DECIPHERING THE DEFENCE OF PROVOCATION

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The only partial defence in Canadian criminal law is that of provocation contained in s. 232 of the *Criminal Code*.[1] It is a defence only to a charge of murder and provides for a conviction for the lesser offence of manslaughter in circumstances where the accused was provoked to kill. It is thus designed as a mitigatory feature of the criminal law in order to avoid the full rigour of a murder conviction and especially to escape the mandatory sentence of life imprisonment.

Unfortunately, the provocation section is seriously flawed. Some of its difficulties lie beyond the scope of this article. They have much, however, to do with the partially objective test(s) contained within the statutory provision. Two, not so uncommon, situations where this impact can be noticed are: (a) the situation where the accused may have acted in self-defence or defence of property but used too much force; and (b) where the accused, almost always a woman, has killed someone who has abused her repeatedly--the so-called "battered woman syndrome."

Because the doctrine of excessive force in self-defence has been ruled out in Canada so as not to permit a reduced verdict of manslaughter,[2] the only remaining mitigating defence, where the elements of murder have been made out, is the defence of provocation. Provocation might founder, however, on the same basis that the justificatory defence failed--a failure to meet the objective requirement involved (though they are, of course, different objective components).[3] Nonetheless, it is, I submit, a situation that begs for some mitigatory defence for the accused caught in such a predicament.

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[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 232 [hereinafter referred to as *Code*]. Some might consider the defence of intoxication also to be a partial defence, on the basis that very often a successful defence to a specific intent offence will still result in the accused being convicted of a lesser and included general intent offence. This occurs, for instance, where there is an acquittal for murder but a conviction for manslaughter. However, further analysis indicates that intoxication is not really a partial defence because it is available to any specific intent offence regardless of whether there is a lesser and included general intent offence. An example is the offence of theft. Moreover, the defence is a complete defence to a specific intent offence and no defence at all to a general intent offence. That is the basis on which there is a conviction for the lesser and included general intent offence, not that intoxication is a partial defence.

[2] *R. v. Gee* (1982), 68 C.C.C.(2d) 516 (S.C.C.); *R. v. Faid* (1983), 2 C.C.C.(3d) 513 (S.C.C.); *Brisson v. The Queen* (1982), 69 C.C.C.(2d) 97 (S.C.C.); *Reilly v. The Queen* (1984), 15 C.C.C.(3d) 1 (S.C.C.). Where the justificatory plea fails, the accused is liable to conviction for murder. *Dicta* in the cases suggests, though, that there may be other bases for a manslaughter verdict, either in the form of a reasonable doubt about the requisite *mens rea* or via the defence of provocation.

[3] The objective components of the various justifications in the *Code* vary. Section 34(2), for example, requires "a reasonable apprehension of death or grievous bodily harm" and a belief, "on reasonable grounds," that there is no other way for the accused to prevent death or grievous bodily harm to herself. On the other hand, s. 232(2) requires, for a successful provocation defence, that the provocation have been such as to deprive the "ordinary person of the power of self-control."

For the battered woman situation, the same difficulty can operate to prevent the defence of provocation. Indeed, many battering situations that result in the accused woman killing the batterer will be examples of arguably excessive force in self-defence. The issues are then the same as for the more general problem. There are, however, other situations that cry for some relief; for example the accused woman against the full rigour of the law where she is a victim of the battered woman syndrome in the sense of being the victim of "cumulative provocation" (for want of a better term) and kills in circumstances where, objectively viewed, there may not have been provocation at that particular time or she may not have acted "on the sudden."

The topics above are themselves worthy of considerable attention which would point in the direction of reform for the provocation defence to handle them. They are beyond the scope of this article because there is a preliminary criticism that can be advanced of the present defence in s. 232. This is simply that it is so doctrinally complex that juries, if not judges, are very unlikely to grasp its many technical points. Indeed, it is conceivable that juries may ignore the instructions given them about it. Involved in this complexity is confusion about the respective roles of judge and jury. The purpose of this article is to show that a major reason for reform is the sheer complexity of the section. That complexity is so great that it warrants treatment as a separate topic.

Section 232 of the *Criminal Code* which embodies the defence of provocation reads as follows:[4]

> 232. (1) Culpable homicide that otherwise would be murder (1) may (2) be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.(3)
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> (2) A wrongful (4) act or insult (5) that is of such a nature as to be sufficient to deprive an ordinary person (6) of the power of self-control (7) is provocation for the purposes of this section (8) if the accused acted on it on the sudden and before there was time for his passion to cool.(9)
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> (3) For the purposes of this section, the questions
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> (a) whether a particular wrongful act or insult amounted to provocation, and
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> (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,
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> are questions of fact, (10) but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, (11) or by doing any-

[4]To give some idea of the complexity of the defence, the bold-faced numbers indicate where legal issues have arisen. As can be seen, this small section of the *Code* has given rise to much jurisprudence.

> thing 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.(12)
>
> (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.(13)

This is an important provision for an accused on trial for murder since the difference lies between the minimum penalty of life imprisonment for a murder conviction and a discretionary sentence up to a maximum of life imprisonment for a manslaughter conviction.[5]

1. "Culpable homicide that otherwise would be murder . . ."

There are really three issues involved in this portion of the section. First, it has been held, both in England[6] and in Canada,[7] that the defence of provocation is only available to a charge of murder. Though, for Canada, this would seem apparent from the wording above, it is also predicated upon the logic behind the defence: to avoid the minimum penalty for murder in ameliorating circumstances. The rationale behind the defence will be discussed somewhat later. It is important here to note that for all offences other than murder, provocation is solely a consideration in sentence mitigation.

Second, the defence applies *after* the elements for murder have been found to exist, including the relevant *mens rea*.[8] In other words, provocation has nothing conceptually to do with negating *mens rea*, even if, to a layperson, the most likely way of a person acting under provocation would be for that person to strike out blindly without appreciation of the consequences. Nevertheless, the effect of a provocative incident on an accused may be relevant in determining whether that accused had the *mens rea* necessary for the offence; moreover, this may potentially apply to any offence.[9] In such a situation, however, provocation is not conceptualized as a separate defence but is merely a factor among all the circumstances in assessing the state of mind of the accused.

Finally, though not restricted thus in its terms, s. 232 probably only applies in practice to certain types of murder--specifically murder under ss. 229(a)(i) and (ii)[10] of the *Criminal Code* where the *mens rea* is specified as either meaning to

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[5] *Code*, s. 218 provides for the minimum life sentence for murder; s. 219 imposes a maximum of life imprisonment for manslaughter.

