F W Guest Memorial Lecture 1997

Francis William Guest, MA, LLM, was the first Professor of Law and the first full-time Dean of the Faculty of Law in the University of Otago, serving from 1959 until his death in 1967. As a memorial to Professor Guest a public lecture is delivered each year upon an aspect of law or some related topic.

A Licence to Kill or an Overdue Reform?: The Case of Diminished Responsibility

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I wish to acknowledge the honour which I feel has been accorded me by this invitation to present the F W Guest Memorial Lecture for 1997.

It is some 29 years since the inaugural lecture was given by Professor Sim and I stand in awe of some of the names of those who have delivered the lecture. Since that time, names such as Lord Cooke of Thorndon, Justice Baragwanath, the new President of the Law Commission and Dame Silvia Cartwright amongst others.

I am conscious of this being a particular pleasure for me because I have had little association with this University apart from having two sons who both took pleasure in their time at this University (I must admit to being somewhat cynical in thinking that the conviviality of campus life had more than a little to do with that!).

To practise law in New Zealand, particularly in Dunedin, with only such an indirect association with the University is something of a handicap which I shall hope is remedied, if only a little, by my presentation tonight.

Introduction

The issues pertaining to the question of diminished responsibility were not originally my first choice of subject-matter for this lecture. However, in February of this year, I embarked for the first time upon the sometimes intriguing, but nearly always frustrating, journey of taking a criminal case to the Privy Council. That case was of course *Regina* v *Oakes*. [1]

It was as a consequence of the often-stimulating, but ultimately-disappointing, debate that the issues of diminished responsibility have assumed some importance and urgency — an importance, I suggest, for all New Zealand jurists and indeed the New Zealand public at large, for there has been, in my submission, no more relevant time for the issue of diminished responsibility to be raised than now. It is an issue I suggest that is indivisible in its connection to the Minister of Justice's proposal to review the mandatory life sentence for murder.

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[1] Privy Council, 6 February 1997.

What do we mean by Diminished Responsibility?

The concept of a diminished form of responsibility has been discussed in judicial arenas for nearly one hundred and thirty years. In 1876 Lord Deas said in *H M Advocate* v *McLean*:[2]

> I am of the opinion that without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account not only in avoiding punishment, but in some cases even in considering within what category of offence the crime shall be held to fall.

A similar approach was also being discussed in New Zealand at about that time by the 1879 Criminal Code Bill Commission in its Report on the Law Relating to Indictable Offences. The Report acknowledged the principle that where an offender was inflicted with some unsoundness of mind but not to such a degree as to render him not responsible, the judge should have the power to apportion punishment to the degree of criminality, making allowance for the weakened or disabled intellect.

However, in the United Kingdom there was to be no statutory acknowledgement of such a concept for another 80 years until the Homicide Act of 1957. That Act formalised the "missing link" between an acquittal on the grounds of insanity and a conviction where despite evidence of a mental disorder, the accused failed to satisfy the restrictive M'Naghten criteria. The M'Naghten Rules had promised much but have proved in recent times to be woefully inadequate when dealing with an ever evolving knowledge of psychological disorders including the personality disorder cult of the 90's.

There is no doubt that the Reform of 1957 was motivated by an intention to address the issue of penalty as opposed to responsibility. The death penalty was still in force in the United Kingdom and remained so until the murder (Abolition of Death Penalty) Act 1965. The Homicide Act of 1957 was a "compromise solution to the controversy over capital punishment."[3]

Whilst there was to be no statutory reform in New Zealand it is suggested this was in all likelihood due to the fact that New Zealand itself abolished the death penalty. A clause in the 1961 Crimes Bill would have provided for a type of diminished responsibility.[4] It also reflected a failure on the part of the legislature to come to terms with the wider implications of the doctrine of diminished responsibility and the inadequacies of the M'Naghten Rules.[5]

It is perhaps a sad reflection on our times that we have continued to demonstrate a lack of ability or willingness to improve our understanding of

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2 *H M Advocate* v *McLean* (1876) 3 Coup 344.

3 F G Jacobs, *Criminal Responsibility*, LSE Research Monographs 8 (1971) at 47.

4 Clause 180 proposed that the defence would be established if "the jury are satisfied that at the time of the offence the person charged, though not insane, was suffering from a defect, disorder, or infirmity of mind to such an extent that he should not be held fully responsible"

5 See Warren Brookbanks' comments in *Movements and Markers in Criminal Policy*, Legal Research Foundation Publication No 23 (1984).

both those areas. It is that failure that now causes the issue of diminished responsibility to be raised again.

