PROVOCATION AS A DEFENCE IN ENGLISH AND SOUTH AFRICAN CRIMINAL LAW

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUMMARY</td>
<td>6</td>
</tr>
<tr>
<td><strong>CHAPTER 1</strong></td>
<td></td>
</tr>
<tr>
<td>THE PROBLEM AND ITS SETTING</td>
<td></td>
</tr>
<tr>
<td>1.1 Introduction</td>
<td>8</td>
</tr>
<tr>
<td>1.2 Defining provocation</td>
<td>12</td>
</tr>
<tr>
<td>1.3 The effect of provocation on the human character</td>
<td>13</td>
</tr>
<tr>
<td><strong>CHAPTER 2</strong></td>
<td></td>
</tr>
<tr>
<td>THE EFFECT OF PROVOCATION ON CRIMINAL LIABILITY IN SOUTH AFRICAN LAW</td>
<td></td>
</tr>
<tr>
<td>2.1 History of the defence of provocation</td>
<td>17</td>
</tr>
<tr>
<td>2.2 Current status of provocation: visiting the case law</td>
<td>23</td>
</tr>
<tr>
<td>2.3 Problems associated with the defence of provocation</td>
<td>32</td>
</tr>
<tr>
<td>2.3.1 Distinguishing automatism from non-pathological incapacity</td>
<td>32</td>
</tr>
<tr>
<td>2.3.2 An implied objective test in determining criminal incapacity</td>
<td>37</td>
</tr>
<tr>
<td>2.3.3 Defining the concept “self-control”</td>
<td>38</td>
</tr>
<tr>
<td>2.3.4 Distinguishing lack of capacity from diminished responsibility</td>
<td>43</td>
</tr>
</tbody>
</table>
CHAPTER 3

THE EFFECT OF PROVOCATION ON CRIMINAL LIABILITY IN ENGLISH LAW

3.1 Emergence of the defence 45

3.1.2 The modern law of provocation 50

3.1.2.1 The requirement of loss of self-control 53
3.1.2.2 The objective test of provocation 58
3.1.2.3 Proportionality and the reasonable person 64
3.1.2.4 Self-induced provocation 66

3.1.2.5 Problems associated with the defence of provocation 69

3.1.2.5.1 Cumulative provocation 69
3.1.2.5.2 Provocation and pluralism 73
3.1.2.5.3 The problem of proportionality 76

CHAPTER 4

CONCLUSION

4.1 South African law 79

4.1.1 Reasonableness versus criminal capacity 79
4.1.2 Reassessing the subjective formulation for capacity 80
4.1.3 Treating provocation under the principles governing the test for capacity 82
4.2 English law 84

4.2.1 Defences arising from cumulative provocation 84

4.2.1.1 Diminished responsibility 85
4.2.1.2 Pleading provocation and diminished responsibility together 90

4.2.2 Provocation and pluralism 94

4.2.2.1 The need for an act of provocation 95
4.2.2.2 Evaluating the provocation 98
4.2.2.3 The standard of self-control 100
SUMMARY

In the past 20 years the defence of provocation has shifted from the periphery of South African law to a fully developed defence available to those who kill when provoked. Not only is the defence available to the provoked, but it has been extended to those who kill when subjected to emotional stress. However, the defence is mirred in controversy and bad decisions. Not only has the precise nature of the defence not been clarified, but this lack of clarity has been exacerbated by confusing decisions of our courts. This confusion is partly a result of the development of the defence of incapacity, particularly its extension to cases involving provocation and mental stress, and partly a result of its application in practice. Three major problems have plagued the provocation defence. Firstly, the courts have confused the defence of sane automatism with that of non-pathological incapacity. Secondly, there has been an implied use of an objective test in determining criminal incapacity where the enquiry has clearly been a subjective one. Thirdly, it has been held that the problem may not so much be the subjective aspect of provocation, but rather its application. The real problem seems to lie in the theoretical confusion as to the precise meaning of lack of “self-control”. Lastly, on occasion the courts have failed to distinguish lack of capacity from diminished responsibility.

Thus, in order to gain clarity concerning this “grey” area of the law these problems have created, it is necessary for South African law to consult more authoritative sources to receive guidance for the problems identified. One of those sources that has been consulted is that of English law. English law, however, deals with the defence of provocation in a different manner. Raising a defence of provocation here does not result in an acquittal but rather in a reduction of the charge to manslaughter. However, the English law on provocation is also
plagued by various problems. Firstly, there is the issue of cumulative provocation. Generally, there is little difficulty in cases where there is no “immediate trigger”. Secondly, the fundamental flaw with the current test of the reasonable man is that the courts have had to swing between the two aims of taking a compassionate view of human frailty while endeavoring to maintain an objective standard of the reasonable man. Lastly, it can be said that the problem with the proportionality requirement is that it makes the provocation defence dependant upon the assessment of the accused’s conduct after he or she lost his or her self-control rather than on his or her giving way to passion and losing control in the first place. It is clear that from the problems identified in both South African law and English law concerning the defence of provocation the courts in each jurisdiction will have to pay careful attention to the problems highlighted and apply the law in such a way so as to ensure clarity and legal certainty.
CHAPTER 1

THE PROBLEM AND ITS SETTING

1.1 Introduction

A husband shoots and kills the man he finds committing adultery with his wife; a son kills his aged father who is in great pain from a terminal cancer;\(^1\) a young man fatally shoots the person who abuses him.\(^2\) All claimed that they had been provoked into losing their self-control and killing their “victims”. Does the law wish to blame such persons for their actions and hold them criminally responsible? If one can envisage situations in which their response would be natural to their suffering, how is the law’s understanding of their plight to be reflected? By means of no punishment or perhaps less punishment?

Prior to the decision on intoxication in \textit{S v Chretien},\(^3\) the question of criminal capacity seldom arose in our courts. In fact, it was an enquiry usually limited to the mentally ill and to

\begin{itemize}
  \item \textit{S v Hartmann} 1975 3 SA 532 (C); \textit{Clarke v Hurst NO} 1992 4 SA 630 (D).
  \item \textit{S v Nursingh} 1995 SACR 331 (D).
  \item 1981 1 SA 1097 (A).
\end{itemize}
the very young. South African law thus traditionally accepted claims of provocation affecting liability in these areas only. In English law the defence operates in a different manner. Provocation in English law reduces murder to manslaughter because its felt unjust to subject the accused to the full rigour of a conviction for murder - in other words, the courts wish to avoid the mandatory life sentence. A conviction for manslaughter, on the other hand, gives the courts the necessary flexibility to impose whatever sentence it deems appropriate.

However, in the past 20 years the enquiry in South African law has shifted from the periphery of the law to a fully developed defence available to those who kill when provoked. It would thus appear as if the law regards the actions of the provoked accused as less blameworthy. This raises the question of what the underlying basis of such an approach would be. One possible rationale of the law’s response is that in weighing the competing interests of the eventual victim against those of the accused, it decides that the victim, in participating in the chain of events, is to some extent responsible for his or her own demise. The victim, thus loses some of his or her claim to be protected by the law.

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5. Ibid.
6. Ibid.
8. Clarkson and Keating supra (n 4).
The question remains whether such a defence is desirable in law. The provocation defence has clearly proved to be a problematic one. Not only has the precise nature of the defence not been clarified, but this lack of clarity has been exacerbated by confusing decisions of our courts. This confusion is partly a result of the development of the defence of incapacity, particularly its extension to cases involving provocation and mental stress, and partly a result of its application in practice. To further compound the problem, the courts have not been able to adopt a uniform approach to the defence of provocation. In some cases the court has been prepared to accept provocation as a complete defence, in others they have not.

It has been submitted that the primary source of difficulty in the analysis of provocation derives from the failure of the courts to face the underlying normative issue whether the accused may be fairly expected to control an impulse to kill under the circumstances.

10. Ibid.
12. S v Arnold supra (n 7).
Obviously there are impulses such as anger that should be controlled. If one fails to control these impulses and kills another intentionally, one is liable for unmitigated homicide. The basic moral question in the law of homicide is distinguishing between impulses to kill where society demands self-control, and those where society relaxes its inhibition. 15

It is clear that not only is clarity necessary concerning this “grey” area of the law, but there is also a need for more uniformity of decisions. It is therefore necessary that the role of provocation in the enquiry into criminal liability be subjected to critical analysis. This task will be undertaken by means of a comparative analysis of the law of provocation with specific reference to English law. It is necessary to consider not only the history of the defence, but also its development in each jurisdiction and how problems that were identified were dealt with. This comparative approach has been taken in an attempt not only to understand the nature of the defence, but also to receive guidance from other authoritative sources to chart a clearer way forward through the confusion.

15. Ibid.
1.2 Defining provocation

It is now established law that it is not only youth, mental disorder or intoxication which could lead to a state of criminal incapacity but also incapacity caused by other factors such as provocation. 16 Provocation and anger are different concepts, just as cause and effect are. In criminal law, the term provocation seems to be used to include both concepts, thereby throwing light on the accused’s conduct. 17 It has been held that the words “provoked” and “provocation” are to be given their plain ordinary meaning, unaffected by any technical legacies. The concept provocation indicates a situation in which a provoker elicits the anger or wrath of the provoked by means of challenging or defiant behaviour, and the latter in reaction to the provocative behaviour commits a criminal act. 18 Legally, the emotional response of the victim to the insulting or provocative words or conduct is relevant. 19

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19. Snyman supra (n 17) 235.
1.3 The effect of provocation on the human character

When a person has been provoked, anger and rage are the predominant emotions that are experienced. 20 The normal reaction to provocation can be described as follows: 21 When anger or rage has been invoked, the pulse rate, blood pressure, blood circulation and blood sugar levels of the body all rise. The breathing rate becomes more rapid, the muscles become more tense and a person is less likely to become fatigued since blood is drawn from other areas of the body such as the internal organs, the digestive system and the alimentary canal.

There is also a decrease in sensory perception. These reactions are the result of impulses emitted from the hypothalamus which works in conjunction with the central nervous system and positive impulses are sent back to the brain with the result being that the brain is alerted into taking further action.

The above processes place the body under strain, which makes it ready for fight or flight and prepares it for extreme physical activity. Once this physical reaction has taken place, the body will revert back to its normal function.

20. Depending on the personality of the provoked, different emotions can be experienced such as shock, fear and self-pity.
21. Bergentuin supra (n 18) 263.
Two aspects are of essential importance. Firstly, the system that is responsible for making the body more tense operates on an all-or-nothing basis. There is thus no question of gradual increase or decrease of tension. Secondly, the reaction to the tension differs from individual to individual. Clinical experimentation has shown that some individuals are highly susceptible to this kind of tension, whereas others have a natural resistance to it. Genetic as well as external factors play a collective role regarding susceptibility towards tension. Individual reactions to tension do not make an attempt to generalize impossible. There is proof that the differences in the susceptibility to tension when provoked are influenced by the duration of the provocative conduct. There is also proof that the rational factors influence emotional behaviour in the sense that the aggressive reaction decreases in comparison with the fairness of the provocative conduct. 22

The common factors of all provocative conduct, whether it be insults or threatening conduct, can, according to psychologists, affect not only an individual’s self-image, but also his self-respect. 23

22. Ibid 264.  
23. Ibid.
It is clear that emotions in general, especially anger and rage, can affect not only an individual’s freedom of will, but also his or her ability to act in accordance with the distinction between right and wrong. Although it is possible to determine the relevance of human emotion and how it brings to bear on the elements of criminal liability, it is essential that both the common effect of extreme provocation and the character of the offender be established through expert testimony.  

It is clear that in provocation the person who suffers the eventual harm may play a direct role in the causation of the crime. According to Conklin, a study conducted in the United Kingdom revealed that the homicide victim may be the first to use force. About one murder in four is victim-precipitated, although one study found that 38 per cent of a sample of murders were caused in part by the victim. There is a continuum from deliberate provocation by the victim, to some involvement by the victim, to little or no victim contribution. One study has examined the social interaction between the offender and the victim prior to the commission of the murder. In about half of the seventy murders there was a prior history of hostility or even physical violence between the parties to the crime. This study found that the homicides were not one-sided events in which a passive victim was attacked by the murderer.

24. Ibid 265.
25. Clarkson and Keating supra (n 4) 685.
In fact, in nearly two thirds of the murders the victim initiated the interchange, the offender stated his intent to harm the victim and the offender killed the victim. 26 Victim studies bring an awareness of how close in reality the plea of provocation may be. With a plea of provocation, even if the response to the provocation is reasonable, the accused is still held to be blameworthy to some extent and thus guilty of manslaughter. Yet he may in some 25 per cent of cases be the true victim of the whole affair. Is it not possible to argue that in such cases the apparent victim has no claim at all to the law’ protection and that the accused ought to be regarded as blameless? And in cases where the victim has played a part and non-fatal injuries have been sustained, should the law reflect this by holding the accused less responsible rather than merely mitigating the severity of the sentence? While it may be that the common law defence of provocation was a partial justification, since the inception of section 3 of the Homicide Act of 1957, the law now seems to regard the defence as a “partial excuse”. The law is no longer solely concerned with the victim-offender relationship. 27 Provocation may now be pleaded even if the victim was not the provoking agent. In short, the thrust of the enquiry has shifted from the victim (and his or her provocative acts) to the accused. 28 As in cases of diminished responsibility and duress, the law recognizes that man is not in perfect control of his emotions, particularly when subject to great pressure. Keeping this in mind, it is now necessary to consider how the South African courts have dealt with the issue of provocation.

26. Ibid.
27. Ibid 686.
28. Ibid.
CHAPTER 2

THE EFFECT OF PROVOCATION ON CRIMINAL LIABILITY IN SOUTH AFRICAN LAW

2.1 History of the defence of provocation

Provocation is frequently dealt with under criminal capacity because it has in the past been treated like intoxication. 29 Before the Chretien 30 case, intoxication was not regarded as a complete defence against criminal liability. It could at the most have the effect of reducing the crime of, for example, murder to the less serious one of culpable homicide. The reason was obviously the unacceptability of allowing a person who voluntarily consumed liquor and thereafter committed an offence, to escape criminal liability. It becomes clear that he or she was convicted not because he or she committed a voluntary act, but because of his or her prior voluntary conduct of consuming liquor. In order to justify this apparent anomaly, it was rationalized that an intoxicated person could not form specific intent but only a general or ordinary intent. This type of approach was, however, severely criticized as being in conflict with the principle that a person who is criminally non-responsible should not be found guilty. To punish a person merely because his or her criminal behaviour resulted from intoxication, was argued, amounted to a resuscitation of the now rejected versari in re illicita doctrine. 31

29. Snyman supra (n 17) 236.
30. S v Chretien supra (n 3).
31. Dlamini supra (n 11) 130.
It was also contended that the distinction between specific intent and general intent is a futile one. If a person could not form a specific intent, he or she could not form a general intent. On the other hand, it has been argued that the “specific intent” doctrine is not completely useless. It can have the effect of reducing a serious crime to a less serious one. However, one of the reasons for the rejection of this doctrine was because it was of English origin and therefore not part of our law.

Roman, Roman-Dutch (both directly) and English law (indirectly) treated provocation as a factor which in specific circumstances might mitigate the punishment to be handed out to the particular offender. Despite attempts to purify South African law of English influences, English law of provocation was adopted in section 141 of the Native Territories Penal Code (also known as the Transkeian Penal Code). It was eminently pragmatic. Section 141 reads as follows:

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

It further provides that:

“[a]ny wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool.”

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32. Dlamini supra (n 11) 131.
33. Ibid.
34. Dean “Provocation” 1964 Responsa Meridiana 133.
Section 141 envisages a type of partial excuse situation: even if the killing was intentional “homicide which could otherwise be murder [it] may be reduced to culpable homicide.” This is illustrated by Van den Heever JA in R v Hercules:

“The law recognizes a hybrid or middle situation where there is an intention to kill but where that intention is not entirely but to some extent excusable.”  

Section 141 was accepted by the Appellate Division in R v Buthelezi, as reflecting South African law on this topic. However, while accepting it, the court did not really apply it for it held that provocation – satisfying the requisite requirements laid down in the Code – was a factor which could rebut the presumption that every killing was intentional. This is clearly at variance with the role assigned to provocation in the Code. At the time that the decision in Butelezi’s case was handed down by the Appellate Division, the test for mens rea was an objective one, it being whether a reasonable person would have lost his or her self-control.

When the matter again arose for decision by the Appellate Division, the position regarding mens rea had been considerably altered. A strong tendency had emerged to treat the test for mens rea as subjective. In light of this development the court felt that provocation could no longer play the negative role assigned to it in the Butelezi case. Accordingly,

36. Burchell and Milton supra (n 16) 280.
37. 1924 AD 160.
38. Ibid.
39. Ibid.
40. Ibid.
in *R v Thibani* \(^{41}\) Schreiner JA held that:

> “[p]rovocation is not a defence… but is a special kind of material from which in association with the rest of the evidence, the decision must be reached whether or not the crown has proved the intent, as well as the act, beyond reasonable doubt.” \(^{42}\)

In *R v Tenganyika* \(^{43}\) the Federal Supreme Court felt that provocation had been given a too restricted role in the *Thibani* case. It was suggested that provocation could not only be used in the way suggested by the court, but also that it could be used in the way indicated in section 141. \(^{44}\) This suggestion was rejected by the Appellate Division in *R v Krull*, \(^{45}\) because the court felt that these two roles were incompatible with one another, and that the approach in *Thibani*’s case was the correct one. In this case, Schreiner JA emphasized that an objective dimension to the examination of provocation was essential for practical reasons. Hot headed persons, so the argument ran, should not be allowed to give free reign to their emotions. \(^{46}\) The decision in the *Krull* case still showed signs that the objective test for mens rea was not a dead letter and as a result the exact role of provocation was still to a small degree uncertain.\(^{47}\) In the case of *S v Mini* \(^{48}\) the Appellate Division decided once and for all that the test for mens rea was a completely subjective one.\(^{49}\)

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41. 1949 4 SA 720 (A).
42. Ibid 731.
43. 1958 3 SA 7 (FC).
44. Ibid 12.
45. 1959 3 SA 392 (A).
46. Ibid 396FF.
47. Dean supra (n 34) 134.
48. 1963 3 SA 188 (A).
49. Ibid 224.
The decision in *S v Mokonto* \(^{50}\) constituted an important milestone in the evolution of South African law on provocation. The facts of *Mokonto* are bizarre and to quote Holmes JA:

> “*The case illustrates the dreaded influence of witchcraft which still holds in thrall the minds of some Bantu.*” \(^{51}\)

In this case, the accused’s alternative plea of provocation is relevant. In contradistinction to previous cases and to section 141 of the Native Territories Penal Code and “in harmony with the subjective approach of modern judicial thinking and with the direction of the development in comparatively recent judgments of the Appellate Division”, it was held that provocation no longer reduces homicide from murder to culpable homicide.\(^{52}\)

With reference to the decision in *S v Dlodlo* \(^{53}\) the court conceded that the presence of provocation may indicate an absence of intention to kill. It was pointed out that the facts of a particular case might show that provocation, far from negating an intention to kill, actually caused it. The crime then would be murder, not culpable homicide. However, depending on the circumstances, such provocation could be relevant to extenuation.\(^{54}\) This then, according to Holmes JA, is the law on provocation:

1. Section 141 of the Transkeian Penal Code should be confined to the territory for which it was passed.

2. In crimes of which specific intention is an element, the question of the existence of such intention is a subjective one, namely, what is going on in the mind of the accused.

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\(^{50}\) 1971 2 SA 319 (A). In this case the appellant, a young tribal Zulu, had been found guilty of murder with extenuating circumstances, of a woman whom he considered to be a witch. According to the appellant’s evidence, the woman had on the fateful day told him: “You will not see the setting of the sun.” The appellant had reason to take this threat seriously, since about a month previously the deceased had informed him and his two brothers that they were all going to die. This proved uncannily accurate as regards the two brothers, and with a view to averting such fate for himself, the appellant killed the witch. He decapitated her with a cane-knife in order, so he explained, to prevent her from rising again, and he chopped off her hands since these had handled the “muti” (the medicine with which she allegedly caused the death of the two brothers.)