[6] *R. v. Cunningham*, [1959] 1 Q.B. 288 (C.A.).

[7] *R. v. Campbell* (1977), 1 C.R.(3d) 309 (Ont. C.A.).

[8] *R. v. Bakun*, [1967] 2 C.C.C. 231 (B.C.C.A.); *Taylor v. The King* (1947) 89 C.C.C. 209 at 224 (S.C.C.).

[9] See, for example, *Campbell*, *supra*, note 7 which dealt with a charge of attempted murder.

[10] *Code*, s. 229(a)(i) and (ii) read as follows: "Culpable homicide is murder (a) where the person who causes the death of a human being (i) means to cause his death, or (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not[.]"

cause death or meaning to cause bodily harm knowing that death will likely ensue and being reckless whether death ensues or not. It is possible, though, to see how provocation could be a factor in the constructive murder provisions, ss. 230 and 231(5), for instance, where, during a bank robbery, a teller insults the robber to the point of causing the person to lose self-control during which she causes the death of the teller. However, before the provocation defence could specifically apply to the constructive murder situation, there would have to be a doubt about the *mens rea* for ordinary s. 229(a) murder but satisfaction of the *mens rea* requirement for s. 230.[11] Moreover, the actions of the teller would have to be outside the "legal right" restriction on provocation contained in s. 232(3).[12] This seems highly unlikely to occur in practice and, indeed, never has. In any case, the Supreme Court of Canada in *Vaillancourt v. The Queen*[13] has now struck down s. 230(d) as unconstitutional and, in so doing, given some tantalizing indications[14] that the other subsections of s. 230 (and possibly s. 229(c) as well) are constitutionally suspect.

It is also difficult, at first glance, to see how provocation could successfully be advanced where the Crown theory is unlawful object murder under s. 229(c).[15] Hypothetically, however, it is conceivable that an accused could respond to a provocative incident by, for example, setting fire to the provoker's home, killing that person, though not having the requisite *mens rea* under s. 229(a) in respect of the death. As long as the unlawful object, the fire, was in response to the provocation and otherwise met the provisions of s. 232, there would seem to be no reason why provocation could not apply to s. 229(c). Again, however, there are no reported cases of this kind and s. 229(c) may be struck down in the wake of *Vaillancourt*.

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[11] *Code*, ss. 230 and 231(5) extend the *mens rea* for murder to situations where the accused was committing (or attempting to commit or to escape after committing) one of the enumerated offences. The *mens rea* for constructive murder is satisfied by the *mens rea* for the underlying offence plus, *inter alia*, the *mens rea* of meaning to cause bodily harm (s. 230(a)) or for using or having a weapon (s. 230(d)). For the offences listed in s. 231(5), a death caused in such circumstances is raised from second degree murder to first degree murder. Other writers have been categorical that provocation could not apply in such situations because the accused must have had the purpose to commit the underlying offence or acted in conditions incompatible with provocation: Alan Mewett and Morris Manning, *Criminal Law* (2nd. ed., 1985) at 553; Alan Mewett, "Murder and Intent: Self-defence and Provocation" (1985) 27 *C.L.Q.* 433 at 433. While I agree that such an eventuality is implausible, it is not beyond the realm of possibility.

[12] *Code*, s. 232(3) states that ". . . no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do . . . ." For the interpretation of this part of the section, see the discussion *infra*, notes 33-36 and surrounding text. For present purposes, it is sufficient to indicate that, so long as the person is acting within a legal right, it matters not that this might have amounted to very severe provocation to the accused person.

[13] (1987), 81 N.R. 115 (S.C.C.).

[14] These indications are in the judgment of Lamer, J. See, for instance: *Vaillancourt*, *ibid.* at 119-20, 131-32, and 136.

[15] *Code*, s. 229(c) requires that the accused cause a death while in pursuit of an unlawful object; this would seemingly rule out provocation since the accused would have had the purpose of pursuing the unlawful object, thereby rendering any provocative act or insult by the victim irrelevant. In any case, in such a situation, s. 232(3) (. . . but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do . . .) would probably apply to remove the defence.

Most often, therefore, provocation will only be considered where murder is of the s. 229(a) type[16] or, perhaps, of the s. 229(b) type.[17] In the latter situation, since the *mens rea* is the same as that required for s. 229(a), the application to it of the defence of provocation is essentially the same. In any case, there appear to be no cases in which this type of murder was under consideration along with provocation. In short, s. 229(a) murders are apt to be the only situations where provocation is in issue--that is, the accused will either have meant to cause death or, when intending bodily harm, have known of the likelihood of death and been willing to take that risk.

2. ". . . may be reduced to manslaughter . . ."

The wording in this portion of the section suggests that it is discretionary whether murder is reduced to manslaughter once provocation is not disproved by the Crown. Though the courts can fairly be criticized when they have, in other respects, departed from the express words of s. 232, such is not the case here. To follow the wording would reduce the section to an absurdity since a jury would be told to apply the complicated tests called for by the section, yet be free to ignore their own findings. Sensibly, therefore, "may" has been translated into "shall" by the courts.[18]

3. ". . . in the heat of passion caused by sudden provocation."

There are two issues in the bare wording of this part of the section but, unfortunately, it is even more complex than that. As later discussion will show, when a jury is to consider the objective part (the ordinary person test) and the subjective part of provocation, elements of the present wording enter into the analysis on the objective part in the sense that the jury can consider previous incidents in order to place the alleged provocation in context.[19] For the moment, however, I will confine the discussion to the threshold requirements of the defence as revealed by the above wording.

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[16] *Code*, s. 229(a) is broken into two parts: (i) where the accused means to kill and (ii) where the accused means to cause bodily harm knowing that it is likely to cause death and being reckless whether death ensues or not.

[17] *Code*, s. 229(b) carries the same *mens rea* requirement as s. 229(a) except that it is directed towards someone other than the actual victim. The accused, with the relevant *mens rea* towards her intended victim, accidentally or mistakenly causes the actual victim's death. This is a somewhat different situation from that which will be discussed later: where the accused mistakenly believes that the victim has offered provocation and causes the death of that person.

[18] *R. v. Tennant and Naccarato* (1975), 23 C.C.C.(2d) 80 at 97-8 (Ont. C.A.); *R. v. Leblanc* (1985), 22 C.C.C.(3d) 126 (Ont. C.A.). This position has also been endorsed by the Supreme Court of Canada in *Linney v. The Queen* (1977), 32 C.C.C.(2d) 294 (S.C.C.) where the majority held that the jury must be instructed that if they had a reasonable doubt as to whether the accused acted under provocation, they must give the benefit of that doubt to the accused and return a verdict of manslaughter.