In any event the proposed legislation in the 1961 Crimes Bill would have had little attraction for the pragmatic trial advocate for Clause 187(2) provided that where the jury returned a special verdict of manslaughter on the grounds of diminished responsibility the sentence was to be one of detention during Her Majesty's Pleasure. Only the prospect of an alternative sentence the like of the death penalty would make such a detention an attractive prospect.

Whilst New Zealand was disinclined to follow its usual English mentor in regard to the diminution of responsibility other Commonwealth countries showed no such reluctance to address the issue. The concept has been adopted and provides a partial statutory defence in the Bahamas,[6] Barbados,[7] Singapore,[8] Hong Kong,[9] and, in Australia, New South Wales,[10] the Australian Capital Territory,[11] Queensland,[12] and the Northern Territory.[13] Whether such a concept truly exists in Canada is a matter of debate. In that country Ewaschuk J has argued that there is no formal defence of diminished responsibility in Canada, but rather says there is: [14]

> an unarticulated form of diminished responsibility existing in Canada in the sense that evidence of mental disorder short of legal insanity is considered in determining specific intent together with any other relevant factors.

The New Zealand Position

In New Zealand at this present time there is no formal place for diminished responsibility in the criminal law. The Court of Appeal in *R* v *McCarthy* did say:[15]

> The trend of the line of decisions just collected is in the direction that the added observations in *McGregor* may have unduly restricted the ambit of the provocation that under the current New Zealand section may reduce murder to manslaughter. The added observations 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 deliberative effect of the statutory changes embodied in s 169 of the Crimes Act 1961.

Despite those observations, the defence remains unavailable in real terms. No clearer confirmation of that position comes than in the 1994 decision on the appeal

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6 Section 2(1) of the Bahama Islands (Special Defences) Act 1959.
7 Section 3 of the Offences Against the Person Amendment Act 1973 (Barbados).
8 Exception 7 to s 300 of the Penal Code of Singapore.
9 Section 3 of the Homicide Ordinance Act 1963 (HK).
10 Section 234A of the Crimes Act 1900 (NSW).
11 Section 14 of the Crimes Act 1900 (ACT).
12 Section 304A of the Queensland Criminal Code.
13 Section 37 of the Northern Territory Criminal Code.
14 E G Ewaschuk, *Criminal Pleadings and Practice in Canada* (2nd ed 1987).
15 [1992] 2 NZLR 550 at 558 per Cooke P.

of June Gordon[16] against a conviction for murder. Mrs Gordon was a 54 year-old grandmother who had suffered years of physical and psychological violence at the hands of her abusive husband. She was suffering from a significant depressive illness at the time her husband was killed and was a victim of battered woman's syndrome. Mrs Gordon was alleged to have arranged for her co-accused to shoot her husband shortly after finding him in the matrimonial bed with a prostitute and discovering that he was also having an affair with the wife of a deceased neighbour and that there was the possibility that he might leave her for this other woman.

Mrs Gordon denied any intention to kill but declined to give evidence on her own behalf. She was a victim of battered woman's syndrome and had been unable to steel herself to give evidence largely due, it was said, to the oppressiveness of her co-accused and his taunting. Not only did Mrs Gordon fail to give evidence but the evidence of battered woman's syndrome was not put to the jury as a consequence.

The Court of Appeal in a judgment delivered by Sir Michael Hardie Boys, the current Governor General, then Hardie Boys J, said in dismissing Mrs Gordon's appeal:[17]

> Were the defence of diminished responsibility available in this country, it may well have been availed of here...

This case for many illustrates the frustration with the present statutory regime which precluded this ageing first-time offender, described by nearly all who knew her as a warm hearted, generous and loving wife, mother and grandmother, from being able to avail herself of any defence despite the fact that her ability to reason was significantly impaired as a consequence of the abuse she suffered at the hands of the deceased.

Mrs Gordon's defence was run on the basis of lack of intent but her failure to give evidence made the task of securing an acquittal or reduction in charge an almost impossible one. Likewise, the possibility of successfully pleading provocation was removed due to the denial of intent. It would have been difficult to see how a jury may ever have accepted this partial defence when the question of delay and pre-planning was such a live issue. It seems to be an almost insurmountable legal hurdle for women defendants that they tend not to respond instantly but rather over a period of time.