\(^{51}\) Ibid 203.

\(^{52}\) Ibid 325.

\(^{53}\) 1966 2 SA 401 (AD).

\(^{54}\) *S v Mokonto* supra (n 50) 326.
3. Provocation, subjectively considered, is also relevant to extenuation or mitigation.\textsuperscript{55} It is clear from the discussion above that although section 141 of the Penal Code was once regarded as the correct reflection of our law,\textsuperscript{56} serious reservations have been expressed against this conclusion.\textsuperscript{57} This is evident from the decision in the \textit{Thibani} case where it was held that provocation is not a matter regulated by mechanical rules as presupposed in section 141, but merely a factor to be considered in determining whether the accused had the requisite intention to murder at the time the crime was committed. This view led to the diminishing influence of section 141 in our criminal law. In subsequent cases the courts vacillated between a subjective and objective test for provocation.\textsuperscript{58}

It was in the \textit{Mokonto} \textsuperscript{59} case that the Appellate Division firmly decided that provocation is a material factor to be taken into account in ascertaining whether the accused subjectively had the particular intention. The court also decided that provocation may sometimes have a contrary effect to that provided for in section 141 of the Penal Code: instead of negating the intention to murder, it may in fact confirm the presence of such intention. In this respect, therefore, the \textit{Mokonto} decision is particularly significant. However, the court, did not go to the extent of deciding that provocation can be a complete defence. Recent developments have indicated that this has happened.\textsuperscript{60}

\textsuperscript{55} Van Niekerk “A Witch’s Brew from Natal – Some Thoughts on Provocation” 1972 \textit{SALJ} 171.
\textsuperscript{56} \textit{R v Thibani} supra (n 41).
\textsuperscript{57} Ibid.
\textsuperscript{58} A subjective test was used in \textit{S v Mangondo} 1963 4 SA 160 (A); \textit{S v Dlodlo} supra (n53); \textit{S v Delport} 1968 1 PH H 172 (A).
\textsuperscript{59} \textit{S v Mokonto} supra (n 50).
\textsuperscript{60} \textit{S v Arnold} supra (n 7).
2.2 Current status of provocation: visiting the case law

Since the decision in *S v Chretien* 61 in 1981, a new approach to provocation is followed. The question now asked is whether provocation (that is, the accused’s angry response) could exclude the basic “elements” of liability – in the same way intoxication can.62

In *S v Van Vuuren* 63 the above question was addressed in an obiter dictum. In this case the judge also made a much broader statement in respect of what is meant by provocation. The judge said:

“I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where failure to comprehend what he is doing, is not attributed to drink alone, but to a combination of drink and other factors such as provocation and severe mental or emotional stress. In principle there is no reason for limiting the inquiry to the case to where a man too drunk to know what he is doing. Other factors which may contribute towards the conclusion that he failed to realize what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing criminal liability.” 64

Also in *S v Lesch* 65 the traditional approach to provocation was expanded to include not only the loss of self-control caused by provocative words or conduct but also some emotional disturbances such as emotional stress. Although the accused in both *S v Van Vuuren* 66 and *S v Lesch* 67 were convicted of murder, the importance of both judgments was that emotional stress or provocation was considered relevant in the determination of the accused’s criminal capacity.

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61. *S v Chretien* supra (n 3).
63. 1983 1 SA 12 (A) 17 G-H.
64. This dictum in *S v Van Vuuren* supra (n63) was quoted with approval in *S v Arnold* supra (n7) at 264.
65. 1983 1 SA 814 (0).
66. *S v Van Vuuren* supra (n 63).
67. *Sv Lesch* supra (n 65).
However, in *S v Arnold* 68 strong authority is laid down for the viewpoint that emotional factors can lead to an acquittal on the basis of a defence of provocation. Arnold suffered from severe emotional stress to such an extent that when he shot his wife:

“...[H]is conscious mind was so flooded by emotions that it interfered with his capacity to appreciate what was right or wrong and, because of his emotional state, he may have lost the capacity to exercise control over his actions.” 69

The court was of the opinion that:

“....it is not only youth, mental disorder, or intoxication which could lead to a state of criminal incapacity, but also incapacity caused by other factors such as extreme emotional stress.” 70

*S v Campher* 71 confirmed the principle in *S v Arnold*. 72 The majority of the court accepted a general test for criminal capacity in South African law – a test wide enough to include provocation as a complete defence. 73

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68. *S v Arnold* supra (n 7). In this case the accused was charged with killing his twenty-one year old wife. Prior to the day of the killing the accused had been subjected to a good deal of emotional stress. One of his sons from a previous marriage suffered from a serious hearing disability and because his second wife (the deceased) developed a hostile attitude to the boy, the accused had to place the child in a special home. The accused was very attached to the boy. The deceased’s mother had moved in with the couple and she suffered from a hysterical condition. The relationship between the accused and the deceased was strained. Now and again she left the house to stay somewhere else but he managed to encourage her to return. On the day in question the accused had just taken his disabled son to the home after arguing with the deceased. Clearly returning his son to the home was a traumatic event for the accused. On his arrival at his house, he encountered his wife. He had a pistol in his possession, which he claimed he needed because his job involved handling large sums of money and sometimes his work took him into areas where there had been riots. When he encountered his wife on his return home, he claimed that she was so positioned in the room that he was unable to put the gun in a secure place. He held the gun in his hand and during their discussions he hit it against the couch to emphasize a point. The accused was upset because his wife did not tell him where she was staying and what work she was doing. During their conversation the gun went off, the bullet going in the opposite direction to where the deceased was standing. The accused admitted that he could not recollect reloading the pistol, but also conceded that he must have done so. Apparently the deceased then bent forward “displaying her bare breasts” and referred to her desire to return to her work as a stripper. A second shot was fired and the deceased was struck and killed.

69. Ibid 263 C-D.

70. Ibid 264 C-D.

71. *S v Campher* supra (n 13).

72. *S v Arnold* supra (n 7).

73. Ferreira supra (n 62) 171.
The issue of emotional stress constituting a complete defence was again considered in *S v Smith*.

In an obiter dictum it was said:

“I assume for the present purposes that what was described as an ‘emotional storm’ or ‘emotional flooding of the mind’ can result in loss of criminal capacity, that is that such an emotional disturbance could result in a person being, in the words of s 78, incapable of appreciating the wrongfulness of her act or of acting in accordance with an appreciation of such.”

As a result, provocation or severe emotional distress may deprive a person of the capacity to appreciate the wrongfulness of his conduct or to act in accordance with this appreciation, and for this reason it seems to constitute a complete defence to criminal liability.

The South African courts have not yet drawn a clear distinction between provocation and emotional stress. Although a person can, in principle, be provoked by the force of surrounding circumstances, as opposed to human conduct, provocation is usually seen as being caused by another human being. Emotional distress which often involves an accumulation of events over a reasonable period of time, rather than an isolated event or events, can and often is, caused equally by human beings or by surrounding circumstances. In principle, the origin of the stressful condition in which the individual is placed does not matter but may affect the intensity of the ultimate condition.

It has been contended that there is no need to define a numerus clauses of biological grounds which could lead to a lack of criminal capacity. A general criterion for criminal responsibility

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74. 1990 1 SACR 130 (A).
75. Ibid 134J–135A.
76. Ferreira supra (n 62) 171.
77. Burchell and Milton supra (n 16) 239.
could be found in a mere psychological test for determining criminal capacity.\(^78\) The defence of non-pathological criminal incapacity was analyzed in S v Laubscher:\(^79\)

“To be criminally liable, a perpetrator must inter alia at the time of the commission of the alleged offence have criminal capacity. Criminal capacity is therefore a prerequisite for criminal liability. The principle of criminal capacity is an independent subdivision of the doctrine of mens rea….To be criminally accountable, a perpetrator’s mental faculties must be such he is legally to blame for his conduct. The recognized psychological characteristics of criminal capacity are: (1) The ability to distinguish between the wrongfulness or otherwise of his conduct. In other words, he has the capacity to appreciate that his conduct is unlawful. (2) The capacity to act in accordance with the above appreciation in that he has the power to refrain from acting unlawfully; in other words, that he had the ability to exercise free choice as to whether to act lawfully or unlawfully. If either one of these psychological characteristics is lacking, the perpetrator lacks criminal capacity, [for example] where he does not have the insight to appreciate the wrongfulness of his act. By the same token, the perpetrator lacks criminal capacities where his mental powers are such that he does not have the capacity for self-control.”\(^80\)

This dictum implies that the pathological cause of the functional disturbances of the conscious mind is not relevant to determine liability, the relevant question is whether the accused was capable of appreciating the wrongfulness of his act and whether he was acting in accordance with such appreciation.\(^81\) Consequently any factor, for example fear \(^82\) will be legally relevant if it leads to a disruption of the cognitive and / or conative functions of the conscious mind.\(^83\)

In S v Bailey\(^84\) the court recognized that an emotional state per se (in this instance fear),

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\(^79\) S v Laubscher supra (n13).

\(^80\) Ibid 166F-167A. Although the accused’s plea of non-pathological incapacity (resulting in a total psychological breakdown) was rejected, it was held that such a defence could in principle lead to an acquittal.

\(^81\) Ferreira supra (n 62) 173.

\(^82\) S v Bailey 1982 3 SA 772 (A).

\(^83\) Ferreira supra (n 62) 174.

\(^84\) S v Bailey supra (n 82).
could lead to loss of criminal capacity:

“Dit is denkbaar dat die beskuldigde so vreesbevange kan word dat hy nie die gevolge van sy handeling kan insien nie of kan insien dat wat hy doen wederregtelik is nie; in ‘n uiterste geval kan hy selfs ontoerekeningsvatbaar word.”  

The idea of a general test for criminal capacity was taken further in S v Campher 86 where two of the three judges agreed that the defence of incapacity is not limited to section 78 of the Criminal Procedure Act. 87 88 It was felt that as a result of the recommendations of the Rumpff Commission, 89 section 78 of the Criminal Procedure Act was so worded as to provide for criteria for the determination of the criminal accountability of someone who suffers from a “mental illness” or a “mental defect.” 80

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85. Ibid 796 C.
86. S v Campher supra (n 13). In this case the deceased (husband) of the accused had assaulted her and mocked her religion, forced her to send her children from a previous marriage to live with her former husband, forced her to clean his pigeon coops, on occasion compelled her to use a toiled outside the house at night, compelled her to arm herself with a firearm and investigate noises at his pigeon coops at night, and often insisted that she sit at his bedside throughout the night to protect him against evil spirits. On the day of the attack, the accused had started the day in an exhausted state. The deceased had forced her to stay awake at his bedside throughout the night, to ward off the spirits he believed endangered him. He started the day in a characteristically bad mood; he quarreled offensively with a all and sundry. He busied himself fitting a bolt-lock to his pigeon coop. The accused had to help him by holding a metal fitting while he bored a hold in the wooden doorframe. She was in an extremely uncomfortable position and did not hold the fitting as requested; as a result the hole was not drilled straight and the screw intended for it would not fit. This enraged the deceased, who threatened the accused with a screwdriver. She fled to their house, but he followed her and prevented her from locking him out. She armed herself with a pistol. The deceased was too enraged to be deterred by this. He forced her back to the pigeon coop. She went there still armed with the pistol. There the deceased berated her to go on to her knees and pray for the hole to become straight. The accused then shot the deceased.
87. Viljoen AJ and Boshoff AJ.
88. 51 of 1977.
90. Ferreira supra (n 62) 175. On the facts of Campher, Viljoen JA held that the severe emotional stress from which the accused suffered, impaired her capacity to withstand the impulse to kill the “monster” (her husband). Viljoen JA reached the conclusion that the accused had to be acquitted as a result of this “irresistible impulse” under which she labored at the time of the killing. However, Boshoff JA and Jacobs JA found that Campher was able to control her conduct and therefore her defence did not succeed.
That the application of section 78 has been so restricted does not mean that the criteria which have developed in the South African law and have now been embodied in the section cannot be applied to temporary impairment of a person’s mental state. The principle of criminal accountability ought to apply irrespective of whether the mental disorder or the change in the emotional condition was caused by liquor or severe emotional stress. The different mental conditions should not be compartmentalized, a general principle should be followed by applying the criteria for criminal accountability irrespective of whether the accused’s aberration was of a temporary or permanent nature.91

In three later Appellate decisions (S v Laubscher,92 S v Calitz,93 and S v Smith)94 the court recognized the existence of a general test for criminal capacity, but the defence did not succeed in either of the cases. In S v Laubscher95 a distinction was made between statutory criminal incapacity 96 and non-pathological criminal incapacity of a temporary nature. The latter can be a result of non-pathological condition that is not attributable to a mental illness or mental defect in the form of a pathological disturbance of the conscious mind. The court held that it is not necessary to specify the condition which can lead to non-pathological criminal incapacity.97

In S v Smith98 the case of Laubscher99 was quoted in approval of the non-pathological test for criminal incapacity.

91. Ferreira supra (n 62) 175.
92. S v Laubscher supra (n 13).
94. S v Smith supra (n 74).
95. S v Laubscher supra (n 13).
96. In terms of s 78(1) of the Criminal Procedure Act 51 of 1977.
97. Ferreira supra (n 62) 175.
98. S v Smith supra (n 74) at 134J-135A.
99. S v Laubscher supra (n 13).
After the decision in *S v Wiid*[^100] there can be no doubt that a general test for criminal capacity is finally accepted in South African law. Not only was the defence of non-pathological criminal incapacity acknowledged but on appeal the defence also succeeded as a result of the application of this principle. It is clear that the cause of the dysfunction of the accused’s conscious mind is irrelevant to determine liability – it only concerns the capacity of the accused to appreciate the wrongfulness of his conduct or to act in accordance thereof.[^101]

Kumleben JA, delivering the unanimous judgment of the Appellate Division in *S v Potgieter*,[^102] emphasized the need to subject the evidence adduced by the appellant in support of the defence of non-pathological incapacity to careful scrutiny. The judge of appeal offered this cautionary observation:

> “Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. Thus – as one knows - stress, frustration, fatigue and provocation, for instance, may diminish self-control to the extent that, colloquially put, a person ‘snaps’ and a conscious act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an involuntary act has been committed. The facts...must therefore be closely examined to determine where the truth lies.”[^103]

[^100]: *S v Wiid* 1990 1 SACR 561 (A). In this case the psychiatric evidence was to the effect that given the accused’s intake of sedatives and alcohol and lack of eating, combined with the severe assault inflicted by the deceased and threat of death after the accused discovered that her husband was having another extramarital affair, the accused may well have lacked criminal capacity altogether and may not have been able to distinguish between right and wrong. The trial court held that it may have reasonably been possible that the accused may have been concussed after the assault and during the time she fired the fatal shots thus accounting for the fact that she could not remember pulling the trigger of the pistol. The Appellate Division clearly emphasized that where a foundation for the defence of temporary non-pathological incapacity is laid, the State bears the burden of disproving this defence beyond reasonable doubt. Here the State was held not to have discharged this burden and the defence of temporary non-pathological incapacity succeeded.

[^101]: Ferreira supra (n 62) 176.


[^103]: Ibid 73-4.
The important message that emerges from the Potgieter case\(^{104}\) is that the defence of non-pathological incapacity will be very carefully scrutinized by the courts,\(^{105}\) and, if the version of the facts presented by the accused is held to be unreliable or untruthful, the psychiatric evidence based on the supposed truthfulness of the accused’s version of the facts must also fall to the ground. What is important is that the courts have in principle been prepared to accept a defence of provocation. However, it is also become necessary to give attention to the evidential aspects surrounding provocation cases.

In S v Nursingh\(^{106}\) the accused after prolonged physical, psychological and sexual abuse at the hands of his mother, shot not only his mother but also his grandparents. The case for the defence was that he “had a personality make-up which predisposed him to a violent reaction, and that his conduct on the fateful night became so clouded by an emotional storm that he lacked such criminal capacity.” A psychologist and psychiatrist gave evidence that the circumstances faced by the accused, including the previous history of sexual abuse by his mother, triggered off a state of “altered consciousness” which deprived him of awareness of normality. The psychiatrist described this apparently well-documented condition, as:

> “...a separation of intellect and emotion, with temporary destruction of the intellect, a state in which, although the individuals actions may be goal-directed, he would be using no more intellect than a dog biting in a moment of response to provocation.”\(^{107}\)

Squires J, reaffirming the need to scrutinize defences of non-pathological incapacity

\(^{104}\) S v Potgieter supra (n 102).

\(^{105}\) Burchell and Milton supra (n 16). 285. See also S v Kensley 1995 1 SACR 646 (A) at 658J; S v Ingram 1995 1 SACR 1 (A) 45 and S v Kalogoropoulus 1993 1 SACR 12 (A) where it was emphasized that the accused is required in evidence to lay a factual foundation for the defence of temporary non-pathological incapacity. The accused failed to so do in S v Potgieter supra (n 102.)

\(^{106}\) S v Nursingh supra (n 2).

\(^{107}\) Ibid 333 D-E.
carefully, opined that there was a reasonable possibility that the accused was telling the truth. The test of capacity is subjective and if there is a reasonable doubt whether capacity is present, the accused must receive the benefit of the doubt. One of the problems which arises in the psychiatric evaluation of any person, whether that person has raised the defence of pathological or non-pathological incapacity, is that the psychiatric evaluation takes place before the full evidence has been heard in court. It might therefore be advisable, in the interests of the pursuit of truth, to allow the psychiatrist who has given evidence of the mental state of the accused an opportunity to re-evaluate his opinion after hearing all the evidence.  

In *S v Di Blasi*, 109 where non-pathological incapacity was raised as a factor mitigating sentence, Vivier JA summarized the law as regards a foundation for the defence of non-pathological incapacity as follows:

“It is for the accused person to lay a factual foundation for his defence that non-pathological causes resulted in diminished criminal responsibility, and the issue is one for the court to decide. In coming to a decision the court must have regard not only to the expert evidence but to all the facts of the case including the nature of the accused persons actions during the relevant period…. This court emphasized the need to subject the evidence by the accused person in support of a defence of non-pathological incapacity to careful scrutiny.” 110

It is therefore clear that the courts must carefully scrutinize any possible defences raised by the accused. This is to avoid any potential abuse of the defence of provocation.

108. Burchell and Milton supra (n 16) 286.
110. Ibid 7F-C.
2.3 Problems associated with the defence of provocation

Provocation is a defence mirred in controversy and inconsistent decisions. This is clearly evident from our earliest case law dealing with the subject. As a result of our court’s past use of imprecise terminology and deficient reasoning, it has created a culture of legal confusion as to the precise nature of the defence which in turn has allowed for the setting of dangerous precedent for future consideration by our courts. One of South Africa’s more recent cases, in particular that concerning road rage, has highlighted some of the main problems associated with the defence. These will now be considered.

