

Whither Provocation?

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I: INTRODUCTION

Provocation, generally accepted in criminal law as a concession to human infirmity,¹ operates as a partial defence to a charge of murder. It developed “in order to accommodate homicides which were not malicious enough to be designated murder nor justifiable enough to warrant total absolution.”² It does not make an unlawful homicide excusable or justifiable but it does enable the accused to have his or her sentence reduced from murder to manslaughter. Although recent developments in the law have somewhat muddied its conceptual waters, it has been generally used when the accused claims that he or she lost self control due to some provocative incident.

In *Johnson v R*,³ Gibbs J noted that:⁴

[T]he law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life.

Jurisprudence in the area has revolved around this tension. As Brown states:⁵

1 *R v Hayward* (1833) 6 C & P 157, 159; 172 ER 1188, 1189, per Tindal CJ.

2 Gormally, “Battered Wives Who Kill” (1978) 2 Law & Hum Behav 133, 135, cited in Walker, “Cumulative Provocation and Domestic Killings” (unpublished dissertation, University of Auckland, 1992) p6.

3 (1976) 136 CLR 619 (HCA).

4 *Ibid*, 656.

5 Brown, “The “Ordinary Man” in Provocation: Anglo-Saxon Attitudes and “Unreasonable Non-Englishmen” (1964) 13 ICLQ 203, 204.

[W]hat should constitute the primary aim of the criminal law in its attitude to provocation? Should it be to foster respect for the sanctity of human life and the preservation of order, or should it be the recognition of the effect of provocation on human frailty?

It seems that no answer to this question has yet been reached and the road of provocation has been a long and curious one. Subjective, objective and hybrid standards of liability have all had their part to play in the development of the defence. As the law stands in New Zealand today it may be said that a crossroads has been reached.

The hybrid test implemented by s 169(2)(a) of the Crimes Act 1961, and as interpreted in *R v McGregor*⁶ is under attack both judicially and legislatively. Recent decisions of the Court of Appeal, culminating with *R v McCarthy*,⁷ have altered the defence beyond all recognition. Furthermore, initiatives undertaken by the legislature in review of the defence have made its position even more precarious. It is the purpose of this article to determine the path which provocation should take and whether the proposed changes have any merit. In order to do this it is necessary to investigate the development of provocation since its inception in the sixteenth century and the tribulations attendant on this problematic defence.

II: THE LEGAL BACKGROUND

1. Early Common Law

“[P]rovocation developed in the sixteenth and seventeenth centuries as the law’s sole contribution to severe emotional perturbation.”⁸ It took its place within a rigidly structured law of homicide in which killings were presumed to proceed from the existence of *malice aforethought*.⁹

[T]he theory being that such 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.

Malice aforethought implied a manifestation of a “wicked, depraved, malignant spirit”,¹⁰ which was rebutted by an instinctive reaction of ungovernable anger. There was an intention to kill, but as it had been formed “in hot blood” which deprived the accused of self control it “was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone.”¹¹

At these early stages the test for provocation was a subjective one: had the

6 [1962] NZLR 1069 (CA).

7 [1992] 2 NZLR 550.

8 Brookbanks, “Provocation – Defining the Limits of Characteristics” (1986) 10 Crim LJ 411, 413.

9 Ashworth, “The Doctrine of Provocation” [1976] CLJ 292, 292-293.

10 Foster, CC & CL 256, cited in Turner, 1 *Russell on Crime* (12th ed 1964) 518.

11 East, “Homicide From Transport of Passion, or Heat of Blood” 1 *A Treatise of the Pleas of the Crown* 232.

accused so lost self control as to negative the presumption of malice?¹² Lord Holt CJ in the judgment of *Mawgridge*¹³ summarised the categories of provocation which would be legally sufficient to rebut the implication of malice. They were:

- (i) angry words followed by an insult;
- (ii) the sight of a friend or relative being beaten;
- (iii) the sight of a citizen being unlawfully deprived of liberty;
- (iv) the sight of a man in adultery with the accused's wife; and
- (v) someone striking the accused.

Categories which were insufficient were:

- (i) words alone;
- (ii) affronting gestures;
- (iii) trespass to property;
- (iv) misconduct by child or servant; and
- (v) breach of contract.¹⁴

The test was subjective, yet when the question was left to the jury, the jurors had to scrutinise the evidence in order to see if it was reasonable to believe the contention of the defence. They would use their own experiences and the experiences of people they knew in the community, and judges gradually developed a practice of directing jurors to decide whether in their opinion the provocative acts were enough to cause a reasonable person to lose control over his or her passions. However, it is crucial to remember that at this stage the objective test was merely "a practical canon for measuring the truth of the defendant's allegation."¹⁵

The first judicial recognition of the "reasonable man" test came in *R v Kirkham*,¹⁶ where it was made plain to the jury that "though the law condescends to human frailty it will not indulge human ferocity. It considers man to be a rational being and requires that he exercise a reasonable control over his passions."¹⁷ This was the start of a process during which "what began as a matter of evidence crystallized into a rule of law and became an objective legal test of liability."¹⁸

However, until the decision in *R v Welsh*¹⁹ some thirty-three years later, the question of provocation was still left to juries in subjective terms. In that case Keating J stated that a prerequisite for the successful operation of the defence was that, "such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion."²⁰

¹² See *Maddy's case* (1671) 1 Vent 159; 84 ER 524.

¹³ (1707) Kel J 119; 84 ER 1107.

¹⁴ *Ibid*, 130.

¹⁵ Turner, *supra* at note 10, at 534. For a statement of the law at this time see *R v Thomas* (1837) 7 C & P 817; 173 ER 356.

¹⁶ (1837) 7 C & P 111; 173 ER 422.

¹⁷ *Ibid*, 119; 424, per Coleridge J.

¹⁸ Turner (ed), *Kenny's Outlines of Criminal Law* (19th ed 1966) 176.

¹⁹ (1869) 11 Cox CC 336.

²⁰ *Ibid*, 338.

In this case the accused had lost a civil law suit against the deceased. In a subsequent squabble the deceased raised his hand, apparently in self defence against the accused, who then stabbed him with a knife. Obviously mindful of this, Keating J continued:²¹

When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it – the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter.

