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Provocation and the Ordinary Person

Timothy Macklem
Oxford University

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I. *The Problem*

As a defence to a charge of murder, provocation is at once the most accessible and the most fascinatingly elusive of ideas. We are all familiar with the concept of an emotional breaking point, and we are generally prepared to recognize that a person pushed beyond that point may in certain circumstances kill his or her tormentor. Yet in law, an acceptable breaking point is very hard to define. As Dickson J. (as he then was) said in *Linney v. The Queen*, "provocation, in the relevant sense, is a technical concept and not easy to apprehend."¹ It is also, unfortunately, a concept that juries must wrestle with regularly, and for high stakes. Glanville Williams points out that in England half the intentional killings of adult males are committed in anger.² And where those killings are found as a matter of law to have been provoked, the average sentence there is from three to nine years;³ where they are found to have been unprovoked, however, the sentence is life imprisonment.

As a result of these factors, the legal definition of provocation has been a matter of debate in both the courts and the legislatures of the common law world for the last century and more. The Supreme Court of Canada has recently made the latest contribution to that debate in *R. v. Hill*.⁴

II. *Evolution of the Defence*

1. *Origins*

Provocation is not a general defence. For most crimes, it is merely a consideration that may be taken into account in sentencing. But in the case of murder, provocation operates as a special defence that, if successful, will reduce the charge to manslaughter. Its existence springs from the fact that murder once carried with it a mandatory sentence of death and even now carries one of life imprisonment. The reduction of the charge to manslaughter allows the court to impose a sentence that is

*LL.B. Ottawa, 1985; B.C.L. Oxford, 1987.

1. [1978] 1 S.C.R. 646 at 652.

2. Williams, *Textbook of Criminal Law*, (2nd ed. London: Stevens and Sons, 1983) at 524.

3. In Canada, the normal range is from one to ten years for domestic homicides and from three to nine years for non-domestic homicides: Nadin-Davis, *Sentencing in Canada*, (Toronto: Carswell, 1982) at 256-258.

4. [1986] 1 S.C.R. 313.

in proportion to the moral gravity of the accused's conduct. In effect, the defence acts as a device that enables the court to bypass the fixed sentence for murder when justice and humanity require it.

The origins of the defence are ancient,⁵ and the earliest reports show its close connection to the question of sentencing. According to Sir Thomas Raymond in 1672,

John Manning was indicted in Surrey for murder, for the killing of a man. And upon Not guilty pleaded, the jury at the assizes find that the said Manning found the person killed committing adultery with his wife in the very act, and flung a jointed stool at him; and with the same killed him; and resolved by the whole court, that this was but manslaughter; and Manning had his clergy at the bar, and was burned in the hand; *and the court directed the executioner to burn him gently*, because there could not be greater provocation than this. (my emphasis)⁶

Sir Edward East, writing in his *Pleas of the Crown* (1803)⁷ stressed the extent to which the defence depended on the accused's reason and self-control having been overborne by the provocation; in law, he said, provocation must be

such . . . as the law presumes might in human frailty heat the blood to a proportionable degree of resentment, and keep it boiling to the moment of the fact: so that the party may rather be considered as having acted under a temporary suspension of reason, than from any deliberate malicious motive.⁸

Tindal C. J. in *R. v. Hayward*⁹ expanded on this statement and made clear that the defence was based on a response to human weakness (whether of the species or the individual he did not say). He charged the jury that they must consider whether the prisoner had acted

while smarting under a provocation so recent and so strong, that [he] might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only . . .¹⁰

Not every insult, however, could amount to provocation. The earliest recognized ground was an act of violence offered by the accused. Provocation was thus understood as violence produced by violence. To this were later added the *sight* of a wife's adultery and the *sight* of

5. See: *Watts v. Brains* (1600), Cro. Eliz. 779 (K.B.); *Royley's Case* (1612), Cro. Jac. 296 (K.B.); Hale, *Pleas of the Crown: A Methodical Summary*, (London: Shrewsbury, 1678) at 48; Hale, *Historia Placitorum Coronae*, (London: Gosling, 1736) at 453-454.

6. (1672), T. Raym. 212 (K.B.). For a fuller report see *Maddy's Case*, 1 Vent. 158.

7. East, Volume I, *A Treatise of the Pleas of the Crown*, (London: Butterworth, 1803).

8. *Id.* at 238.

9. (1833), 6 C. & P. 157.

10. *Id.* at 159.

sodomy being committed upon a son.¹¹ Mere words, gestures or injuries to property did not amount to provocation.¹² Thus by the middle of the 19th century the defence had two basic requirements: first, the provocation must have taken a form recognized by law, and second, it must have had the effect of temporarily depriving the accused of his self-control.

2. *The Reasonable Man*

It is clear from the above that some sort of objective standard was always implicit in the defence. East's definition refers to "such a provocation as the law presumes might in human frailty heat the blood". And the refusal to recognize insulting words or gestures as grounds for provocation, whatever their actual effect on the accused, suggests that the courts were seeking to interpret and apply the defence in a manner consistent with the general criminal law principle of providing a standard of conduct applicable to all citizens alike. This tendency toward an objective approach was reinforced by the need to test the credibility of an accused's claim to have lost control of himself, at a time when an accused could not yet testify in his own defence.

However, there was no explicit requirement that the defence meet an objective standard until the decision in *R. v. Kirkham*, where Coleridge J. (as he then was) instructed the jury:

Though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being and requires that he should exercise a reasonable control over his passions.¹³

That direction was formulated into a test by Keating J. in *R. v. Welsh*.¹⁴ The accused was a creditor who, having just lost an action against his debtor, happened to meet him in a public-house. The accused's actions were aggressive from the beginning and culminated in the fatal stabbing of the debtor; the debtor's actions, on the other hand, were good-humoured and pacific throughout. Defence counsel acknowledged that the provocation in question was slight, but argued that the only issue for the jury was whether the accused had been under the influence of an ungovernable passion when he struck the fatal blow. Keating J. disagreed. He charged the jury as follows:

11. *R. v. Fisher* (1837), 8 C. & P. 182.