2.3.1 Distinguishing automatism from non-pathological incapacity

In S v Eadie\textsuperscript{111} the accused killed the deceased in circumstances commonly referred to as road rage. While driving home after spending an evening at his sports club and where he had consumed a considerable amount of alcohol, the accused was harrassed by another driver who either drove behind the him with his headlights on bright or overtook him, then slowed down again. When the two vehicles stopped at a set of traffic lights, the accused alighted from his vehicle with his hockey stick in hand. As he approached the other vehicle, the driver’s door opened and the accused struck at it with his hockey stick breaking the stick in half. He tried to pull open the door, which was then kicked back at him. He then kicked the driver with both feet and punched him on the head. The driver slumped towards the passenger’s seat. The accused punched him repeatedly on his face, pulled him out of the vehicle, stamped on his face with the heel of his shoe and then kicked the bridge of his nose.\textsuperscript{112}

\textsuperscript{111} 2001 1 SACR 172 (C).
\textsuperscript{112} Ibid 174C-175G.
The defence would appear simple enough: the accused relied on non-pathological incapacity. However, the matter was complicated by the court’s tendency to confuse the defence with sane automatism. In sane automatism the State is required to prove that the accused voluntarily committed the unlawful act and that he intended to do so. Intention is assessed subjectively and where applicable, conduct is assessed objectively. Conduct is voluntary where it is subject to the conscious will of the accused and therefore involuntary when not subject to the conscious will. Capacity in one respect appears to be similar to conduct. This relates to the second leg of the enquiry: whether the accused was able to control himself in accordance with his appreciation of right and wrong. Thus capacity is absent where the accused lacked self-control. It is unclear in our law when self-control is considered absent.\textsuperscript{113}

The confusion surrounding the conflation of the two defences as well as the use of imprecise terminology by our courts has a long standing history and dates back to when provocation as a complete defence was first recognized.\textsuperscript{114}

In \textit{S v Arnold} \textsuperscript{115} Burger J adopted the approach of finding that the accused lacked capacity, having already concluded that the State had failed to prove that the accused had acted voluntarily.\textsuperscript{116} In light of this the learned judge declined to examine whether the accused had the necessary intention. It is difficult to appreciate why it was deemed necessary to refer to capacity or intention at all, after a finding of automatism, which by definition excludes the possibility of the presence of the mens rea elements of liability.\textsuperscript{117}

\begin{flushleft}
\textsuperscript{113}. Louw supra (n 9) 207.
\textsuperscript{114}. \textit{S v Arnold} supra (n 7).
\textsuperscript{115}. Ibid 264D.
\textsuperscript{116}. Ibid 263H.
\textsuperscript{117}. Hoctor “Road rage and reasoning about responsibility” 2001 \textit{SACJ} 196 at 201.
\end{flushleft}
In *S v Laubscher* \(^{118}\) there are indications of terminological imprecisions. Joubert JA posed the question for the court to answer as follows:

“Die vraag is wat die toestand van die appellant se geestesvermoe ten tyde van die pleeg van die beweerde misdade was. Hy het `n totale sielkundige ineenstorting of persoonlikheidisintegrasie van `n tydelike aard ondergaan sodat hy onwillekeurig opgetree het omdat hy nie weerstandskrag gehad het nie. Met ander woorde het hy sonder wilsbeheer ten tyde van die pleeg van die beweerde misdade gehandel?…” \(^{119}\)

It is clear that the lack of conative capacity does not necessarily result in involuntary behaviour. \(^{120}\) A similar mistake was made later where the learned judge stated:

“Ofskoon die appellant se optrede irrasioneel was en nie in ooreenstemming met sy gewone persoonlikheid was nie het hy wel willekeurig opgetree omdat hy onderskeidingsvermoë en weerstandskrag gehad het sodat hy nie antoerekeningsvatbaar was nie.” \(^{121}\)

This error was perpetuated in the Appellate Division case of *S v Wiid* \(^{122}\) where Goldstone AJA cited the question formulated by the court in *S v Laubscher* and concluded that there was reasonable doubt about the question whether “…die appellante willekeurig opgetree het.” However, the finding did not relate to voluntariness at all, but to lack of capacity. In light of her “onbeheersde optrede” there was doubt as to whether she could be found to be “criminally capable.” \(^{123}\)

In *S v Nursingh* \(^{124}\) the court conflated the defence of incapacity with intention as well as

\(^{118}\) *S v Laubscher* supra (n 13).

\(^{119}\) Ibid 171D.

\(^{120}\) Hoctor supra (n 117) 202.

\(^{121}\) *S v Laubscher* supra (n 13) at 173B.

\(^{122}\) *S v Wiid* supra (n 100).

\(^{123}\) Hoctor supra (n 117) 202.

\(^{124}\) *S v Nursingh* supra (n 2).
automatism, and also seemed to have confused the capacity test:

“The primary issue in the matter is whether, at the time and in the circumstances in which he fired those ten shots, he had the mental ability or capacity to know what he was doing and whether what he was doing was wrongful. If he did, then a second issue falls to be considered, which is whether he could have formed the necessary level of intention to constitute the offence of murder.” 125

The court’s formulation of the capacity test appears to be incorrect. The test should be formulated as follows: criminal capacity consists of the capacity to appreciate right and wrong, and the ability to act in accordance with such appreciation. 126 At least the court in the above quotation distinguishes between capacity and intention but it does not maintain this distinction consistently throughout the judgment:

“Now, although the onus is on the State to show that the accused had the necessary criminal capacity to establish and found the mens rea necessary to commit an offence, where an accused person relies on non-pathological causes in support of a defence of criminal incapacity, then he is required to lay a factual foundation for it in evidence, sufficient at least to create a reasonable doubt on the issue as to whether he had the mental capacity.” 127

Although the courts have in the past referred to the “capacity to form an intention”, the trend has been to deal with capacity as a distinct element of liability. Perhaps then not too much might be made of the conflation, except that the court’s other references to capacity and intention are too problematic to ignore: 128

125. Ibid 332 E-F.
126. Burchell and Milton supra (n 16) 105.
127. S v Nursingh supra (n 2) at 334B-C.
128. Louw supra (n 9) 208.
“In our law a man is responsible only for wrongful acts that he knows he is committing. Before he can be convicted of an offence, he must have the intellectual or mental capacity to commit it. That means an ability to distinguish between right and wrong and act in accordance with that appreciation. If that is lacking the obviously it follows he does not have the necessary capacity and it is for the prosecution to prove that he knew what he was doing.”

It appears from the above that once capacity is lacking, the onus shifts to the State to prove intention. This is of course incorrect, for once capacity is absent, the accused must be acquitted. Finally, the court again conflated capacity and intention in its conclusion:

“At that explosion [the shooting of the three deceased] was not the result of a functioning mind, so all its consequences can be regarded as unintentional.”

While it is true that there can be no intention where there is no capacity, the capacity enquiry is merely a preliminary one and so capacity and intention should not be conflated.

The existence of confusion regarding the two defences was accepted by Griesel J in *Eadie*:

“There appears to be some confusion between the defence of temporary non-pathological incapacity, on the one hand, and sane automatism, on the other. The academic writers…point out that they are in fact two distinct and separate defences. At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity.”

However, the problem with the above formulation is that either the two defences are distinct or they are the same: they cannot be both the same in some circumstances and distinct in others. Thus, also this viewpoint is not technically correct.

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129. *S v Nursingh* supra (n 2) at 339A-B.
130. *Louw* supra (n 9) 209.
131. *S v Nursingh* supra (n 2) at 339D.
132. *Louw* supra (n 9) 209.
133. *S v Eadie* supra (n 111).
134. Ibid 178A-C.
135. *Louw* supra (n 9) 211.
2.3.2 An implied objective test in determining criminal incapacity

The second aspect of confusion that the Eadie judgment \(^{136}\) raises is the implied use of an objective test for determining criminal incapacity. Our law clearly holds that the capacity enquiry is a subjective one:\(^{137}\)

> “Thus the law is clearly to the effect that where provocation and emotional stress are raised as a defence, it is a subjective test of capacity without any normative evaluation of how a reasonable person would have acted under the same strain and stress. What matters is what was going through the accused’s mind at the relevant time.” \(^{138}\)

The origin of the “subjective” test can be traced back to the 1950’s when the subjective evaluation of intention replaced an objective one and the courts rejected the presumption that a person intended the natural and probable consequences of his acts.\(^{139}\) The next milestone was in 1977 when the Appellate Division in *S v De Blom* \(^{140}\) held that the intention enquiry included an investigation into subjective knowledge of unlawfulness. In 1981 the Appellate Division in *S v Chretien* \(^{141}\) held that self-induced intoxication could also exclude subjective capacity.

However, in *Eadie* \(^{142}\) the court introduced an element of objectivity into the enquiry:\(^{143}\)

> “While I do not doubt that those stresses were present and played a significant role in his life, I do not accept that in the present case they could have resulted in a lack of capacity, as suggested.

\(^{136}\) *S v Eadie* supra (n 111).

\(^{137}\) Louw supra (n 9) 211.

\(^{138}\) *S v Moses* 1996 SACR 701 (C) at 714B-C.

\(^{139}\) Burchell “Unraveling compulsion draws provocation and intoxication into focus” 2001 SACJ 363 at 369.

\(^{140}\) 1977 3 SA 513 (A).

\(^{141}\) *S v Chretien* supra (n 3).

\(^{142}\) *S v Eadie* supra (n 111).

\(^{143}\) Louw supra (n 9) 211.
I agree with Dr. Kaliski that there was nothing unique about the situation of the accused. Hundreds of thousands of people daily find themselves in similar or worse situations, yet they do not go out clubbing fellow-motorists to death when their anger may be provoked."  

Despite our law’s acceptance in principle of the subjective test, a more explicit objective requirement for capacity was set out in *S v Kensley* and was quoted in *Eadie*:

\[
\text{“Criminal law for purposes of conviction - sentence may well be different matter – constitutes a set of norms applicable to some adult members of society in general, not different norms depending upon the personality of the offender then virtue would be punished and indiscipline rewarded. The short-tempered man would be absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members to exercise self-control and the requirement is a realistic one since experience teaches that people normally do... It follows that the evidence in which a defence of sane criminal incapacity due to intense emotion is based, should be viewed with circumspection.”} \]

**2.3.3 Defining the concept “self-control”**

The problem may not be so much the subjective aspect of the provocation defence but rather its application.

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144. *S v Eadie* supra (n 111) 183H-I.
145. *S v Kensley* supra (n 105).
146. Louw supra (n 9) 211.
147. *S v Eadie* supra (n 111) at 184B-D.
148. Navsa JA in the Supreme Court of Appeal case of *S v Eadie* 2002 3 SA 719 (SCA) agrees with Louw that the greater part of the problem lies in the misapplication of the test. Part of the problem appears to be a too-ready acceptance of the accused’s ipse dixit concerning his state of mind. It would appear to be justified to test the accused’s evidence about his state of mind not only against his prior and subsequent conduct, but also against the court’s experience of human behaviour and social interaction. It has been criticized as policy yielding to principle. Navsa JA is of the opinion that it is an acceptable method for testing the veracity of accused’s evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence (at 749E-F).
The real problem lies in the theoretical confusion as to the precise meaning of “lack of self-control.” It is clearly a legal construction without a psychological foundation. The introduction of the concept into law without psychological support might stem from the all too easy jump the incapacity enquiry made over the pathological divide. Prior to the Chretien case incapacity and the specific two-leg enquiry was largely applicable to the insane.

When the defence of incapacity became available to the sane, specifically in the case of

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149 Louw submits that logic dictates that we cannot draw a distinction between automatism and a lack of self-control. He argues that if the two were distinct, it would be possible to exercise conscious control over one’s actions (automatism test) while simultaneously lacking self-control (the incapacity test). He submits that if there is no distinction, the second leg of the test in the Laubscher case should fall away: capacity would then be determined solely on the basis of whether the person is able to appreciate the difference between right and wrong. It follows, so he argues that once the accused has been shown to have capacity he may then raise involuntariness as a defence. Louw thus states: “We will then also have a sounder principle and body of law to rely on in assessing the defences. Such a clearer distinction will deal correctly with the more controversial judgments that have recently dogged the provocation defence”. Louw supra (n 10) 211. Navsa JA in delivering his judgment in the Supreme Court of Appeal case of S v Eadie supra (n 148) at 747D-F agreed with Louw’s view that there is no distinction between sane automatism and non-pathological incapacity, due to emotional stress and provocation. However, he was not persuaded that the second leg of the test expounded in the Laubscher case should fall away. It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence. However, the result is the same if an accused’s verified defence is that his psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton – his acts would then have been unconscious and involuntary. In the present context, the two are flipsides of the same coin. Navsa JA is thus of the opinion that Joubert AJ was concerned to convey, in the second leg of the test in the Laubscher case, that the state has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Voluntary conduct must be regarded as conduct controlled by the accused’s conscious will. In the South African Criminal Law and Procedure vol 1 General Principles of Criminal Law 3rd ed (1997) Burchell in discussing voluntarily conduct states the following: “Modern western philosophy derives the notion of individual responsibility from the doctrine of free will. This holds that all humans are born with the ability to freely choose between different courses of action. Having this freedom the individual may justifiably be held to be responsible for the consequences of his actions. It follows from this that persons only be held criminally liable if their actions are determined by their own free will. This principle is expressed by the requirement that for the purposes of the criminal law, a human act must be voluntary in the sense that it is subject to the accused’s will. Where for some reason or another the person is deprived of the freedom of his will, his actions are “involuntary’ and he cannot be held liable for them.” (at 41-42) However, Navsa JA in S v Eadie supra (n 148) (at 748A-B) is of the view that insistence that one should see an involuntary act unconnected to the mental element in order to maintain a more scientific approach to the law, is an over-refinement. Navsa JA is also of the opinion that the view espoused by Snyman and those reflected in some of the decisions of our courts, that the defence of non-pathological criminal incapacity is distinct from a defence of automatism, followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, does violence to the fundamentals of any self-respecting system of law. This approach suggests that someone who gives in to temptation may be excused from criminal liability because he may have been so overcome by the temptation that he lost self-control. (at 748 D-F)

150 Louw supra (n 10) 210.

151 S v Chretien supra ( n 4).
intoxication, it was inevitable that it would become available to the short-tempered. In *Eadie* 152 the court tries to resolve the problem by relying on legal jealousy:

> “The fact of the matter is that in the final analysis the crucial issue of the accused’s criminal responsibility for his actions at the relevant time is a matter to be determined, not by psychiatrists, but by the Court itself.” 153

While it is trite that the courts must be the final arbiter of all decisions before them, their decisions must be based on sound foundations. If a sound psychological foundation for the concept “self-control” is absent, then on what basis is it justified? 154 Nevertheless, should the concept “lack of self-control” equate to automatism, then the problem with the *Nursingh* 155 and *Moses* 156 cases is that they were wrongly decided. In both cases the problem of goal-directed behaviour was a major obstacle to the accused. 157 In *Nursingh* 158 it was held:

> “The State’s real argument was that there were sufficient signs of deliberate conduct in such evidence as there is of the actual shooting, to show that the accused must have been capable of ordered, rational thought and action, which belies his claim not to have known what happened until his friend Soni intervened. Without going into details of that case, it is enough to say that he professes he was unable to remember anything more than red rage.

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152. *S v Eadie* supra (n 111).
153. Ibid 180D-E.
154. Louw supra (n 9) 210.
155. *S v Nursingh* supra (n 2).
156. *S v Moses*, supra (n 138). In this case the accused and the deceased had had a brief but otherwise happy relationship. After some three months they engaged in their first act of penetrative, unprotected sexual intercourse. Immediately thereafter the deceased informed the accused that he was HIV-positive. The accused flew into a rage beating and stabbing the deceased with various weapons. The deceased died as a result of the attack. Approximately half an hour thereafter the accused proceeded to remove his fingerprints from that which he had touched and tried to clean up various bloodstains. He then drove off in the deceased’s motor vehicle, picked up a hitchhiker and proposed that they have oral sex. The accused argued in his defence that he lacked self-control at the time of the killing, as he was so upset at learning of his lover’s HIV-status and the possible implications for him.
157. Louw supra (n 9) 212.
158. *S v Nursingh* (n 2).
But Mr. Macadam pointed to the accuracy of the shooting, the different situation in the room of the three deceased, the instruction to Soni to keep the grandfather quiet, the decision to leave the house, dispose of the pistol and then concoct and execute a plan to divert suspicion for the deed elsewhere. That all showed a train of conduct that required a conscious awareness of what was going on and an ability to respond to the circumstances. That showed, so it was argued, that his intellect was working, that is to say his cognitive function of the brain and, if that was the case, he was not incapable of knowing what he was doing and that what he was doing was wrong.” 

The court in this case accepted that the accused’s series of goal-directed acts constituted only one act in each case. The court noted that:

“[t]he psychiatrist identified the resulting mental state as a separation intellect and emotion with temporary destruction of the intellect, a state in which, although the individual’s actions might be goal-directed, he would be using no more intellect than a dog biting in a moment of response to provocation.”

With respect, the analogy of the intellect required of a dog when biting a human being accurately compared to firing ten bullets is a strained one.

In Moses a set of more complex goal-directed actions were undertaken by the accused:

“Then he reached for an ornament next to the door about a meter from the bed...As he picked it up the ornament broke and he let it go. He was angry at the time because he hated the deceased for abusing his trust and not confiding in him that he had AIDS and for allowing him to go on something that was weak as it had happened to him in the past. The experience reminded him of how he was sexually abused by his father in the past. When the [ornament] broke off as he picked it up, he then ran into the lounge and picked up the...black cat

159. Ibid 336F-H.
160. Louw supra (n 9) 212.
161. S v Nursingh supra (n 2) 333E.
162. Louw supra (n 9) 213.
163. S v Moses supra (n 138).
ornament. He went back to the deceased in the bedroom and the deceased was trying to close the sliding door which could not close properly because it was broken. The accused pushed the door open and proceeded to the bedroom. At the time the deceased was motioning backwards towards the bed as the accused moved in. The accused hit him on the head with the cat...As he hit the deceased the thoughts were still flooding his mind. He was thinking about how he was to break the news at home, because many AIDS victims have difficulties in telling their families they are HIV positive. He was also thinking of how he was going to die a horrible death and the fact that his future had now come to an end. He said all these thoughts were just flooding his mind at the same time. He even thought of not living anymore. He felt that he was stupid and felt that he could not change things. He did not feel in control of things at that stage. He was not thinking properly. He was so furious. The accused testified that he struck the deceased twice with the cat. The second blow was inflicted while the deceased was down. Thereafter the accused ran to the kitchen and got hold of a smaller knife.... He ran back to the deceased’s bedroom. The deceased at the time was in the process of getting up. He said he looked at him and he hated him. The deceased moved his hand as if to strike him. The accused ran back to the kitchen and got hold of a big knife.... Thereafter he ran back to the deceased’s bedroom and cut the deceased’s throat and wrists.”

In this case the court also accepted that the accused committed only one act:  

“Mr Yodaiken [a defence witness] did not contend that the accused was acting in a state of automatism during the killing. On being asked to comment on the different weapons used to inflict injuries on the deceased, he stated that to him the two acts, that is the hitting the deceased with a blunt object and the stabbing, were in fact one. The accused was in an annihilatory rage, a rage which tends to damage or destroy.”

However, the above passage clearly suggests at least fourteen instances of goal-directed actions. Thus to describe all the actions as one act, is untenable. Clearly if you combine all the actions, then the problem of goal-directed behaviour falls away.

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164. Ibid 705D-I.
165. Louw supra (n 9) 214.
166. S v Moses supra (n 138) 709H-I.
167. Louw supra (n 9) 214.
It would seem as if the better alternative in the cases of Nursingh\textsuperscript{168} and Moses\textsuperscript{169} cases be to find the accused’s capacities were not absent, but diminished. This is evidently another problem which the Moses case has ignored.

2.3.4 Distinguishing lack of capacity from diminished responsibility

The confusion in respect of the provocation defence is exacerbated in the Moses\textsuperscript{170} case by the fact that the court failed to draw a distinction between lack of capacity and diminished capacity. In the Eadie case\textsuperscript{171} it was stated that the distinction between lack of capacity and diminished responsibility is critical:

“The fit of anger in which the appellant was at the time of his attack on the deceased could well have reduced his ability to control himself with the result that he could be regarded as having diminished responsibility, but that is not a relevant consideration in the determination of his criminal liability. It may in appropriate circumstances mitigate, but it does not exonerate.”\textsuperscript{172}

Thus in the Moses case the conceptual foundation of the defence’s case was the psychological contention that the accused’s controls “collapsed”. Although this does suggest a lack of self-control, the defence’s witness implied elsewhere that the accused’s control might only have been diminished. Nevertheless, the court does not draw this distinction and implies that either results in an acquittal, which is not correct since only lack of capacity can lead to acquittal.\textsuperscript{173}

“Dr Gittleson testified that he believed Mr. Moses knew what he was doing at the time of the killing. He would have had the capacity to foresee that Gerhard would be killed. However, his capacity to exert normal control over his actions and also to consider his behaviour in light of what was wrong, was significantly impaired at the time of the killing.”\textsuperscript{174}

\textsuperscript{168.} S v Nursingh supra (n 2).
\textsuperscript{169.} S v Moses supra (n 138).
\textsuperscript{170.} S v Moses supra (n 138).
\textsuperscript{171.} S v Eadie supra (n 111).
\textsuperscript{172.} Ibid 183 F-G.
\textsuperscript{173.} Louw supra (n 9) 215.
\textsuperscript{174.} S v Moses supra (n 138) 710C-D.
and:

“Dr Gittleson testified further that in a stage of rage one’s capacity to retain control is definitely impaired. With specific reference to the accused, it was possible for a state of rage to have continued to such a degree that the loss of control or partial loss of control, lasted throughout the time that the killing took place. Despite the killing the accused’s capacity to stop himself, to control his behaviours in accordance with what he knew was right and wrong, was impaired. While he knew that it was wrong in principle, his awareness of the wrongfulness of what he was doing at the time was also impaired.”