2. Later Common Law

Despite a lack of reported case law on the matter, in the next thirty years this test became firmly established as part of the common law.²² Although there is a lack of writing and analysis on just why so fundamental a change took place in the law, it was clearly a judicial initiative, as there had been no legislative action in this area. Obviously expanding industrialisation and urbanisation, with increasing population density and resultant scope for personal friction, led to the courts' concern that juries were being too lenient towards some accused.²³ The pendulum of provocation was swinging towards order.

The vital question with regard to provocation thus became, just what are the attributes of the reasonable man? Some of the difficulty with this doctrine can be gauged by the fact that the courts themselves have balked at providing a concrete definition. Lord Goddard CJ stated:²⁴

No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury....

Instead of giving a concrete definition, the “portrait of the “reasonably provoked man” at common law was created out of a series of judicially conceived negative attributes.”²⁵ Hence the accused was precluded from relying on any physical or psychological characteristic which may have rendered that person particularly susceptible to the alleged provocation. In *R v Lesbini*,²⁶ where the accused had shot the woman in charge of a firing range after she made some impertinent personal remarks about him, the fact that he suffered from defective

21 Ibid.

22 See the comment of North J in *R v McGregor*, supra at note 6, at 1075.

23 It should be remembered that the death penalty was still in force at this stage and it is entirely understandable that juries would be loath to send someone to his or her death when there was even a small amount of doubt as to guilt or innocence. Even without the death penalty there still exists some concern today that juries think with their hearts rather than their minds as regards this defence. See the Crimes Consultative Committee, *Report on the Crimes Bill 1989* (April 1991).

24 *R v McCarthy* [1954] 2 QB 105, 112 (CCA). Although note the attempt to define the “reasonable man” made in *R v Ward* [1956] 1 QB 351, 356 where the words “any reasonable person, that is to say, a person who cannot set up a plea of insanity” were used by the English Court of Appeal. This very broad definition was never used in practice.

25 Brown, supra at note 5, at 208.

26 [1914] 3 KB 1116 (CCA).

control and want of mental balance was of no moment in deciding whether he was provoked.²⁷ Nor could the accused rely on pregnancy,²⁸ exceptional pugnacity,²⁹ or self-induced intoxication.³⁰ The nadir of the purely objective test came in the case of *Bedder v Director of Public Prosecutions*,³¹ where the accused was a youth of eighteen who was sexually impotent. When he attempted in vain to have sexual intercourse with a prostitute, she jeered at him and attempted to leave. In the ensuing struggle he killed her. The House of Lords found that the jury was correctly directed in being told to consider what effect the prostitute's acts would have had on an ordinary person who was not impotent. Simonds LJ opined that if "the normal man is endowed with abnormal characteristics the test ceases to have any value."³²

In essence the "reasonable man" was strictly limited to three categories. The first of these was the finding of a spouse in an act of adultery.³³ This was tightly circumscribed by the fact that a mere confession of adultery or threat to commit adultery would not suffice;³⁴ nor would there be provocation if the parties were merely engaged,³⁵ or merely living together.³⁶ Some variations, such as finding a man sodomising your son, could constitute sufficient provocation.³⁷

The second situation was serious physical assault, in which case self defence was the preferred defence. The third situation was mere words in circumstances of the most extreme and exceptional character.³⁸ In practice this was never.

On top of these narrowly confined criteria the plight of the accused was worsened by the requirement that the reasonable person would reassert self control within a reasonable period of time,³⁹ and by the controversial requirement in *Mancini*⁴⁰ that the degree of reaction must bear a reasonable relationship to the alleged provocation if the defence is to succeed.

The reasonable relationship criteria assumes that although a person has lost self control, he or she is in some way able to regulate the degree of his or her reaction.

27 Following *R v Alexander* (1913) 9 Cr App R 139.

28 *R v Smith* (1915) 11 Cr App R 81.

29 *Mancini v Director of Public Prosecutions* [1942] AC 1 (HL).

30 *R v McCarthy*, supra at note 24.

31 [1954] 2 All ER 801 (HL).

32 *Ibid*, 804.

33 A common favourite of the courts. See for instance Blackstone, 4 *Commentaries on the Laws of England* 192 where he says that such killing "is of the lowest degree of [manslaughter]; and therefore ... the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation".

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

35 *R v Palmer* [1913] 2 KB 29.

36 *R v Greening* [1913] 3 KB 846.

37 *R v Fisher* (1837) 7 C & P 182; 173 ER 452.

38 *Director of Public Prosecutions v Holmes*, supra at note 34. By contrast, in New Zealand s 184(2) of the Crimes Act 1908 provided that an insult could be provocation.

39 *R v Alexander*, supra at note 27.

40 Supra at note 29.

This seems a strange assumption, for as Wells comments:⁴¹

If the jury has found that the defendant has lost his self control and that this was “reasonable,” it does seem otiose for them to consider further the relationship between the gravity of the provocation and the reaction. If the nearest available weapon is a bread knife, the fact that the defendant walked across the room to fetch a wooden spoon would surely discredit his plea of loss of self-control.

The courts tended to justify this requirement by saying that there are degrees of loss of self control⁴² but just how does one regulate the degree of reaction in cases where someone has lost self control? A recurrent feature of a number of provocation cases is that the defendant could not remember much about the incident.⁴³ Overall, it does not really add to the fundamental question of whether the accused lost self control.

This requirement, like the objective test itself, was crystallised into a rule of law when it had been previously used as a loose evidentiary guide to exclude the defence in bad cases of extreme violence. Its original function is summarised by East:⁴⁴

[W]here the punishment inflicted for a slight transgression ... is outrageous in its nature, 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

Under *Mancini* this requirement became an inflexible legal test. Whatever the justifications and machinations of the courts in establishing these tests, the result was that, by 1954, “the personal equation in provocation had been almost completely eliminated”,⁴⁵ and judges showed a marked reluctance to leave the decision to the jury in the first place.

It should be noted however that to mitigate the harshness of the law the courts did not always apply the “archetype of improbable propriety”⁴⁶ as strictly as they might. In *R v Raney*,⁴⁷ for example, the fact that the accused had a wooden leg was taken into account. This judicial leniency was lauded by the Royal Commission on Capital Punishment in 1953 which stated that although they supported the objective test they acknowledged that “if the criterion of the reasonable man was strictly applied by the courts and the sentence of death was carried out in all cases where it was so applied, it would be too harsh in its operation.”⁴⁸

41 Wells, “The Death Penalty for Provocation?” [1978] Crim LR 662, 666.

42 See Brett, “The Physiology of Provocation” [1970] Crim LR 634; contrast the opposing view expressed by Ashworth, *supra* at note 9.