[19] See, e.g.: *R. v. Daniels* (1983), 7 C.C.C.(3d) 542 (N.W.T.C.A.); *R. v. Conway* (1985), 17 C.C.C.(3d) 481 (Ont. C.A.); *R. v. Desveaux* (1986), 51 C.R.(3d) 173 (Ont. C.A.). The *Daniels* approach was approved by the Supreme Court of Canada in *R. v. Hill* (1986), 25 C.C.C.(3d) 322 at 335.

The intention of the wording would seem to be twofold: first, to insist that the killing occurred while the accused was in a fit of passion[20] and, second, that there was a causal link between that state and the provocation by the victim.[21] A natural corollary of the latter requirement is that the link be a temporal one as well. An accused must have reacted very quickly after the provocative incident for the defence to apply.

4. "A wrongful act or insult . . ."

This phrase has to be considered in conjunction with the clause "*. . . no one shall be deemed to have given provocation to another by doing anything that he had legal right to do . . .*" contained in s. 232(3). Several issues present themselves.

At common law, an insult could never provide sufficient provocation.[22] However, our *Code* provision has, from its beginning in 1892,[23] permitted an insult to constitute provocation. This is a sensible provision since it has been well recognized that an insult can often be more provocative than an act. Indeed, this was the ground upon which the extension to include insults was made.[24] The intention was to leave to a jury the evaluation of the provocative effect on the accused of conduct by the victim, an intention which, by the way, has not always been fulfilled.

"Wrongful" could be taken to modify both "act" and "insult." The result of this, however, would be to greatly restrict the ambit of insults for the defence since it would likely mean that only those insults which were actionable as slander or, perhaps, libel (if they were written insults) or illegal under the various *Code* provisions dealing with defamatory libel, advocating genocide or inciting hatred[25] would qualify. Therefore, courts have concluded that acts must be wrongful but all insults are *per se* wrongful.[26]

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[20] The classic way of framing this requirement is set out in *R. v. Tripodi*, [1955] S.C.R. 438 at 443 where Rand, J. stated: "I take that expression [sudden provocation] to mean that the wrongful act or insult must strike a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame." A majority in *Tripodi* held that provocation was unavailable where the accused had previously known about and brooded upon his wife's adultery and then killed her when she informed him that she had had an abortion and was unable to bear children. Since past events can now be taken into account in putting the provocation in context, it is likely that *Tripodi* would be decided differently today.

[21] *Faid, supra*, note 2 at 522.

[22] *Huggett's Case* (1666), 84 E.R. 1082; *Rex v. Mawgridge* (1707), 84 E.R. 1107 at 1112. For fuller discussion of the defence at common law, see: Andrew Ashworth, "The Doctrine of Provocation" (1976), 35 *Camb. L. J.* 292; Joshua Dressler, "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982), 73 *J. of Crim. L. & Criminology* 421; Timothy Macklem, "Provocation and the Ordinary Person" (1987), 11 *Dal. L. J.* 126.

[23] *Criminal Code*, 55-56 Vict., 1892, c. 29, s. 229.

[24] Criminal Code Bill Commission, *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences* (1879), 24-25, cited in *Taylor, supra*, note 5 at 231, 217 [hereinafter referred to as the *Draft Code of 1878*].

[25] *Code*, ss. 261-281.3 inclusive.

[26] *R. v. Murdoch* (1978), 40 C.C.C.(2d) 97 (Man. C.A.); *R. v. Galgay* (1972), 6 C.C.C.(2d) 539 at 553 (*per* Kelly, J.A.) (Ont. C.A.).

In addition, the definition given the word "insult" has traditionally been the dictionary definition relied upon in *Taylor v. The King*:

> . . . an act, or the action, of attacking or assailing; an open and sudden attack or assault without formal preparations; *injuriously contemptuous speech or behavior; scornful utterance or action intended to wound self-respect; an affront; indignity.*[27] [Emphasis added.]

The underlined portion is the most applicable part of the definition.

Associated with this is the question of whether some gesture or utterance of the victim can, in law, amount to an insult if the accused found it insulting even though the victim did not necessarily intend it thus. Here, strangely, the cases have preferred an objective test for deciding whether the words or gestures are insulting.[28] What courts appear to have done is merge the question of whether the conduct was itself insulting with the further question contained in s. 232(2) of whether the insult complained of was sufficient to deprive the ordinary person of the power of self-control.

These should be separate questions. Whether some conduct is insulting is surely a question of fact and is very dependent upon the context in which it is given. Moreover, it can only be decided properly and fairly when the background circumstances are explored--what is insulting to one person may not necessarily be to another.[29] In other words, it is debatable whether there can be any real objectivity in deciding whether some particular conduct is insulting. In contrast, the further question concerning the ordinary person is a normative judgment which can only be answered after the trier of fact has decided that there was an insult.

The meaning of the adjective "wrongful" as it modifies "act" has itself apparently not been judicially interpreted,[30] though it has been considered. In *R. v. Galgay*,[31] Kelly, J.A. considered the meaning of the word though he did not settle on a meaning for it. He posited that it could mean either "illegal" or "performed, executed or done unjustly, unfairly or harmfully" but did not decide which meaning should govern. However, consistent with the following discussion, the latter meaning should be the preferred one.

Consideration also has to be given to the relationship between "wrongful" as it modifies "act" and the restriction on the defence contained in s. 232(3), name-

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[27] *Taylor v. The King*, *supra*, note 8 at 223. Many other cases have adopted this definition including *Parnerkar v. The Queen*, [1974] S.C.R. 449 and *Murdoch*, *ibid*.

[28] *R. v. Clark* (1974), 22 C.C.C.(2d) 1 at 12-13 (Alta. C.A.); *R. v. Hansford* (1987), 55 C.R.(3d) 347 (Alta. C.A.).

[29] A good illustration of this point is given by Allan Manson in an annotation to *Hansford*, *ibid*. An incompetent black ditch digger who is called a "rotten digger" by the supervisor but believes the epithet to have been "rotten nigger" is surely entitled to rely on this as an insult; the courts in *Hansford* and *Clark* would say otherwise!

[30] Don Stuart, *Canadian Criminal Law* (2nd. ed., 1987) at 450.

