provocation was capable of arousing anger to such a degree as to be likely to overcome the accused's capacity for self-control. Only provocations that are deemed serious enough to enrage an ordinary or reasonable person so that he may lose his self-control and kill could furnish a morally acceptable basis for a reduction of culpability. In this respect, the reasonable person is endowed with those individual characteristics of the accused that are deemed relevant to assessing the gravity of the provocation and hence to determining the degree of psychological pressure to which the accused was subjected. As to the forms of wrongdoing that may be regarded sufficiently provocative, the most straightforward cases would be those where the wrongdoing constitutes criminal behaviour of a serious nature. In addition to these, conduct that infringes commonly recognised standards of decent behaviour may satisfy the test of provocation, even though such conduct is not, strictly speaking, criminal. The reasonable person, as represented by the ordinary member of the jury, epitomises those commonly accepted standards of decent conduct the violation of which could support a claim of provocation and, at the same time, is seen as the vehicle of those common failings of human nature to which the

71 *Provocation and Responsibility*, (Clarendon Press, Oxford, 1992), 145.

72 See, e.g., S. Yeo, "Recent Pronouncements on the Ordinary Person Test in Provocation and Automatism", (1990-91) 33 *Criminal Law Quarterly* 280. Yeo argues that "It is difficult to appreciate why such a characteristic could not be relevant to the assessment of the gravity of the provocation if an ordinary person belonging to the same culture could have felt likewise" (at p. 290).

provocation defence is said to be a concession.

Concluding Note

Provocation operates as a partial defence on the assumption that provocative conduct is capable of raising in an ordinary person such a degree of psychological pressure, in the form of angry passion, as to deprive her of her ability to exercise rational control over her actions. Excusing those who succumb to anger in the face of grave provocation and lose control of their actions constitutes a concession to the 'failings' of human nature and becomes possible because these failings are seen as being common to all people. From this point of view the emphasis is on the element of loss of self-control as a factor reducing the actor's moral responsibility for his or her actions. In so far as the actor's anger at the author of the provocation is morally justified, an intentional killing committed in the 'heat of passion' does not reflect the moral disposition or trait of character normally associated with murder. Nevertheless, this sort of pressure can only support a claim of extenuation, not exculpation, for the provoked actor has failed to live up to community standards which demand us to exercise self-control even under pressure. Impaired volition does not mean that the provoked agent must have lost his self-control in an absolute sense, for loss of self-control is a matter of degree and, as such, it does not always preclude some form of deliberation or choice. What must be precluded or, at any rate, seriously affected, however, if provocation is to provide a partial excuse, is the actor's capacity of assessing the moral significance of her actions and of bringing her actions into line with her all-things-considered moral choices.