43 See, for example, *Bedder v Director of Public Prosecutions*, *supra* at note 31, at 802. The accused claimed that “she kicked me in the privates. Whether it was with her knee or her foot I do not know. After that I do not know what happened till she fell.”

44 *Supra* at note 11, at 234.

45 Brown, *supra* at note 5, at 210.

46 *Ibid.*

47 (1942) 29 Cr App R 14.

48 *Report of the Royal Commission on Capital Punishment* (1953) Cmd 8932, para 145.

3. The Merits of the Objective Test

This period marked the high water mark of the strictly objective test, when the scales of justice were tilted towards the maintenance of order. As such it is an apposite time to assess how just or sensible the objective test is. Brett notes that “[i]t seems likely, however, that a number of factors, some genetic, others environmental, combine to produce the differences of susceptibility and response.”⁴⁹ Is it fair to punish the person who has a power of self control below that of the “ordinary” person? As a result of the objective test:⁵⁰

[T]he law judged, and continues to judge, the abnormally strong by the same standard as the abnormally weak. There is every reason for a doctrine which was first conceived of as a shelter for human frailty, closing its doors on the super strong; but there is no justification for its exclusion of those whom it was originally established to accommodate.

With the benefit of hindsight the plight of *Bedder* and similar “abnormal” killers seems almost comic in its absurdity and the judges’ overriding concern to maintain consistency in the law came at a very heavy cost. Once the unadorned objective test was enshrined as a legal principle of liability there were a number of undesirable consequences:

- (i) there was a conflict with the original basic justification for the admission of the defence; the “concession to human frailty” – that people do not have impregnable powers of self control and it is morally wrong to punish people for things they could not prevent themselves from doing;
- (ii) its vagueness led to uncertainty. The concept did not need precise definition when it was a mere evidential guide to keep the jury within the margins of probability. The accused could always adduce evidence to rebut the presumption that he or she was a “reasonable” person. This was not the case when the test was elevated into a legal principle;
- (iii) it introduced a morally insupportable distinction between the treatment of a person born “normal” or average and a person born “abnormal” or varying from the average;
- (iv) the test produced results which offend the moral sensibility of many people and bring the law into disrepute.⁵¹

So while strict objectivity may have provided some form of consistency in the law in this area it was obvious that some change was needed, and it was in New Zealand that the most innovative change came.

III: THE NEW ZEALAND EXPERIENCE

1. The Crimes Act 1961 and *R v McGregor*

Section 169 of the Crimes Act 1961 formulated an innovative test for determining whether the provocation experienced was sufficient to cause a loss of self

⁴⁹ *Supra* at note 42, at 637.

⁵⁰ *Brown*, *supra* at note 5, at 230.

⁵¹ See *Turner*, *supra* at note 10, at 535.

control. In “a very difficult feat”⁵² the legislature attempted to retain the objective standard while mingling with it some subjective characteristic of the accused. The test is only satisfied when it is shown that the allegedly provocative words and acts were “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”.⁵³ This is somewhat problematic, requiring the “fusion of ... two discordant notions.”⁵⁴ As Brown notes, “[o]n the face of it, an imperative subjective force meets an unyielding objective obstacle.”⁵⁵

The first decision to deal with s 169 was *R v McGregor*.⁵⁶ The dicta of the Court of Appeal in that case have until very recently provided the touchstone for New Zealand courts in their interpretation of s 169.

The Court of Appeal, in its interpretation of the section, showed the same degree of innovation that the legislature had in drafting this *via media*, sacrificing grammar and plain meaning as a result. Its interpretation centred on the meaning of “but otherwise” in s 169. The Court rejected giving “but otherwise” the meaning of “in other respects”, which would have made the offender’s characteristics irrelevant to the central question of lack of self control and would therefore have effected little.⁵⁷

To the Court, “[t]his could not have been the intention of the Legislature, for the purpose of adopting the new provision must have been to give some relief from the rigidity of the purely objective test”.⁵⁸ An interpretation was preferred which transmuted “but otherwise” into “nevertheless”, with the result that the offender was deemed to possess the power of self control of an ordinary person except in so far as that self control was weakened because of some characteristic of the offender.

As a corollary to this construction it was necessary to place some limit on what could be a “characteristic”, for otherwise the objective element of the provocation equation would be rendered virtually irrelevant.⁵⁹ As the Court noted, “[i]t is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man.”⁶⁰

The Court stated that “a characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind.”⁶¹ It could encompass physical qualities and some mental

52 *R v Tai* [1976] 1 NZLR 102, 105 (CA).

53 Section 169(2)(a) of the Crimes Act 1961.

54 *R v McGregor*, supra at note 6, at 1081.

55 Brown, “Provocation: Characteristics, Diminished Responsibility and Reform”, in *Movements and Markers in Criminal Policy* (Legal Research Foundation 1984) 40, 41.

56 Supra at note 6.

57 Ibid, 1080.

58 Ibid, 1081.

59 The fact that no guidance was given in the legislation as to the meaning of “characteristics” may be an indication that the legislature did not intend that they should be elevated to such an important position within the Act.

60 Supra at note 6, at 1081.

61 Ibid, 1081.

qualities, as well as colour, race or creed but had to be of “sufficient degree of permanence to warrant its being regarded as something constituting part of the individual’s character or personality.”⁶²

The Court of Appeal expressly excluded dispositions such as pugnacity and hot temper, and temporary states of mind such as depression, excitability or irascibility.⁶³ Still less could a self induced transitory state such as intoxication be relied upon, although this will be relevant as regards the subjective test contained in s 169(2)(b). Of special concern to the Court was the issue of mental peculiarities. A substantial peculiarity, such as a phobia, was necessary. Mere mental deficiency or weak-mindedness would not suffice, as to allow such conditions would “go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it.”⁶⁴

It was stressed that there must be “some real connection”⁶⁵ between the alleged provocation and the particular characteristic of the offender which must have been “exclusively or particularly provocative to the individual because, and only because, of the characteristic.”⁶⁶ As Brookbanks notes, “[t]he sense is that the provocation must be more than tangentially associated with the characteristic. It must be *connected* with it in some significant sense”.⁶⁷