This case demonstrates the inadequacy of the criminal law to accommodate the accused who labours under a disability to the extent that an abnormality of reasoning occurs. The consequence is that the ultimate question of sentencing or how long the person should serve in prison as a punishment is left to be determined by the parole board rather than the jury (through a manslaughter verdict) and the sentencing judge.

The primary argument against the introduction of diminished responsibility would appear to be the enormous criticism that has been levelled at the drafting

16 *R* v *Gordon* (1993) 10 CRNZ 430.

17 Ibid at 441.

of the 1957 Homicide Act. The Act appears to be at least the basis for most Commonwealth countries who adopt the concept of diminished responsibility.

Other Jurisdictions

The English Position[18]

Section 2 of the Homicide Act 1957 states:

(1) Where a person kills or is a 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 and omissions in doing or being a party to the killing;

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder;

(3) A person who but for this section would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

Australian Capital Territory

Section 14 of the Crimes Act 1900 states:

14 (1) A person on trial for murder shall not be convicted of murder if, when the act or omission causing death occurred, the accused was suffering from an abnormality or mind (whether arising from a condition of arrested or retarded development of mind or any inherent cause or whether it was induces by disease or injury) that substantially impaired his or her mental responsibility for the act or omission.

(2) An accused has the onus of proving that he or she is, by virtue of subsection (1), not liable to be convicted of murder.

(3) A person who, but for subsection (1), would be liable (whether as principal or accessory) to be convicted of murder is liable to be convicted of manslaughter.

(4) The fact that a person is, by virtue of subsection (1), not liable to be convicted of murder does not affect the question whether any other person is liable to be convicted of murder in respect of the same death.

(5) Where, on trial for murder the accused contends:

(a) that he or she is entitled to be acquitted on the ground that he or she was mentally ill at the time of the act or omission causing the death; or

(b) that he or she is, by virtue of subsection (1), not liable to be convicted of murder;

the prosecution may offer evidence tending to prove the other of those contentions and the court may give directions as to the stage of the proceedings at which that evidence may be offered.

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[18] Prior to the English Court of Appeal in *Cox* (1968) Cr App R 130, accused persons were unable to plead guilty to manslaughter on the grounds of diminished responsibility.

Queensland

Section 304A of the Criminal Code 1984 provides:

304A (1) When a person who unlawfully kills another under circumstances which, but for this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission, he is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When two or more persons unlawfully kill another, the fact that one of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.

New South Wales

Section 23A of the Crimes Act 1900 provides:

23A (1) Where, on the trial of a person for murder, it appears that at the time of the acts or omissions causing the death charged the person was suffering from such abnormality or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for the acts or omissions, he shall not be convicted of murder.

(2) It shall be upon the person accused to prove that he is virtue of subsection (1) not liable to be convicted of murder.

(3) A person who but for subsection (1) would be liable, whether as principal or accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that a person is by virtue of subsection (1) not liable to be convicted or murder in respect of a death charged shall not affect the question whether any other person is liable to be convicted of murder in respect of that death.

(5) Where, on the trial of a person for murder, the person contends:

(a) that he is entitled to be acquitted on the ground that he was mentally ill at the time of the acts or omissions causing the death charged; or

(b) that he is by virtue of subsection (1) not liable to be convicted of murder.

evidence may be offered by the Crown tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

Northern Territory

Section 37 of the Criminal Code (NT) 1983 states:

> When a person who has unlawfully killed another under circumstances that, but for this section, would have constituted murder, was at the time of doing the act or making the omission that caused death, in such a state of abnormality of mind as substantially to impair his capacity to understand what he was doing or his capacity to control his actions or his capacity to know that he ought not to do the act, make the omission or cause that event, he is excused from criminal responsibility for murder and is guilty of manslaughter only.

The Formulation of Diminished Responsibility

The difficulties of course arise in the restriction of the "abnormality of the mind" to being one caused by a particular event, that is, retarded mental development or any inherent cause being induced by disease or injury.

If one of the perceived needs for such a defence is the need to appropriately accommodate those who kill in consequence of suffering from battered women's syndrome or some other debilitating condition which affects their culpability, the recent United Kingdom case, *R* v *Hobson*,[19] has given hope that the difficulties may be resolved. In that case the English Court of Appeal adopted the British medical profession acknowledgement of battered woman's syndrome as a mental disease.

If New Zealand were to adopt a similar concept of diminished responsibility then it would still require the New Zealand medical profession to take similar steps. Their understanding of battered woman's syndrome has been slow in developing in comparison with the United States of America and the United Kingdom.