[31] *Galgay*, *supra*, note 26 at 552-3.

ly: ". . . no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do." As with the question of "wrongful" modifying "insult," to apply this restriction to insults would almost entirely remove the defence of provocation in respect of insults. After all, there is no legal prohibition (barring those referred to above)[32] against insulting another person. In *Galgay*,[33] it was decided that this restriction applied only to wrongful acts:

> What is the meaning of the term "legal right" in the provision of the section? Surely, it does not include all legal conduct not specifically prohibited by law. The absence of a remedy against doing or saying something or the absence of a specific legal prohibition in that regard does not mean or imply that there is a legal right to so act. There may be no legal remedy for an insult said or done in private but that is not because of legal right. The section distinguishes legal right from wrongful act or insult and the proviso of the section ought not to be interpreted to license insult or wrongful act done or spoken under the cloak of legal right. One has a right to do and to say those things which he is specifically authorized by law to say or to do, such as a Sheriff proceeding to execute a warrant of the Court. One has a right to do and to say those things which arise in the ordinary course of one's affairs and relationships. But in neither case does the right extend to speaking or acting so as to insult the other person.[34]

An associated issue within this restriction is the interpretation accorded "legal right." If given a wide interpretation, anything done by the victim that was not illegal or that did not attract legal liability would bar the defence of provocation. Courts, therefore, have restricted its meaning to mean a right sanctioned by law[35] (such as the right to defend oneself). Thus, not only are insults outside the ambit of legal right but so are acts not sanctioned in a positive way by law.

5. ". . . no one shall be deemed to have given provocation to another . . . 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 that human being."

This issue is related to the last one and simply means that an accused cannot rely upon the fact that she has done something to the victim which caused the victim to respond in a provocative way. As Don Stuart has pointed out,[36] it is probably unnecessary but is meant to guard against a feigned defence. In *R. v. Squire*,[37] the accused had apparently gotten into a consensual fight with the victim who kicked the accused during the course of the fight. The accused responded by shooting the victim. The issue on appeal was whether the trial judge was correct

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[32] *Supra*, note 25 and surrounding text.

[33] *Galgay*, *supra*, note 26.

[34] *Ibid.* at 558.

[35] *R. v. Haight* (1976), 30 C.C.C.(2d) 168 (Ont. C.A.). See also: *R. v. Louison* (1975), 26 C.C.C.(2d) 266 (Sask. C.A.), appeal to the Supreme Court of Canada dismissed (1978), 51 C.C.C.(2d) 479.

[36] Stuart, *supra*, note 30 at 451.

[37] *R. v. Squire* (1975), 26 C.C.C.(2d) 219 (Ont. C.A.), reversed on other grounds (1977), 29 C.C.C.(2d) 497 (S.C.C.).

in not placing provocation before the jury. However, the Ontario Court of Appeal was also faced with considering whether the above restriction removed the defence even if it had a factual basis in the evidence. Martin, J.A. referred with approval[38] to a passage from *The King v. Graves (No. 2)*:

> I think the proviso refers to a case of a defendant inciting a deceased into an act of provocation *just for the purpose of providing the defendant with an excuse for killing or hurting him, a merely colourable provocation*, and it does not apply to a case of a defendant who because he struck the first blow or is wrong in the quarrel is to be barred of the reduction of the offence.[39][Emphasis added.]

In other words, the proviso has been given a restrictive meaning in that the accused is not to be denied the defence only because her actions caused the victim to act in a predictably provocative way.[40] Only if the accused set out with the purpose of inciting the victim to provoking her in order to excuse her subsequent violence is the defence removed. Such situations could easily be passed upon by a jury when deciding whether there was in fact provocation without the necessity of there being this proviso.

6. S. 232(4)

This subsection provides that a false or illegal arrest does not itself amount to provocation though it may be evidence of such if the accused knew of the falsity or illegality of the arrest. There would seem to be no judicial interpretation of this provision.[41] It likely is an historical anomaly, dating from a time in England when there was much attention to form in arrest warrants: when a person killed her arrester, if the warrant contained a defect, she was guilty of manslaughter only; if the warrant was legal, the verdict was murder. Indeed, the defence was seen as somewhat separate from the defence of provocation, though related to it.[42] Obviously, from its lack of consideration in modern cases, it is an irrelevant provision today.

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[38] *Ibid.* at 234.

[39] *The King v. Graves (No. 2)* (1912), 20 C.C.C. 384 at 416 (N.S.S.C.).

[40] A case possibly going against this view is *Louison*, *supra*, note 35 where the Saskatchewan Court of Appeal, though in *obiter*, at 287 interpreted the restriction more widely to include predictable responses by the victim to the accused's initial aggression. However, the case was actually decided on the evidentiary basis that there was no evidence sufficient to make provocation a live issue for the jury, i.e. that the accused had not really lost self-control due to the victim attempting to escape from him. A second basis for the decision upholding the trial judge's decision not to charge on provocation was that the actions by the victim were within his legal rights to defend himself and resist his abductor.

[41] Stuart, *supra*, note 30 at 451.

[42] The situation described is referred to in *Huggett's Case*, *supra*, note 22 and *Mawgridge*, *supra*, note 22. For the proposition that it was a separate though related defence, see: Vol. I, Sir William Russell, *A Treatise on Crimes and Misdemeanours* (1979) at 798-848. This is a reprint of the original work published in 1879. The *Draft Code of 1878*, *supra*, note 24 at 100, referred to the common law position in drafting its s. 176 (which is the same provision as in what is now s. 232(4)), expressing some doubt about whether it reflected the common law.

7. "... sufficient to deprive an ordinary person of the power of self-control ..."

This is undoubtedly the most controversial portion of the entire section: the so-called objective test. Concealed within its wording are extremely complex issues of physiology, psychology, philosophy and, one would hope, justice. Not surprisingly, there has been no lack of debate about its meaning and Canadian legal doctrine concerning it is currently in a state of flux.