As well as the lengthy discourse on characteristics *McGregor* also established that, despite the lack of terms like “heat of passion”, “sudden provocation”, and “before there has been time for passion to cool”,⁶⁸ the time element was important as the accused must act “under provocation.”⁶⁹ Nevertheless a jury should not be told that the provocation must occur immediately before the killing.⁷⁰

In *R v Dougherty*,⁷¹ four years after *McGregor*, the law as regards a reasonable relationship between provocation and mode of resentment was established. While the relationship was a weighty factor to be taken into account, it was not a rule of law in itself.⁷²

Clearly the Courts were trying to allay the harshness of the objective test while at the same time being careful not to make the defence too lenient. For the next decade provocation, led by *McGregor*, travelled in relatively calm waters, but from 1976 there were increasing signs of mutiny both from the judiciary and from the Criminal Law Reform Committee. In 1993 it appears that this mutiny has taken

62 Ibid.

63 Ibid.

64 Ibid, 1082.

65 Ibid, 1081.

66 Ibid, 1082.

67 Supra at note 8, at 416.

68 Section 184 of the Crimes Act 1908 provided for all of these characteristics.

69 Section 169(1) of the Crimes Act 1961.

70 Supra at note 6, at 1079. See also *R v Savage* [1991] 3 NZLR 155, 160 (CA).

71 [1966] NZLR 890 (CA).

72 See also *R v Savage*, supra at note 70, at 160, where it was stated that a direction to the jury that “what the person did must bear some reasonable proportion or relationship to the provocation” is as bad as elevating the proposition to the status of a matter of law.

place, that *McGregor* has been ignored, and that the doctrine is about to be swept into the diminished responsibility debate.

2. The Attack from the Judiciary

The signs of mutiny can be traced back as far as *R v Tai*⁷³ in 1976. The Court of Appeal noted, most sensibly, that:⁷⁴

By “ordinary person” is meant, naturally, an ordinary New Zealander – not one of exclusively British blood or background. We have in this country a population of markedly mixed racial origins with, especially a substantial Polynesian minority.

However, it then opined in dicta that as the anger of Samoan people takes longer to reach its peak than is the case with Europeans, this could be a “characteristic” within s 169(2)(a), despite noting that this assumption was probably contrary to *McGregor*.⁷⁵ The immediate question is, what was the link between the provocation and the characteristic? With all due respect, the analysis of characteristics contained in this case is neither penetrating nor sizeable. Indeed the Court of Appeal’s lack of concern in contradicting *McGregor* comes as a surprise, bearing in mind the tone of the rest of the judgment, which while noting criticism of *McGregor* also states that it “was a most careful and reflective judgment and it rapidly became the foundation of the Judge’s direction in all subsequent cases where provocation was raised.”⁷⁶

Six years later there followed the case of *R v Dixon*.⁷⁷ The accused had shot his separated wife after her response to inquiries about the wellbeing of their children, who were in her custody. She had telephoned the police from the public bar where he had found her and had then said “[t]he police are on their way and you will never see the children ever again.” Chilwell J noted that the ordinary person experiencing matrimonial problems of this order would not be expected to act in this way. His Honour stated, however, that on the view of the facts most favourable to the accused, there was a credible narrative of events such that evidence of the accused’s “unusual attitude of fear” could go to the jury, in order to decide whether there was a sufficient degree of permeance about Dixon’s phobia to constitute part of his character or personality.

73 Supra at note 52.

74 Ibid, 106.

75 Ibid, 107. Brown expresses some disdain for this analysis which he terms “mythical-psychological” and indeed it does seem a very facile and unsubtle assertion. For a somewhat more patronising summary of a Pacific Island race see *Latoatama, Folitolu, and Tamaeli v Williams* [1954] NZLR 594, 606, where the Court of Appeal was content to accept “that the Niuean is a simple being whose thoughts are largely of sex, food, and bodily comfort, and that provocative conduct in respect of these simple requirements may preoccupy his mind longer and more effectively than that of his European brother.”

76 Supra at note 52, at 105.

77 High Court, Auckland. 1 October 1982 T 36/82 Chilwell J.

This case is more in keeping with *McGregor* than *Tai*, and indeed, “[i]t seems clear that his Honour’s ruling fell square within the inclusory dictum in *McGregor*.”⁷⁸ There was a firm nexus between the alleged provocation and the phobia in *Dixon*, which was exactly the example *McGregor* had offered. This clearly illustrates the flexibility of the *McGregor* test, if it is taken on its own terms.

It also illustrates the overlap between the New Zealand defence of provocation and the English defence of diminished responsibility.⁷⁹ The Crown had argued that the evidence went no further than to establish diminished responsibility. Chilwell J agreed that it fell under this heading, but noted that this was not an issue he had to decide, for if it fell within the meaning of s 169(2) then it was of no moment that it also happened to be analogous to a foreign defence.

*R v Taaka*⁸⁰

While *Dixon* was a reasonable interpretation of *McGregor*, *R v Taaka* stretched the traditional jurisprudence on provocation to breaking point. The events started after a night’s drinking, following which Taaka and his wife repaired to bed. Taaka’s cousin, Hongi, was later that night discovered by Taaka in bed with them. Not surprisingly, Taaka suspected Hongi of raping his wife. Hongi was chased from the house and there was evidence, some of it psychiatric, that Taaka was deeply shocked by the incident and spent the next fortnight in a quagmire of deep depression and drink.

Thirteen days later Taaka attended a party and had a fist fight with Hongi. He then drove a round trip of forty-two kilometres to get a gun. When he returned to the party, a concerned bystander dismantled the gun. Taaka regained it, reassembled it, strode through the house and shot Hongi point blank in the head.

Counsel for Taaka argued that his client was suffering from an obsessive-compulsive personality disorder in regard to the deceased’s upsetting the tightly knit family grouping of Taaka, his wife, their severely handicapped daughter and Hongi himself. This, according to counsel, would make him brood in resentment for a longer period than the ordinary person and also make him significantly more vulnerable to provocation than the ordinary person.