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As a result of the courts’ confusing and contrasting decisions concerning provocation, it is imperative that clarity is sought concerning the defence in order to avoid retrogressive developments and the setting of dangerous precedent. However, before possible recommendations can be made concerning the problems identified, it is necessary to consider how English law has dealt with provocation.

175. Ibid at 710H-I.
CHAPTER 3

THE EFFECT OF PROVOCATION ON CRIMINAL LIABILITY IN ENGLISH LAW

3.1 Emergence of the defence

The distinction between murder and manslaughter began to emerge in the early years of the 16th century. At first, the distinction was introduced to deal with problems resulting from the practice known as “the benefit of clergy”. This related to the right of all clerks in holy orders accused of crimes before lay courts to seek to be tried by ecclesiastical courts. If the accused’s claim of clergy was successful, the case came under the jurisdiction of the ecclesiastical courts where the accused had a much better chance of avoiding conviction and punishment. However, frequent resort to the benefit of clergy by persons accused of serious crimes tended to undermine the credibility of the secular criminal law and, in the early 16th century, a number of statutes were enacted which removed benefit of clergy from those charged with “murder of malice prepensed”. Through these statues a tripartite classification of homicide was introduced: homicides committed with malice aforethought, punished by death; homicides committed without prior malice, known as “chance medley manslaughters”; and excusable homicides, that is, homicides which were subject to royal pardon. To these one may add, as a fourth category, homicide considered justifiable and entitling the accused to a full acquittal. The only difference between chance medley manslaughter and excusable homicides, was that the former took place in the course of an unlawful act.

177 Ibid 64.
The distinction between murder and manslaughter was redefined, however, following the enactment of a statute in 1547, which clearly excluded the benefit of clergy from those found guilty of manslaughter. After the passing of that statute, murder was distinguished from manslaughter on the basis of the presence or absence of premeditation. From that time the term manslaughter came to mean a deliberate killing on the spur of the moment, as understood by Coke and other commentators of the 16th and 17th centuries. The basis of the distinction was the assumption that a premeditated killing was more reprehensible than a killing which although deliberate, took place in the course of a sudden fight at a time when the accused had been overwhelmed by anger. But the distinction between killing with malice aforethought and chance medley manslaughter proved unsatisfactory, for malice was difficult to prove. So, in many cases, malice had to be implied from the circumstances surrounding the killing. For example, malice was presumed or implied in those cases the accused killed the victim without apparent provocation on the victim’s part. In such cases the accused was found guilty of murder, despite the absence of evidence or premeditation on his part. Gradually, the doctrine of chance medley was abandoned and the test of manslaughter came to be the presence or absence of provocation rather than the absence of premeditation as such.

178. Ibid.
179. Ibid 65.
181. Thus, according to Coke, malice aforethought “is implied in three cases (1) If one kills another without any provocation on the part of him that is slain. (2) If a magistrate, or known officer, or any other that hath lawful warrant, and in doing or offering to do his office, or to execute his warrant, is slain, this is murder by malice implied by law. (3) In respect of the person killing. If A assaults B to rob him, and in resisting A kills B, this is murder by malice implied, albeit he (A) never saw or knew him (B). If a prisoner by duress of the gaoler comes to an untimely death, this is murder in the gaoeler, and the law implieth malice in respect of cruelty.” (3rd Inst. Pp 50-51). Taken from Mousourakis supra (n 176) 65.
182. Mousourakis supra (n 176) 65.
This development was facilitated by the enactment in 1604 of the Statute of Stabbing, which removed the benefit of clergy from those who killed another by stabbing, where the victim had not drawn his weapon, even though the killing was committed without premeditation.\(^{183}\)

The narrow scope of the Statute of Stabbing made its application problematic in certain cases, as for example, in the case where the accused stabbed and killed another caught in the act of adultery with his wife. To deal with these cases, judges of the late 17th and 18th centuries began to lay down criteria for determining what sort of conduct could amount to provocation in law. At the same time, it was reconfirmed that provocation could provide no defence to those who killed in cold blood out of revenge. It is at that time that provocation, as a distinct defence reducing murder to manslaughter, clearly emerged.\(^{184}\)

Forms of conduct amounting to provocation included grave assaults,\(^{185}\) attacking one’s relative, friend or master,\(^{186}\) unlawfully depriving a man of his liberty\(^{187}\) and seeing a man in the act of adultery with one’s wife.\(^{188}\) The emphasis on the wrongfulness of the provocative conduct exercised a considerable influence on the subsequent development of the defence of provocation. However, the real basis of the defence, as many commentators observed, was the law’s compassion to human frailty. It was believed that as a result of provocation,

\(^{183}\) Stat. 2 Jac. VI, C.8 (1604). The Statute stated: “Every person… which shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken the party, which shall so stab or thrust shall thereof die within the space of six months then following, although it cannot be proved that the same was done of malice aforethought,… shall be excluded from the benefit of his clergy, and suffer death as in the case of willful murder.” As taken from Mousourakis supra (n 176) 66.

\(^{184}\) Mousourakis supra (n 176) 66.

\(^{185}\) Mawgride (1707) Kell 119. As taken from Mousourakis supra (n 176) 66.

\(^{186}\) Royley’s (1612) 12 Co Rep 87 and (1612) Cro Jac 296.As taken from Mousourakis supra (n 176) 66.

\(^{187}\) Hopkin Hugget (1666) Kel 59; Tooley (1709) Holt KB 485.As taken from Mousourakis supra (n 176) 67.

\(^{188}\) Manning (1617) 1 Vent 158 and 83 Eng Rep 112 (KB 1683-84); Mawgridge supra (n 185) 137. As taken from Mousourakis supra (n 176) 67.
the accused becomes so subject to passion that his ability to reason and exercise judgment was temporarily suspended. At the same time it was recognized that if the accused’s response was out of all proportion to the provocation received, the presumption of malice would not be negated. This approach to provocation is reflected in a number of cases decided in the 18th and 19th centuries. During this period, there appears to be a gradual shift in the emphasis from the wrongfulness of the provocative conduct to the requirement of loss of self-control, although the courts continued to recognize and apply the categories of legal provocation as laid down by 17th and early 18th century authorities.

An important step towards the formulation of the modern doctrine of provocation was the emergence, in the late 19th century, of the concept of the reasonable person, as providing a universal standard of self-control by which the accused’s response to provocation was to be assessed. One of the earliest cases in which the reasonable person was referred to was Welsh, a case which many modern commentators regard as the starting point in the development of the modern law of provocation. There was no immediate recognition of the role of the “reasonable person” in the law of provocation, however, as manifested by the fact that the objective standard is not mentioned by Sir James Stephen in his influential works, the Digest of the Criminal Law (1877) and A History of the Criminal Law of England (1833). Stephen simply lays down the different forms of conduct that were taken to amount to provocation in law, pointing out that the success of the accused’s plea in such cases depended

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189. Aves (1810) R&R 166; Lynch (1832) 5C & P 324; 325; Hayward (1833) 6C & P 157; 159; Fisher (1837) 8 C & P 182; Kelly (1848) 2 C & K 814. As taken from Mousourakis supra (n 176) 67.

190. Mousourakis supra (n 176) 67.

191. Ashworth supra (n 171) 180.

192. Welsh (1869) 2 Cox CC 336. As taken from Mousourakis supra (n 176) 68.

193. In that case Keating J stated: “…[I]n law it is necessary that there should be a serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow – something which might naturally cause an ordinary and reasonable minded person to lose his self-control. (at 338).
depended, firstly, on whether the victim’s conduct came under one of the established categories of legal provocation, and, secondly, on whether the accused actually lost his self-control as a result. Only where these conditions were met, the offence was reduced to manslaughter.

It was not until the early 20th century that the role of the reasonable person in the law of provocation received full recognition. In *Lesbini* the court rejected the argument that a 

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194. Articles 224-226 of Stephen’s Digest reflect the common law position of the defence of provocation as it was in the late 19th century. “224. Homicide, which would otherwise be murder, is not murder but manslaughter if the act by which death is caused is done in the heat of passion caused by provocation as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm. The following acts, subject to the provisions contained in Article 225, amount to provocation: (a) An assault and battery of such nature as to inflict actual bodily harm or great insult is a provocation to the person assaulted. (b) If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel and whichever strikes the first blow. (c) An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace at to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest made by officers of justice whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders. (d) The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress. (e) The sight of the act of sodomy committed on a man’s son is provocation to the father of the person committing the offence.(f) Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this article, except words expressing an intention to inflict actual bodily injury, accompanied by some act which shows that such injury is intended; but words used at the time of an assault – slight in itself – may be taken into account in estimating the degree of provocation given by a blow. (g) The employment of lawful force against the person of another is not a provocation to the person against whom it is employed. 225. Provocation does not extenuate guilt of homicide unless the person provoked is, at the time when he does the act, deprived of the power of self-control by the provocation which he received, and in deciding the question whether this was or was not the case regard must be had to the nature of the act by which the offender causes death, to the offenders conduct during the interval, and all the circumstances tending to show the state of his mind. 226. Provocation to a person by an actual assault, or by a mutual combat, or by false imprisonment, is in some cases, provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends.” As taken from Mousourakis supra (n 176) 68-69.

195. In *Welsh* supra (n 192) provocation was said to negate the malice element of murder which, according to law, is implied when a killing is committed intentionally. In the court’s words: “Malice aforesaid means intention to kill. Whenever one person kills another intentionally, he does it with malice aforesaid. In point of law, the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear, the malice aforesaid implied in the intention remains.”

196. [1914] 3 KB 116. The same position was adopted in *Alexander* (1913) 109 LT 745.
lower standard of provocation should apply with regard to those suffering from some form of mental disability, pointing out that in all cases the provocation must be serious enough to affect the mind of a reasonable person. 197 In those and subsequent cases it was confirmed that for the defence of provocation to succeed two conditions must be satisfied, namely (a) the accused must have actually been deprived of his self-control at the time of the killing and (b) the victim’s provocation, which caused the accused to lose his self-control, must have been such as to be likely to have the same effect on any reasonable or ordinary person. 198

However, until the passing of the Homicide Act 1957, the question of whether the victim’s conduct amounted to provocation or not was a question of law, and as such, it was for the judge, and not for the jury to decide. There have even been cases in early law in which provocation was accepted as a defence to the charge of attempted murder. This does not represent the present law, however, which recognizes provocation as a defence to murder only. 199

3.1.2 The modern law of provocation

Traditionally, provocation has been considered as either a partial excuse or a mitigating excuse. Only recently has it been asked in Anglo-American law whether provocation could not qualify as an excusing condition. If provocation can negate voluntariness (which may occasionally happen), it should be dealt with as an excusing condition and not a partial excuse. Even though provocation is a legal defence, it is not one that necessarily allows the accused to go free. 200 Provoked killing is generally thought to be less heinous than

197. Ashworth supra (n 180) 298.
198. Mousourakis supra (n 176) 69.
199. Ibid 70.
200. Ferreira supra (n 62) 124.
unprovoked killing, and has been long accepted as a ground for reducing murder to manslaughter.\textsuperscript{201} If the jury members accept the defence they are directed to return a verdict of manslaughter on an initial charge of murder.

The definition of provocation offered by Devlin J in \textit{Duffy},\textsuperscript{202} although now somewhat out of date, is still taken to provide a useful starting point in the discussion of the defence. According to Devlin J:

\textit{“Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind.”}\textsuperscript{203}

However, the common law definition has been amended by section 3 of the Homicide Act of 1957. According to this section:

\textit{“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose self-control, the question of whether the provocation was enough to make a reasonable person do as they did shall be left to be determined by the jury; and in determining that question the jury should take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable person.”}\textsuperscript{204}

\textsuperscript{201} Jurisdictions which do not belong to the common law family also recognize provocation as a partial or mitigating defence to homicide. For example, Para 213 of the German Criminal Code creates a less serious offence of manslaughter for killings committed under provocation: “If the person committing manslaughter, through no fault of his own, had been aroused to anger by the abuse of his own person or of a relative of his by the grossly insulting conduct of the victim, and committed the homicide under the influence of passion, or the circumstances otherwise indicate the existence of a less serious case, the imprisonment to be imposed shall be from six months to five years.”

\textsuperscript{202} \textit{(1949) 1 All ER.}

\textsuperscript{203} Duffy supra (n 202) 932N.

\textsuperscript{204} Under section 3 of the Homicide Act 1957, there is no restriction as to what may constitute provocation in law other than that the alleged provocation must have been serious enough to provoke a reasonable person.
As regards its effect on criminal liability, this provision is similar to those found in other common law jurisdictions.\textsuperscript{205} The section assumes the existence of a dual test, the success of the provocation defence thus depending on two aspects: the alleged provocative words or conduct must be of such a nature as

- actually causing in the accused, and
- would have caused in a reasonable person,

a sudden and temporary loss of self-control as the result of which the accused kills the deceased.

The first hurdle is to satisfy the judge that there is evidence – fit for the consideration of the jury – that the accused was provoked to lose his or her self-control (subjective test).\textsuperscript{206} Whether a person was provoked to lose his or her self-control is a question of fact: it is for the judge to decide whether evidence has been produced on which the jury could decide,\textsuperscript{207} and for the jury to decide whether the onus to establish lack of provocation is

\textsuperscript{205} In Canada, section 232 of the Criminal Code provides: “(1) Culpable homicide that would otherwise be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. (2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation enough for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool. (3) For the purposes of this section the questions (a) whether a particular wrongful act or insult amounted to provocation, and (b) whether the accused was deprived of the power of self-control by the provocation he alleges he received, are questions of fact, but no-one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being. (4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.”

\textsuperscript{206} In \textit{Acott} [1997] 1 All ER 706, it was held that for the defence of provocation to be put to the jury, there must be evidence of some identifiable words or actions of another likely to have provoked the accused into losing his self-control. It is not sufficient that the accused’s loss of self-control may possibly have been caused by some unidentified conduct of another.

\textsuperscript{207} In \textit{Mancini v DPP} [1942] AC 1, [1941] 3 All ER 272 an accused charged with murder pleaded self-defence, a defence leading to full acquittal. In such cases the accused may be unwilling to raise the issue of provocation, for evidence of provocation might be detrimental to a plea of self-defence. In such cases the courts have recognized that the accused has a tactical reason for not raising provocation, notwithstanding the fact that such a defence may be supported by existing evidence.
satisfied.208

3.1.2.1 The requirement of loss of self-control

In dealing with a plea of provocation the jury has to consider, first, the subjective or factual question of whether the accused was actually provoked to lose his or her self-control. In dealing with the subjective criterion the jury is entitled to consider all the relevant circumstances, the nature of the provocative act and the manner in which the accused reacted, the sensitivity of the accused or otherwise and the time, if any, which elapsed between the provocation and the act which caused death.209

Although the House of Lords has stated that the Homicide Act of 1957 “abolishes all previous rules as to what can or cannot amount to provocation,” it appears that the subjective condition is unchanged. In Ibrams,210 Thornton 211 and Ahluwalia212 the Court of Appeal has, after Camplin,213 reaffirmed that there must be a “sudden and temporary loss of self-control,” as Devlin J put in Duffy,214 and approved that judge’s further words:215

“Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation.” 216

208. Onus is on the prosecution to prove beyond reasonable doubt that the accused was not provoked into losing his self-control. If no evidence of provocation appears in the case as presented by the prosecution, then the accused will bear the burden of introducing some evidence of provocation. Similarly, in Canada it is accepted that with regard to the provocation defence, the accused bears an evidentiary burden and that the judge should not put the defence to the jury unless this burden is discharged.

209. As Widgery CJ stated in Davies [1975] QB 691 at 702: “Considering the relevant backround is material to the provocation as the setting in which the state of mind of the defendant must be judged.”


214. Duffy supra (n 202) 932N.


216. Duffy supra (n 202) 932N.
In *Ibrams* \(^{217}\) the accused who had been terrorized by the victim over a period of time, killed the victim following an agreement between them to do so. There was no evidence that on the day of the killing the victim had done anything to provoke them, the last provocation on his part having been offered a few days earlier. The Court of Appeal adopted the view that the formulation of a plan to kill as well as the lapse of time between the last act of provocation and the killing negated the accuseds’ claims of loss of self-control.\(^{218}\) The same position was adopted in the subsequent cases of *Thornton*\(^{219}\) and *Ahluwalia*.\(^{220}\)

In *Thornton* \(^{221}\) the accused killed her husband who was an alcoholic and had been violent towards her on several occasions. On the night of the killing, the accused found her husband asleep on the couch. When she asked him to come to bed, he called her a prostitute and said that he would kill her if she had been out with other men. She went into the kitchen, looking for a truncheon which she planned to use for her own protection, but found a long carving knife and returned to the sitting room where her husband was lying. She again asked him to come to bed. He refused and told her that he would kill her while she was asleep. At this point she stabbed him once in the stomach, causing his death.

The accused’s appeal was based on the argument that requiring a sudden and temporary loss of self-control was inappropriate, particularly in a case where the accused was subjected to a long course of provocative conduct, which may sap the resilience and resolve to retain self-

\(^{217}\) *Ibrams* supra (n 210).

\(^{218}\) *Mousourakis* supra (n 176) 81. The Court of Appeal approved the statement of Devlin J in *Duffy* that “[c]ircumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden and temporary loss of self-control, which is the essence of provocation.”

\(^{219}\) *Thornton* supra (n 211).

\(^{220}\) *Ahluwalia* supra (n 212).

\(^{221}\) *Thornton* supra (n 211).
control when the final confrontation erupts. However, the Court of Appeal took the view that the requirement of loss of self-control has so long been an essential part of the provocation defence, that it could only be removed by legislative enactment. The court held that the distinction between acting while in control of oneself and acting under a sudden and temporary loss of self-control, as drawn in Duffy, remained an important element of provocation. It was stated that:

“[t]he distinction...is just as, if not more, important in [this] kind of case...It is within the experience of each member of the court that in cases of domestic violence which culminate in the death of a partner there is frequently evidence given of provocative acts committed by the deceased in the past, for it is in that context that the jury have to consider the accused’s reaction. In every such case the question for the jury is whether at the moment the fatal blow was struck the accused had been deprived for that moment of self-control which previously he or she had been able to exercise...We reject the suggestion that in using the phrase ‘sudden and temporary loss of control’ there was any misdirection of the jury.”

The same approach was adopted by the Court of Appeal in Ahluwalia. The accused who had endured ten years of violence and humiliation from her husband, threw petrol in his bedroom and set it alight. He sustained severe burns and died six days later. Counsel for the defence challenged the applicability of the loss of self-control requirement. Reference was made to the phrase “cooling off” period which has sometimes been applied to an interval of time between the provocation relied upon and the fatal act. Counsel suggested that although in many cases such an interval may indeed be a time for cooling and regaining control so as to forfeit the protection of the defence, in others the time lapse has an opposite

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222. Ibid 313.
223. Duffy supra (n 202).
224. Thornton supra (n 211) 314.
225. Ahluwalia supra (n 212).
It was submitted that women who have been subjected frequently over a period of time to violent treatment may react to the final act or words by what was called a “slow-burn” reaction rather than by immediate loss of self-control.  