12. Stephen, *Digest of the Criminal Law*, (London: Macmillan and Company, 1877) Art. 224. See also East, *supra*, note 7 at 233.

13. (1837), 8 C. & P. 115 at 119.

14. (1869), 11 Cox C.C. 336.

The question, therefore, is — first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and, if there be any such evidence, then it is for the jury to decide whether it is such that they can attribute the act to the violence of passion naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man . . . The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act.¹⁵

It may be observed that, strictly speaking, these comments were *obiter*, since the provocation in question did not fall within one of the grounds recognized by law at the time, and the accused's reaction would almost certainly have failed to meet even a subjective standard. Indeed, Keating J.'s objective requirement not only did not form part of the defence as it was set out in Stephen's *Digest of the Criminal Law* but was virtually ignored for many years. Nevertheless it was later incorporated in the criminal codes of several common law jurisdictions, including that of Canada, and from at least 1914 on was recognized as the law of England.

(a) *Emergence of the Reasonable or Ordinary Person Standard*

Whatever Sir James Stephen may have thought of an objective requirement in 1877, by 1879 such a requirement was part of the ill-fated English Draft Code,¹⁶ which Stephen himself helped to prepare. Section 176 of that Code provided, insofar as is relevant, that

[a]ny wrongful act or insult of such a nature as to be sufficient to deprive an 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. (my emphasis)

That definition was incorporated *verbatim* in the Canadian *Criminal Code, 1892*,¹⁷ and, with only minor changes in wording, has been carried forward into the present Code. It also became part of the criminal codes of New Zealand (1893)¹⁸ and Tasmania (1924)¹⁹ and its effects can be traced in the criminal statutes of New South Wales (1883),²⁰ Queensland

15. *Id.* at 338.

16. Criminal Code Bill Commission [Lord Blackburn (House of Lords), Barry J. (Irish High Court), Lush J. (English High Court), Sir James Stephen], *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, Cmnd. 2345 (1879), in *XX Reports from Commissioners, Inspectors, and Others* (1878-79), at 169.

17. 55-56 Vic., c. 29, s. 229.

18. *The Criminal Code Act, 1893*, 57 Vic., No. 56, s. 165. Repealed and replaced by *Crimes Act 1961*, S.N.Z. 1961, No. 43, s. 169.

19. *Criminal Code Act 1924*, 14 Geo. V, No. 69, s. 160.

20. *Criminal Law Amendment Act of 1883*, 46 Vic., No. 17, s. 370; repealed and re-enacted by *Crimes Act, 1900*, S.N.S.W. 1900, No. 40, s. 23; repealed and replaced by *Crimes (Homicide) Amendment Act, 1982*, S.N.S.W. 1982, No. 24, Sched. 1.

(1901)²¹ and Western Australia (1902).²² Section 215 of the *Criminal Code* now reads:

215. (1) Culpable homicide that otherwise would 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 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.^{22a}

It should not be overlooked that the incorporation of an objective requirement in the statutory defence took place at the same time as the old grounds for provocation were being abandoned and the definition of the defence expanded to include “any wrongful act or insult”. Once the recognized grounds of provocation were abandoned, it was inevitable that the role of the objective standard would be increased. In effect, society wished to maintain its interest in the grounds of provocation, but for reasons of justice and common sense wished to refrain from defining them. The problem, of course, was that it was then up to the courts to provide a definition indirectly, through their characterization of the ordinary person.^{22b}

In England, where no statutory definition of provocation existed, the common law approach to the defence was finally settled by *R. v. Lesbini*.²³ The argument against an objective standard had previously been raised without success in *R. v. Alexander*,²⁴ and in *Lesbini* Lord Reading C.J. approved that decision and firmly rejected the contention that an objective standard ought to reflect the mental ability of the accused. *Lesbini*, who was found at trial to be hot-tempered and sensitive, with defective control and want of mental balance, had taken offence at certain jocular remarks made to him by a girl in charge of a shooting gallery. As he approached the gallery the girl had said, “Iky wants some

21. *The Criminal Code Act, 1899*, 63 Vic., No. 9, s. 268.

22. *Criminal Code, 1902*, 1 & 2 Edw. VII, No. 14, s. 243; repealed and re-enacted by *Criminal Code Act 1913*, S.W.A. 1913, No. 28, s. 245.

22a. R.S.C. 1970, c.C-34, s. 215.

22b. It has also been suggested that the word “ordinary” was used in the Draft Code, rather than the word “reasonable”, because the ordinary person could more readily be believed to have so far lost control of himself as to kill another. I do not share the view that a reasonable man is not one who could give way to provocation. The reasonable man is not the perfect man, after all, nor even always the rational man; he is simply, as Lord Diplock put it in *Camplin*, the anthropomorphic expression of the standard of conduct that our society expects of its members. Our society recognizes that its members may kill one another in extreme circumstances, and is prepared to at least partially forgive them for doing so.

23. [1914] 3 K.B. 1116 (C.C.A.).

24. (1913), 9 Cr. App. R. 139.

shots". A short exchange ensued, in which she explained that she had only been joking and handed him a loaded revolver for use on the range. Lesbini took the revolver and shot her instead of the target.

On appeal from conviction Lord Reading C.J. adopted the statement in *Welsh* that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion".²⁵ He added:

This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts.²⁶

Avory J. observed of the defence argument:

It would seem to follow from your proposition that a bad-tempered man would be entitled to a verdict of manslaughter when a good-tempered one would be liable to be convicted of murder.²⁷

Following *Lesbini* the English courts took a two-step approach to the defence of provocation. To succeed, an accused had to establish not only that he had lost his self-control, but that a reasonable person would have done the same. The appropriate test was summed up by Devlin J. in *R. v. Duffy* in a direction that was approved by Lord Goddard C.J. on appeal²⁸ as "as good a definition of the doctrine of provocation as it has ever been my lot to read":

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 master of his mind.²⁹

This test was much the same as that set out in the *Criminal Code*, but was not accompanied by the same abandonment of the recognized grounds of provocation that, as a matter of principle, justified the extension of the objective standard in the Code jurisdictions. It was not until the passing of the *Homicide Act, 1957*³⁰ that the English courts were compelled to recognize words or gestures as acts of provocation (something they had previously refused to do: see *Holmes v. D.P.P.*).³¹

25. *Supra*, note 14, at 338.