To begin with, it has always been assumed that "ordinary person" equates with the mythical "reasonable" person.[43] Yet, it is not obvious that this should be so. The reasonable person

> ... was invented as a model of the standard to which all are required to conform. He[/she] is the embodiment of all the qualities we demand of the good citizen: *and if not exactly a model of perfection, yet altogether a rather better [person] than probably any single one of us happens, or perhaps even aspires, to be*. [Emphasis and gender reference added.][44]

Given this, it is plausible that the "ordinary person" is a person with somewhat lower self-control than that of the "reasonable person." This was certainly the view of some members of the Australian High Court in *Moffa v. R.*[45] In any case, as Glanville Williams long ago said of the reasonable person:

> Surely the true view of provocation is that it is a concession to "the frailty of human nature" in those exceptional cases where the legal prohibition fails of effect. It is a compromise, neither conceding the propriety of the act nor exacting the full penalty for it. This being so, how can it be admitted that that paragon of virtue, the reasonable [person], gives way to provocation? [Gender reference changed.][46]

There is therefore an illogicality involved even to insist upon an objective standard. But to elevate that standard to "reasonable" from "ordinary" is to com-

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[43] As a recent example, see: *Hill, supra*, note 19. All of the Justices treated "ordinary person" as connoting an objective test, i.e. as being synonymous with "reasonable person."

[44] John G. Fleming, *The Law of Torts* (6th. ed., 1983) at 102.

[45] *Moffa v. R.* (1977), 13 A.L.R. 225 at 227 (*per* Barwick, C.J.) and 233 (*per* Gibbs, J.) (Aust. H.C.). In the former passage, Barwick, C.J. stated: "There is nothing suggested about the applicant, his disposition or mental balance, which could be called in human terms extraordinary. That he was emotionally disturbed by his wife's disclosed attitude to him did not make him, in my view, other than an ordinary man ... If the use of the word "reasonable," in the statement of what is called the objective test in relation to provocation, would exclude from consideration such emotional reactions, I have even greater reason for preferring the description "ordinary man" in vhe formulation of that test." Gibbs, J., though dissenting in the result, stated: "I have throughout this judgment referred to a "reasonable person," in conformity with the usage of many of the authorities, but in this context a "reasonable person" obviously does not mean one who acts reasonably, but one who has reasonable powers of self-control, and the expression "ordinary person" may be preferable."

[46] Glanville Williams, "Provocation and the Reasonable Man," [1954] *Crim. L. Rev.* 740 at 742.

pound that illogicality. Nevertheless, the case law typically equates the two standards.

For many years in Canada and elsewhere in the common law world, the ordinary person standard was an inflexible and rigid standard.[47] No allowance was made for any characteristics of the particular accused such as age, sex, race or physical infirmity nor were previous incidents to be taken into account. The usual rationale given for this was that all citizens must show a minimum level of self-control. In particular, it was thought wrong that a person could rely upon her own bad temper, excitability or intoxication to mitigate what would be murder for someone with an ordinary degree of self-control.[48] But even more general characteristics or circumstances were excluded from consideration on this part of the defence.

This view attracted severe criticism over the years. As Glanville Williams put it:

> [R]eflection will perhaps show that the argument is mistaken. Even under the law as it stands, a bad-tempered [person] may be entitled to be acquitted of murder where a good-tempered one may be liable to be convicted. This is because of Viscount Simon's second question [as stated by him in *Mancini*[49] and again in *Holmes v. D.P.P.*[50]] which attaches importance to the particular temperament of the accused. Ever since the time of East the legal requirement has been that the accused should have acted in the heat of passion or in blind rage; and the question whether [s]he acted in this way or with cool calculation is one of fact. This rule, which has never been questioned, does, therefore, discriminate between good-tempered and bad-tempered [people], to the advantage of the latter. The only way of removing from the law the privilege given by bad temper would be by abolishing the law of provocation; for good-tempered [people] are never provoked to kill. The good-tempered [person] may, of course, kill from a motive of gain or other profit, but by definition [s]he does not kill from bad temper, which is the only sort of killing with which provocation deals. [Parenthetical remarks and gender references added.][51]

In the more practical vein of attempting to apply the test, Murphy, J. in *Moffa* advanced this criticism of the objective test:

> The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the

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[47] Examples are: *Taylor*, *supra*, note 8; *Salamon v. The King* (1959), 123 C.C.C. 1 (S.C.C.); *Wright v. The Queen*, [1969] 3 C.C.C. 258 (S.C.C.); *Clark*, *supra*, note 28. Examples of English cases include: *Mancini v. D.P.P.*, [1942] A.C. 1 (H.L.) and *Bedder v. D.P.P.*, [1954] 1 W.L.R. 1119 (H.L.).

[48] See, for example: *Hill*, *supra*, note 19 at 330; *Mancini*, *ibid.* at 9; *D.P.P. v. Camplin*, [1978] A.C. 705 at 716, 726 (H.L.).

[49] *Mancini*, *ibid.*

[50] *Holmes v. D.P.P.*, [1946] A.C. 588 (H.L.).

[51] Williams, *supra*, note 46 at 751-52.

> test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances.[52]

Probably the nadir for the rigid form of the reasonable person standard was reached, in England, in *Bedder v. D.P.P.*,[53] and, in Canada, in *Parnerkar v. The Queen*.[54] In *Bedder*, the House of Lords held that a jury, on the objective test, could not consider a reasonable person who was impotent even though Bedder himself was an impotent man who was allegedly provoked by his victim twitting his impotency. In *Parnerkar*, where the racial origin of Parnerkar (he was an Indian born in India) could very well have been of importance in assessing whether the alleged insult by the victim ("I will not marry you because you are black.") would have caused an ordinary person to lose self-control, a majority of the Supreme Court held that this was not sufficient evidence of provocation to even have the defence placed before the jury.

Whether in response to growing criticism or to greater appreciation of the injustice of the inflexible standard, courts have begun in recent years to modify the standard. In Canada, the first breakthrough occurred when courts began directing juries to take into account background events in assessing whether the provocation was of sufficient degree to meet the objective test. Thus, in *R. v. Daniels*,[55] it was held that the jury could take into account the years of infidelity with the victim by the accused's husband and his abuse of the accused in assessing whether the victim's statements to her were sufficient provocation to have deprived the ordinary person of the power of self-control. In *R. v. Conway*,[56] the Ontario Court of Appeal stated:

> He [the trial judge] should have told them present acts or insults, in themselves insufficient to cause an ordinary man to lose self-control, may indeed cause such loss of self-control when they are connected with past events and external pressures of insult by acts or words and accordingly in considering whether an ordinary man would have lost self-control they must consider an ordinary man who had experienced the same series of acts or insults as experienced by the appellant.[57]

Likewise, in *R. v. Desveaux*,[58] the same Court held that the jury should have been told to consider previous tensions between the accused and his victim and, fur-

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[52] *Moffa, supra*, note 45 at 243.

[53] *Bedder, supra*, note 47.

[54] *Parnerkar, supra*, note 27.

[55] *Daniels, supra*, note 19.

[56] *Conway, supra*, note 19.