While the Court of Appeal was primarily concerned with evidence relating to s 169(2)(b), it did state that:⁸¹

We think that [the psychiatric evidence] is capable of supporting an inference that the appellant’s characteristics *could* cause him to feel the insult of Hongi’s conduct unusually deeply and impel him to lose self-control and take public revenge for an insult publicly known. Counsel for the Crown indeed accepted ... that it would be evidence of “characteristics” relevant under s 169(2)(a).

78 Brown, *supra* at note 55, at 42.

79 As defined by s 2(1) Homicide Act 1957 (UK). This defence is discussed *infra*.

80 [1982] 2 NZLR 198 (CA).

81 *Ibid*, 201-202.

It was held that there was “just enough” evidence of provocation to leave it to a jury.⁸²

The fact that the Court included both the original incident and the public revenge indicates that the same characteristic was viewed as relevant thirteen days later in the nature of a characteristic brooding resentment. This is a characteristic very like that in *R v Tai*, which Brown terms a “putative” as opposed to a “strict” characteristic.⁸³ Where a strict characteristic is evident there will be a direct causal relationship between the alleged provocation and the claimed characteristic. A good example is furnished by *Bedder v Director of Public Prosecutions*,⁸⁴ where the alleged provocation was directed at the accused’s impotence. *Dixon* also provides an excellent example, as the wife’s taunts were directed at Dixon’s particular phobia.

However, with a characteristic such as that in *Tai* and *Taaka* no such link is possible. The forensic relevance of this type of characteristic is “sourced by the *mode and circumstances* of the offender’s homicidal *response* to the provocation, not by his special vulnerability (due to his characteristics) to deprivation of his self-control by that provocation.”⁸⁵ A direct connection between a provocative act and a putative characteristic is highly unlikely. As Brown points out, it is unlikely that anyone would have called *Tai* a “slow burning Samoan.”⁸⁶ In effect, these putative characteristics are a loose cannon in the provocation doctrine. They clearly override the requirement that the alleged provocation be directed at the characteristic, for the simple reason that the characteristic overarches all aspects of the accused’s personality to the extent that any action would be enough to constitute a provocative act. To take *Taaka* as an example, it is difficult to see just what provocative act Hongi committed on the night of the killing; it seems that his mere existence was enough to inflame Taaka and that it would not have mattered what Hongi had done that night. The Court of Appeal used the word “revenge” in its judgment and that is really what this case appears to be – a case of a revenge killing for what Taaka considered a grave breach of trust and a public insult. Traditionally, the finding of “precedent malice” deprived provocation of all legal effect,⁸⁷ for evidence that the accused had intended to take revenge would severely damage any claim of a sudden inflammation of the passions. In *Taaka*, however, the desire for revenge was inextricably connected to the alleged characteristic, and the existence of evidence of a desire for revenge supported the existence of this characteristic, rather than making the defence unavailable.

82 *Ibid*, 202.

83 *Supra* at note 55, at 44.

84 *Supra* at note 31.

85 Brown, *supra* at note 55, at 46.

86 *Ibid*.

87 See for example *Maddy’s Case*, *supra* at note 12, where a husband returned home to find his wife in an act of adultery and struck the man over the head with a joint stool. The jury was asked to find whether Maddy had the precedent knowledge, in the form of a prior determination to take revenge. If he had declared his intention to take revenge, then not even the discovery of his wife in the act of adultery would have reduced murder to manslaughter.

*R v Leilua*⁸⁸

The strict definition of the defence was further assailed in *R v Leilua*. The deceased had been involved in an argument, lost his temper, and gone along a road pulling down letterboxes. The appellant, who was intoxicated, saw this happening, took a knife, sprinted out into the street, and with the assistance of the co-accused, stabbed the deceased fourteen times.

Leilua was convicted of murder, but following a psychologist's report fourteen months later filed an application for leave to appeal based on the availability of new evidence. The report had stated that there was a possibility that the accused had been suffering from a condition known as post-traumatic stress disorder ("PSD"), a condition found sometimes in survivors of extremely stressful and dangerous situations, such as combat veterans and concentration camp survivors. As the report fell somewhat short of concluding that Leilua was actually suffering from PSD, the Court of Appeal dismissed the application. However, it noted that:⁸⁹

We are disposed to think, notwithstanding *R v McGregor*, that a chronic disorder of this type, if it rendered the sufferer particularly susceptible to certain kinds of provocation, could amount to such a characteristic.

With respect, it is striking that such a broad statement could be made with such a minimum of reasoning. No discussion is made of "characteristics" or of the effect of holding that PSD could be considered to be one. Again it is clearly a "putative" characteristic, an all-encompassing mental condition that virtually any action could trigger. Spare a thought for the dustman who might one morning make a fraction too much noise, or a friend who sees the PSD sufferer in public three weeks after the latter had perceived that he had made a pass at his wife. In neither case will the deceased have done anything directly against the accused, but still the question of provocation will arise.

It is submitted that the New Zealand Court of Appeal has effected major changes in the law of provocation, with little discussion of the justifications for, or ramifications of doing so. One commentator has noted that:⁹⁰

[W]hat does emerge from *Taaka* and *Leilua* ... is a movement away from traditional jurisprudence on provocation, concerned as it was with sudden passion, immediacy between the provocative act and the response to it, and the actual loss of self-control, to a position which views mental characteristics as a discrete exculpatory factor in defining legal provocation.

Traditional provocation jurisprudence appears to be of little use in cases like *Taaka*, and:⁹¹

The question which arises is whether the acceptance of these conditions comprises a logical extension of a complex legal doctrine whose boundaries have never been fully chartered, or whether the conditions themselves are simply convenient "abnormalities" for the unself-controlled killer to shelter behind.

⁸⁸ Court of Appeal, Wellington. 20 September 1985 CA 19/84 (Cooke, Richardson, and Tompkins JJ).

⁸⁹ *Ibid*, pp4-5, quoted in Brookbanks, *supra* at note 8, at 412.

⁹⁰ Brookbanks, *supra* at note 8, at 413.

⁹¹ *Ibid*, 417.

The law, quite apart from its need to be internally consistent, also needs to appear to effect justice. As Brown points out:⁹²

General acceptance by the Courts of the putative “characteristic” countenanced by dicta in *Tai* (and possibly *Taaka*) could erode public confidence in the administration of the existing defence of provocation.