26. *Supra*, note 24, at 1120.

27. *Id.* at 1118.

28. [1949] 1 All E.R. 932 at 933 (C.C.A.).

29. *Id.* at 932.

30. 5 & 6 Eliz. II, c. 11.

31. [1946] A.C. 588 (H.L.).

(b) *The Reasonable Man Defined*

The character of the reasonable man was first considered by the House of Lords in *Mancini v. D.P.P.*³² Mancini was the manager of a club in Wardour St. called the Palm Beach Bottle Party. The deceased was a member of the club who had been involved in a violent altercation early in the evening and who then returned to the club at between three and four in the morning. He grappled with Mancini at the entrance and Mancini stabbed him fatally with a seven-inch-long, double-edged dagger. The House rejected the defence of provocation on the ground that the mode of retaliation must bear a reasonable relationship to the provocation (a questionable requirement to be made of a man who is alleged to have lost his self-control), but in the course of his decision Viscount Simon L.C. reformulated the objective test of provocation:

The test to be applied is that of the effect of the provocation on a reasonable man, as was laid down by the Court of Criminal Appeal in *Rex v. Lesbini*, 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.³³

The House of Lords took that approach a great deal further in the infamous case of *Bedder v. D.P.P.*³⁴ Bedder was impotent, a fact that caused him a good deal of concern, and on the night in question he sought to have intercourse with a prostitute. When he failed in the attempt she jeered at him and pushed him away. He still tried to hold her and she struck him twice. He then grabbed her, and she kicked him “in the privates”, at which point he stabbed her twice, causing her death. At trial he pleaded provocation. The trial judge directed the jury that they were not entitled to consider the accused’s impotence in deciding whether the reasonable man would have acted as he did and the jury accordingly convicted.

The Court of Criminal Appeal approved that direction and held that:

. . . no distinction is to be made in the case of a person who, though it may not be a matter of temperament, is physically impotent, is conscious of that impotence, and therefore mentally liable to be more excited unduly if he is “twitted” or attacked on the subject of that particular infirmity.³⁵

The Court of Appeal’s decision was thus premised on its treatment of the accused’s condition as a mental infirmity, namely, consciousness of impotence that made him react more violently to the prostitute’s blows

32. [1942] A.C. 1.

33. *Id.* at 9.

34. [1954] 1 W.L.R. 1110.

35. *Id.* at 1121.

than would a reasonable man. As the ascription of exceptional mental or temperamental qualities to the reasonable man had been clearly ruled out by *Mancini*, the Court of Appeal's decision did not represent a departure from the previous law.

However, Lord Simond's judgement in the House of Lords did. He rejected the argument that the reasonable man should be invested with at least the physical qualities of the accused. In characteristic fashion he remarked: "For that proposition I know of no authority; nor can I see any reason in it".³⁶ In his view it would be illogical to refuse to consider mental characteristics yet agree to recognize physical defects, particularly when in so many cases the former were the product of the latter. He concluded:

It was urged upon 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 invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is 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 invoked. If the reasonable man is then deprived in whole or in part of his reason or the normal endowed with abnormal characteristics, the test ceases to have any value.³⁷

Apparently, in addition to his other virtues, the reasonable man is never impotent.

This approach was endorsed by Fauteux J. writing for a majority of the Supreme Court of Canada in *Salamon v. The Queen*.³⁸ Salamon had killed his landlady in what was apparently a fit of sexual jealousy; he had, however, not only nursed his resentment for several hours but initiated the train of events that led to the fatal incident. Fauteux J. was prepared to dismiss the appeal on that basis alone. He went on, however, to approve the following aspect of the direction given by the trial judge as to the self-control to be expected of an ordinary person: "At this stage you must not consider the character, background, temperament, or condition of the accused."³⁹ Cartwright J., dissenting on another point, also shared this view: "On this branch of the inquiry no account should be taken of the idiosyncrasies of the appellant . . . the standard to be applied is that of an ordinary man".⁴⁰

36. *Id.* at 1122-1123.

37. *Id.* at 1123.

38. [1959] S.C.R. 404.

39. *Id.* at 410.

40. *Id.* at 415.

The Court reaffirmed this position in *Wright v. The Queen*.⁴¹ Wright was a young man who had suffered as a child from a violent and authoritarian father and who returned home to visit his parents after some years of absence. On the night in question, the father became infuriated on hearing that his son had acquired a revolver. He left home, went to where his son was and roughly demanded the gun. The son, who was quite drunk, replied, "I am twenty-one" and shot his father three times.

In considering the defence of provocation Fauteux J. approved and applied the comments of Lord Simonds L.C. in *Bedder*. In his view the trial judge had erred in failing to instruct the jury that no consideration should be given to the nature of the accused's relationship with his father, or to his mentality, or to his drunkenness. He said:

While the character, background, temperament, idiosyncrasies, or the drunkenness of the accused are matters to be considered in the second branch of the inquiry, they are excluded from the consideration in the first branch. A contrary view would denude of any sense the objective test.⁴²

He concluded that it was a trial judge's duty to warn a jury not to give any consideration to peculiar or abnormal characteristics of the accused.

This approach was taken to its most extreme conclusion in *R. v. Parnerkar*.⁴³ Parnerkar was a Hindu who had for some years courted a Regina woman. They had exchanged letters after Parnerkar moved to Toronto and he entertained hopes of marrying her and becoming a father to her children. When the issue came up, however, she laughed at him in front of the children, told him she would not marry a "black man" and tore up his letters. She then told the children to go outside as she was expecting her boyfriend to call. Parnerkar took a knife from his flight bag and killed her.

At trial, psychiatric testimony showed that to a Hindu, the term "black" referred to untouchables or criminals, and hence was highly provocative. Moreover, Hindus born in India, as Parnerkar had been, where literacy was rare, attached great importance to letters and invested family correspondence with great emotional significance. The destruction of a letter amounted to the destruction of the bond between the author and the recipient. Relying on this testimony, the trial judge put provocation to the jury.