[57] *Ibid.* at 487.

[58] *Desveaux, supra*, note 19.

ther, that the fact of the provocation occurring within the confines of a penitentiary was a relevant consideration on the objective test.

More recently, another development has begun in Canada. The impetus for this was the House of Lords decision in *D.P.P. v. Camplin*.[59] In that case, the Law Lords were faced with interpreting a statutory provision for provocation[60] which had been passed by Parliament after the decision in *Bedder*.[61] In a case where a fifteen-year-old boy had purportedly responded to being buggered and taunted by killing his victim with a chapati pan, the question was whether the age of the reasonable person should be adjusted to reflect the accused's age. While all of the Lords agreed with the modification, Lord Diplock wrote the leading (and sometimes confusing) judgment.

Perhaps influenced by an article by Andrew Ashworth[62] (though not referring to it), Lord Diplock separated the objective test into two parts: the degree of self-control to be expected and the susceptibility to the particular provocation offered. With respect to the second, it was considered that the characteristics of the actual accused might increase the likelihood of self-control being lost if the provocation related to those characteristics; therefore, it might be appropriate to vary the objective standard to incorporate the characteristics in question.[63] Lord Diplock defined the reasonable person in the following way:

> It means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.[64]

However, he also considered that the accused's own characteristics might be important in assessing the severity of the provocation. When a young person was involved, a lower degree of self-control might be expected but the young age might also affect the gravity of the provocation.[65] In such a case, he thought it in-

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[59] *Camplin*, *supra*, note 48.

[60] *Homicide Act, 1957* (U.K.), 1957, c. 11, s. 3 which reads as follows: "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[61] *Bedder*, *supra*, note 47.

[62] Ashworth, *supra*, note 22.

[63] The theory here is that conduct, usually an insult, by the victim which relates to an attribute of the accused is more apt to be insulting. Calling a black person "nigger" would be more insulting than calling a white person "nigger." I do not believe, however, that it is invariably the case that a true insult is more provocative than a false one. Calling a communist a "fascist" conceivably could be more provocative than calling a fascist by that name.

[64] *Camplin*, *supra*, note 48 at 717.

[65] *Ibid.* at 717-18. Presumably, the thinking here was that a young person might find the provocation (especially that in question) more grave than would an adult.

appropriate to mention the two arms to a jury because of the likelihood for confusion. Finally, he set out a model direction to a jury:

> [The judge] should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him.[66]

Unfortunately, because of confusion in the passages referred to above, different interpretations have been given *Camplin*. The two main ones are:

> (1) That the standard of self-control is relatively fixed though it can be adjusted for the age and sex[67] of the accused. Exceptional excitability, pugnacity or intoxication would certainly be excluded from this arm. However, when assessing the seriousness of the provocation, any relevant characteristics of the accused could be considered by the jury. Thus, this interpretation keeps the two arms quite distinct.[68]
>
> (2) Any characteristics of the accused that are not idiosyncratic (such as excitability, pugnacity or drunkenness) can be considered on the objective test without specific reference to either of the two arms. This interpretation would maintain that the clause in the model direction ". . . but in other respects sharing such of the accused's characteristics . . .," modifies the following phrase ". . . a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused," thus merging the two arms together or, at least, not insisting that they be kept separate.[69]

The Supreme Court of Canada in *R. v. Hill*[70] had an opportunity to avoid this confusion in this jurisdiction but, regrettably, blew it.[71] There is no need here to analyze the decision. The Supreme Court sanctioned some modification of the objective standard but gave little guidance as to how this should be done. Clearly,

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[66] *Ibid.* at 718.

[67] Even here there is confusion. Lord Diplock may have intended to say that women have a different standard of self-control from men but it is more likely that he merely sought to remove the sexism of the term "reasonable man." However, King, C.J. of the South Australia Court of Criminal Appeal in *R. v. Romano* (1984), 36 S.A.S.R. 283 at 288-89 interpreted this as meaning that sex was linked with age and the law ought to reflect possible differences in maturity between young males and young females of the same age. He did not, however, think that there should be a different standard of self-control as between adult males and adult females.

[68] Among academic writers, Eric Colvin, *Principles of Criminal Law* (1986) at 222-223 and Glanville Williams, *Textbook of Criminal Law* (2nd. ed., 1983) at 538-40 adopt this view although the latter has some doubts.

[69] In contrast to Colvin and Williams, *ibid.*, J.C. Smith and Brian Hogan, *Criminal Law* (5th ed., 1983) at 305 hold to this view.

[70] *Hill, supra*, note 19.

[71] For a criticism of *Hill*, see: Quigley, "Provocation and the Ordinary Person: *R. v. Hill*" (1986-87), 51 *Sask. L. Rev.* 280.

the idiosyncrasies usually mentioned (exceptional excitability, pugnacity and intoxication) are excluded. On the other hand, age, sex, race,[72] physical disability,[73] and possibly culture,[74] language,[75] and sexual orientation[76] perhaps can be considered--though on which arm is anybody's guess. The biggest shortcoming of *Hill* is the failure to mandate a direction to a jury on which characteristics are to be considered. Juries are apparently to use their own judgment on a question that continues to perplex judges, lawyers and academic writers!

It is noteworthy that the objective test for provocation is contained in virtually all common law jurisdictions and that it presents many of the same difficulties everywhere.[77] The response has, of course, been uneven. New Zealand has, for the most part, modified the standard by allowing general, but not idiosyncratic, characteristics to be taken into account, probably on the gravity of the provocation arm.[78] Australia, on the other hand, has been more haphazard in its variation of the objective standard. Courts have permitted the standard of self-control to be varied for aboriginal accuseds[79] but not for others whose ethnic origin differs from the Anglo-Saxon standard. Only the Republic of Ireland, it seems, has abolished the objective test outright.[80]

All of these jurisdictions reflect the unease with a single objective standard in societies which are increasingly diverse. Moreover, the objective test asks juries to create an artificial person and, in Canada, to do this without any guidance at all from the trial judge. It is a situation that cries for reform.

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[72] *Hill*, *supra*, note 19 at 335.

[73] *Ibid.* at 336, 348.

[74] *Ibid.* at 347.

[75] *Ibid.* at 348.

[76] *Ibid.* at 352 though it is not clear what the sexual orientation of the accused Hill was and Wilson, J. in this passage may not have been intended that sexual orientation be taken into account. In *R. v. Valley* (1986), 26 C.C.C.(3d) 207 at 218, the Ontario Court of Appeal held that sexual orientation could not be taken into account. The position after *Hill* is unclear.

