PROVOCATION: CHARACTERISTICS, DIMINISHED RESPONSIBILITY, AND REFORM*

More than twenty years have passed since the Court of Appeal, in *R* v *McGregor* (1962),[1] gave its fulsome interpretation of the terms "but otherwise" and "characteristics" in the then newly reformed definition of provocation (s 169 (2) (a) Crimes Act 1961). In spite of criticism by the leading New Zealand text-writer,[2] that guidance has proved remarkably hardy. In dozens of directions to juries, judges have summarised, even quoted, portions of the *McGregor* judgment. The highest tribunals here and in England have referred to it with approval,[3] and both at home and overseas official law revisers have accorded it a place in their deliberations.[4]

The plain purpose of subparagraph (a) of section 169 (2) was to effect a compromise between the contending demands of strict objectivism and 'soft' subjectivism.[5] The danger of exclusive, or even heavy, reliance on the latter was seen as its subversion of settled legal policy and an inevitable weakening of the deterrent and retributive impact of the penalty for murder. A subjective test could be readily negotiated by hot-temptered killers[6] reacting to flimsy or fancied provocations.[7] The obverse position, the application of an unqualified 'reasonable man' or 'ordinary person' yardstick to all cases, was equally open to criticism. To judge a sexually impotent youth by the standard of the ordinary virile man was unrealistic and patently unjust.[8] Many defendants' provable frailties of body or mind rendered them peculiarly susceptible to particular provocations that would have left other persons quite unmoved. To require of such provoked defendants the power of self-control of an 'ordinary person' was to make a sheep's-head of the law. By the mid-1950s the personal equation in provocation had been almost completely eliminated. Significant 'peculiarities' ranging from minority racial or national status to mental and emotional and physical disabilities, even to pregnancy, had been the subjects of unsuccessful appeals to some of the highest courts in the Common Law world.[9] In promoting certainty in the law, the objective criterion had bred some very hard cases.

In 1961 the New Zealand Parliament enacted what it saw as the ideal, workable, *via media*.

s 169

2. Anything done or said may be provocation if —

(a) In the circumstances of the case it was sufficient to deprive a person

* The first three sections of this article repeat the essence of my *Note* published in (1983) *NZULR*, vol 10, no 4.

1 (1962] NZLR 1069.

2 *Adams, Criminal Law and Practice in NZ* (2nd ed), 345–6.

3 See *eg Tai* [1976] 1 NZLR 102, *Barton* [1977] 1 NZLR 295, *Fryer* [1981] 1 NZLR 102, *Taaka* [1982] 2 NZLR 198; and see *Camplin* [1978] AC 705, 727 (*per* Lord Simon of Glaisdale).

4 *Report on Culpable Homicide* (1976), Criminal Law Reform Committee (NZ). And see, *eg, Provocation as a Defence to Murder* (Working Paper No 6) (1979), Law Reform Commission of Victoria.

5 *McGregor*, 1081. It might be noted that the courts in Eire have declared the objective standard non-applicable; *The People* v *McEoin* (1978) 112 Irish Law Times Rep. 53.

6 Samuels, in [1972] *M.L.R.* 163, 168–9, exposes this claim as myth.

7 See *eg* the 'provocation' alleged in *Welsh* [1869] 11 Cox C.C. 336; *Latoatama* [1954] NZLR 594.

8 See the argument of Marshall QC for the (unsuccessful) appellant in *Bedder* (1954) Cr.App. R. 133.

9 For instances of these and other provocation-linked attributes and dispositions, see Brown in 13 *ICLQ.* (1964), 203, 223–7. On pregnancy, see *Smith* (1914) 11 Cr.App.R. 36.

> having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; . . .[10]

The Court of Appeal was quick to remark that the subparagraph yokes two discordant notions.[11] On the face of it, an imperative subjective force meets an unyielding objective obstacle.