The Saskatchewan Court of Appeal held that the trial judge had erred. Culliton C.J. held that to consider Parnerkar's background in evaluating

41. [1969] S.C.R. 335.

42. *Id.* at 340.

43. (1971), 5 C.C.C. (2d) 11 (Sask. C.A.) *aff'd* [1974] S.C.R. 449.

the deceased's conduct was to apply a subjective test: "The test to be applied is, would the tearing of a letter be sufficient to deprive an ordinary person of his power of self-control, and, in my view, it would not."⁴⁴ In his view the trial judge had also applied a subjective test in considering the significance to Parnerkar of the word "black". Accordingly, he allowed the appeal. Fauteux C.J., speaking for a majority of the Supreme Court, affirmed.⁴⁵

It is significant that in none of these cases were physical characteristics involved. All three decisions turned on the ascription of certain temperamental characteristics to the ordinary person. Therefore, while the statements made in *Bedder* were approved by the Supreme Court, they were never applied in their full breadth.

III. Reform

1. Criticism of the Objective Standard

The objective standard clearly represents a compromise, and like most compromises it has earned the love of few. As the Royal Commission on Capital Punishment put it in its 1953 *Report*:⁴⁶

The rule of law that provocation may, within narrow bounds, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness, but it suffers from the common defects of a compromise. The jury might fairly be required to apply the test of the "reasonable man" in assessing provocation if the Judge were afterwards free to exercise his ordinary discretion and to consider whether the peculiar temperament or mentality of the accused justified mitigation of sentence. It is less easy to defend the application of the test in murder cases when the Judge has no such discretion.

The most common ground of criticism is also the most straightforward. Simply put, it is that the reasonable man, as he is referred to by the English courts, does not kill. Accordingly, if the objective standard were to be vigorously applied, the defence of provocation would rarely, if ever, be successful.

Moreover, in the law of negligence and in other areas of the criminal law, the reasonable person test indicates an ethical standard, as Glanville Williams points out. If, then, a reasonable person's reaction to provocation is a rational act when judged by an ethical standard, one must agree with Williams that it is questionable whether the offence of provoked homicide should continue to be punished. As he says:

44. (1971), 5 C.C.C. (2d) 11 at 27.

45. [1974] S.C.R. 449 at 455.

46. Cmnd. 8932, para. 144.

The reason why provoked homicide is punished is to deter people from committing the offence; and it is a serious confession of failure on the part of the law to suppose that, notwithstanding the possibility of heavy punishment, an ordinary person will commit it.⁴⁷

However, in the Canadian context, this debate is somewhat beside the point. The reasonable man standard is only one response to the fundamental question of whether our society should treat provoked homicide as murder. Broadly speaking, only three responses are possible. The first is to ignore provocation and treat the killing on the same basis as any other homicide; both the courts and the legislature have shrunk from the harshness of that conclusion, however, and will probably continue to do so unless and until the mandatory sentence of life imprisonment for murder is abolished.

The second possible response is to treat all homicides inspired by a wrongful act or insult as manslaughter. This would involve the adoption of a purely subjective approach, in which the jury would confine itself to determining whether or not the accused had been deprived of his self-control, and the judge would decide what sentence was appropriate in the circumstances. Law Reform Commissions in New Zealand,⁴⁸ Victoria⁴⁹ and South Australia⁵⁰ have supported this approach and recommended the abolition of the objective standard. In this country, however, such an approach, attractive as it might be, is precluded by the language of the *Criminal Code*, though the Law Reform Commission of Canada has recommended that provoked homicide no longer be punished by a minimum sentence.⁵¹

The compromise position, of course, and the one adopted both at common law and by statute, is to say that provoked homicide can be manslaughter in special circumstances. This shifts the focus of the defence from the character of the accused to the nature of the circumstances in which he finds himself. If a reasonable or ordinary person would have killed in those circumstances, then the culpable homicide in question will be treated as manslaughter rather than murder, despite the existence of an intent to kill. Logically, perhaps, it should follow, as Williams suggests, that where a reasonable person would commit the offence it should no longer be punished. But our society's view of homicide is so strict that it

47. Williams, *Provocation and the Reasonable Man*, [1954] Crim. L. Rev. 741 at 742.

48. Criminal Law Reform Committee, *Report on Culpable Homicide* (1976), para. 16.

49. Law Reform Commissioner, *Provocation and Diminished Responsibility as Defences to Murder* (Report No. 12, 1982), para. 1.30(a).

50. Criminal Law and Penal Methods Reform Committee, *Substantive Criminal Law* (Fourth Report, 1977), para. 11.6.

51. Law Reform Commission of Canada, *Homicide* (Working Paper 33, 1984), Recommendation 11.

is unwilling to treat even provoked homicide by a reasonable person as acceptable, however irrational in terms of pure logic that conclusion may be. The defence is based, after all, on forgiveness, not approval.

Perhaps the logical difficulty arises from the language employed by the English courts. As Lord Diplock put it in *Camplin*, “powers of ratiocination bear no obvious relationship to powers of self-control”.⁵² However the *Criminal Code* speaks of the ordinary person and the issue under the Code therefore is not whether the reasonable person would have *chosen* to commit the offence but whether the ordinary person would have lost his self-control. Since the ordinary person is necessarily imperfect, he can be expected to lose his self-control if sufficiently provoked. Consequently a strict application of the ordinary person standard does not mean that the defence will never succeed, as William suggests, or that the offence should not be punished.

The purpose of the ordinary person test, then, is to provide an assessment of the insult offered to the accused in order to determine whether it was grave enough to justify the accused’s loss of control and invoke the compassion of the law. Assessment of the insult necessarily involves some acceptance of the circumstances of the accused, and the crucial question for the courts, of course, is how far those circumstances may be taken into account in order to fully appreciate the insult before the objective test is turned into a subjective one and the ordinary person becomes the individual accused. To largely ignore those circumstances, on the other hand, is, as Williams points out, not only to overly restrict the application of the defence, but to defeat its underlying principle.