However, the Court of Appeal approved the trial judge’s insistence on the requirement of loss of self-control. The Court held that loss of self-control is an essential element of the provocation defence serving “to underline that the defence is concerned with the actions of an individual who is not, at the moment when she acts or acts violently master of her own mind.” Moreover, it was recognized that the words “sudden and temporary loss of self-control” did not imply that the accused’s reaction to the provocation received had to be immediate; they imply only that the accused’s act of killing must not be premeditated. From this point of view, it was pointed out that a delay between the acts or words of provocation could be fatal to the accused’s plea, because:

“[T]ime for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control. The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation.”

226. Clarkson and Keating supra (n 4) 691.
227. Ibid.
228. Ahluwalia supra (n 212) 895.
229. The acceptance in Ahluwalia that a delayed reaction may still amount to killing under provocation was followed in Baillie [1995] Crim LR 739. In this case the accused, enraged, went to the attic to fetch a gun, drove two miles to the victim’s house and then killed him. The Court of Appeal concluded that although there might be difficulties with the defence of provocation succeeding, it should still have been left to the jury to determine. This treatment of delay as a matter of evidence rather than rule of law could open the door to the defence of provocation becoming available to more battered women who kill. If this is the case, the chances of a manslaughter conviction rather than murder will be considerably greater, since at the moment such accused are unlikely to succeed with a plea of self-defence, and they should not be placed in the position of having to plead diminished responsibility unless their debilitated mental condition makes this truly the appropriate plea. However, although it is now widely accepted that the current test of sudden and temporary loss of self-control is based upon a male typology of anger, changing it may not be straightforward. Smith and Hogan supra (n 215) 692.
230. Smith and Hogan supra (n 215) 692.
In both cases, the Court of Appeal rejected the accuseds’ appeals in connection with the defence of provocation, although in Ahluwalia\(^{231}\) a new trial was ordered to consider evidence relating to the defence of diminished responsibility – a defence that had not been raised at the trial despite evidence that the accused suffered from endogenous depression at the time of the killing.\(^{232}\)

It is clear that a loss of self-control remains a necessary condition of the provocation defence. However, judges will usually leave the defence to the jury if there is some evidence suggesting that the accused may have been provoked to lose self-control, despite evidence of premeditation, and even if the defence has not been raised by the accused.\(^{233}\) In Burke\(^{234}\) the defence of provocation was put to the jury, although the accused, following an argument at a nightclub, left the premises, fetched a knife and returned to the club where he stabbed the victim. As Lord Morris stated in Camplin:\(^{235}\)

"It will be for the court to decide whether, on a charge of murder, there is evidence on which the jury can find that the person charged was provoked to lose his self-control; thereafter...all the questions are for the jury."\(^{236}\)

Moreover, these cases show that what needs to be sudden is loss of self-control, not the provocation. Thus, a long history of provocation may be relied upon to explain why the accused lost his or her self-control and killed as a response to an act of provocation which, considered in the abstract, would not seem to warrant such a response. The idea here is that individual incidents might be trivial but that they might become serious provocation because

\(^{231}\) Ahluwalia supra (n 212).

\(^{232}\) Mousourakis supra (n 176) 84.

\(^{233}\) Ibid.


\(^{235}\) Camplin supra (n 213).

of the cumulative effect which along period of provocative conduct may have had on the accused.\textsuperscript{237}

\textbf{3.1.2.2 The objective test of provocation}

Once the jury has found that the accused was subjectively provoked to lose his or her self-control, they must decide whether the provocation was enough to make a reasonable person behave as he or she did. For a number of years, the courts refused to modify the standard to allow for certain individual characteristics of the accused to be taken into account on the grounds that such an approach would undermine the purported objectivity of the standard.\textsuperscript{238}

In \textit{Bedder} \textsuperscript{239} the jury was directed to ignore the fact that the accused was impotent in deciding whether the victim’s conduct amounted to provocation. The House of Lords held that this was a correct direction pointing out that the considerations regarding any physical or mental peculiarities of the accused lie outside the scope of the objective test in provocation.

In dismissing the accused’s appeal Lord Simonds said:\textsuperscript{240}

\begin{quote}
“It was urged on your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused, and that this could not be fairly done unless he was also vested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose it to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the ‘reasonable’ or the ‘average’ or the normal man is
\end{quote}

\begin{footnotes}
\item[237.] Mousourakis supra (n 176) 85.
\item[238.] Smith and Hogan supra (n 215) 369.
\item[239.] Bedder v DPP [1954] 2 ALL ER 801, [1954] 1 WLR 1119. Bedder shows the difficulty common law courts have had in recognizing criteria for distinguishing between those individual characteristics of the accused that are morally relevant to mitigation and those that are not. Fletcher, in criticizing this approach to the objective standard in provocation, remarked: “Once we forget that the problem is the analysis of those impulses that we are fairly expected to control, it follows that judges would have difficulty distinguishing between a head injury and a bad temper. Once the moral perspective on provocation is lost, the concern develops that the individuation of the [reasonable person] standard might lead to its total collapse. Not knowing where to draw the line, judges would prefer not to include any unusual physical feature of the defendant.” As taken from Fletcher \textit{Rethinking Criminal Law} 1\textsuperscript{st} ed (1978) 249.
\item[240.] Mousourakis supra (n 176) 86.
\end{footnotes}
invoked. If the reasonable man is then deprived in the whole or in part of his reason, or the normal man endowed with abnormal characteristics, the term ceases to have any value...It would be plainly illogical not to recognize an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another...It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account.”

The decision in Bedder 242 was reversed, following the introduction of section 3 of the Homicide Act 1957, under which the judge cannot direct the jury as to what characteristics the reasonable person should be endowed with. However, it was not until the decision in Camplin 243 that the effect of section 3 on the issue of characteristics was recognized. 244

In Camplin 245 Lord Diplock, in explaining how the jury should be directed in provocation cases, stated:

“The judge should state what the question is, using the terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accuseds characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person in like circumstances would be provoked to lose his self-control but also whether he would react to the provocation as the accused did.” 246

The broadening of the objective test in provocation to some degree of individualization was deemed necessary in order to avoid the morally controversial decisions to which the

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241. Bedder supra (n 239) 803-804.
242. Ibid.
243. Camplin supra (n 213).
244. Mousourakis supra (n 176) 88.
245. Camplin supra (n 213).
246. Ibid 718.
rigid application of the test has led in the past. Nonetheless, this more liberal interpretation of
the objective test has not been without difficulties. Problems have arisen, for example, about
how to distinguish those individual characteristics bearing upon the gravity of the
provocation from those character traits relating to the accused’s capacity for self-control. \(^{247}\)
In Newell \(^{248}\) the Court of Appeal in explaining what characteristics may be taken into
account in deciding whether the provocation offered was enough to make a reasonable person
do as the accused did, referred with approval to a passage from McGregor, \(^{249}\) a case decided
by the New Zealand Court of Appeal. \(^{250}\) In McGregor \(^{251}\) North J stated:

“It is not every trait or disposition of the offender that can be
invoked to modify the concept of the ordinary man. The
characteristic must be something definite and of such
significance to make the offender different from the ordinary run
of mankind, and have also a sufficient degree of permanence to
warrant its being regarded as something constituting part of the
individual’s character or personality... [It includes] not
only...physical but also...mental qualities and as such more
indeterminate attributes as colour, race and creed...
Moreover... there must be some real connection between the
nature of the provocation and the particular characteristic of
the offender by which it is sought to modify the ordinary man
test. The words or conduct must have been exclusively or
particularly provocative to the individual because, and only
because, of the characteristic.” \(^{252}\)

In Morhall \(^{253}\) the main question that arose from the Court of Appeal’s approach was whether
it is for the judge to decide whether a particular characteristic is consistent with the concept
of the reasonable person and, as such, it should be taken into account by the jury. The House
of Lords held that the accused’s addiction should have been taken into consideration

\(^{247}\). Mousourakis supra (n 176) 90.
\(^{249}\). [1962] NZLR 1069.
\(^{250}\). Mousourakis supra (n 176) 91.
\(^{251}\). McGregor supra (n 249).
\(^{252}\). Ibid 1081-1082.
\(^{253}\). [1995] 3 ALL ER 659, SHC 425, HL.
“[I]t was a characteristic of particular relevance, since the words of the deceased which were directed towards the appellant’s shameful addiction to glue sniffing and his inability to break himself of it.”

However, the House noted that North J’s judgment in McGregor must be treated with caution, especially in light of the reservations expressed in relation to that judgment by the New Zealand Court of Appeal in McCarthy. In this case North J’s position that there must be a direct connection between the provocation and the characteristic the accused seeks to rely upon to modify the objective standard, was called into question. In that case the accused had suffered brain damage and this had affected his personality. Although the provocation offered was not aimed directly at this characteristic the Court held that the accused was entitled to have this characteristic taken into account. The Court adopted the view that:

“[a] racial characteristic of the accused, his or her age or sex, mental deficiency or a tendency to excessive emotionalism as a result of brain injury... are examples of characteristics to be attributed to the hypothetical person. In a case where any of them apply, the ordinary power of self-control falls to be assessed on the assumption that the person has the same characteristics. The question is...whether a person with ordinary power of self-control would have retained self-control notwithstanding such characteristics.”

But this cannot mean that any attribute of an accused’s character or personality can be regarded as a relevant characteristic. A particular attribute may be treated as a characteristic for the purposes of the provocation defence only if it is capable of converting relatively

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254. Smith and Hogan supra (n 215) 370.
255. Morhall supra (n 253) 661.
256. McGregor supra (n 249).
258. Mousourakis supra (n 176) 92.
259. McCarthy supra (n 257) 67.
harmless conduct into grave provocation, either because the relevant conduct is aimed at the characteristic or because the accused has a tendency to interpret certain conduct differently from a “reasonable” or “ordinary” person. In either case, the accused is expected to have exercised ordinary powers of self-control. 260

In Luc Thiet Thuan261 the Privy Council referred with approval to Ashworth’s view that:

“[t]he proper distinction is that individual peculiarities which bear on the gravity should be taken into account, whereas individual peculiarities bearing on the accused’s level of self-control should not.” 262

The judgment of the Privy Council is potentially of great significance. It holds that mental abnormality, unless the subject of taunts, is not a relevant characteristic for the purposes of the objective test. 263 In this case the accused that was charged with murder in Hong Kong raised the defences of diminished responsibility and provocation. There was medical evidence that he had suffered organic brain damage of a kind, which results in difficulty controlling an impulse. The judge directed the jury that this evidence was relevant to diminished responsibility, but did not refer to it when dealing with provocation. The Court of Appeal dismissed the accused’s appeal, holding that a person’s mental abnormality was not to be considered in applying the reasonable man test, unless the provocation was directed at that condition. The Court of Appeal was of the opinion that the English Court of Appeal went astray in Newell, 264 by the “wholesale adoption without analysis” of a substantial part of a dictum of North J in the New Zealand case of McGregor. 265 In particular, the treatment of

260. Mousourakis supra (n 176) 93.
262. Ashworth supra (n 180) 300.
263. Smith and Hogan supra (n 215) 370.
264. Newell supra (n 248).
265. McGregor supra (n 249).
“purely mental peculiarities” as relevant characteristics, was not a satisfactory approach to the interpretation of the objective test in English law. The Privy Council held that mental abnormality, in so far as it can provide a basis for raising diminished responsibility, cannot be a characteristic for the purposes of the provocation defence, unless the provocation bore a direct connection to that condition. This approach calls into question the position adopted in a number of cases, including Ahluwalia, where it was suggested that mental conditions, such as that relating to post-traumatic stress disorder, or battered woman syndrome, might be a relevant characteristic for the purposes of the objective test in provocation. It is submitted that the role of the reasonable person in the context of the provocation defence, is best understood as relating to the norms of attribution. From this viewpoint the issue is not how a reasonable person would have reacted to the provocation, but whether the accused, given his or her personal characteristics and history, could fairly be expected to have retained his or her self-control in the face of the provocation received.

A question that has arisen in a number of provocation cases is whether the accused’s suffering from a mental condition should be regarded as a characteristic. In Ahluwalia the Court of Appeal said obiter that such a condition might be treated as a characteristic for the purpose of the objective test in provocation. Similarly in Dryden and Humphreys, where the defence of provocation was raised, the courts adopted the position that eccentric

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266. Smith and Hogan supra (n 215) 371.
267. Ahluwalia supra (n 212).
268. Smith and Hogan supra (n 215) 371.
269. Mousourakis supra (n 176) 95.
270. Ibid 97.
271. Ahluwalia supra (n 212).
272. Mousourakis supra (n 176) 97.
274. [1995] 4 ALL ER 1008.
and obsessional personality traits, as well as abnormal immaturity are mental characteristics on which the jury should have been specifically directed. The approach taken in these cases has been thought by some commentators to suggest that: 275

“[g]iven the right sort of evidence, reasonableness ought to be judged from the perspective of a syndrome sufferer. …[In Ahluwalia] given the finding on the evidence, and the fact that the issue of the required link between the defendant’s characteristics and the provocation had not been raised, this aspect of the judgment was only obiter. Nevertheless it may come to mark an important step in the liberalization of the reasonable person test by allowing consideration of any characteristic affecting the defendant’s power of self-control.” 276

This way of looking at the issue tends to minimize the value of the objective test in provocation, especially the requirement that for a characteristic to be considered relevant it must affect the gravity of the provocation, not the accused’s level of self-control. The fact that the provocation is assessed in light of certain personal attributes of the accused should not be seen as divesting the test in provocation of its objective character. 277

3.1.2.3 Proportionality and the reasonable person

At common law the judge could withdraw the defence of provocation from the jury if he believed that there was no evidence suggesting that a reasonable person would have been provoked to lose his or her self-control and do as the accused did. 278 In Mancini 279 the accused, a manager of a club, stabbed the victim to death with a knife-like instrument during a fist fight. In his appeal the accused argued that although he himself did not plead provocation, the judge should have directed the jury on the defence. The appeal was rejected

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276. Ibid 732-733.
277. Mousourakis supra (n 176) 98.
278. Ibid.
279. Mancini v DPP supra (n 207).
Because the judge does not have to direct the jury on provocation unless the mode of the accused’s retaliation bore a “reasonable relationship” to the provocation offered. 280 In the words of Lord Simon:

“The test to be applied is that of the effect of provocation on a reasonable man… so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance… to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.” 281

The above passage expresses what has become known as the “reasonable relationship rule,” a restatement of the early law’s requirement of proportionality. After the introduction of the Homicide Act of 1957, however, if there is evidence that the accused was provoked to lose his or her self-control, the judge is under duty to put the defence to the jury, even though, in his view, the mode of the accused’s reaction was disproportionate. It was in this respect that Lord Diplock in Camplin 282 said that Mancini 283 is no longer to be treated as an authority on the law of provocation. However, it is for the jury, not for the judge, to determine whether the accused’s response to provocation was that expected from a reasonable person in the circumstances. 284 In Brown 285 Talbot J said:

“[W]hen considering whether the provocation was enough to make a reasonable man do as the accused did, it is relevant for the jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act

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280. Smith and Hogan supra (n 215) 373.
281. Mancini v DPP supra (n 207) 9 and 27.
282. Camplin supra (n 213).
283. Mancini v DPP supra (n 207).
284. Mousourakis supra (n 176) 100.
Committed by the accused. It may be, for instance, that a jury might find that the accused’s act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think therefore that a jury should be instructed to consider the relationship of the accused’s acts to the provocation when asking themselves the question: was it enough to make a reasonable man do as he did?” 286

Under section 3 of the Homicide Act of 1957, the jury, in applying the objective test, should consider whether the provocation offered was enough to make a reasonable person do as he or she (the accused) did. Even when acting in the heat of passion, the provoked act must retain a degree of self-control, for only on such an assumption the requirement of proportionality in provocation would be meaningful. 287 In Phillips 288 Lord Diplock, in rejecting the view that loss of self-control is an all or nothing concept, argued as follows:

“Counsel contended, not as a matter of construction but as one of logic that once a reasonable man has lost his self-control his actions ceased to be those of a reasonable man and that accordingly he was no longer fully responsible for them whatever he did. This argument was based on the premise that loss of self-control is not a matter of degree but is absolute, there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordship’s view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon.” 289

3.1.2.4 Self-induced provocation

A question that has perplexed the courts for many years has been whether an accused could rely on the defence of provocation where it appears that the provocation has been induced by

286. Ibid 234.
287. Smith and Hogan supra (n 215) 375.
289. Ibid 137.
the accused’s own offensive conduct towards the victim. Under section 3 the judge cannot withdraw the defence from the jury in such cases, although he may still draw the jury’s attention to the fact that the provocation was self-induced as a factor militating against the accused’s plea. It is for the jury to decide, however, whether the accused’s claim that he or she was provoked should be accepted or not by taking into account everything both done and said according to the effect which in their view, it would have on a reasonable person. In Edwards the Privy Council adopted the position that, in principle, an accused cannot rely on provocation when he or she or herself caused it. The accused’s appeal against his conviction of murder was dismissed by the Full Court of Hong Kong. The accused appealed to the Judicial Committee of the Privy Council. The accused’s appeal focused on the trial judge’s failure to direct the jury on the issue of provocation. The Privy Council reduced the accused’s offence to manslaughter stating:

“On principle it seems reasonable to say that (1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with fists; (2) but if the hostile reaction by the person sought to be blackmailed goes to extreme lengths it might constitute sufficient provocation even for the blackmailer; (3) there would in many cases be a question of degree to be decided by the jury.”

But as was said before, section 3 requires that the jury in deciding whether the accused was

290. Mousourakis supra (n 176) 107.
291. section 3 of the Homicide Act of 1957.
292. [1973] AC 648, [1973] 1 ALL ER 152, PC. In this case the accused stabbed the victim to death during a struggle in the victim’s hotel room. The accused had gone to the victim’s room intending to blackmail the victim. He claimed that the victim became enraged when he heard the accused’s demands and attacked him with a knife. The accused wrestled the knife from the victim and killed him in a fit of blind rage.
293. Mousourakis supra (n 176) 108.
294. Edwards supra (n 292) 158 (per Lord Pearson).
provoked to lose his or her self-control, is to take into account everything that, in their view, is capable of amounting to provocation, regardless of whether it was a predictable result of the accused’s own conduct. If there is evidence that the accused was provoked, the judge is required to put the issue to the jury, even if he has a good reason to believe that the provocation was self-induced. By adding the further condition that the provocation must not have been a predictable result of the accused’s own actions, the Privy Council’s decision in Edwards\textsuperscript{295} does not appear to accord with section 3.\textsuperscript{296} Thus in Johnson\textsuperscript{297} the accused was allowed to rely on the provocation defence, although the provocation was a predictable result of the accused’s own offensive behaviour.\textsuperscript{298} In that case the Court of Appeal expressed its disapproval of the position adopted by Edwards\textsuperscript{299} stating:

“In view of the express wording of s. 3…we find it impossible to accept that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his self-control, should result in the issue of provocation being kept outside a jury’s consideration. Section 3 clearly provides that the question is whether things done or said or both provoked the defendant to lose his self-control. If there is any evidence that it may have done, the issue must be left to the jury.”\textsuperscript{300}

The fact that the provocation was self-induced may nevertheless be taken into account by the jury in deciding whether the provocation was such as to make a reasonable person lose his or her self-control and act as the accused did. It may also be relevant in determining the appropriate amount of punishment, following the accused’s conviction of manslaughter.\textsuperscript{301}

\textsuperscript{295} Edwards supra (n 292).
\textsuperscript{296} Mousourakis supra (n 176) 108.
\textsuperscript{297} [1989] 1 WLR 740.
\textsuperscript{298} Mousourakis supra (n 176) 108.
\textsuperscript{299} Edwards supra (n 292).
\textsuperscript{300} Johnson supra (n 297) 744.
\textsuperscript{301} Mousourakis supra (n 176) 109.
3.1.2.5 Problems associated with the defence of provocation

3.1.2.5.1 Cumulative provocation

There is little difficulty in those cases of cumulative provocation where there is an immediate trigger, even if it is trivial to a loss of control that is sudden and temporary. Courts are now more willing to look at the history of mistreatment in judging the nature of provocation. But what if there is no immediate trigger? It was this problem that the counsel in Ahluwalia 302 confronted by asking the court to consider so-called “slow-burn” anger. Such rage in women is said to be considered as legally and morally equivalent to the paradigmatic male “snapping”. The question then is whether the person who kills during a state of slow-burn anger can really be said to be acting without self-control. This is potentially extremely difficult to establish evidentially, and, arguably, amounts to abandoning not only the “sudden and temporary” element but also the requirement that there must be a “loss of self-control.”