Eschewing a construction of "but otherwise" to mean "in other respects" (which would have made an offender's characteristics relevant, but not in regard to self-control), the Court, in *McGregor*, preferred an interpretation in line with what it thought the Legislature must have intended — one which would give some relief from the rigidity of the purely objective test of an ordinary person.[12]

To achieve that sensible construction, their Honours recognised the need to place some limitation on the term "the characteristics". A characteristic must be something "definite and of sufficient significance to set the offender apart from the common run of mankind". It could encompass physical as well as some mental qualities and more indeterminate attributes too, such as creed, race and colour. There must also be evidence of its "sufficient degree of permanence" to warrant its being regarded as "something constituting part of the individual's character or personality". The Court expressly excluded dispositions such as undue suspicion, pugnacity, hot-temper, and temporary states of mind such as moods of depression, excitability and irascibility. Nor could a self-induced transitory condition, e.g. intoxication, be relied upon.[13]

Special caution, it was stated, should be applied in relation to "mental" pecularities: "mere" mental deficiency or weak-mindedness would not suffice. To allow that would moreover "go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it". Something "substantial", like a phobia, was instanced as a characteristic.[14]

The Court went on to stress that there must be "some real connection" 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". In that, and in its other references to objectivism and the fused, or 'hybrid', test it posed, the '*McGregor* judgment' must be regarded as *obiter*, but it has been accorded the very considerable weight that a detailed analysis by a strong appellate bench commonly receives.

Only in one respect (an apparent extension, again *obiter*, of the meaning of "characteristic" by the Court of Appeal in *Tai* (1976)[15] — of which more later) had that interpretation been modified or (implicitly) questioned; that is, until 1982. In that year, views expressed by the Courts in *R* v *Taaka*[16] and *R* v *Dixon*[17] posed the question, is there now available in New Zealand, through the provocation definition, a limited diminished responsibility defence (in spite of

10 Section 169(2) (b) requires that "it [the alleged provocation] did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide."
11 *McGregor*, 1081.
12 *Ibid* 1080–81.
13 *Ibid* 1081.
14 *Ibid* 1082.
15 [1976] 1 NZLR 102.
16 [1982] 2 NZLR 198.
17 Unrep., 1 Oct. 1982, T 31/82, High Court, Auckland.

the Court of Appeal's apparent effort, in *McGregor*, to preclude that possibility)? A second question arises out of dicta in *Taaka* and the earlier case of *Tai*. That is, has there been spawned a new type of (putative) "characteristic" to which the alleged provocation need not be directly connected? It is towards formulating the answers that this article is principally devoted.

At the trials on indictment for murder of both *Dixon* and *Taaka*, defence counsel claimed the accused possessed mental characteristics within the terms of s 169 (2) (a).

The provocation alleged in *Dixon* was the accused's separated wife's responses to his inquiry about the well-being of their children (who were in the wife's custody); first, by her action of 'phoning the police from the pub where he had found her, and second, by her words to him, "The police are on their way to get you now and you will never see the children again ever". The trial judge, Chilwell J, ruled that the ordinary person having the same matrimonial problems of the accused would not be expected to shoot his wife in such circumstances. But he went on to find that there was "a credible narrative" that Dixon was suffering from "a major depressive illness" due to the deprivation of his wife and his children. Psychiatric and other evidence suggested that he had "an unusual attitude of fear" concerning their loss about which the jury might be entitled to find a "phobia" on his part, and that that phobia could well have been of some months standing. Could that mental state qualify as a "characteristic"? Relying on *McGregor*, the learned Judge ruled that, on the most favourable view of the evidence to the accused, the jury might well take the view that he had quite an unusual attitude towards his children. Thus, according to his Honour, "The matter becomes a jury matter because they will have to decide whether there is a sufficient degree of permanence about this man's phobia which constitutes part of his character or personality."

Emphasising the need for a firm nexus between provocation and claimed characteristic, the Court of Appeal in *McGregor* had instanced "words or acts directed to a particular phobia from which the offender suffers". In *Dixon* the Crown conceded that the wife's conduct and words amounted to legal provocation and Chilwell J. accepted that it was connected to Dixon's mental peculiarity.

Relying on *McGregor*, the Crown yet argued that the evidence went no further than to establish diminished responsibility — a defence defined "by section 2(1) of the Homicide Act 1967 of the United Kingdom but not available in New Zealand". "I agree with counsel" the learned Judge replied, "but that really is not the issue I have to decide".

It seems clear that his Honour's ruling fell square within the inclusory dictum in *McGregor*. He found there was sufficient evidence of all the factors relevant to "characteristics" (in s 169 (2) (a)) to leave the question to the jury; *viz* testimony pointing to sufficient significance and permanence of the accused's mental peculiarity as well as to its direct connection with the wife's provocation. In no sense did Chilwell J ignore the Court of Appeal's 'back-door to diminished responsibility' stricture. *McGregor* had left that door ajar and the Judge made use of an opening for phobia which that Court had expressly legitimised in its proferred illustration.