Another major and related criticism of the objective standard is that in its strictest form, as set out in *Bedder*, it is virtually meaningless. As Murphy J. put it in *Moffa v. The Queen*:

The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the 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.⁵³

And in *The Queen v. Welsh*, Bray C.J. said of *Bedder*:

Comment on this decision, which we must accept, would be futile and is best left to academic writers who are not restrained by judicial decorum.⁵⁴

52. [1978] A.C. 705 at 716 (H.L.).

53. (1977), 51 A.L.J.R. 403 at 412 (H.C.).

54. (1977), 16 S.A.S.R. 309 at 313 (S.C.).

These reactions are perhaps inspired by the rather rigid language employed in *Bedder*. Yet Murphy J. assumes that, even if *Bedder* were not the law, it would be impossible, in theory or in practice, to interpret the objective standard in light of the circumstances of the accused without denuding it of its objectivity. Murphy J. was free to discard that standard in favour of a purely subjective approach because he was writing in the context of the common law defence of provocation. The challenge for a Canadian court, faced with a statute that requires the application of an objective standard, is to make that standard realistic without allowing it to become subjective. It is a challenge to which I have already referred and to which I will return later.

Critics of the objective standard also question whether a subjective standard would in fact entitle a bad-tempered man to a verdict of manslaughter but make a good-tempered man liable to conviction for murder (cf. Avory J. in *Lesbini*). They point out that a good-tempered man faced with a trifling affront either does not kill or kills without provocation, in which case he deserves his conviction for murder. A bad-tempered man who allows himself to be provoked by such an affront is still guilty of manslaughter and can be sentenced to life imprisonment, the same penalty as for murder, at the discretion of the judge.

2. *Legislative and Judicial Responses*

(a) *Britain*

The harshness of the English common law was mitigated by the passing of s. 3 of the *Homicide Act, 1957*. That section provides, insofar as is relevant, that in determining whether the provocation in question would have caused a reasonable man to lose his self-control, "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." The section did not come before the House of Lords until *D.P.P. v. Camplin* (1977).⁵⁵ Camplin was a 15-year-old male. According to his testimony he had visited the deceased in his flat, where he was first raped and then laughed at for his shame. Overwhelmed by anger and humiliation he picked up a pan and struck his tormentor a fatal blow to the head.

Lord Diplock, for the majority, took the opportunity to re-evaluate *Mancini* and *Bedder* in light of the 1957 Act. In his view those cases could no longer be supported. He summarized the proper approach to the objective standard in a sample charge to the jury that provides, in part:

The reasonable man referred to . . . is a person having the power of self-control to be expected of an ordinary person of the sex and age of the

55. *Supra*, note 52.

accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him . . .⁵⁶

At almost the same time that *Chaplin* was being decided, the Criminal Law Revision Committee was preparing its own recommendations on provocation. In its 1976 *Working Paper on Offences Against the Person*, the Committee recommended that the reasonable man standard be abolished and replaced by the requirement that "provocation is sufficient if, on the facts as they appeared to the accused, it constitutes a reasonable excuse for the loss of self-control on his part".⁵⁷

The English Law Commission's Report on *Codification of the Criminal Law*⁵⁸ proposes that the reasonable man standard embodied in s. 3 of the *Homicide Act, 1957* be replaced by the following provision:

60. This section applies where —

b) the provocation is, in all the circumstances (including any of [the accused's] personal characteristics that affect its gravity), sufficient ground for the loss of self-control.

(b) *New Zealand*

In *Camplin* Lord Simon of Glaisdale suggested that the law as it then stood in England was little different from that of New Zealand. He said:

I think that the law as it now stands in this country is substantially the same as that enacted in the New Zealand Crimes Act 1961, section 169(2), as explained by the Court of Appeal of New Zealand in *Reg. v. McGregor*.⁵⁹

In New Zealand, the defence of provocation, as it was first enacted in 1893, was taken *verbatim* from the English Draft Code and hence was identical to the Canadian defence. However in 1961 a special amendment was passed to prevent the application of *Bedder* there. The amendment provided:

169(2) Anything done or said may be provocation if

a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control.⁶⁰

If theory were closer to practice the application of this amendment would have been straightforward. The section required the jury to

56. *Id.* at 718.

57. Criminal Law Revision Committee, *Working Paper on Offences Against the Person* (1976), para. 54.

58. The Law Commission, *Codification of the Criminal Law* (Law Com. No. 143, 1985).

59. *Supra*, note 52, at 727.

60. *Crimes Act 1961*, S.N.Z. 1961, No. 43, s. 169(2).

imagine the reaction of a person identical to the accused in all respects save one, that of self-control. Accordingly, the jury was to consider individual circumstances in order to put the insult into context and determine its gravity, but it was to ignore these circumstances when assessing the self-control to be expected of the accused. To borrow a phrase, the standard was to be that of the ordinary person similarly situated and similarly insulted.

In practice, however, the New Zealand courts found it necessary to integrate some of the characteristics of the accused into the degree of self-control to be expected of the ordinary person. In *The Queen v. McGregor*,⁶¹ North J. took the position that the test of "ordinary self-control", if unmodified in any way by the characteristics of the accused, would be little different in effect from the traditional "ordinary person" test, since the traditional ordinary person test amounted in practice to a test of ordinary control. The court presumed that such a result could not have been intended by the legislature, and held that "the offender must be presumed to possess in general the power of self-control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristics possessed by him".⁶² It thus placed itself in the position of having to fuse two discordant notions, the subjective test and the ordinary person test, without destroying the objectivity of the ordinary person test. It did so by setting out an elaborate, almost tortured definition of those traits in the offender that could be legitimately regarded as characteristics of a person of ordinary self-control. To fall within the definition the accused's traits must be not only definite but sufficiently important to set him off from the ordinary run of mankind; they must relate to the provocative words or conduct in question; and they must amount to specific phobias rather than general weakness of mind.⁶³

This approach obviously runs the risk of being too refined, too close to the merely semantic, for the average jury member to grasp, let alone apply, even after explanation from the judge. Indeed the Criminal Law Reform Committee of New Zealand reported in 1976 that in many cases judges did little more than put the words of the section to the jury, with perhaps the addition of selected quotations from *McGregor*. "These explanations may be lucid to lawyers but, we are convinced, are frequently too difficult for jurymen to comprehend fully."⁶⁴ The

61. [1962] N.Z.L.R. 1069 (C.A.).