303 If a final wrongdoing triggering off the accused’s reaction cannot be identified, the accused’s claim that he or she was provoked would be difficult to accept. The assumption that the act of provocation was in the circumstances foreseeable, or that the accused was in a sense used to the victim’s untoward behaviour may seem to militate against a loss of self-control requirement of provocation. 304 In general, evidence of planning and deliberation would be fatal to the accused’s plea, as it would tend to negative the element of loss of control or impaired volition as required by the current definition of the defence. 305 As Devlin J pointed out in his direction to the jury in Duffy: 306

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302 Ahluwalia supra (n 212).
303 Clarkson and Keating supra (n 4) 692.
304 Mousourakis supra (n 176) 157.
305 Ibid 158.
306 Duffy supra (n 202).
“Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law. Indeed the further removed an incident is from the crime the less it counts. A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here – the blame attaching to the dead man. Circumstances which induce a desire for revenge, or a sudden passion of anger are not enough. Indeed, circumstances which induce a desire for revenge are inconsistent with provocation since the conscious formulation of a desire for revenge means that the person has had time to think, to reflect, and that would negative a sudden, temporary loss of self-control which is the essence of provocation.”  

The position expressed by Devlin J in Duffy has been adopted in a number of subsequent cases.  

In Ibrams the Court of Appeal adopted the position that the time that had elapsed after the final provocative incident, as well as the formulation of a plan, negated any claim by the accused that they lost their self-control. In Thornton the Court of Appeal took the view that loss of self-control remained an “essential ingredient” of the provocation defence. 

Ironically, until the hardening of attitudes towards the loss of self-control from the time of Duffy onwards, no real extension or relaxation of the law would have been required to incorporate such “slow-burn” cases within the scope of the defence. The root of the trouble and misunderstanding has been the recent failure to recognize that the law’s conception of anger has not always been the loss of self-control alone, but has historically included outrage. 

Someone who acts in outrage acts on a principle of retributive justice, and may not be 

\[\text{307. }\text{Duffy supra (n 202) 933.}\\\text{308. }\text{Mousourakis supra (n 176) 158.}\\\text{309. }\text{Ibrams supra (n 210).}\\\text{310. }\text{Mousourakis supra (n 176) 159.}\\\text{311. }\text{Thornton supra (n 211).}\\\text{312. }\text{Mousourakis supra (n 167) 159.}\\\text{313. }\text{Duffy supra (n 202).}\\\text{314. }\text{Clarkson and Keating supra (n 4) 692.}\]
responding to a proximate triggering event in quite the way a tennis player responds to an opponent’s shot with a “reflex” volley. The person who boils up when her long-term violent abuser is asleep in his chair may well be acting out of provoked outrage, despite the absence of immediate provocation. Historically, such a person’s anger would have fallen within the scope of the defence. It has been held that what is required is a restatement of this legal position through the substitution of references to provoked angry retaliation in place of references to provoked loss of self-control in section 3 of the Homicide Act of 1957. 315

In contrast to the view that the courts may return to their earlier, broader conception of anger, their Lordships in Ahluwalia 316 took the view that any change to the principles governing provocation would have to come from parliament. 317 Certainly reform is urgently required to do justice “in the kinds of cases where the provocation is arguably at its greatest – where a woman kills her husband or partner in response to his prolonged and violent abuse of her.” In general, section 3 of the Homicide Act of 1957 is understood not to have altered the traditional position that provocation requires a sudden temporary loss of self-control. This means that in a case where there is no evidence suggesting that the accused was provoked to lose his self-control, the judge is still entitled to withdraw the defence from the jury. 318 In this respect, the Criminal Law Revision Committee has recommended: 319

“No change in the present rule, whereby the defence [of provocation] applies only where the defendant’s act is caused by the provocation and is committed suddenly upon the provoking event, not to cases where the defendant’s reaction has been delayed, but the jury should continue to take into consideration previous provocations before the one which produced the fatal reaction.” 320

315. Ibid.
316. Ahluwalia supra (n 212).
317. Clarkson and Keating supra (n 4) 693.
318. Mousourakis supra (n 176) 159.
319. CLRC, 14th Rep.
320. Ibid para 84.
The CLRC’s recommendations are consistent with the traditional position, as expressed in Duffy.\(^{321}\) that loss of self-control is an essential element of the provocation defence. Moreover, it is recognized that in so far as there is evidence that the accused was provoked to lose his or her self-control, evidence of cumulative provocation should be taken into consideration in determining whether the accused was sufficiently provoked. However, the position expressed by the CLRC has been criticized on the grounds that it is based on a very narrow definition of the provocation defence.\(^{322}\) The CLRC’s approach overlooks the important requirement that a conviction of murder should be avoided unless the accused fully deserved to be stigmatized as a murderer. In some cases of cumulative provocation, evidence of forethought and deliberations is not sufficient to warrant, morally, the accused’s conviction of murder. It is pointed out that the position – also adopted by the CLRC – that the scope of the crime of murder should be narrowed down to include only those killings which deserve to be stigmatized as murders, militates against the outright rejection of the provocation defence where the hot anger requirement is not met. Strict adherence to this requirement may lead in some cases of cumulative provocation to convictions of murder that are deemed morally unfounded.\(^{323}\) As Wasik puts it:

“Cases of cumulative provocation should fall outside the scope of ‘new murder.’ The law should recognize that there are degrees of culpability even in deliberate killings. Whilst evidence of forethought and premeditation must always tell against the defendant on sentence, the more lenient approach evident in some sentencing cases, which regards cumulative provocation as mitigating the offence rather than making it more serious, is recommended. The traditional view of provocation as a ‘concession to human frailty’ is clearly important both on liability and on sentence, but in cases [of cumulative provocation] there must be proper weight given to the justificatory as well as the excusative element.”\(^{324}\)

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\(^{321}\) Duffy supra (n 202).

\(^{322}\) Wasik “Cumulative Provocation and Domestic Killing” 1982 Criminal Law Review 29 34-35.

\(^{323}\) Ibid.

\(^{324}\) Ibid 37.
Admittedly, the tendency in English law is towards treating the accused in cases involving cumulative provocation with leniency.

3.1.2.5.2 Provocation and pluralism

The question has been put as to the best way to reflect human diversity in the structure of the provocation defence, and similar excusatory defences in the criminal law. Until the recent House of Lord’s decision in R v Smith 325 English criminal law had two competing views of the moral structure of its provocation defence. One view, favoured in a line of Court of Appeal decisions since the 1990’s, is that the provocation defence is conceived as a close relative, morally speaking, of the diminished responsibility defence that appears next to it in the Homicide Act of 1957. To be provoked to a murderous rage is to suffer a temporary diminution of one’s responsibility. The rival view endorsed by the Privy Council in 1996, is that the provocation defence is be contrasted with the diminished responsibility defence. The diminished responsibility defence created by section 2 of the Act exists to make allowances for conditions of pathological unreasonableness. By contrast, the provocation defence referred to in section 3 of the Act is a defence available only in respect of reasonable losses of temper. It is reserved for cases in which the provocation was enough to make a “reasonable man do as [the accused] did.” 326

However, rather than decide cleanly between these two views, the House of Lords in Smith 327 adopted the view that when the court was in doubt, it should pass the buck to the jury. The main reason for doing this was the need for the defence to be interpreted with sufficient sensitivity to differences between individual accused.

325. R v Smith [1998] 4 All ER.
327. Smith supra (n 325)
The standard of “reasonableness” in the provocation defence is not to be taken literally, for taking it literally would mean holding everyone to a uniform standard, rather than allowing the standard to be tailored, as the jury would naturally tailor it, to suit the special (sympathetic) features of each accused.  

In the case of Ahluwalia it would appear as if such a development would be a step forward. Battered women will no longer be judged by the same standards as non-battered women and expert evidence can be led to explain how battered women typically respond to years of violence. However, the law relating to the Battered Women Syndrome (BWS) suffers from serious problems. Whereas BWS is useful in explaining the reasonableness of general behaviour of battered women, it is not well suited (at least as presently developed and applied) to establish the reasonableness of her killing in provocation, nor that it took place during a sudden loss of self-control. But even if BWS is developed to address the pertinent issues, it will actively shift the emphasis from the reasonableness of the accused’s actions to her personality in a way which confirms existing gender stereotypes, silences battered women and conceals society’s complicity in domestic violence.

The broadening of the objective test in provocation to some degree of individualization was deemed necessary to avoid morally controversial decisions to which the rigid application of the test has led in the past. However, the fundamental flaw with the current test of the reasonable man is that the courts have to swing between the two aims of taking a compassionate view of human frailty while endeavouring to maintain an objective standard.

328. Macklem and Gardner supra (n 326) 816.
329. Ahluwalia supra (n 212).
330. Clarkson and Keating supra (n 4) 704.
331. Ibid.
332. Ibid.
of reasonableness.\textsuperscript{333} The first aim leads the court to take more and more characteristics into account. The second acts as a block on this: if all characteristics are taken into account the standard would become so individualized as to be meaningless.\textsuperscript{334}

Thus the majority of the House of Lords in \textit{Smith}\textsuperscript{335} contradicted the traditional interpretation of Lord Diplock’s judgment in \textit{Camplin}.\textsuperscript{336} Many have thought that Lord Diplock meant to attribute different “characteristics” to the reasonable person for the purposes of different “objective” issues arising under section 3.\textsuperscript{337} If, for example, the accused was taunted about his or her bad temper, then the jury were to consider the effect of this on someone who was both bad-tempered and not bad-tempered; bad-tempered for the purposes of assessing the gravity of the provocation; not bad-tempered for the purpose of assessing the proper measure of self-control.

The majority of the House of Lords in \textit{Smith}\textsuperscript{338} denied that Lord Diplock meant to draw any such distinction, the application of which would require excessive mental gymnastics of the jury. However, it has been argued that Lord Diplock intended to draw exactly this distinction. In fact there are three different issues in respect of which section 3 requires the jury to set standards by which the accused is to be judged, and in respect of each of these issues different facts about the accused and his or her background may bear on what counts as his or her meeting those standards.\textsuperscript{339} The accused’s cultural milieu may be relevant in determining

\begin{itemize}
  \item \textsuperscript{333} Ibid 705.
  \item \textsuperscript{334} Ibid.
  \item \textsuperscript{335} \textit{Smith} supra (n 325).
  \item \textsuperscript{336} \textit{Camplin} supra (n 213).
  \item \textsuperscript{337} Macklem and Gardner supra (n 326) 819.
  \item \textsuperscript{338} \textit{Smith} supra (n 325).
  \item \textsuperscript{339} Macklem and Gardner supra (n 326) 820.
\end{itemize}
whether the alleged words or deeds amount to provocation. \(^{340}\) In respect of how grave the provocation really was, it may be relevant as (Lord Diplock saw) whether the accused actually possessed the characteristic about which he or she was taunted. \(^{341}\) And in respect of whether he or she should have lost self-control to the point at which he or she killed, we may need to know what role he was occupying at the time. \(^{342}\) In each case the facts about the accused and his or her background are needed, not to make the objective standard of reasonableness any less objective, but to identify exactly what would count as meeting the objective standard of reasonableness in the accused’s case. \(^{343}\)

It has been argued that the qualification of the reasonable person standard is not the right approach to be followed. Rather, the unqualified reasonable person standard already accommodates the only variations between people that the law should want to accommodate in an excusatory defence.

### 3.1.2.4.3 The problem of proportionality

The requirement of proportionality in provocation has been criticized on the grounds that it is contradictory to expect the provoked actor to respond as a reasonable person, that is in proportion to the provocation received and, at the same time, to hold him or her liable for manslaughter on the assumption that a reasonable person, when provoked, does not lose his or her self-control. \(^{344}\) The problem with the proportionality requirement is that it makes the provocation defence dependent upon an assessment of the accused’s conduct after he lost his

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\(^{340}\) Ibid.

\(^{341}\) Ibid.

\(^{342}\) Ibid.

\(^{343}\) Ibid.

\(^{344}\) Mousourakis supra (n 176) 102.
self-control rather than on his giving way to passion and losing control in the first place.\footnote{345}

The requirement of proportionality, interpreted as relating to the accused’s mode of retaliation, would appear to militate against the provocation defence where the provocation did not involve a threat to the accused’s life. If the provocation did not involve such a threat, the defence should fail, unless it is accepted that the provoker’s killing was not intended - a conclusion that would entail that the accused should be convicted of involuntary rather than voluntary manslaughter.\footnote{346} It has been argued that, in so far as loss of self-control remains an important element of the provocation defence, the accused’s mode of retaliation may be considered only as relevant to answering the question of whether the accused did in fact lose control.\footnote{347}

The Criminal Law Revision Committee has proposed the reformulation of the test in provocation. The Committee has recommended that the jury should be invited to consider whether, as seen from the viewpoint of the accused, the provocation offered can reasonably be regarded as providing a sufficient ground for loss of self-control leading the accused to

\footnote{345. As Fletcher remarked: “In the context of provocation, the reasonable person is hardly at home. First, as everyone is prepared to admit, the reasonable person does not kill at all, even under provocation. Therefore, it is difficult to assess whether his or her killing should be classified as manslaughter rather than murder… The underlying question is whether the accused should be able to control the particular impulse or emotion that issue in the killing. Yet the intrusion of this mythical standard sometimes induces judges and legislative draftsmen to think that the issue is whether if the average person would have killed under the circumstances, the killing should be partially excused. The test cannot be whether the average person would have killed under the circumstances, for that should more plausibly generate a total excuse.” Fletcher supra (n 239) 247-248.}

\footnote{346. Mousourakis supra (n 176) 103.}

\footnote{347. As was stated in the Australian case of Johnson v The Queen [1976] 136 CLR 619: “The proportion of the fatal act to the provocation is part of the material on which the jury should consider whether the provocation offered the accused was such as would have caused an ordinary man, placed in all the circumstances in which the accused stood, to have lost his self-control to the point of doing the act of the kind and degree of that by which the accused killed the deceased” (at 636 per Barwick CJ).}
react against the victim with intent to kill.\textsuperscript{348} In answering this question the jury should take into account those characteristics of the accused, including any physical and mental disability from which he or she suffered, which, in their view, are relevant to determining the gravity of the provocation.\textsuperscript{349} As Williams has noted:\textsuperscript{350}

\begin{quote}
\textit{``[T]his rewording [of the test in provocation] would not solve the problem for the jury, but the committee thought it might express the question in slightly clearer words.''}\textsuperscript{351}
\end{quote}

He pointed out that it was nonetheless a logical improvement to make the word “reasonably” refer to the jury’s reasoning faculty instead of attaching it to what the accused did.\textsuperscript{352} This approach consorts with the position that any reference to reasonableness or proportionality in the context of the provocation defence can only be relevant to answering the question of whether the provocation offered was such as to make the accused giving way to anger and his or her losing self-control to such a degree as to lead him or her to commit an intentional killing appear a likely or not unexpected reaction.\textsuperscript{353}

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\textsuperscript{348} CLRC par 81. \\
\textsuperscript{349} Ibid paras. 82, 83. \\
\textsuperscript{350} Williams \textit{Textbook of Criminal Law} 2\textsuperscript{nd} ed (1988). \\
\textsuperscript{351} Ibid 342. \\
\textsuperscript{352} Ibid. \\
\textsuperscript{353} Mousourakis supra (n 176) 103.
\end{flushright}
CHAPTER 4

CONCLUSION

After an analysis of the law of provocation in both South Africa and England, it becomes evident that the two jurisdictions have very different approaches to the subject. In South African law a defence of provocation can lead to a complete acquittal whereas in English law it can result in an accused being convicted of manslaughter instead of murder. Not only do the two jurisdictions have very different outcomes as regards the defence, but each has its own set of problems. Instead of determining which jurisdiction has a more favourable approach in dealing with provocation, it would be more appropriate to consider possible solutions to the problems in the respective jurisdictions.

4.1 South African law

Short of tampering with the rules of onus of proof, how can the legislature or the courts limit the obvious injustice on the one hand, requiring a mentally ill person to prove insanity and run the risk of institutionalization if successful and, on the other hand, requiring the person who alleges non-pathological incapacity to raise a reasonable doubt regarding capacity to qualify for a complete acquittal such as in the case of *Nursingh*? 354

4.1.1 Reasonableness versus criminal capacity

A number of possible solutions have been considered. One approach would be to focus on the provoked or emotionally stressed person’s perceptions of the reasonableness of his or her

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354. *S v Nursingh* supra (n 2).
retaliatory conduct, rather than on his or her criminal capacity. \(^{355}\) In terms of the current South African criminal law, a way of achieving this is to recognize that, in accordance with the subjective approach to intention, which includes an examination of the accused’s knowledge or absence of knowledge of unlawfulness of the conduct, the provoked or emotionally disturbed person’s perceptions of the imminence of an attack or the appropriateness of the retaliation are relevant to his or her mens rea. \(^{356}\) The advantage of this approach is that if the provoker is killed, the provoked’s perceptions of the reasonableness of his or her conduct in bringing about such death will not only need to be bona fide to exclude intention to kill required for a murder conviction, but would have to conform with objective norms to exclude a conviction of culpable homicide based on negligence. In essence, in the context of homicide, provocation or emotional stress would become a partial defence, leading to a lesser conviction than murder on the basis of general principles relating to mens rea (viz exclusion of intention and presence of negligence) rather than an automatic reduction from one crime to another. \(^{357}\)

### 4.1.2 Reassessing the subjective formulation for capacity

Another possible approach is to accept that in fact provocation or emotional stress can exclude capacity with regard to all crimes, but on policy grounds only provocation or emotional stress which would have induced a reasonable person to succumb to the pressure will excuse killing. Where the crime of culpable homicide is in issue, the question is one of objective reasonableness, but capacity (which is judged subjectively) is in principle required before any examination into negligence is made. \(^{358}\) It could be argued that, in the interests of

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\(^{355}\) Burchell and Milton supra (n 16) 292. The emphasis on the actor’s perceptions of the reasonableness of his or her conduct is necessary because in some provocation or emotional stress cases there is no self-defence situation, objectively assessed.

\(^{356}\) Burchell and Milton supra (n 16) 292.

\(^{357}\) Ibid.