From this it might be fair to assume that particular phobias (as well as certain other "sufficiently significant and permanent" mental conditions with which the provocation is connected) should readily qualify as a jury matter, notwithstanding their likely inclusion in the 'foreign' diminished responsibility definition.

Shortly after Chilwell J's ruling in *Dixon*, the Court of Appeal delivered its judgment in *Taaka* — a case in which the appellant was alleged to have been suffering from "an obsessively compulsive personality" which, in the particular circumstances, might constitute a characteristic in two distinct senses. At the trial it was claimed to have rendered him likely to 'brood in resentment' for a longer period than would an ordinary person, and also to have made him significantly more vulnerable (than the notional 'being) to the provocation. The Court of Appeal held that the trial Judge had erred in withdrawing provocation from the jury. The conviction for murder was quashed and a new trial ordered.

In what must be regarded as the *ratio decidendi* of *Taaka* the Court of Appeal concluded that there was "just enough" evidence of provocaton ("a credible narrative of events disclosing material suggesting provocation in law") to have required that defence to have been put to the jury.

General and relatively brief as they will be seen to be, the Court's observations on the question of characteristics in terms of s 169 (2) (a) are of interest in the light of its earlier dicta in both *McGregor* and *Tai*. A summary of the factual situation in *Taaka* is necessary for an understanding of the case's interplay (or its largely unexplored potential for such) with those two pronouncements.

After an evening's drinking the appellant and his wife had repaired to bed. His cousin, Hongi Brown (another Maori), was later discovered by Taaka in the bed with them — in circumstances in which Taaka not unreasonably suspected Brown of having attempted to rape his wife. Taaka chased Brown from the house. There was psychiatric and other evidence that Taaka was powerfully shocked by the incident and that he spent the next fortnight in deep depression and drink. In the Court of Appeal counsel for Taaka emphasised that his "peculiar characteristics" (including his personal history and his race) were chiefly derived from his three major relationships with his wife, his infant daughter who was severly handicapped physically and mentally, and with Brown, regarded by Taaka more as a brother than a cousin. Not only was Brown's conduct seen by Taaka as the worst kind of "public treachery" in their tight-knit community, it also destroyed the delicate balance of a stable yet understandably stressful family situation.

The length of time between the nocturnal incident and the killing of Brown, together with the circumstances of the killing, might seem to be highly pertinent to the defence of provocation. Ater brooding for thirteen days Taaka had attended a party with the local Maoris, become engaged there in fisticuffs with Brown and had then driven a round route of forty-two kilometres to procure a gun. Although back at the party a concerned person had dismantled the weapon, Taaka regained it and shot Brown dead at close range. At his trial it was argued on Taaka's behalf that the fist fight might have revived the earlier bedroom provocation.

Understandably, in view of the Crown's acceptance before it that there was evidence of legal characteristics, the Court dealt somewhat crisply with that question, observing that the trial Judge had been wrong in ruling that the evidence did not go to "relevant characteristics". The Court's view was simply that the psychiatric evidence was capable of supporting an inference that Taaka's characteristics, which were engaged by the provocation, could have caused him to lose his self-control and kill his provoker. Implicit in this is a recognition of the direct connection between the victim's conduct and Taaka's obsessive personality. No close inquiry was conducted by the Court of Appeal

into the presence or absence of any comparable nexus between the provocation and any such aspect of his personality that might have led him to 'brood in resentment' for the two weeks before killing Brown (or for setting about killing him with apparent deliberation after an arguable 'revival' of the provocation at the party). The Court seems to have merged into one characteristic, or a single set of characteristics, what critics (pedants?) might perceive to be two different characteristics (or alternatively, as one characteristic which defence counsel at the trial had sought to invoke in respect of two discernably different factual situations).

Again, probably because the issue of characteristics (in s 169 (2) (a)) was not contested on appeal, the question of provocation's possible exploitation as a 'back-way' to diminished responsibility did not appear to commend itself to the Court for comment.