62. *Id.* at 1081.

63. *Id.* at 1081-1082.

64. *Supra*, note 48, para. 15.

Committee accordingly recommended that a discretionary sentence for murder be established and the defence of provocation be abolished.

Yet in *R. v. Newell*⁶⁵ Lord Lane C.J. held, relying on Lord Simon's reasons in *Camplin*, that the test set out in *McGregor* was now the proper test to be applied in England. After quoting at length from the reasons of North J. he wrote:

That passage, and the reasoning therein contained, seem to us to be impeccable. It is not only expressed in plain, easily comprehended language; it represents also, we think, the law of this country as well as that of New Zealand.⁶⁶

Accordingly he dismissed the appellant's particular predicament from consideration on the basis that it was merely transitory in nature:

The other matters advanced by Mr. Ashe Lincoln as being characteristics which the jury should have been invited to consider, in examining what a reasonable man might or would have done, are not characteristics at all. The appellant's drunkenness, or lack of sobriety, his having taken an overdose of drugs and written a suicide note a few days previously, his grief at the defection of his girl friend, and so on, are none of them matters which can properly be described as characteristics. They were truly transitory in nature, in the light of the words and reasoning of North J., in *McGregor's* case.⁶⁷

He held, therefore, that the trial judge had properly instructed the jury members to ask themselves whether they would have reacted as the accused had if their girlfriends had been insulted in the way his had been. Leave to appeal to the House of Lords was sought on the ground that North J.'s test should not be accepted to the extent that it failed to take into consideration temporary mental states, but was denied by the Appellate Committee.⁶⁸ *Newell* has now been accepted as stating the law on provocation in New South Wales⁶⁹ and Victoria.⁷⁰

(c) *Other Jurisdictions*

As noted above, Law Reform Commissions in both Victoria and South Australia, where the defence is still a matter of common law, have recommended the abrogation of the ordinary person standard by statute, despite its liberalization in *Camplin*. In Eire, where provocation also

65. (1980), 71 Cr. App. R. 331 (C.A.).

66. *Id.* at 340.

67. *Id.*

68. *Id.* For criticism of the decision see *Provocation — The Need for Radical Reform* (1980), 130 New L.J. 618: "R. v. *Newell* demonstrates . . . that the law as laid down in *Camplin* may still lead to absurd results."

69. *R. v. Croft*, [1981] 1 N.S.W.L.R. 126 at 162 (C.C.A.).

70. *R. v. Dincer*, [1983] V.R. 460 at 463 (S.C.).

remains a creature of common law, the objective test has been abolished.⁷¹ In this country, the Law Reform Commission of Canada, in its Working Paper on Homicide⁷² has recommended the creation of an offence of "intentional homicide" with two degrees. Provoked homicide would fall within the second, rather than the first degree, and hence would be subject to a maximum rather than a minimum penalty of life imprisonment.

IV. *Options for the Future*

We shall not cease from exploration
 And the end of all our exploring
 Will be to arrive where we started
 And know the place for the first time.
 — Little Gidding

As a matter of principle, as long as a minimum sentence for murder exists, humanity and compassion require that some means of reducing that sentence be provided where the accused's conduct was an uncontrollable, albeit intentional response to grievous provocation. The *Criminal Code*, like the common law, has adopted the device of reducing the charge to manslaughter.

Again as a matter of principle, it would in my view probably be desirable if the existence of provocation were to be assessed by purely subjective standards. It seems both unfair and illogical to attempt to judge an accused's inevitably personal reasons for his loss of self-control in terms of the capacity for self-control of a hypothetical ordinary person. It would be more appropriate, in my opinion, if any reservations our society may feel about the accused's conduct were incorporated into the question of sentencing, to the extent that they are not already embodied in the requirement of a causal connection between the provocation and the killing.

This approach is precluded, of course, by the presence of an ordinary person standard in the *Criminal Code*. However, I think it is important to recognize that the significance of the objective standard does not lie in the fact that it embodies the principle that the criminal law must establish and maintain a standard of conduct applicable to all. That principle could have been as readily embodied in a purely subjective standard, which would have left its protection to the trial judge and given effect to it through sentencing. Instead Parliament, like the courts before it, has preferred to employ the objective standard. In doing so, it has transferred the assessment of our society's expectations from the judge to the jury.

71. *The People v. McEuin* (1978), 112 I.L.T.R. 53 (C.C.A.).

72. *Supra*, note 51. See also the discussion at 72-74.

Accordingly, since the objective standard operates as a means to an end, its ability to function effectively is central to its existence, and since it is to be applied by the jury, simplicity and accessibility must characterize its interpretation and application.

Assuming then that provocation is to be measured by an objective standard and that that standard is to be interpreted according to the principles suggested above, the question of how to determine the content of that standard remains. The history of the development of the defence suggests that three approaches are possible; I will evaluate these and add a fourth, more closely tied to the language of the *Criminal Code*.

The most extreme form of objective standard is, of course, that set out in *Bedder*. That standard ignores all features of the accused, physical or mental, even for the purpose of assessing the gravity of the insult. In their place it posits a hypothetical ordinary or reasonable person, deprived of any element of context. Such an abstract being is, of course, unimaginable, and amounts, as Lord Diplock says, to no more than the anthropomorphic expression of our society's expectations. The fallacy underlying this standard is that it assumes that our society expects the same thing of each of us when in fact it does not; society's expectations are inevitably modified, though never nullified, by context.

The injustice of the rigid objective approach, therefore, lies in the fact that it strips the accused of that context, thereby depriving him of his right to have his circumstances taken into account in assessing what is expected of him. The black man is asked to be colourless, the blind man to see. Such an approach violates the notion of individual responsibility: the criminal law is expected to treat all equally, but not identically. That is why the substantive requirements of the *Criminal Code* are tempered by the sentencing discretion of the judge.