The obvious conclusion to be drawn from these cases, with their willingness to expand the concept of characteristics “to embrace a growing range of bizarre mental aberrations”,⁹³ is that the law of provocation has been dipping its toes into the lake of diminished responsibility. The expansion seems to attack the moral base of provocation; if it is to be allowed to be commensurate with diminished responsibility, where does that leave the premise that the deceased brought the attack upon himself or herself in some way? Did the Court of Appeal intend to completely undermine the defence?

*R v McCarthy*⁹⁴

Any doubts on this matter have been removed by *R v McCarthy*, where observations in the judgment of Cooke P completed the job begun in *Tai*. The appeal in *McCarthy* concerned the Crown Prosecutor’s address to the jury concerning the accused’s failure to give evidence and to provide explanations for his conduct. A new trial was ordered. Provocation was one of the defences pleaded at the first trial, and as it had given the trial judge difficulty in his summing up, Cooke P felt obliged to make some general observations about the defence. He notes that *McGregor* has given rise to difficulties in cases like *Tai* and *Taaka*, and that the recent case of *R v Trounson*⁹⁵ had forecast that *McGregor* might have to be revisited. Then follows the observation that “*McGregor* may have unduly restricted the ambit of the provocation that under the current New Zealand section may reduce murder to manslaughter.”⁹⁶ The Court of Appeal notes:⁹⁷

[I]n light of judicial experience of the operation of s 169, that the added and obiter observations in *McGregor* go somewhat too far and add needless complexity to the application of the section.

To add insult to injury the Court of Appeal then states “[w]e do not think that [the obiter comments] have been found workable or followed closely in practice.”⁹⁸

Following *McCarthy*, age and gender,⁹⁹ mental deficiency or “a tendency to

92 Brown, *supra* at note 55, at 46.

93 Brookbanks, *supra* at note 8, at 411.

94 *Supra* at note 7.

95 [1991] 3 NZLR 690.

96 *R v McCarthy*, *supra* at note 7, at 558.

97 *Ibid*.

98 *Ibid*. This is a stunning assertion considering the regard in which this case has been held. See for example *Tai*, *supra* at note 52; and the English case of *R v Newell* (1980) 71 Cr App R 331, 340, where the Court, commenting on *McGregor*, stated: “[T]hat passage, and the reasoning contained therein, seems to us to be impeccable.”

99 These characteristics have never previously been allowed under *McGregor*, although they have been allowed as relevant factors to be taken into account in the English case of *DPP v Camplin* [1978] 2 All ER 168 (HL).

excessive emotionalism as a result of brain injury”¹⁰⁰ can be a characteristic. What one first notices when reading the judgment is the lack of justification for the changes. The second aspect of the judgment that attracts attention is how vague some of the allowed characteristics are. What exactly constitutes a mental deficiency? Will any half-formed Oedipal syndrome suffice? The fact that intoxication is expressly excluded because it is of too transitory a nature indicates that the mental deficiency must have some permanence, but the journey from the careful dicta in *McGregor* that mental peculiarities must be tightly defined, to this vague pronouncement, is a questionable one.

The Court also necessarily rejects the argument that any provocation must be directed at the characteristic. In a startling statement the Court of Appeal noted “difficulty in comprehending or applying that suggestion.”¹⁰¹ Of course the only reason that this requirement should afford any difficulty at all is because of the sorts of putative characteristics that the courts have been allowing, which have made traditional provocation jurisprudence redundant.

The rather awkward construction that *McGregor* gave to s 169(2)(a) is also replaced. The test is now “whether a person with the ordinary power of self-control would in the circumstances have retained self-control notwithstanding such characteristics.”¹⁰² Hence the test now involves a conflict between an ordinary power of self control and the defendant’s particular susceptibility to the provocation. It is difficult to see how this will work if the alleged characteristic is a condition like paranoia.¹⁰³ How clearly will a jury understand a direction that they have regard to a person with the self control of an ordinary person but one who happens to be paranoid? Surely the essence of paranoia is that it affects the power of self control? Clearly there is not much sense in allowing such conditions to be characteristics while still retaining an objective power of self control.

As regards the spectre of diminished responsibility the Court is quite definite in its views, stating with regard to the *McGregor* line of cases:¹⁰⁴

[They] appear to have been influenced by the view that diminished responsibility had not been accepted by the New Zealand Parliament; yet, within a limited field, this may be seen as the inevitable and deliberate effect of the statutory changes embodied in s 169 of the Crimes Act 1961.

With all due respect, it is hard to see the justification for this statement. A reading of s 169 certainly does not give the impression that it was meant to be the harbinger of a new age in diminished responsibility for murder. The *McGregor* decision explicitly stated that this was not a diminished responsibility defence, and surely the legislature, if it had desired such a defence, would have expressly provided for

100 *R v McCarthy*, supra at note 7, at 558.

101 Ibid.

102 Ibid. This was the test strenuously advocated by Sir Francis Adams. See Robertson (ed), *Adams On Criminal Law* (3rd ed 1992) paras 1264-1269 for his criticism of the *McGregor* test.

103 See *R v Aston*, Court of Appeal. 17 May 1989 CA 390/88 (Cooke P, Casey and Wylie JJ), where the Court did not question that paranoia could be a characteristic.

104 *R v McCarthy*, supra at note 7, at 558.

one, as is the case in the United Kingdom, rather than trying to disguise it within provocation. One cannot help but question the Court of Appeal's reasoning. Its judgments since 1976 have expanded the boundaries of s 169 far beyond what was originally envisaged and it comes full circle by saying that this must have been the intention of the legislature in the first place. It replaces what had been a reasonable, working interpretation of s 169 with a completely new understanding thirty years later.

3. The Defence of Diminished Responsibility

The preceding discussion may have given the impression that the defence of diminished responsibility is an entirely unwelcome visitor. This is not the case, as the following discussion will show, but it is clearly undesirable for it to be introduced under the umbrella of some other defence.

Diminished responsibility was introduced in the United Kingdom by s 2 of the Homicide Act 1957 which provides that:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.

A successful plea of diminished responsibility will result in a manslaughter conviction. Diminished responsibility is pleaded in cases where there is no chance of a defence of insanity succeeding, such as with mercy killers, deserted spouses, disappointed lovers who kill in states of depression, or persons with chronic anxiety. Even though the abnormality of mind has to be such as to *substantially* impair mental responsibility, this is a question of degree and is essentially for the jury to decide.