Another argument against the introduction of diminished responsibility is that it is unnecessary as those who should be excused for the act of killing are already accommodated by the law of provocation. Provocation reduces the level of culpability in certain limited circumstances and has evolved in its interpretation very much around male scenarios, that is, the hard working, exhausted husband who returns to the matrimonial home only to find his ungrateful/unfaithful wife in bed with his best friend. The decision of the moment to pick up a gun and administer fatal punishment to the errant wife and her adulterous partner is a scenario apparently well understood and accepted by New Zealand juries. Likewise the fatal response of a man to adverse criticism of the size of his private parts has been readily accepted as provocation.[20]

It could be argued that the introduction of a further complicating piece of legislation would seem unnecessary when you consider the cases of *R* v *Aston*[21] and *R* v *Campbell*[22], both of which demonstrated that an "abnormality" of reasoning may be sufficiently wide to accommodate seemingly pre-planned

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19 Unreported, Criminal Appeal Division, England, 23 May 1997, Rose LJ, Sedley J, Keene, J.

20 *R* v *Minnett*.

21 (1989) 4 CRNZ 241.

22 [1997] 1 NZLR 16.

killings and the killing of totally innocent victims where the provoking triggers seems slight indeed.

In *Campbell* the 22 year-old accused killed a man in a vicious assault involving an axe after he had a flashback brought about by the deceased putting his hand on the accused's knee and smiling. It was argued in the re-trial of that case held earlier this year, that Campbell had been viciously abused by a known paedophile when he was younger. Campbell argued that the provocation of the deceased was such that he lost control and thought he was killing the man who had abused him.

Another remarkable demonstration of provocation operating can be seen from case of *Aston*. Mr Aston was convicted of manslaughter and three counts of arson after a unbelievable incident in Northland in 1989. While at a petrol station Mr Aston was called a "queen" by the service station proprietor. Mr Aston drove to a store, bought gas canisters and ammunition before dropping his wife off at a neighbour's. He then went and bought petrol and drove home. He shot four bulls belonging to his neighbour (who he had a longstanding dispute with) then drove to the petrol station proprietor's house. He wasn't home so Mr Aston drove back to the petrol station, shot the proprietor in the head at close range then set fire to the petrol station with the proprietor's wife still inside. Mr Aston next drove to his neighbour's museum and burnt that down. He then drove back to the proprietor's house and burnt that down. The jury found him guilty of only manslaughter either because his mental disorder affected the level of intent or because they accepted he was provoked. In considering Aston's sentence Cooke P turned to Australian patterns of sentencing for manslaughter with diminished responsibility, deciding that this was "in substance the present case."[23]

However, such liberal interpretation of "provocation" has to be contrasted with the narrower interpretation when applied in cases like *Oakes* and *R* v *Brown*.[24]

In *Oakes*[25] battered woman's syndrome was seen by the Court of Appeal as possibly giving rise to a "motive to murder" and therefore it may have explained why the trial judge chose not refer to the condition and its effect to any great degree in his summing up. The author of one academic article found this a "remarkable statement [which] is contrary to all the evidence given in the case, and in other cases, about the nature of the effects of battered woman syndrome."[26]

In *Brown* the genuineness of belief that her child had been sexually abused when she herself was highly sensitised to such abuse was not seen as sufficient to avoid a conviction for murder for Mrs Brown. She had made a 25 km journey to obtain the weapon that she used to kill the man she thought had abused her child.

These two cases are in stark contrast to *Aston* where calculated pre-planning including having taken the time to drop his wife off and go and purchase

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23 *Aston*, supra n 21 at 245.

24 CA 93-94, 11 April 1995, Cooke P, Casey & Heron JJ.

25 [1995] 2 NZLR 637.

26 Jeremy Finn, "Case and Comment : Oakes" (1995) 19 Crim LJ 291 at 293.

ammunition before driving yet again to shoot dead an innocent garage proprietor who may have called the accused a "queen". In *Campbell* the flashback to an earlier sexual abuse was sufficient to persuade a jury that the killing of an innocent man who merely touched the knee of the accused was sufficient to satisfy the rules of provocation and provide an excuse for the killing.