It must be remembered that the use of the ordinary person standard in this context was a creation of the 19th century, the product of an era in which it was commonly believed that there was an ideal standard of proper behaviour, toward which all Englishmen should strive and to whose minimum content all Englishmen must be held. Most Canadians today no longer share that belief. We recognize that people of different ages, sexes, colours, religions and races may have very different values, or at least may well attach different weights to the same values. Each of us, therefore, has his or her own way of meeting the community standard. It is up to the law to accommodate the individual without betraying the community.

The *danger* of such an approach is that in practice it will be ignored in favour of other, equally unjust, but less recognized approaches. As the *Report* of the Law Commissioner for Victoria puts it:

The jury may impose their own standard in the wrong sense, *i.e.*, what would *they* have done if *they* were the accused? After all, who is more ordinary or reasonable than we? Or perhaps (reverting to the situation in *Camplin's* case) a juror will compromise — What would I have done if I was buggered at 15?⁷³

In *Newell* this approach was actively encouraged. The trial judge, in his summing-up, told the jury:

You gauge what a reasonable man's reactions are; and a reasonable man's reactions are essentially your reactions. Would any of you, individually or collectively, have so behaved with that provocation? If you think you would have, or you might well have, then he is entitled to the defence of provocation . . .⁷⁴

The Court of Criminal Appeal considered that direction “perfectly proper”. Proper it may have been, but to ask a jury to adopt this approach is only reasonable as long as its members share the values of the accused; where they do not it is patently unjust.

There seems to be general agreement that the rigid objective approach should be abandoned. It was discarded by the House of Lords in *Camplin* and, indeed, despite its approval in *Wright*, it has never been applied by the Supreme Court of Canada.

The compromise position, set out in *Lesbini* and *Mancini*, is to invest the ordinary person with the physical characteristics of the accused, but not with his temperament. In my view, this approach is as unsound as that taken in *Bedder* and only marginally less unfair. It would make the distinction between manslaughter and murder depend on whether the provocation in question was directed at something the jury could see or at something it could not. The ordinary person would thus have a sex and a skin colour, but no religion, no nationality and no sexual orientation, to pick a few obvious examples. Such an approach largely ignores the principle of compassion for human frailty on which the defence of provocation is based. Moreover it has the effect of according greater significance to the external features of the accused than to his internal qualities when the latter are, in many cases, more relevant to the fundamental question of loss of self-control. As such it appears to be based on a rough equation of the physical with the objective and the mental with the subjective, an equation that is psychologically faulty, since physical qualities may be as subjective as mental qualities and mental qualities as objectifiable as physical. That being the case, there is no reason in principle why mental qualities should not be incorporated into the objective standard.

73. *Supra*, note 49, at para. 1.22.

74. *Supra*, note 65 at 335.

The unfairness of this approach is clear from the decision in *Parnerkar*. Had Parnerkar indeed been black he might, if other conditions had been satisfied, have succeeded in his defence. But because he was East Indian, and because the significance to him of being called “black” was not externally recognizable, he failed. Such a conclusion is manifestly unjust, unless one takes the attitude that an East Indian is black in the eyes of the average jury member. And even if one does, one would still be faced with a case like *Moffa*, in which an Australian wife, toward the end of a long night of domestic strife that culminated in her death, called her Italian husband a “black bastard”, a description that at least one member of the Australian High Court felt “might have been an unbearable insult to a person of the accused’s origin . . .”⁷⁵ *Moffa*’s defence succeeded because his wife had also told him that she had tried and preferred every other man on the street and offered nude photos of herself as proof. But if the jury had had to rely on the epithet “black bastard”, what significance could they have attributed to it by looking at the accused?

A more recent and more liberal compromise is that set out in the New Zealand *Crimes Act* and in *Camplin*, where the difficult feat of interweaving the subjective and objective approaches was attempted. As I indicated above, this approach credits the ordinary person with all the characteristics of the accused, mental and physical, except his self-control. Thus both subjective and objective considerations may be applied in evaluating the gravity of the provocation, but only objective considerations may be applied in assessing the self-control to be expected of the accused.

I have said enough about the difficulties involved in the application of this test in my discussion of *R. v. McGregor* that I need not review them here. I would only emphasize that in my view it is impossible in practice to distinguish between the gravity of an insult and the capacity of a person to withstand it. Suppose a person was beaten as a child and now reacts more abruptly to physical aggression than other people. Is his reaction a measure of the significance of the provocation to him, or a measure of his poor self-control in regard to that issue? In my opinion, a jury member faced with such a situation could say no more than that that person was particularly susceptible to that provocation. To ask him or her to do more is unreasonable, probably psychologically invalid, and likely to produce an unjust result.

Given the inadequacy of these approaches, it seems to me that a resolution of the problem requires a return to the actual words of the *Criminal Code*. It defines provocation as an “insult . . . of such a nature

75. *Supra*, note 53 at 412, *per* Murphy J.

as to . . . deprive an ordinary person of the power of self-control”.^{75a} In my view, these words must be read together, so that the term “ordinary person” is interpreted in light of the function he is supposed to serve — the evaluation of the nature of the insult. The proper response to the question of what characteristics should be ascribed to the ordinary person, and how far they may include the characteristics of the accused, is to say, in effect, that the ordinary person should be endowed with such characteristics as are relevant to the nature of the insult; that is, the ordinary person should be placed in the circumstances of the accused as the author of the insult knew or can be taken to have known them. For the purpose of s. 215, therefore, the ordinary person should be a person invested with such characteristics and experience of the accused as the accused could reasonably expect the author of the insult to be aware of. If the author was a stranger, those characteristics would probably be physical, but if the author was an intimate (such as a husband or wife) those characteristics should be held to include any idiosyncrasies of the accused known to the author that are relevant to the insult. So if the deceased in *Parnerkar*, for example, knew or could be expected to have known of the cultural background that led Parnerkar to attach a special significance to letters, or to being called black, the ordinary person standard in s. 215 should be modified by that knowledge. There are several reasons for this.

First, it protects justified expectations. No person is entitled to preserve a special degree of sensitivity at the expense of his fellow citizens, and an accused cannot, in normal circumstances, claim to have been legally provoked simply because he is thin-skinned. This is the principle of equality of responsibility. Our society is entitled to expect that its members will possess or at least live up to a normal level of sensitivity. The ordinary person standard has been created to protect that expectation.