The impulse acted on need not be irresistible. It is sufficient that the difficulty which the defendant experienced in controlling it was substantially greater than would be experienced in the circumstances by an ordinary person not suffering mental abnormality.¹⁰⁵ While the impairment need not be total, it must be more than trivial or minimal.¹⁰⁶

As Smith and Hogan comment, “[t]he test appears to be one of moral responsibility”¹⁰⁷ and as such the capacity for overlap with provocation is obvious. A case like *Taaka* or *Dixon* could very easily be accommodated under this defence.¹⁰⁸ Nonetheless, while both defences are concessions to human infirmity,

105 *R v Byrne* [1960] 2 QB 396, 402.

106 *R v Lloyd* [1967] 1 QB 175.

107 Smith & Hogan, *Criminal Law* (6th ed 1988) 205.

108 See for example, *R v Bathurst* [1968] 2 QB 99, where there was a successful diminished responsibility plea for the accused, who had killed his ex-mistress while in the throes of a reactive depression caused by the break up. There is also an overlap with insanity; see Smith & Hogan, *ibid*, at 103-105.

they are by no means identical. Diminished responsibility does not require evidence of lack of self control, and requires neither a comparison with the archetypal reasonable person nor evidence of provocation. Diminished responsibility is obviously broader than provocation as regards mental elements. This accentuates the difference between the two defences. They are clearly not the same and this article has already noted the problems that can occur when trying to squeeze what would more properly be included under diminished responsibility into the provocation defence. Just as New Zealand led the world with the hybrid objective-subjective test, we now appear to be the only common law country which has a hybrid provocation-diminished responsibility defence.

It cannot be overestimated that the purpose of this paper is not to denigrate diminished responsibility, but as Brookbanks states:¹⁰⁹

By its very nature as a partial exculpatory claim, diminished responsibility has a significant impact on the way mental abnormality has been traditionally perceived in the criminal law. It should not be permitted to evolve by a process of extension of existing defences without an accompanying careful consideration of its theoretical considerations.

It seems ridiculous to assert that merely because there is some overlap of a doctrine in one country with a foreign doctrine, a judge should refuse to apply the local defence in that manner. In Brown's words:¹¹⁰

[I]t would be pettifogging to exclude the engagement of a constituent of a defence enacted by the New Zealand Parliament because it partially and incidentally trespasses on the ground of another palliative doctrine not recognised by New Zealand law.

Once *McGregor* held that mental characteristics, albeit tightly constrained, could constitute a characteristic under s 169(2)(a), it became obvious that there would be some overlap with diminished responsibility, which in itself is of no real concern. The problem becomes apparent when the area of concurrence expands, as appears to be, for as noted above the doctrines are not exactly the same and the intermingling which is occurring supports the possibility of "provocation being used consistently, or cynically, as an alias for diminished responsibility plea".¹¹¹

That the Court of Appeal in New Zealand has felt the need to expand the defence of provocation is clearly indicative of the need for a broadly based defence of diminished responsibility, if only to catch difficult cases which do not correlate exactly with existing statutory defences (insanity, self defence and provocation). Nonetheless, "[t]he task to consider the imperious claims of such a defence lies with the legislature. It should not be allowed to pass to the courts by default."¹¹² One is reminded of the admonishment of Lord Reid in *Shaw v Director of Public Prosecutions*:¹¹³

Where Parliament fears to tread it is not for the courts to rush in.

¹⁰⁹ Brookbanks, *supra* at note 8, at 418.

¹¹⁰ *Supra* at note 55, at 46.

¹¹¹ *Ibid.*, 47.

¹¹² Brookbanks, *supra* at note 8, at 418.

¹¹³ [1962] AC 220, 275.

At present it appears that the New Zealand Court of Appeal has expanded the defence of provocation further than was ever originally intended. Analysis of a case like *Taaka* leads one to the conclusion that, whatever else it may have been, it was not a case of provocation. The traditional desire of the judiciary to keep this defence tightly constrained is not presently in evidence in New Zealand and with this in mind we turn to the second area of attack on the provocation doctrine.

4. The Attack from the Legislature: The Crimes Bill 1989

The Crimes Bill 1989, which was based on the Criminal Law Reform Committee's Report on Culpable Homicide (1976), proposes radical changes to the law of culpable homicide. Of most importance to provocation is the move away from a mandatory life sentence for murder, which is what Wells calls "[t]he lifeline of provocation as a separate defence".¹¹⁴ As a result, provocation ceases to be a partial defence and becomes merely a factor relevant in sentencing.¹¹⁵

The Criminal Law Reform Committee considered that provocation as it stood in 1976 was unsatisfactory to a degree which justified its abolition. They had three main concerns.

Of most concern was that the defence did not do justice to the accused, with the result that people who could not fairly be described as ordinary people were not benefitting from the defence. It is to be remembered that the Report was written in the same year as *Tai*, the case which to some extent opened the floodgates to a far wider view of what could constitute a characteristic. As a result it is submitted that the criticism is not nearly as cogent today as it once was. Cases such as *Dixon*, *Pita*¹¹⁶ and *Taaka* show such a willingness by the court to expand the purview of characteristics. What Orchard identifies as "an expansive view of which "characteristics" might qualify the objective test"¹¹⁷ appears to have been transmuted into an overly expansive test.

The Committee was also of the view that it was anomalous that provocation should change the nature of the crime when there had been a killing, whereas it only affected the penalty in other cases. This is certainly an arguable point but an excellent rebuttal comes from Sir Robin Cooke's extra-judicial assertion that the defence is "wholly consistent with confining the stigma of murder to the worst of killings. It is the very gravity of murder that justifies singling it out from the generality of offences".¹¹⁸ If the law recognises such a defence it makes sense that "[p]lain murder should be stigmatised as such, killings as a result of real

114 *Supra* at note 41, at 662.

115 Clause 128 of the Crimes Bill 1989.

116 (1989) 4 CRNZ 660. In this case the accused's particular aversion to drugs and her horror at the effect of drugs on her lover, which usually made him violent towards her, appeared to gain approval as a characteristic.

117 "Homicide", in Cameron & France (eds), *Essays on Criminal Law in New Zealand: Towards Reform?* (1990) 20 VUWLR 147, 149.

118 "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235, 239.

provocation should not be.”¹¹⁹ Having already noted that deserving persons have been missing out on the defence it makes sense to recognise the distinction.