[77] England, Australia, New Zealand and most U.S. states have some form of an objective standard for provocation. Some U.S. states have adopted the Model Penal Code proposal which, while it retains an objective component, is more relaxed in the accused's favour in the sense that the situation is to be viewed from the accused's standpoint. See: Dressler, *supra*, note 22 for a review of the American position. For a review of the position in other common-law jurisdictions, particularly the Indian subcontinent, see: Bernard Brown, "The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and "Unreasonable Non-Englishmen"" (1964), 13 *International and Comp. L. Q.* 203. For a discussion of the position in Papua New Guinea, Western Samoa, New Zealand and Australia, see: Stanley Meng Heong Yeo, "Ethnicity and the Objective Test in Provocation" (1987), 16 *Melbourne U. L. Rev.* 67 and Yeo, "Provoking the "Ordinary" Ethnic Person: A Juror's Predicament" (1987), 11 *Crim. L. J.* 96.

[78] *The Crimes Act, 1961*, N.Z.S. 1961, No. 43, s. 169(2) as interpreted in *R. v. McGregor*, [1962] N.Z.L.R. 1069 (N.Z.C.A.) largely accounts for this. However, in *R. v. Tai*, [1976] 1 N.Z.L.R. 102, the same Court decided that the standard of self-control of someone of Samoan ethnic origin could be attributed to the ordinary person, on the theory that Samoans have a notoriously slow buildup of anger, that is, that they have a different level of self-control.

[79] See cases referred to in Yeo, "Ethnicity and the Objective Test in Provocation," *supra*, note 77.

[80] *People v. MacEoin* (1978), Ir. L.T. 53 (Irish C.C.A.).

One last point is worthy of note. Unlike the English provision,[81] s. 232(2) does not require proportionality--that is, it is not necessary that an ordinary person, in addition to losing self-control, would have acted in the way that the accused did. The English requirement is nonsensical--after all, the reasonable person would not commit homicide--and is, I submit, in part responsible for the untoward complexity of even having two arms to the objective test.

8. ". . . if the accused acted on it on the sudden and before there was time for his passion to cool."

Once a jury has decided that the alleged provocation would have deprived an ordinary person of the power of self-control (or are left in doubt on the question), they must go on to consider this, the subjective part of the defence. This provision usually causes less difficulty than the objective part. At this stage, all factors and characteristics of the accused can be considered, including the infamous excitability, pugnacity and intoxication.[82]

The only real question is whether the accused truly was provoked. It is possible, in circumstances where an ordinary person would be provoked, that the actual accused was not. This could occur where the accused was more inured to the provocation offered than an ordinary person would be but the defence is more likely to be rejected by a jury where there was a gap in time so that the fatal response seemed more calculated than as a result of passion. This temporal connection, identical to that contained in s. 232(1),[83] can, at times, be arbitrarily found lacking. *Tripodi*[84] and *Olbey v. The Queen*[85] are illustrations of this.

Moreover, the connection rests on the twin assumptions that "passion" refers exclusively to anger and that individuals all express anger quickly. Both of these assumptions are suspect: anger can be bound up with fear and some people lose control more slowly than others.

9. Mistakes

Several kinds of mistakes can occur in a provocation situation. The accused may construe something not intended to be provocative in the wrong way; she may take something as graver provocation than it really was; she may misconstrue who was offering provocation; finally, she may accidentally or by mistake kill an innocent bystander instead of the one who provoked her.

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[81] *Homicide Act, 1957, supra*, note 60.

[82] See, for example: *Wright, supra*, note 47; *Haight, supra*, note 35.

[83] *Supra*, notes 20 and 21 and surrounding text.

[84] *Tripodi, supra*, note 20.

[85] *Olbey v. The Queen*, [1980] 1 S.C.R. 1008. A majority in the Supreme Court of Canada ruled that a four to five minute gap between the alleged provocation and the homicidal response was, pardon the pun, fatal to the accused's defence.

The first of these was referred to earlier.[86] *Hansford*[87] is an example. Courts have, wrongly in my opinion, tended to apply an objective test. The second is bound up with the objective standard since the threshold test is whether the ordinary person would have lost the power of self-control from the alleged provocation.

On the other hand, what little authority there is on the third point conflicts with the previous two types of mistake. The Supreme Court of Canada in *R. v. Manchuk*[88] held that an accused who killed the actual provoker and then a third party believing she was also implicated in the provocation had available the defence of provocation. The test used was clearly subjective.

However, the Court in *Manchuk* stipulated[89] that the accused must believe that the third party was involved in the provocation; he would have had no defence absent that belief--that is, if he had been so lacking in self-control that he killed her without such belief or had simply missed the intended victim and struck the actual victim. This is in contrast with the present English position where the defence is not ruled out for the death of a person when the provocation was given by someone else.[90] It is difficult to see why the Canadian position should obtain. Neither the English nor the Canadian statutory provision explicitly rules out the defence in such circumstances and it is entirely plausible that a person provoked to the point of losing self-control might lash out blindly, killing someone other than the actual provoker.

The central holding in *Manchuk* that the test is subjective for a mistaken belief that the eventual victim was provoking the accused, is quite consistent in one respect with s. 229(b)[91] murder where the accused mistakenly or accidentally kills someone other than the person she intended to kill. There, the test is clearly subjective. But the requirement of a belief that that person was offering provocation conflicts in another respect with s. 229(b): all that provision requires is that the accused have the relevant *mens rea* in respect of the death of the intended victim. Though there seem to be no Canadian cases of that kind in which provocation was in issue, in *Droste v. The Queen*,[92] Dickson, J. suggested, without referring to *Manchuk*, that provocation could apply to a s. 229(b) situation. Thus, *Manchuk* may no longer be good law on this point.

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[86] *Supra*, note 29 and surrounding text.

[87] *Hansford*, *supra*, note 28.

[88] *R. v. Manchuk*, [1937] 4 D.L.R. 737 (S.C.C.). The same Court reiterated the point in an appeal by the accused from his conviction for murder on the new trial ordered after the first appeal: *Manchuk v. The King*, [1938] 3 D.L.R. 693.

[89] *R. v. Manchuk*, *ibid.* at 738.

[90] *R. v. Davies*, [1975] 1 All E.R. 890 (C.A.).

[91] *Code*, s. 229(b).

[92] *Droste v. The Queen* (1984), 10 C.C.C.(3d) 404 at 408 (S.C.C.).