The *McGregor* dictum had left room for recognition of other mental states than phobia so long as they met the general criteria for characteristics. The evidence in *Taaka* of obsessive or compulsive personality directed to his child, his wife and to Brown, even had it been contested, would seem to qualify. Psychiatric and other testimony suggested his mental condition set him apart from other men, that it was a pathological and not a transitory one and that the provocation struck at that condition. English case-law on diminished responsibility demonstrates that Taaka (and Dixon) would be quite readily accommodated within that defence: *vide R* v *Eeeles* (1974)[18], *R* v *Miller* (1972)[19], *R* v *Bathhurst* (1968)[20]; see also Glanville Williams *Textbook of Criminal Law*, 495–6, 622–630.

CHARACTERISTICS IN THE STRICT SENSE, AND PUTATIVE CHARACTERISTICS

The Court of Appeal showed understandable concern over the other aspect of Taaka's 'mental peculiarity' — his alleged propensity for brooding on the initial provocation for nearly a fortnight before killing with apparent deliberation. The dictum in *Tai* regarding the so-called smouldering resentment of Samoans[21] — which this writer would term a 'putative', not a 'strict' characteristic (in the *McGregor* sense) — might have been considered by the Court in *Taaka* to cover the appellant's situation. It was not. The Court approached the question in a different way. It referred to testimony supportive of Taaka's continuing "odd and obsessive behaviour" after the first provocation and to other material "symptomatic of his extreme emotional arousal and shock" prior to the killing, as amounting to a bare sufficiency of evidence suggesting he might not have been exercising his self-control. In short, it reasoned that that evidence ought to have been put to the jury under subparagraph (b) of s 169 (2). It is interesting to note that in *R* v *Barton* (1977)[22] and *R* v *Fryer* (1981)[23], the Court had chosen to treat evidence of the appellants' intoxication, frustration, and violent response

18 The Times, November 22, 1974.
19 The Times, May 16, 1972.
20 [1968] 2 QB 99.
21 That mythic-psychological analysis of provoked Samoans was advanced by Marsack in [1959] *Crim.L.R.* 697 and seems to have gained a measure of uninquiring acceptance by courts and text-writers. For an earlier judicial reference to a similar assertion made on behalf of Niuean Islanders, see *Latoatama,* fn 7 *supra* (*per* Stanton, J), at 605–6.
22 [1977] 1 NZLR 295.
23 [1981] 1 NZLR 748.

(conditions plainly excluded from "characteristics' by the *McGregor* doctrine) as matters appropriate to that same subparagraph. That is one way of dealing with evidence of mental or emotional peculiarities (essentially of a transitory kind) that might affect the offender's mode of reacting to the provocation.

As already indicated, the Court in *Tai* had posted a different route which engages subparagraph (a) of s 169 (2). At one point in its judgment in *Taaka* there may be discovered a suggestion, or hint, that, had it been necessary, the Court might have countenanced such an approach. Immediately before their Honours' conclusion that they must disagree with the trial Judge that the evidence did not go to "relevant characteristics", there occurs this passage:

> We do not propose to detail the psychiatric evidence further. We think that it is capable of supporting an inference that the appellant's characteristics *could* cause him to feel the insult of Hongi Brown'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).

No-one would take issue with the burden of that reasoning as it points to the direct impact of the provocation on Taaka (invested with his particular 'characteristics') at the time of the bedroom incident. Yet the references to his loss of self-control and the public revenge (plainly relating to the occasion of the killing) implies that the self-same characteristics were viewed as a continuing relevant factor thirteen days later and, indeed, had taken on the colour of a brooding-resentment characteristic. If that is a fair inference then the Court's words might well be understood as countenancing a *Tai*-type characteristic (regardless of its problem of want of a direct, or 'real', nexus between the provocation and the 'characteristic'). True, there had been a suggestion made at the trial of Taaka of a 'revival' of the provocation on the night of the killing, but the Court of Appeal's reference hints at the existence of a 'brooding' characteristic during a period well before that event.

What, in effect, the Court may have yielded — intentionally or not — could be regarded as a rolled-up characteristic, one comprising both *McGregor*-type and *Tai*-type characteristics. Expressly consigned, as it was, to subparagraph (b), the latter may yet smoulder or brood on in subparagraph (a).