\(^{358}\) Ibid 293.
the security of the community, in cases of violence perpetrated under provocation or emotional stress, only reasonable lack of capacity for self-control or reasonable loss of self-control should excuse. Burchell and Milton seem to suggest that our law should include some objective criterion in the capacity enquiry, but they acknowledge that such a shift in our law would “require remedial legislation or a bold judicial reassessment of the current subjective formulation for capacity.” 359

However, Louw is of the opinion that neither development is likely, nor, more importantly, necessary. 360 Part of the current uneasiness with the provocation defence is that it is one that seems to lead to an acquittal contrary to a common sense feeling of injustice:

“[O]ne cannot help but feel a measure of disquiet about the conclusion that an intelligent person albeit under a good deal of stress, can shoot his mother and grandfather by firing three bullets into the bodies and his grandmother by firing four bullets into her body, and escape criminal liability completely.” 361

Nevertheless, Burchell and Milton are of the opinion that if a test of reasonableness were adopted in all cases where provocation or emotional stress was raised as defence (even in cases where intention is the fault element required), then this would be closer to the approach of the Rumpff Commission (that severe emotional tension or impulsiveness should not be regarded as excluding volitional control) and the Roman-Dutch law approach. It would allow a court to emphasize objective factors, such as the proportionality between the provocation received and the retaliation by the accused. If the accused has in fact acted involuntarily or without criminal capacity as a result of provocation and his or her reaction to the provocation

359. Ibid.
360. Louw supra (n 9) 212.
361. Burchell and Milton supra (n 16) 286.
is confined within reasonable bounds, taking account of the circumstances in which he or she finds himself or herself, then the defence will succeed. 362 This solution is premised on the fact that even a reasonable person may lose his self-control. One of the consequences of this approach is that it may lead to some of the fine distinctions which are drawn in the English, Australian and Canadian law in order to determine the reaction of a reasonable person placed in the same circumstances as those faced by the accused. 363 The English courts have held that the reasonable person must be endowed with the accused’s characteristics which affect the gravity of the provocation. 364 For instance, the gender, age or any other personal characteristic of the accused which bear upon the gravity of the provocation and the degree of self-control to be expected, have been considered relevant to the enquiry into the reasonableness of the accused’s conduct. 365 A movement towards including a measure of subjectivity in the objective test of negligence can be detected in some of the recent South African case law as well. There may be some subjective factors which bear upon the nature of the provocation which would be relevant. A test of the reasonable person placed in the same circumstances would allow evidence of the circumstances of the abuse to be led. 366

4.1.3 Treating provocation under principles governing the test of capacity

Lastly, it has been suggested that it is more desirable to treat cases of provocation and emotional stress under the principles governing the test of capacity, which is a general

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362. Ibid 293.
363. Colvin in 1995 19 Criminal Law Journal 147 wrote: “In both Australia and Canada, increasing tension in recent years has been directed to the problem how far objective tests should be tailored to fit the capacities, of the individual accused” and he refers to the leading decision of the Canadian Supreme Court in Creighton (1993) 23 CR (4th) 189, where a five-to-four majority ruled that a uniform standard should be used. The minority, however, advocated a flexible standard, which can be adapted for either the frailties or the strengths of the accused. Taken from Burchell and Milton supra (n 16) 294.
364. DPP v Camplin supra (n 213).
365. Burchell and Milton supra (n 16) 294.
366. Ibid.
enquiry, preliminary to both intention and negligence investigations, and a finding of lack of capacity or reasonable doubt regarding the existence of capacity will lead to a complete acquittal. 367 This approach grants a more viable defence to the battered and abused who kill their tormentors, but the defence lacks definable, objective bounds. Under the current law, it also perpetrates inequality in the treatment of persons suffering from pathological as opposed to non-pathological incapacity. 368 This could result in a constitutional challenge to the rule relating to the onus in insanity cases. 369 In the result, then, in South African law severe emotional stress or provocation may deprive a person of the capacity to appreciate the wrongfulness of his or her conduct, or to act in accordance with this appreciation, and for this reason constitutes a complete defence to criminal liability. 370 However, there has been a reflection in the case law of an apparently increasing tendency to conflate sane automatism and non-pathological incapacity. This development is retrogressive in that it is clearly

367. Ibid.
368. The defence of insanity presents an exception to the general rule that the onus of proof rests on the prosecution. The accused who raises the defence of insanity must prove, on a preponderance of probabilities, that he or she was insane at the time of the commission of the crime. Thus, unlike the accused who raises the defence of non-pathological incapacity or any other defence, it is not enough for the accused who raises the defence of insanity simply to raise a doubt that he or she might have been insane at the relevant time. Thus, if the prosecution is relieved of its task of proving criminal capacity or any other element of liability, due process is severely undermined. Not only is due process threatened by placing the onus on the accused but also, under the current state of the South African criminal law, a situation of gross inequality of treatment of accused persons can result from the reverse onus in insanity cases. An accused who simply adduces evidence of non-pathological incapacity can receive a complete acquittal if a reasonable doubt exists in his or her favour, but the accused who raises insanity (pathological incapacity) must prove this condition on a preponderance of probabilities, and if successful, is sent to an institution. Burchell and Milton supra (n 16) 252-253.
369. Burchell and Milton supra (n 16) 252.
370. It is becoming clear that the courts will scrutinize the basis of such a defence with special care and the weight given to the psychiatric evidence will depend on the court’s assessment of the credibility of the accused’s own evidence. Two practical solutions might be helpful to the courts in dealing with evidential issues: (1) A judge hearing a matter involving the defence of non-pathological incapacity based on provocation and emotional stress would be entitled to require the State to lead psychiatric/psychological evidence in order to test evidence on the question of capacity led by the defence against evidence of capacity lead by the state. (2) Such evidence (referred to in (1) above) should ideally be heard after the factual issues of the case (especially issues pertaining to the credibility of the accused’s story) have been canvassed. The weight given to the psychiatric evidence depends, as Kimbleben JA emphasizes in Potgieter, supra (n 102) on the cogency of the accused’s version of what happened, and therefore the hearing of psychiatric evidence should be delayed until after the accused’s version has been tested in cross-examination and in the presence of psychiatrists. Burchell “Evaluation of psychiatric testimony” 1995 SACJ 41-42.
unscientific. The courts have struggled to draw a distinction between the two concepts, each of which have a clear meaning at least in law. Not only is there a conflation of principles but there has also been a trend towards using an implied objective requirement in the capacity enquiry. It has been suggested that lawyers have a responsibility to ensure that legal terms are characterized by clarity and precision.\textsuperscript{371} As Austin held:

\begin{quote}
\textit{“…Words are our tools, and, as a minimum, we should use clean tools…”}\textsuperscript{372}
\end{quote}

It is also submitted that it is the task of the courts to scrutinize the basis of the defence of non-pathological incapacity with special care, the weight of the psychiatric evidence depending on the court’s assessment of the credibility of the accused’s own evidence.\textsuperscript{373}

4.2 English law

4.2.1 Defences arising from cumulative provocation

The question has been raised as to the precise nature of the legal defence or defences that may stem from the circumstances of cumulative provocation. Three possible suggestions have been advanced. Firstly, cases of cumulative provocation may be dealt with under the existing defence of provocation.\textsuperscript{374} This would presuppose an interpretation of the provocation defence broader than the one currently adopted – an interpretation that would place sufficient emphasis on the justificatory as well as on the excusative element in provocation. Under this broader interpretation, provocation would not always depend upon a sudden and temporary loss of self-control. Despite evidence of forethought and deliberation, the defence could succeed if the accused’s resentment against the victim is justified in the

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\textsuperscript{371} Hoctor supra (n 117) 205.  \\
\textsuperscript{372} Austin \textit{“A Plea for Excuses”} 1956-7 57 \textit{Proceedings of the Aristotelian Society} 1 at 7. As taken from Hoctor supra (n 117) 205.  \\
\textsuperscript{373} Burchell and Milton supra (n 16) 295.  \\
\textsuperscript{374} Mousourakis supra (n 176) 161.
\end{flushright}
light of the abuse he or she suffered at the latter’s hands.\(^{375}\) Secondly, cases involving cumulative provocation may be treated under the defence of diminished responsibility or, perhaps, under a combined defence of provocation and diminished responsibility.\(^{376}\)

### 4.2.1.1 Diminished responsibility

Provocation has traditionally been described as a defence for “normal” people. On the assumption that the accused is a normal person, evidence of planning and deliberation prior to the killing should normally militate against his or her claim of loss of self-control. Some degree of forethought and deliberation is not necessarily incompatible with the loss of self-control. In so far as the latter element is viewed as a matter of degree, the plea of provocation should normally fail if the accused appears to have regained his or her composure at the time of the killing. In such case the accused may be able to rely on a different kind of legal excuse, namely diminished responsibility.\(^{377}\)

Like provocation, diminished responsibility operates as a partial defence to murder reducing murder to voluntary manslaughter. The defence, which was introduced in response to the recommendation of the Royal Commission on Capital Punishment for a broader insanity defence, is provided for by section 2 of the Homicide Act of 1957.\(^ {378}\) As with provocation, it must first be established that the accused has had the mens rea for murder before the defence

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\(^{375}\) Ibid 162.  
\(^{376}\) Ibid.  
\(^{377}\) Ibid 164.  
\(^{378}\) According to section 2 of the Homicide Act of 1957: (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 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 principle or as accessory, to be convicted of murder, shall be liable instead to be convicted of manslaughter. (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.”
of diminished responsibility is put to the jury. As with the defence of insanity, it rests upon the accused to prove the defence on a balance of probabilities. For the defence to succeed it is important that medical evidence is brought forward to support the claim that the accused was suffering from an abnormality of mind arising from one of the causes specified in section 2 (1). If the medical evidence supports a finding of diminished responsibility, the jury must find the accused guilty of manslaughter only.  

Under section 2, it must be proved, first, that the accused, at the time of the killing, was suffering from an abnormality of the mind. This is a question for the jury to decide on the basis of medical evidence brought forward and all other relevant evidence. In Byrne the term “abnormality of mind” was defined by Lord Parker CJ as follows:

“‘Abnormality of mind’, which has to be contrasted with the time-honored expression in the M’Naughten Rules, ‘defect of reason’, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.”

As this statement makes clear, an irresistible urge, or an inability or extraordinary difficulty to hold one’s impulses in check, could be treated under diminished responsibility. In Byrne the accused killed a young woman and then mutilated her body. Medical evidence suggested that he was subject to perverted sexual urges which he found impossible or extremely difficult to resist, and that he had committed the killing while under the influence of such urges. In light of the existing evidence, it was clear that at the time of the killing not

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379. Mousourakis supra (n 176) 164. Where the accused raises the defence of insanity it is possible for the prosecution to raise the issue of diminished responsibility. And conversely, where the accused pleads diminished responsibility the prosecution may, on the basis of the evidence available, raise the issue of insanity.
381. Ibid 403.
only did the accused know what he was doing, but that he was also fully aware of the wrongful character of his actions. The Court of Criminal Appeal found him guilty of manslaughter only, on the grounds that due to his condition, it was extremely difficult for him to control his impulses. It was pointed out that “the step between ‘he did not resist his impulse’ and ‘he could not resist his impulse’” is one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his or her impulses. The jury should seek to resolve this problem by approaching it “in a broad common sense way.” 382 In this case the Court of Appeal recognized that mental responsibility for the accused’s acts requires consideration by the jury “of the extent to which the accused’s mind is answerable for his physical acts which include a consideration of the extent of his ability to exercise will-power to control his physical acts.” 383 This question, as being one of degree, can only be decided by the jury. In Lord Parker’s words:

“Medical evidence is of course relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused but whether such impairment can properly be called ‘substantial’, a matter upon which juries may quite legitimately differ from doctors.” 384

In Byrne 385 the Court accepted that the accused’s condition was correctly described as “partial insanity” or as a condition “bordering on insanity.” 386 To avoid confusion the Court of Appeal in Seers 387 adopted the position that judges should avoid comparing diminished responsibility to insanity for there may be cases in which the abnormality of the mind upon

382. Byrne supra (n 380) 406.
383. Mousourakis supra (n 176) 167.
384. Byrne supra (n 380) 403.
385. Byrne supra (n 380).
386. Ibid 403.
which the accused’s defence is based has nothing to do with any of the conditions relating to
the insanity defence.\textsuperscript{388} It is further required that the abnormality of mind from which the
accused claims to suffer arises from one of the causes laid down by section 2(1). Although no
clear description is given of the causes referred to in section 2, it appears that “disease or
injury” most likely pertains to physical injury or illness and that “inherent cause” includes
functional mental disorder.\textsuperscript{389}

The defence of diminished respons ibility operates as a partial excuse on the assumption that
the accused’s impaired capacity reduces his or her moral responsibility for his or her actions.
This does not mean that a third, intermediate level between full responsibility and complete
lack of responsibility should be recognized. Diminished responsibility refers, rather, to a
special type of being responsible, one that presupposes a capacity for both perception and
control. Due to the actor’s mental condition, perceiving the character of his or her actions
correctly, or the exercising of self-control, is regarded as being extraordinarily difficult, that
is “as compared to normal people normally placed.”\textsuperscript{390} This is what justifies the reduction of
culpability and, consequently, legal liability in such cases. For the defence of diminished
responsibility be accepted, Griew is of the view that it should be demonstrated that:

“\textit{The defendant had an abnormality of mind (of appropriate origin). This had a substantial effect upon one or more relevant functions or capacities (of perception, understanding, judgment, feeling, control). In the context of the case this justifies the view that his culpability is substantially reduced. His liability is on that account to be diminished. More shortly:}"

\textsuperscript{388} Consider also \textit{Rose v R} [1961] 1 All ER 859. In this case it was held that if the word insanity is used in relation to diminished responsibility it must be used in “its broad popular sense”.

\textsuperscript{389} Examples of abnormalities of mind that were sufficient for the defence of diminished responsibility to be put to the jury range from arrested intellectual development combined with psychopathic tendencies \textit{Egan} [1972 4 All ER 470]; a disorder of personality induced by psychological injury \textit{Gittens} [1984] QB 698); reactive depression caused by marital difficulties \textit{Sanders} (1991) 93 Cr App Rep 245); chronic alcoholism \textit{Randlov} [1989] 1 WLR 350); and “Othello Syndrome”, described as morbid jealousy for which there was no cause \textit{Viare} (1979) 69 Cr App Rep 104). Intoxication by drugs or alcohol is generally excluded as a basis of the diminished responsibility defence.

\textsuperscript{390} \textit{Hart Punishment and Responsibility} 1\textsuperscript{st} ed (1968) 15.
his abnormality of mind is of such consequence in the context of this offence that his legal liability for it ought to be reduced." 391

When the defence of diminished responsibility is raised, its success or failure depends largely on whether the jury believed that the accused deserves to be convicted as a murderer. This, in turn, depends upon the extent of their sympathy for the accused and the circumstances and gravity of the killing. As Williams remarked:

“The defence…is interpreted in accordance with the morality of the case rather than as an application of psychiatric concepts. Where sympathy is evoked…it seems to be dissolving into what is virtually the equivalent of a mitigating circumstance." 392

This explains why the defence has been accepted despite the absence of clear evidence of abnormality of mind, in some cases involving mercy-killings, or killings committed in conditions of reactive depression or association, where the accused has killed in response to extreme grief. 393 Diminished responsibility may provide the legal basis for dealing with cases of cumulative provocation that cannot be treated under the provocation defence. Having been subjected to a long course of cruel and violent behaviour, the accused may claim that he or she is experiencing such grave distress or depression as to substantially diminish his or her capacity for self-control and, hence, the moral responsibility for his actions. 394 Pleading diminished responsibility instead of provocation, in a case involving a long history of abuse would seem more appropriate where no final provocative incident, occurring immediately prior to the killing, can be demonstrated, or where the accused’s retaliation was preceded by planning.

392. Williams supra (n 350) 693.
393. Mousourakis supra (n 176) 170.
394. Crimes of passion are often the result of intense anxiety or depression leading into a psychotic state of morbid resentment or jealousy.
4.2.1.2 Pleading provocation and diminished responsibility together

In some cases, especially those involving cumulative provocation, the accused may be able to plead a combined defence of provocation and diminished responsibility. The practical effect of raising such a combined defence would be the reduction of the offence from murder to manslaughter if it is found that the accused was suffering from an abnormality of mind and was provoked to lose his or her self-control. The possibility of setting up a combined defence of this kind has been recognized by the Criminal Law Revision Committee. According to them:

“[i]t is now possible for a defendant to set up a combined defence of provocation and diminished responsibility, the practical effect being that the jury may return a verdict of manslaughter if they take the view that the defendant suffered from an abnormality of mind and was provoked. In practice this may mean that a conviction of murder will be ruled out although the provocation was not such as would have moved a person of normal mentality to kill.” 396

The problem with reducing the accused’s legal liability on the grounds of both provocation and diminished responsibility is that the basic assumptions upon which these defences are based appear to be incompatible: provocation presupposes a reasonable or normal person driven to the act of killing by angry passion; diminished responsibility presupposes a person suffering from an abnormality of mind and who, for that reason, cannot be called “normal” or “reasonable”. 397 A number of cases may be cited in which this problem has prevented the courts from accepting such a combined defence. 398 In Matheson 399 the Court of Criminal

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395. Thus in Ahluwalia supra (n 212), although the defence of provocation was rejected, the accused’s appeal was allowed and a retrial ordered on the grounds that diminished responsibility had not been raised at her trial despite medical evidence suggesting that she was suffering from an abnormality of mind (endogenous depression) when the offence was committed.
397. This does not mean, however, that the defences are necessarily mutually exclusive.
398. Mousourakis supra (n 176) 171.
399. [1958] 2 All ER 87.
Appeal adopted the position that when a combined defence is raised the jury, in returning a verdict of manslaughter, should state the ground upon which their decision is based.

According to Lord Goddard CJ:

“[i]t may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground as provocation. If the jury returns a verdict of manslaughter, the judge may and generally should ask them whether their verdict is based on diminished responsibility or on the other ground or on both.” 400

As a defence strategy, pleading provocation and diminished responsibility together is considered to be to the accused’s advantage. The reduction of murder to manslaughter in such cases rests on the assumption that the accused suffered from an abnormality of mind and was provoked. This would render admissible medical or psychiatric testimony which the jury would not be allowed to consider if the accused had chosen to rely on provocation alone. 401

A combined plea of provocation and diminished responsibility entails a further advantage for the accused as regards the sentence imposed for the lesser offence of manslaughter.

According to Williams:

“[s]uccess in the combined defence of provocation and diminished responsibility has an advantage for the defendant in respect of sentence: it may result in a more lenient outcome than a defence of provocation alone, and it is virtually free from the risk of life sentence that attends a defence of diminished responsibility by itself.” 402

When the defence of provocation is raised the jury must assess the accused’s plea by deliberating upon how a reasonable person may have reacted to the provocation offered,

400. Ibid 90.
401. Mackay in “Pleading Provocation and Diminished Responsibility Together” 1988 Criminal Law Review 411 at 422 remarked: “Where there is some psychiatric evidence which supports the contention that at the time of the killing the accused may have been suffering from an abnormality of mind, then if this evidence also mentions provocation or some similar term, it will be advantageous for the accused to plead both defences. The pleading of provocation alone will almost certainly mention that psychiatric evidence will be inadmissible, at least in so far as the ‘ordinary man’ criterion is concerned.”
402. Williams supra (n 350) 544-545.
relying on their collective common sense and everyday experience. As Lord Simon explained in Camplin:

“Whether the defendant exercised reasonable self-control in the totality of the circumstances...would be entirely a matter for the consideration by the jury without further evidence. The jury would use their collective common sense to determine whether the provocation was sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal characteristics) act as the defendant did.”

In Turner Lawton L J said:

“Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.”

However, it should be noted that in most cases where provocation and diminished responsibility are raised together the jury may find it difficult to keep the two issues separate. This seems true, particularly with regard to some cases of cumulative provocation in which elements of provocation, abnormality of mind and loss of self-control appear to be interrelated or interdependent. One reason for pleading provocation and diminished responsibility together relates to the uncertainty that surrounds the application of the objective test in provocation. This uncertainty is often the result of the difficulty in differentiating between individual characteristics or peculiarities of the accused that may be taken into account as modifying the reasonable person test and those peculiarities that lie outside the scope of the test. Thus, pleading a combined defence of diminished responsibility would be a better defence in a case where it is unclear whether the reasonable person

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403. Mousourakis supra (n 176) 172.
404. Camplin supra (n 213).
405. Ibid 182-183.
407. Ibid 841-842.
408. Mousourakis supra (n 176) 173.
may be endowed with a particular mental characteristic of the accused or not. 409

It has been suggested that by dealing with cumulative provocation under the defence of diminished responsibility it may result in a misunderstanding as regards the rationale and purpose of the defence of diminished responsibility. 410 Lastly, it has been suggested that cumulative provocation cases be dealt with under a separate defence to murder. The ambit of such a defence should be drawn wide enough to encompass a variety of extenuating circumstances that may justify the reduction of culpability for homicide. 411

It seems difficult, however, to view all cases of cumulative provocation as capable of being treated under a single legal defence. Rather, cumulative provocation should be regarded as a situation likely to give rise to the source of different legal defences. 412 Instead of widening the scope of the existing defence categories in order to accommodate all cumulative provocation cases, it would perhaps be better to distinguish between the different possible pleas that may arise in such cases. Those pleas might be either for extenuation or, possibly in some cases, exoneration, depending upon the nature of the particular defence raised. 413 In cases involving cumulative provocation, a plea for mitigation on grounds of provocation

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409. In Taaka [1982] NZLR 198, the New Zealand Court of Appeal adopted the view that the obsessively compulsive personality of the accused should be regarded as a characteristic relevant to the issue of provocation and, as such, it should be taken into account by the jury in applying the objective test. In some cases it has been suggested, moreover, that a post-traumatic stress disorder or battered woman syndrome may be regarded as a “characteristic” for the purposes of the provocation defence. Some commentators have concluded that these cases suggest a departure from the traditional jurisprudence of provocation, as the position adopted indicates that mental peculiarities may be viewed as a discrete exculpatory factor in defining provocation in law. One should note, however, that New Zealand law does not provide for a separate defence of diminished responsibility and this might explain the more liberal approach to the application of the objective test adopted in cases like these.