Mistakes, then, are treated somewhat inconsistently at present. This is probably because courts have devoted little analysis to the justification--excuse distinction. Because mistakes in respect of justifications are partly objective,[93] there seems to have been a tendency to treat mistaken excuses in the same way. The analysis contained in *Hansford* would confirm this.

Yet, there is a difference of opinion between two of Canada's leading criminal academics on this question. Eric Colvin has suggested that mistakes in respect of excuses should be judged on a purely subjective basis.[94] On the other hand, Don Stuart disagrees.[95] Neither gives authority for his assertion; both argue from general principle. Therefore, one can perhaps forgive judges for not having conducted much analysis on the question. Suffice to say that it would be desirable for all mistakes in a provocation situation to be judged in the same way. That, however, is dependent upon a clear rationale behind the defence and straightforward indications of its content, both things presently lacking.

10. Functions of Judge and Jury

As with most defences,[96] once an evidential burden on the accused has been met by pointing to sufficient evidence in favour of provocation, the burden rests with the Crown to disprove it.[97] However, the evidential burden for provocation is extraordinarily high. In *Parnerkar*,[98] a majority of the Supreme Court held that it was the duty of the trial judge, in addition to ruling whether there was evidence that the accused had been provoked, to decide whether the provocation was capable of depriving the ordinary person of the power of self-control. This was later confirmed by the same Court in *Faid*.[99]

This is wrong in two major ways. First, it contravenes the express wording of s. 232(3)(a) which makes it a question of fact for the jury whether the conduct of the victim amounted to provocation. Second, this question is surely an evaluative, not an evidentiary, question. The English position recognizes this. In *Camplin*, it was held that the issue is a jury question and, furthermore, that expert evidence was not admissible to show how a reasonable person would have reacted to the

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[93] See, for instance, *Reilly*, *supra*, note 2, which dealt with the reasonable apprehension and reasonable belief provisions of self-defence as contained in *Code*, s. 34(2). Any mistakes made must be both honest and reasonable. This is, of course, consistent with the theory of justifications that what is justified is what society would consider rightful; when a societal standard is involved, it is arguably more appropriate to have an objective component to the test.

[94] Colvin, *supra*, note 68 at 168.

[95] Stuart, *supra*, note 30 at 391.

[96] Insanity and, for strict liability offences, due diligence are the exceptions, being reverse onuses. The decision in *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C.(3d) 295 (Ont. C.A.) may have created another reverse onus in the case of officially induced error but it is not clear whether the Court would reverse the onus for all offences or only for strict liability offences.

[97] *Linney*, *supra*, note 18.

[98] *Parnerkar*, *supra*, note 27.

[99] *Faid*, *supra*, note 2.

provocation.[100] Though there are no Canadian cases directly on the point, general principles relating to expert opinion evidence would seem to weigh against the admissibility of such evidence in this country as well.[101] This is surely common sense--no one has yet devised a profile of an ordinary or reasonable person, hence, a jury is in as good a position as anyone to decide the issue. How then is it justified for the trial judge to make a preliminary ruling that the provocation in a given case was not sufficient to have affected an ordinary person? If, for a few years, provocation seemed in decline as a defence, it was no doubt due to this very high evidential burden, a matter that ought to be considered in proposing changes to the defence.

11. Conclusion

The unusually complex doctrine of provocation should have been revealed by the foregoing discussion. In *Linney*, Dickson, J. recognized this when he said: "Provocation . . . is a technical concept and not easy to apprehend."[102] Though he appeared to have changed his views in *Hill* when he said,

> It seems to be common ground that the trial judge would not have been in error if he had simply read s. 232[5] of the *Code* and left it at that, without embellishment.[103]

this may simply have been judicial handwringing at the thought of properly explaining the provision! A section of the criminal law so unduly complex must surely invite misapplication by judges and juries.

Since Canada is in a process of recodification of the criminal law,[104] it is an opportune time to consider a much-simplified alternative to the present defence.[105] As was indicated at the beginning, there are other serious complaints

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[100] *Camplin*, *supra*, note 48 at 717 and 727.

[101] 101. See the dissent of Davey, C.J. in *R. v. Lupien*, [1969] 1 C.C.C. 32 at 36 (B.C.C.A.), wherein he suggested that it would be dangerous to admit expert evidence on the behaviour of normal people. *Lupien* was reversed in the Supreme Court: *Lupien v. The Queen* (1969), 9 D.L.R.(3d) 1 (S.C.C.) without specific reference to this point though the tenor of the judgments might be said to be in the same direction. See also: P.K. McWilliams, *Canadian Criminal Evidence* (2nd. ed., 1984) at 239-60. In particular, the admissibility of such evidence would founder on lacking a factual basis for the opinion. What evidence could possibly exist on what is an ordinary person, let alone the reaction to the particular provocation of such a person? Although in *R. v. Scopelliti* (1981), 63 C.C.C.(2d) 481 (Ont. C.A.), a case of self-defence/defence of property, evidence, including where appropriate, expert opinion evidence, was held to be admissible on the propensity of the *victims* for aggression, it is submitted that the case does not change the above proposition. First, the evidence concerned the disposition of the *victim*, not the accused; second, expert opinion evidence would only be admissible on the question if the disposition of the victims fell *outside* the normal.

[102] *Linney*, *supra*, note 18 at 298.

[103] Hill, *supra* note 19 at 338.

[104] As evidenced by *Recodifying Criminal Law* (Law Reform Commission of Canada, 1987).

[105] Unfortunately, the Law Reform Commission of Canada appears to have forgotten about the defence of provocation altogether since it does not appear in *Recodifying Criminal Law*, *ibid.* One answer for this oversight may be that the Commission originally proposed abolishing the minimum penalty of life imprisonment for murder: *Homicide* (Working Paper 33) (Law Reform Commission of Canada, 1984), 72-74. Though this would not remove the stigma of a murder conviction for someone acting under provocation, it would avoid the severity of life im-

about the existing law of provocation. Those complaints, particularly those surrounding the objective components, should also be considered in the context of law reform. Whatever form that law reform should take, however, there is a crying need for an uncomplicated provision that is truly intelligible to judges and juries.

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prisonment. Before *Recodifying Criminal Law* was released, the Commission backtracked somewhat and decided to leave the question of penalty to the Canadian Sentencing Commission. It hopefully was only an oversight to have failed to provide for a defence of provocation without ensuring that the minimum penalty of life imprisonment would not be imposed for all murder convictions. Otherwise, the criminal law in Canada would be taking a very harsh turn indeed!