A maintainable distinction might be laid on the criterion of direct relatability of alleged provocation to claimed characteristic. Where the direct relationship exists, a *Characteristic Stricto Sensu* can be established (eg where V. has kicked away the crutch of D., a one-legged person). Where there is no such direct nexus (usually, it is surmised, in cases where only some 'general dispositional' feature is presented as a characteristic), the term *Putative* (or *'Constructive'*) *Characteristic* might serve as a suitable description. *Dixon* is an illustration of the former, the victim's conduct being directly referable to Dixon's characteristic (albeit in that instance, a particular 'dispositional' one); the respective provocations and susceptabilities in *R* v *Raney* (1942)[24] and *Bedder* v *D.P.P.* (1954)[25] would constitute even plainer examples of *Characteristic Stricto Sensu*. Both the 'strict' and the 'putative' categories seem to be illustrated in *Taaka*: the victim's sexual misconduct can be viewed as relating directly to Taaka's particular vulnerability in his triangular (or, including the handicapped

24 (1942) 29 Cr.App.R. 14.
25 [1954] 1 WLR 1119.

child, his quadrangular) domestic situation; Taaka's broody resentment might qualify, in the sense acknowledged in *Tai*, as a *Putative Characteristic*. The forensic relevance of the latter type of 'characteristic' seems destined to be 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. As suggested earlier in this essay, a *direct* connection between the provocation and such a (putative) 'response-characteristic' is hard to conceive: (insults along the lines of "You long-fused, slow-burning Samoan" or "Brooding Maori" would be rare provocations, if indeed they registered as such in New Zealand or anywhere else).

General acceptance by the Courts of the putative 'characteristic' countenanced by dicta in *Tai* (and possibly *Taaka*) could erode public confidence in the admininstration of the existing defence of provocation. It might be thought prudent to restrict the relevance of such evidence to the factual question of self-control in s 169 (2) (b).

THE PROPRIETY OF INTRUSION

One thing seems clear. *Taaka* and *Dixon* will tend to fuel defence counsel's optimism over the prospects of their clients' mental peculiarities gaining the courts' recognition as "characteristics" within s 169 (2) (a). But will Judges thwart such attempts by reliance on the *McGregor* stricture when the supporting evidence (in most cases drawn from psychiatrists) appears to encroach on to the 'foreign defence' of diminished responsibility?

As observed earlier, the Court of Appeal in *Taaka* said nothing on that subject even though the evidence of mental characteristics there might be seen to qualify within diminished responsibility. What the Court did not say on the score of overlap could possibly be taken as its tacit approval of provocation's encroachment. In *Dixon*, Chilwell J was faced with the issue, but he deftly, yet quite properly, side-stepped it — albeit in a way that might be construed as suggesting that a degree of invasion of the English defence by provocation may be found judicially tolerable. Indeed, it seems clear that the Court of Appeal in *McGregor* must have prospectively countenanced that correct and realistic position. If mental characteristics are to be accommodated under subparagraph (a) (*vide McGregor, Taaka, Dixon*) it 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. (The broad implication of the contrary viewpoint, as argued by the Crown before Mr Justice Chilwell, could have the courts looking back over their shoulders at any number of defensive doctrines available in all manner of jurisdictions while doing sums of subtraction in respect of defences currently available in New Zealand.) Where the requirements of s 169 (2) (a) as well as the terms of *McGregor* are all met, it would seem to be a gross injustice to deny the defence even where, had the offence occurred in England, the accused sensibly might have opted for a diminished responsibility plea rather than provocation.

As a compassionate doctrine, a concession to human infirmity, provocation has always been a defence of 'diminished responsibility'. Yet its scope is nowhere near identical with the Scottish defence or with that defined in s 2 of the Homicide Act. On the one hand, provocation ranges wider (in not depending on evidence of substantial impairment of mind); on the other, diminished

responsibility goes far beyond provocation by not requiring evidence of want of self-control, or that a mythical ordinary person would have lost it, or, for that matter, evidence of 'provocation'. Plainly, as the English courts, and the Criminal Law Revision Committee, have discovered, there is a segment of overlap. (Had Taaka or Dixon been prosecuted in an English court, he might as well have been defended as a diminished responsibility sufferer, or as a provoked person, or as both: see Glanville Williams, *op cit* and see 'Working Paper on Offences Against the Person' (1976) paras. 48-60, esp. para 53.)