The Debate Over Diminished Responsibility

I suggest it is a misconception that diminished responsibility would result in something akin to the 'license to kill' of Special Agent 007. Research in New South Wales between 1990 and 1993 showed that the most commonly diagnosed conditions giving rise to the defence of diminished responsibility were:

(1) Severe depression and schizophrenia

(2) Brain damage

(3) Personality disorders

(4) Post-traumatic stress syndrome

Diminished responsibility was raised by approximately 14 per cent of people accused of murder and 61 per cent of that group were in fact convicted of manslaughter only. Given the developing knowledge of the complicated area of psychological disorder and given that society presumably operates on the basis that to kill is not a normal act, the figures are open to be interpreted as society's acceptance that there are a small number of people who kill who are neither mad nor bad but whose actions are excused full blameworthiness because at the time they acted they were under a disability.

The emotive argument often stated that diminished responsibility would merely create a licence to kill hardly seems pertinent to the debate over diminished responsibility in light of the cases previously mentioned.

I suggest that the introduction of a specific diminished responsibility defence would have allowed the verdicts in both *Aston* and *Campbell* to have been much purer verdicts than it might appear. Public confidence in the justice system is only maintained when we ensure the integrity of the verdict. Thus we have the constant search for the pure verdict (the goal of course will never be achieved but striving for the same is essential to the integrity of the law). Diminished responsibility might also have created an acceptable parameter for both *Brown* and *Oakes* to have had their disabilities more readily understood in a legal context.

The issue of public confidence in the administering of justice requires that we must address the anomalies that exist such as *Aston* and *Oakes, Campbell* and *Brown,* and the failure to accord justice to June Gordon short of a parole board hearing.

Another of the more compelling pragmatic arguments for adopting a diminished responsibility defence is that it would provide the platform for a guilty plea based upon diminished responsibility. This would avoid juries having to sit through traumatising, yet non-contentious, evidence and even more traumatising experiences of families of victims reliving the horror of the death of a loved one.

Whilst it could be argued that the community is thus deprived of overtly engaging in the decision making process as to responsibility, that in fact would not be so as the Crown are the representatives of the people and such a process could only occur with their acquiescence. It is interesting to note that in the 1976/77 figures for the UK only 20 per cent of cases went to trial because there was no agreement over the issue that diminished responsibility was applicable.[27] Of the 20 per cent that went to trial 51 per cent resulted in a finding of not guilty to murder but guilty to manslaughter on the grounds of diminished responsibility.

Women in the Diminished Responsibility Debate

The question has to be raised whether the failure to secure a verdict of less than guilty to murder in cases like *Oakes, Gordon* and *Brown* are in anyway related to the difficulties experienced by society as a whole to both understanding and accepting mind-altering conditions such as battered woman's syndrome.

It is argued that the present criminal law accommodates the genuine battered woman who kills as a consequence of the syndrome. Indeed, I have argued in the Privy Council that the law *should* be able to accommodate it but I am no longer convinced that on a practical level it is going to do so. In 1993 Stanley Yeo said:[28]

> [T]here is a major problem confronting women who seek to rely on ... criminal defences. It is that those defences have been developed through a long history of judicial precedents on the basis of male experiences and definitions of situations. Consequently, female defendants whose experiences and definitions fall outside these male inspired defences are confronted with the prospect of either failing to plead them successfully or having to distort their experiences in an effort to fit them into the defences.

Such difficulties are seen in the New Zealand experience where yet again New Zealand reflects a mirror image of the English experience. In the UK the high profile cases of Ahluwalia, Sarah Thornton and Emma Humphries demonstrated the difficulty that the justice system had in coming to terms with the difference between the female perspective and the male. All three were women who killed their male partner after significant periods of physical and psychological abuse. They each suffered from battered woman's syndrome and a depressive illness or personality disorder. None, however, killed in the classic heat-of-the-moment jealousy situation that, it would seem, is readily understood. All were originally convicted of murder and, in the case of both Thornton and Humphries, more than one appeal was required together with applications to the Home Secretary before the murder convictions were quashed and subsequently manslaughter convictions entered. Ian Leader-Elliot in his *Sydney Law Review* article says:[29]

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27 Susanne Dell, *Murder into Manslaughter : The Diminshed Responsibility Defence in Practice,* Maudsley Monographs No 27 (1984) at 73.

28 "Resolving Gender Bias in Criminal Defences" (1993) 19 Monash ULR 104 at 104.

29 "Battered But Not Beaten: Women Who Kill in Self Defence" (1993) 15 Syd LR 403 at 405.

> The policies which shaped the modern law of self defence and provocation developed without reference to the very different parents of homicide when men are killed by women.

It would appear that New Zealand law is prepared to accept that battered woman's syndrome is capable of founding both a plea of self-defence and provocation (see *Oakes* and *Gordon*) but the practical reality may be that it will remain extremely difficult to do so.