410. Wasik supra (n 322) 35-36.

411. Ibid 36. Wasik regards the first of these three possible approaches to the problem of cumulative provocation as comparatively the least troublesome.

412. Wasik supra (n 322) 36.

413. In some cases of cumulative provocation the accused may be able to plead, e.g., self-defence or insanity.
should not be accepted unless all the conditions of the defence, as it is currently defined, are satisfied. From the point of view of the excuse theory, this would presuppose that the accused has retaliated in the heat of passion and that his or her reaction was triggered off by a provocative incident of some sort. However, the gravity of that final provocative incident or, to put it otherwise, the accused’s judgment of certain conduct or words as gravely provocative, should be assessed in the light of previous provocation from the same source.

According to Ashworth:

“[t]he significance of the deceased’s final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased’s final act and the accused’s retaliation should continue to tell against him. The point is that the significance of the deceased’s final act and its effect upon the accused – and indeed the relation of the retaliation to that act – can be neither understood nor evaluated without reference to previous dealings between the parties.”

In a case of cumulative provocation the final act of provocation, however trivial it might appear to have been, should be regarded as in a sense epitomizing or reflecting in the accused’s eyes all the previous abuse he or she suffered at the victim’s hands. In this respect, such a provocation may be seen as being serious enough to support a partial excuse on the grounds of impaired volition or loss of self-control.

### 4.2.2 Provocation and pluralism

It has been suggested that the unqualified reasonable person standard already accommodates the only variations between people that the law should want to accommodate in the excusatory defence. To defend this viewpoint there has been a revival of the common

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414. Mousourakis supra (n 176) 163.
416. Mousourakis supra (n 176) 163.
law’s tripartite analysis of the “objective” issues in provocation.  

4.2.2.1 The need for an act of provocation

Firstly, it needs to be established whether there was an action capable of constituting provocation. Neglected in Smith 418 and other cases is the obvious point that an act of provocation underlies a defence of provocation. To cross this initial threshold it may be enough simply to point to things that were done or said, that were the cause of one’s anger. However, section 3 of the Homicide Act of 1957 does not merely require that the accused has been caused to lose his or her self-control by the things done or said: preserving the common law on this point, it requires that he or she has been provoked to lose his or her self-control by the things done or said. Since 1957, the courts have increasingly suppressed the difference. 419 The question that needs to be answered is what is this difference that the courts have suppressed? To grasp the difference, an understanding of an act of provocation is necessary. This is because the passive category “being provoked” is parasitic on the active category “provoking”. This does not mean that someone’s provoking “can only ever provoke a person.” Thus a person cannot make an act a provocation by thinking it so except by

417. Macklem and Gardiner supra (n 326) 815.
418. Smith supra (n 325). During the course of an argument at his flat, the accused stabbed another man a number of times with a kitchen knife, fatally wounding him. At the trial he put forward the defence of provocation pursuant to section 3 of the Homicide Act of 1957. Psychiatric evidence was given that he was suffering from severe depression at the time of the killing which would have had the effect of reducing his threshold or would have been a significant contributory factor in reducing his threshold for erupting with violence. The judge directed the jury that while for the purposes of section 3 of the 1957 Act, such a severe depressive episode was capable of being a characteristic with which the reasonable man was to be imbued, it was only relevant to gravity of the provocation and not the reasonable man’s loss of self-control. On appeal it was held that when attributing characteristics with which a reasonable man was deemed to be endowed for the purposes of the objective part of the test imposed by section 3, no distinction could properly be drawn between their relevance to the gravity of provocation and the reasonable man’s reaction to it. It followed that the judge had misdirected the jury and the misdirection rendered the murder conviction unsafe. Accordingly, the appeal was allowed, and the conviction of murder was substituted with manslaughter.
419. Macklem and Gardiner supra (n 326) 817.
understanding what could possibly make that act a provocation apart from a person’s thinking it so. Accordingly, a person always needs to know what it is to provoke somebody (actively) in order to know what it is to be provoked (passively), even in cases in which a person was provoked without anybody having done so. Not all possible causes of anger are provocations to anger, in short, for not all involve a provoker or someone mistakenly but intelligibly taken to be a provoker. So the question is where to find the all-important threshold element of provocation. How do social forms structure the possibility of insult? Although it is always possible to develop new ways of insulting people, all of them necessarily trade on ways of insulting people that are already socially established. One implication of this is that in each different social milieu there is a different menu of possible insults, and more broadly of possible provocations in the locally available social milieu of the day. The question is what the implications are for the law regarding this way of thinking about the threshold question. It should be noted that the courts have clearly been right to warn the jury in provocation cases that different words and deeds have different significance for the different accused. Jurors should not ask themselves what the alleged insult would have meant to them. This is not because the accused might have personal idiosyncrasies that sets him apart from others. It is because he might inhabit a different social milieu from the jury, and so might participate in a different menu of possible insults. However, in deciding whether the accused was provoked, the jurors need to adjust their horizons to accommodate

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420. There are cases of error of judgment in which one is provoked by what one mistakenly regards or treats as someone’s provocative conduct. But even in those cases it is clear that to be provoked to lose one’s self-control is not merely to be caused to lose one’s self-control by things that someone did or said.

421. Macklem and Gardiner supra (n 326) 817.

422. Ibid 818.

423. Ibid.
different social milieu with their different indigenous forms of insult. The fact that the accused is, for example, a Muslim, can be pertinent to the question of whether there was a provocation only if there is a Muslim social milieu in which there is a distinctive menu of possible insults, some of which are unknown or not available as insults to non-Muslims. Unless there is a similar social milieu of schizophrenics, the same argument does not apply to make the fact that an accused was a schizophrenic relevant to the threshold question of whether he or she was provoked. 424

This shows that there was method in the madness of the common law’s traditional assertion that only certain legally recognized insults were capable of constituting provocation in law. 425 The common law was warranted in this claim if and to the extent that these were the only (sufficiently grave) forms of insult that were possible in the locally available social milieu of the day. 426 This concession to the common law’s approach sheds new light, in turn, on the reforms to the common law that were made by section 3 of the Homicide Act of 1957. The reforms evidently reflected the fact that the locally available forms of insult, and hence of provocation, were multiplying, and in some cases being displaced with the fragmentation, and in some cases eradication, of social milieu. 427 Since judges must consider precedent where juries need not do so, section 3’s solution of leaving it to the jury to devise for themselves the menu of possible provocation was one way to remove certain conservative restrictions from that menu. But it did not imply that the menu had been abolished and replaced with a free-for-all in which anything at all could in principle amount to provocation. The jury still needs much the same question that judges used to ask at common law:

424. Ibid. This is done so as to prevent Schizophrenia from being institutionalized.
425. Ibid.
426. Ibid 821.
427. Ibid 819.
Were these deeds or words that caused the accused to lose his or her self-control capable of amounting to provocation, such that he or she was not just caused but provoked to lose his or her self-control?

4.2.2.2 Evaluating the provocation

The next question that needs to be asked is whether the accused should really have been provoked as he or she was. This in law is known as the gravity question. It conceals two subsidiary issues, only the second of which is aptly described in terms of gravity. The first subsidiary issue is the issue of whether the things that are intelligible as insults in a particular cultural milieu are really insulting. For example, calling someone “queer” is intelligible as an insult in many cultures. The fact that it is used as an insult in many cultures proves this. But the question remains as to whether it is really insulting to be called “queer” when there is absolutely nothing wrong with being “queer” and it does not blemish one’s life. This is not a question of whether being called “queer” is a particularly grave insult but a question of whether it is really an insult at all. In other words, it is not a question of whether the accused should have been angered as much as he or she was by it, but the question of whether he or she should have been angered by it at all. The other subsidiary issue is the issue of how serious a certain insult is. It is only possible to reach this subsidiary question of degree when it is agreed that what one is dealing with is really an insult. Even if in some contexts it is an insult to call someone “queer”, quite possibly it is not as much of an insult as in those contexts, where it is widely taken to be. The two subsidiary issues are dealt with under the same

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428. Ibid 820.
429. Ibid 821.
430. Ibid.
431. Ibid.
432. Ibid.
heading because, as far as making space for differences among accused is concerned - as far as the problem of social pluralism is concerned - they raise variants of exactly the same puzzle. The first issue raises in a dramatic form the puzzle raised in a more muted (and sometimes almost imperceptible) form in the second. The puzzle is structurally identical to a puzzle that is also found in the law of defamation. Under what circumstances would “a right thinking person” reduce his or her opinion of another due to the association of that other with a quality that is not truly obnoxious, but is widely thought to be so? In the law of defamation there has been much doublespeak on this subject. In that context the courts are under some pressure to concede popular prejudices to the plaintiff who claims to have been defamed and the pressure is that those very prejudices may subsequently have been the immediate occasion of his or her special damage.

There are doubts about the wisdom of succumbing to this pressure but it has been conceded that it may be justified by the special focus on damage in the law of tort. No similar pressure exists in the law of provocation. Therefore, the puzzle should be approached with a more open mind. Granted that the justification of anger is a moral matter, a person’s first instinct would be to say that the provocation should be judged for the provocation it really was, for its true moral import, quite irrespective of the provocation it was commonly thought to be. It is one thing to include cultural milieu when addressing the question of what is intelligible as an insult, but quite another – and one is tempted to say that it is a mistake - to include cultural milieu in its evaluation Thus is it possible for a person to be insulted by

433. Ibid.
434. Ibid.
435. Ibid.
436. Ibid.
an allegation of some quality that is widely, but wrongly, taken to be obnoxious? The answer is both yes and no. No, if that is the end of the story. But yes if the allegation is of something wrongly taken to be an instance of what is rightly regarded as a wider kind of obnoxiousness. Then the real insult, and the one which must be tested for gravity, is not the superficial, pseudo insult, which is not in fact genuinely insulting, but the underlying insult, which is. 437

Special idiosyncrasies of the accused are not necessarily ruled out as a factor in the assessment of what counts as a genuine insult. But it is important to note how such factors may be relevant to that assessment. 438 They are relevant because they reveal whether the words or deeds in question really were insulting in some hidden way, or more or less insulting than at first they might seem to someone not au fait with the full circumstances. In cases where there is no cross purpose in an insult the guidance is clear: an insult is only as insulting as it really is, when addressed to the accused in these circumstances. No amount of thinking on the part of the accused or his or her peers or society at large, can make the words or deeds more insulting. 439

4.2.2.3 The standard of self-control

For the purposes of the provocation defence the law is interested only in the lowest possible level of self-control that any reasonable person would have. Once that constant is located, the gravity of the insult is known; the question is whether it is not automatically known whether the reasonable person would have lost self-control to the point of killing. 440 The answer to

437. Ibid 821.
438. Ibid 823.
439. Ibid.
440. Ibid 824.
to this question is no. It was conceded in the Smith,\textsuperscript{441} case that the standard of self-control should not be lowered merely to meet the bad temper of the bad-tempered person. This suggests the reasonable person standard. The question thus is whether there are different standards of temper that are applicable to different people in respect of the same insult? It would appear that there could be.

A recruitment advertisement for the Metropolitan Police challenged readers on the question of whether their self-control in the face of grave provocation would be up to the standard reasonably expected of a police officer. The reason for asking the question was that the standard is higher than that applicable to people generally. This is not because police officers necessarily have more self-control; it is because as police officers they are expected to exercise more self-restraint.\textsuperscript{442} If in principle standards of self-control can be higher than standards applicable to people in their capacity as ordinary members of public, they can surely also be lower. No doubt there will be arguments about the extent to which special professional standards should be carried over into the general criminal law. But the very fact that these arguments are intelligible shows that variations in the standard of self-control are possible.\textsuperscript{443}

In lowering the standard one faces the same moral and policy debates that one encounters in raising standards. Those debates are about the desirability of institutionalizing in the law standards that belong to roles that are out of the ordinary in calling for or permitting a more

\textsuperscript{441} Smith supra (n 325).
\textsuperscript{442} Macklem and Gardiner supra (n 326) 824.
\textsuperscript{443} Ibid 825.
temperamental disposition. 444 Is it possible to extend this point to the predicament, for example, of battered women and express their predicament as a syndrome or simply as a terrible history? The answer depends on whether there is a set of special standards for being a good or adequate battered woman. The question is thus whether she must be adequate in her response. Even if there are such special standards, the question is whether this is a role that the criminal law should institutionalize? Such a question is difficult to answer. One tends to think that if there are distinctively lowered standards of self-control for battered women, it should not be institutionalized. This is not simply because the standards are lower, for lower standards should sometimes be upheld, when they are constitutive of worthwhile roles. It is because the role of a battered woman should not exist and its unwarranted existence in our society should not be given the stamp of legal approval. 445

Of course, the lowering of standards to fit the role is not the argument many campaigners make or wish to make with respect to battered women. The argument that many wish to make is an argument that abandons the standards altogether. For them there is no question of judging the reactions of battered women, it is a matter of making the space to “excuse” them, by accommodating the reaction that they have been reduced to by their batterers. 446 This is of course quite literally to diminish their responsibility by abandoning any claim that they are people who can be judged by standards, in this case by standards of self-control. This makes the whole exercise of accommodation self-defeating since the whole point of pleading provocation rather than diminished responsibility is to garner respect and self-respect that

444. Ibid 826.
445. To draw a dramatic parallel, it is possible for people to be good slaves, not just in the sense of being good at performing the tasks of slaves, but also in the sense of being temperamentally and dispositionally well-suited to slavery. In an attenuated sense such people can be self-respecting slaves, for they tend to live up to the standards of the role that they are forced to play. Nevertheless, the role is foul and its standards should not be institutionalized in law.
446. Macklem and Gardiner supra (n 326) 827.
flows from being judged by the proper standards. The plea of provocation then becomes
euphemistic. It is really a defence of diminished responsibility by another name. 447 Thus
many are of the view that Lord Diplock in Camplin 448 meant to attribute different
“characteristics” to the reasonable person for the purpose of different “objective issues”
arising under section 3. 449 The majority of the House of Lords in Smith 450 denied that he
meant to draw any such distinction. However, it has been argued that Lord Diplock intended
to draw exactly this distinction. 451 In respect of whether the words or deeds that are claimed
to have amounted to provocation are capable of amounting to the accused’s cultural milieu
may be relevant. In respect of how grave the provocation really was it may be relevant
whether the accused actually possessed the characteristic about which he was taunted. And in
respect of whether he or she should have lost self-control to the point at which he or she
killed, one may need to know what role he or she was occupying at the time. 452 In each case
facts about the accused and his or her background are needed, not to make the objective
standard of reasonableness any less objective, but to identify exactly what would count as
meeting the objective standard of reasonableness. 453 Thus the questions have a built-in
sensitivity to certain variations between the different accuseds’ situations, but do not detract
from their objectivity. 454

447. Ibid.
448. Camplin supra (n 213).
450. Smith supra (n 327).
451. Mackem and Gardiner supra (n 326) 830.
452. Ibid 831.
453. Ibid.
454. Ibid 815.
To conclude, it has been submitted that in cases of cumulative provocation, the best solution would be to plead diminished responsibility. Regarding the problem of reflecting human diversity in the structure of the provocation defence, it has been suggested that instead of allowing the jury to personalize and thereby qualify the apparently uniform “reasonable person” standard, it would be preferable to use the reasonable person standard unqualified, as it already accommodates the only variations between people that the law should want to accommodate in an excusatory defence.
BIBLIOGRAPHY

BOOKS


THESES

JOURNALS

Dean, W.B. “Provocation” 1964 Responsa Meridiana 231.
TABLE OF CASES

SOUTH AFRICAN

Clark v Hurst NO 1992 4 SA 630 (D)
R v Buthelezi 1924 AD 160
R v Hercules 1924 AD 160
R v Krull 1959 3 SA 392 (A)
R v Tengayika 1958 3 SA 7 (FC)
S v Arnold 1985 3 SA 256 (C)
S v Bailey 1982 3 SA 772 (A)
S v Calitz 1990 1 SACR 119 (A)
S v Campher 1987 1 SA 940 (A)
S v Chretien 1981 1 SA 1097 (A)
S v De Blom 1977 3 SA 513 (A)
S v Delport 1968 1 PH H 172 (A)
S v Di Blasi 1996 1 SACR 172 (C)
S v Eadie 2001 1 SACR 172 (C)
S v Eadie 2002 JDR 0232 (SCA)
S v Hartman 1975 3 SA 532 (C)
S v Ingram 1995 1 SACR 1 (A)
S v Kalogoropoulas 1993 1 SACR 12 (A)
S v Kensley 1995 1 SACR 646
S v Laubscher 1998 1 SA 163 (A)
S v Lesch 983 1 SA 814 (O)
S v Mangondo 1963 4 SA 160 (A)
S v Mini 1963 3 SA 188 (A)
S v Mokonto 1971 2 SA
S v Moses 1996 1 SACR 701 (C)
S v Nursingh 1995 2 SACR 331 (D)
S v Potgieter 1994 1 SACR 61 (A)
S v Smith 1990 1 SACR 130 (A)
S v Van Vuuren 1983 1 SA 12 (A)
S v Wiid 1990 1 SACR 561 (A)

ENGLISH

Acott [1997] 1 All ER 706
Alexander (193) 109 Lt 745, 9 Cr App R 139
Ayes (1810) R & R 166
Baillie [1995] Crim LR 739
Bedder v DPP [1954] 2 All ER 801, [1954] 1 WLR 1119
Burke [1987] Crim LR 336
Byrne [1960] 2 QB 396
Dryden [1995] 4 All ER 987
Duffy [1949] 1 All ER 932

Fisher (1837) 8 C & P 182

Gittens [1984] QB 698

Hayward (1883) QB 698

Hopkin Hugget (1666) Kel 59

Humphreys [1995] 4 All ER 1008

Ibrams (1981) 74 Cr App R 154

Johnson [1989] 1 WLR 740

Kelly (1848) 2 C & K 814

Lesbini [1914] 3 KB 1116


Mancini v DPP [1942] AC 1, [1941] 3 All ER 272

Manning (1617) 1 Vent 158, 83 Eng Rep 112 (KB 1683-4)

Matheson [1958] 2 All ER 87

Mawgridge (1707) Kell 119


Randy [1989] 1 WLR 350

Rose v R [1961] 1 All ER 859

Royleys (1612) 12 Co Rep 87 & (1612) Cro Jac 296

Sanders (1991) 93 Cr App R 245

Seers (1984) 79 Cr App Rep 261
R v Smith  [1998] 4 All ER
Tooley  (1709) Holt KB 485
Turner  [1975] 1 QB 834, [1975] 1 All ER 70
Viangre  (1979) 69 Cr App R 104
Welsh  (1869) 2 Cox CC 336

NEW ZEALAND

McGregor  [1962] NZLR 1069
Taaka  [1982] NZLR 198

AUSTRALIA

Johnson v The Queen  [1976] 136 CLR 619
### TABLE OF STATUTES

**SOUTH AFRICAN**

Criminal Procedure Act 51 of 1977

Native Territories Penal Code Act 24 of 1886 (C)

**ENGLISH**

Homicide Act of 1957

Statute of Stabbing of 1604
TABLE OF COMMISSION REPORTS

SOUTH AFRICAN


ENGLISH

Criminal Law Revision Committee Working Paper on Offences Against the Person CLRC/OAP/R