The third contention is that the defence is difficult for juries to understand and for judges to sum up. However, Sir Robin Cooke has stated, “I am not aware that any judge now serving complains that summing up on provocation is too hard.”¹²⁰ Similarly, Lord Simon of Glaisdale in the English case of *Director of Public Prosecutions v Camplin* opined “I have heard nothing to suggest that juries in New Zealand find the task beyond them.”¹²¹

On the other hand, Bisson J, as he then was, has commented judicially that provocation is not a simple matter to deal with in summing up, and that it is occasionally difficult to know whether to leave the defence to the jury.¹²² Again there is obviously some merit in the suggestion that the unreformed provocation defence is difficult and overly technical but overall its fundamentals are easily understood and it involves issues which are surely ideal to go to a jury.

The suggestion has also been made that a desirable consequence of the change will be that it will encourage more guilty pleas and the avoidance of unnecessary trials. The argument assumes that someone like *Taaka* would plead guilty, thus avoiding a long and complicated trial. This assumption is not enough in itself to change such an important part of the law. It is also highly questionable how much of a saving will be made, bearing in mind how elaborate sentencing hearings will become.

None of these arguments are particularly compelling on their own grounds, and while one commentator has argued that taken as a whole they paint a gloomy picture of provocation as it now stands,¹²³ it is doubtful whether the picture was stygian enough to warrant an abolition of the defence. Some commentators, however, have been most enthusiastic about the defence.¹²⁴

[A] five-hundred-years overdue element of sanity would be returned to homicide law. Out of the shadow of the gibbet, out of the shadow of the mandatory “life” sentence, provocation would assume its proper place as merely a factor to be taken into account in sentence. Gone would be that inhibiting anachronism the hypothetical person (with or without “characteristics”) and, with it, other questionable enacted and common-law distinctions pertaining to “over-reaction” to provocations, to misdirected retaliation and to indirect provocation.

Certainly *prima facie* there appears to be a victory for subjectivity, the question simply being: was the accused provoked? The query that immediately surfaces is what would in fact be lost by the complete abolition of the objective test? Primarily, “[t]he link with popular moral judgments about causation and blame-worthiness would be severed”.¹²⁵ The objective test stands for certain moral

119 Orchard, *supra* at note 117, at 149.

120 *Supra* at note 118, at 239.

121 [1978] AC 705, 727.

122 *R v Pita*, *supra* at note 116, at 666.

123 Wells, *supra* at note 41, at 671.

124 Brown, *supra* at note 55, at 49.

125 Ashworth, *supra* at note 9, at 318.

standards, as it reflects the values of society in a general way. Ashworth makes the excellent point that “it is surely intelligible in moral discourse to state that a person was provoked to lose his self-control in a situation in which he ought to have retained control.”¹²⁶

Of course not every instance of provocation will result in a reduction of sentence. But surely in order to adequately reflect the culpability of various offenders, some regard will have to be paid to what is reasonable, and every exercise of a judge’s discretion will involve such a judgment. The danger is clearly that some sort of pseudo-objectivity will creep in, without rules of law or precedent to constrain it. Eventually the sentencing guidelines handed down by the Court of Appeal would result in a defence that was far more straitjacketed than those adherents of subjectivity would like.

It can also be asked whether the judiciary should wield such power. As the law stands today a judge may occasionally decline to leave provocation to the jury if there is insufficient evidence¹²⁷ or in rare cases when the accused’s conduct is so extreme in its brutality that the judge will be warranted in refusing to allow it.¹²⁸ Under the Crimes Bill proposal the judge would have far wider powers and this could be of some concern. It has been commented that:¹²⁹

The longer a judge sits on a bench the less he is likely to become or remain acquainted with ordinary men or women in their daily activities and their patterns of thought and behaviour.

Provocation as a whole, while couched in technical legal terms, essentially involves crimes of passion and it seems that the average person on the street would be more well equipped to pass judgment on such matters than the judge. As it stands the balance appears excellent; the judge is there to guide the jury through the legal points, but the jury has the leeway to come to a good decision. This would be taken away by the Crimes Bill.

Overall this writer has grave doubts as to the efficacy of the Crimes Bill proposal¹³⁰ and it is questionable whether any of the problems that have accompanied the hybrid test will be solved. More importantly, it is highly questionable whether the defence will be improved. It is perhaps fortunate, with regard to provocation, that the Crimes Bill is unlikely to become law.

126 Ibid.

127 *R v King* (1987) 7 CRNZ 591 (CA). The victim had produced a knife after a night of verbal altercations with the appellant. The appellant’s accomplices attacked the victim, who dropped the knife and ran off. He was pursued and the appellant stabbed him repeatedly.

128 *R v Erutoe* [1990] 2 NZLR 28 (CA). The accused had run over his wife repeatedly and then refused to help her.

129 Victorian Law Reform Commission, Working paper No 6, *Provocation As A Defence to Murder* (1979) 27.

130 This aspect of the Bill was re-approved by the Crimes Consultative Committee, *supra* at note 23, at 45-46, 48-49.

IV: CONCLUSION

The law of provocation has undergone such significant change in New Zealand that it bears little resemblance to any previous incarnations of the defence. Provocation as it stood under *McGregor* may not have been perfect but one should not be unrealistic in searching for utopias in an area as contentious as criminal law. Perfection is relative and the *McGregor* dicta seemed to steer as fair and reasonable a path as one could logically hope for between the harshness of pure objectivity and the indulgence of pure subjectivity. Brown believes that the s 169(2) hybrid person “would still be more comfortably received by Mary Shelley than by logicians or criminologists”,¹³¹ yet as a balancing of competing interests it seems as fair as could be logically hoped for.

What must be avoided is the mutation of provocation into something that it should not be. The need for diminished responsibility is obvious but it is not yet part of our law, and with the current political climate may not be for some time. It is not for the judiciary to decide whether the country needs a new criminal defence, and the New Zealand Court of Appeal has set a dangerous precedent in introducing such a defence into New Zealand law without any authority to do so. Provocation, as defined in *McGregor*, coupled with diminished responsibility, appears to be the best solution to the problems facing the law in this area, but until that time comes New Zealand criminal lawyers will have to deal with a provocation defence that has a severe identity crisis.

131 *Supra* at note 55, at 47.