The Issue of Credibility

One of the frequently cited reasons for the failure of women to succeed with their defences is that of credibility, "she wasn't believed". There is no answer to that statement of course unless we were to be able to question juries on the verdict. But one wonders what the answers might have been from the jury in the *Oakes* case were they asked:

1 Did you find Mrs Oakes was suffering from battered woman's syndrome?;

2 Did the syndrome affect her ability to reason properly?; and

3 Was the ability to reason in a normal way a causative factor in her administering sleeping pills to Douglas Gardner?

It is of course usually those that already see the circumstances of the case as amounting to "murder" that are drawn into such comments as "the jury didn't believe her". The search for the real "battered woman" is likely to be for those critics as endless a search as those who travel the jurisprudential stratosphere in search of the pure verdict, (that is, a verdict that is truly based upon the evidence and the strict interpretation of the law without any "distorting" of either the law, the evidence or the burden of proof).

The argument may however reveal more about the reality of life for women for there is a credibility gap between men and women who give evidence. Research has shown that men as a group are perceived as more credible that women.[30] Even in non-legal settings—such as discussion groups and university lectures—the same propositions put forward in the same manner are more likely to be accepted when they are presented by men than by women.[31] Thus the task of the woman accused who attempts to successfully plead self-defence or provocation on a battered woman's syndrome foundation presents massive difficulties for she is already handicapped in two major ways before the evidence is even taken into account, viz:

1 the need to deal with male precedents for provocation and self defence; and

2 the credibility gap

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30 N J Wikler, *Credibility in the Courtroom: Does Gender Make a Difference?* Eureka 1995: Equality and Justice Conference, Ballarat, Australia, 18-20 October 1995.

31 See Cziparisky, "Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts" (1993) 27 Family L Q 247.

Conclusion

It is in this atmosphere that the whole question of culpability for unlawful killing needs to be addressed. I do not say at this stage that diminished responsibility is necessarily the answer to the inequality and anomalies previously discussed, it may be that there is some better answer. What I do say is that it is appropriate to now consider the issue of whether diminished responsibility in some form should be introduced into New Zealand criminal law. Alternative considerations may include the provision for specific instructions for juries when addressing issues of provocation and self defence when they are founded on battered woman's syndrome, or indeed society may decide that the removal of the life sentence is sufficient. What I do say is that the issue needs to be debated now.

The Proposed Review of the Mandatory Life Sentence for Murder

Culpability for killing is a matter for society as a whole. In its recent report the New South Wales Law Commission firmly recommend the retention of the defence of diminished responsibility. It said:[32]

> The principal and fundamental reason for our recommendation is the vital importance of involving the community, by way of the jury, in making decisions on culpability and hence enhanced community acceptance of the due administration of criminal justice (including acceptance of sentences imposed).

Such a position I suggest has much to commend it. The removal of the mandatory life sentence for murder also removes the responsibilities and the rights of the community to decide on the blameworthiness of an accused. It vests such responsibility solely in the administration which is inappropriate for society dictates what is acceptable. Defences such as self-defence, provocation and diminished responsibility protect the rights of society to acknowledge the value of human life and the rights of the individual to be recognised as being either less culpable or not culpable at all in the appropriate circumstances. What the appropriate circumstances are that would allow justification for killing or a reduced level of culpability for killing are matters for the legislature to determine. It is this issue that the Government's review of the mandatory life sentence for murder should be expanded to cover.

Whilst the legislature may have the responsibility for defining the available defences, it is society, through the jury, that should say whether those circumstances exist.

The value we place on human life must be great and all lives must be of a equal value. No life is more important than another. The life of Douglas Gardner (the *Oakes* case) was of no greater or less value than the life of the deceased in the *Campbell* case who innocently touched the knee of Campbell not knowing the violent response it would provoke.

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32 *Partial Defences to Murder: Diminished Responsibility*, NSW Law Reform Commission Report 82 (May 1997) at 29.

Whilst the value of human life must be equally valued, culpability however is not equal and assessing the same is a task that must involve a jury. There are undoubtedly problems that exist at present with the law relating to murder convictions. But the answer is unlikely to be found in passing the problem onto the shoulders of the sentencing judge. Rather, they are best addressed by a revision of the homicide law.

I would invite the Minister of Justice to expand his review of the mandatory life sentence to consider the fundamental issue of culpability for killing and appropriate punishment. There is no better time than now.