Were it to be shown that the two doctrines in practice share a very broad area of concurrence, say, to the extent of provocation being used consistently, or cynically, as an alias for the diminished responsibility plea, then the *caveat* entered in *McGregor* should, and would, deserve to attract serious judicial attention. Indeed, the demonstration, albeit rather improbably, of such extensive misuse might reinforce the need for the legislative adoption in New Zealand of this formally uninvited, yet not always unwelcome, overseas visitor.[26]

AN OMNIBUS SOLUTION

This essay has dealt with little more than refinements of the central logical problem of provocation. That has dogged the law of homicide since 1869,[27] perhaps earlier.[28] I refer to the invasion of the original personal, or human, equation in provocation by an artificial presence, the "reasonable man". No amount of 'fine-tuning' reform, however ingenious, can retrieve that mismatch of discordant criteria. (The most notable attempt, to date, to reconcile the irreconcilable is that made by the New Zealand legislature aided by the Court of Appeal; in spite of their quite uncommon ingenuity, the "s 169 (2) hybrid person" would still be more comfortably received by Mary Shelley than by logicians or criminologists.) It is too late for cosmetic surgery with a tuner's fork. The most effective treatment of the ills of provocation (and the related ills of homicide) is by a stake through the heart.

Such action was proposed by the (NZ) Criminal Law Reform Committee in its *Report on Culpable Homicide*, 1976. There it was recommended that the defence of provocation be abolished and, with it, the crimes of murder and manslaughter (to be replaced by one of 'unlawful killing') as well as the mandatory penalty for murder of life imprisonment. Evidence of provocation by the deceased would be treated by the court in the same way as it now is in offences less than murder: it would be considered in the plea in mitigation of sentence.

26 After this lengthy examination of some legal aspects of the test posed by s 169 (2) (a), it is desirable to inquire about rumoured difficulties of its application in trials. Even before the judgment in *Tai* was reported, the New Zealand Criminal Law Reform Committee had advertised its opinion that Judges were failing to adequately communicate to juries the complex elements of the 'hybrid' test posed in s 169 (2) (a) as interpreted in *McGregor*. (The Committee's final *Report on Culpable Homicide*, published in 1976, was preceded by a preliminary report on the defence of provocation which it circulated among, *inter alios*, Judges and law practitioners two years earlier.) Embellishment of the kind portrayed in *Tai*, and by this writer in this essay, might well be comprehended by Judges and counsel but would further complicate their thankless task of having to explain the law of provocation to jurors. Evidently Lord Simon of Glaisdale was unaware of this problem (and of the existence of the two Law Reform Committee reports) when he ventured in *Camplin* [1978] AC 705, 727, "I have heard nothing to suggest that juries in New Zealand find the task beyond them."

27 The *fons et origo* if the 'reasonable man' test is commonly attributed to the summing up of Keating J in *R* v *Welsh* (1896) 11 Cox CC 336.

28 The 'reasonable man' was first accorded judicial recognition in *R* v *Kirkham* (1837) 8 C and P 115, 116.

These conclusions were not reached lightly. The Committee had already spent two years juggling with some half-a-dozen variously 'reformed' definitions of a provocation defence which ranged from a finely amended s 169 to a near-subjective test. Advice communicated at that stage by the (then) Minister for Justice, Dr Finlay, probably proved crucial to the thrust of the eventual recommendations. He counselled against the reformers' concentration on one part (provocation) of a much larger problem area (culpable homicide) at a price of delayed examination of the whole. The Committee took the hint. Concentrated discussion produced agreement that homicide, like much of crime, suffers from the law's preoccupation with the actual, sometimes fortuitous, *consequences* of conduct (the 'harm'). Transference of the stress of the inquiry to the *conduct* itself (the degree of fault — for *potential* harm[29] — which is established in the accused, *viz* his intention, recklessness, or gross negligence) would brace legal principle by pin-pointing blame for the offence and its moral gravity, and expedite trial without detriment to prosecutor or prosecuted. From that base, the Committee proposed melding the two main definitions of culpable homicide (murder and manslaughter) into a new crime of 'unlawful killing'. It would comprise the current definitions of murder in section 167 and section 168 (an apparent departure from principle there) together with the one 'intentional-homicide' category of manslaughter — killing under provocation.

The rump of manslaughter (in practice, most instances of that offence as presently defined) was recommended to be subsumed under new offences of endangerment to life, health and safety, whether or not death or, for that matter, any actual harm, eventuated from the accused's conduct. This "tail-end" exercise attracted strong criticism from one learned commentator who, divining the pulse of a probably retributivist public, thought that it would lead to some strange and generally unacceptable results.[30]

That criticism may be well-founded. Yet one suspects that it is not the main reason why successive governments have taken no action on the *Report*. The order-and-law outlook of the past decade is widely assumed to have been a politically safe, and successful, policy. Removal of the mandatory life penalty (indeed of 'murder' itself) would invite loud opposition from the social conservative element.

The demise of murder, a familiar and useful hate-symbol, certainly would lose some votes for its executioners. But that is only one part of the picture which could be presented to a crime-conscious electorate. A more thoughtful sector might be impressed by careful publicity favouring the *discretionary* penalization of all unlawful homicide. The sound of finite sentences of twenty years (or more) for "the worst" killings would be music to even the fiercest imprisoners; others of strong, if not extreme, views on the virtues of a steep tariff, might concede that evidence of 'real provocation' justifies a substantial reduction to something approximating the current sentencing practice, and that punishment by imprisonment of, say, genuine 'mercy'-killers serves very little

29 "The potential harm rather than the actual harm provides the proper measure of liability." (*Report*, para 48).

30 G. R. Orchard, 'Culpable Homicide — II', (1977) *NZLJ*, 447, 453 *et seq.* Dr Orchard's two articles about the *Report*, *op cit* and 'Culpable Homicide — I', at 411 *et seq*, together form a full and penetrating analysis.

purpose.[31] There is no good reason why 'murder' should not be preserved (and extended by the inclusion of provoked-manslaughter) to do the work proposed for the achromatic 'unlawful killing'.

The major attraction of the *Report* to a government intent on public sector economies could well be a substantial saving in court and legal aid costs. Lengthy depositions, and lengthier trials (sometimes centred on weak factual and palliative defences) in numerous cases would be replaced, on the defendant's election for the guilty plea, with a day or so's adversarial argument over the appropriate sentence. Put money in thy purse, Roderigo!

From the standpoint of this essay, 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 inhibitory 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.

Under a revised law, both Dixon and Taaka might well have pleaded guilty and would have anticipated receiving similar sentences to those actually imposed. Yet cases are not uncommon where evidence of 'factual' provocation exists but, because of the mandatory penalty for murder and the present definition of provocation, such materials are either not regarded by the Courts as 'sufficient in law' to engage the palliative effect of s 169, or are deliberately left understated by experienced defence counsel as being tactically disadvantageous to their clients' causes. The recent case of *R* v *O'Kane* (1982)[32] illustrates both problems.*

The dilemma faced by counsel in O'Kane's trial, and the inhibitions imposed by the present law of homicide, can, and do, result in sentences of life imprisonment which can take no account of genuine mitigating factors. Implementation of the recommended reforms would afford the opportunity for a fair and exacting inquiry, with provocation, like other extenuating circumstances, having a

* O'Kane was unsuccessful in his appeal against conviction for the murder of his wife.

On hearing that his separated wife (with whom he had wished to be reunited) had acquired a lover, Murray, O'Kane stated he "would blow [Murray's] light out", procured a gun and, partially intoxicated, drove 300 km to Mossburn. There he found Murray and his wife naked in bed with his infant daughter. Mrs O'Kane told him to "piss off and leave [them] alone" but O'Kane shot Murray, wounding him. He then pursued his wife into an adjoining room and shot her dead. He was convicted on two counts of attempted murder and murder, but did not appeal against the former.

For tactical reasons not hard to understand in the context of the current law of murder and its mandatory penalty, O'Kane did not testify at his trial and no specialist evidence was called to confirm suggestions made by other witnesses that his habitual drinking might constitute part of his character or personality (*quaere* a dispositional 'characteristic').

Neither the trial Judge nor the Court of Appeal acknowledged any requirement to separate out the evidence of 'provocation' emanating from Murray and Mrs O'Kane respectively. Although there was plain evidence of 'malice prepense' by O'Kane against Murray, there appeared to be little real animus shown to his wife until he saw her in bed at Mossburn and was told by her to "piss off". Without his own testimony, there was no direct evidence that O'Kane was in fact deprived of his self-control by the sight of her in bed and by her words to him.

31 When a finite sentence in excess of two years is imposed for 'unlawful killing', it should be noted that the Committee would preserve the existing discretion in the Minister of Justice to recall a prisoner to serve the rest of his life sentence.

32 Unrep., 30 November 1982, CA 53/82.

bearing on penalty. That could result in some awards of lesser periods of imprisonment than the present 'mean' of nine or ten years actually served by 'lifers'. Where such mitigations do not exist, or where they are exposed as sterile or fatuous, the killer might reasonably expect a finite sentence substantially in excess of a decade behind bars.

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