In many cases, however, we may be aware of the infirmities of our fellows, and that awareness necessarily alters our expectations. At that point we no longer have the right to treat a thin-skinned person like everyone else. We have no right to exploit our special knowledge at the expense of those who are hypersensitive or otherwise susceptible and then expect that they will be held to an ordinary person standard. The ordinary person standard is designed to protect those whose conduct is innocent because it is ignorant. For example, in *Lesbini*, the girl who said “Iky wants some shots” knew nothing of Lesbini’s temperament and hence of his volatility. Accordingly she had a right to expect that he

75a. R.S.C. 1970, c.C-34, s. 215.

would be as thick-skinned as her average customer and Lesbini's peculiar temperament was properly excluded from the jury's consideration of the ordinary person standard. Had the girl been aware of Lesbini's character, however, Lesbini should have been entitled to have that character taken into consideration as part of the ordinary person standard, though consideration would not necessarily have led to a successful defence.

The extent to which expectations are altered by personal knowledge is particularly clear in the case of a husband and wife, as at least two recent decisions have recognized. In *R* the accused, a South Australian woman, had been the victim of what the court called "an appalling background of domestic violence and ill-treatment,"⁷⁶ that was "about as repulsive as it is possible to imagine."⁷⁷ Her husband had beaten and terrorized both her and her children and unknown to her, had committed incest with each of their daughters in succession, from as early an age as six. On the day in question the youngest daughter told her mother that she had been raped by her father at knife-point the night before. At that moment, the accused later testified, she "seemed to freeze up, everthing went cold". That evening her husband went out in the car with the same daughter and attempted to rape her again. When he came home he told his wife:

We settled our differences. We are going to be one big happy family. There isn't going to be no more talk about the girls leaving home.⁷⁸

Later, in the bedroom, he said to her:

We are going to be happy Jean. I love you. Why don't we go away for a second honeymoon.⁷⁹

After smoking several cigarettes, her emotions rising, the accused went out to the shed, got an axe and hewed her husband to death. A majority of the South Australian Court of Appeal held that the husband's conduct had to be considered in its context in order to determine whether it amounted to provocation in law:

The deceased's words and actions in the presence of the appellant on the fatal night may appear innocuous enough on the face of them. They must, however, be viewed against the background of brutality, sexual assault, intimidation and manipulation. When stroking the appellant's arm and cuddling up to her in bed, and when telling her that they could be one happy family and that the girls would not be leaving, *the deceased was not only aware of his own infamous conduct but must also have at least suspected that the appellant knew or strongly suspected that, in addition to the long history of cruelty, he had habitually engaged in sexual abuse of*

76. 28 S.A.S.R. 321 at 323 (C.C.A.).

77. *Id.* at 328.

78. *Id.* at 324.

79. *Id.*

her daughters. The implication of the words was therefore that this horror would continue and that the girls would be prevented from leaving by forms of intimidation and manipulation which were only too familiar to the appellant. In this context it was, in my opinion, open to the jury to treat the words themselves and the caressing actions which accompanied them as highly provocative and quite capable of producing in an ordinary mother endowed with the natural instincts of love and protection of her daughters, such a loss of self-control as might lead to killing. (My emphasis.)⁸⁰

The court thus invested the ordinary person with the experience and hence the sensitivities of the accused, where it was of the opinion that the author of the provocation was aware of them or at least strongly suspected their existence.

A similar approach was adopted by the Northwest Territories Court of Appeal in *R. v. Daniels*.⁸¹ In that case a native woman, maddened by her husband's treatment of her, responded to his latest infidelity by stabbing his mistress to death. The court held that the ordinary person standard should be modified so as to reflect the peculiar circumstances of being married to Mr. Daniels. Laycraft J.A. wrote:

In my view, the objective test lacks validity if the reaction of the hypothetical ordinary person is not tested against all of the events which put pressure on the accused.⁸²

A further advantage of the approach I am suggesting is that it is flexible enough to accommodate the needs of our pluralistic and changing society. Because it preserves the objectivity of the ordinary person standard it helps to keep the defence of provocation in harmony with contemporary attitudes, for what an ordinary person would regard as a provocation justifying the loss of self-control will alter as social standards alter. In 1672 it was held that there could be "no greater provocation" than the sight of one's wife in bed with another man, but in my view it is questionable whether the ordinary person in Canada today would regard that sight, however distressing, as sufficient provocation to explain the taking of a life. Therefore susceptibility of a kind that has become socially unacceptable would cease to support a defence of provocation, unless the accused could reasonably have expected the author of the insult to be aware of it.

The ordinary person standard must also be flexible enough to change not only with time but with circumstance. Members of a sub-culture may have very different values from those of the dominant culture, or of

80. *Id.* at 326.

81. (1983), 7 C.C.C. (3d) 542 (N.W.T.C.A.).

82. *Id.* at 554.

another sub-culture, and where both parties to a provocation are members of a single culture, or at least share an understanding of that culture, it would be unjust to judge their conduct by the standards of the ordinary member of another culture, as *Parnerkar* makes clear. Equality before the law requires not only the uniform application of laws but different treatment of different cases. The approach I am suggesting protects that equality, while retaining sufficient objectivity to also protect the expectations of those who are ignorant of a particular cultural context, as indicated above. I note that in Australia this position has been adopted where the parties to a provocation are both aborigines. In *R. v. Muddarubba*, Kriewaldt J. observed:

In my opinion, in any discussion of provocation the general principle of law is to create a standard which would be observed by the average person in the community in which the accused person lives. I tell you that if you think the average member of the Pitjinjara tribe (and you must remember these are "Myall" blacks) would have retaliated to the words and actions of the woman by spearing her, then the act of spearing is not murder but manslaughter. If provocation sufficient for the average reasonable person in his community to lose his self control exists, then the unlawful killing is manslaughter and not murder. I may be wrong but until put right by a higher court I shall continue to tell juries that the members of the Pitjinjara tribe are to be considered as a separate community for the purposes of the rules relating to provocation. I shall not apply to them the standard applied to the white citizens of the Northern Territory.⁸³

Finally, because this approach is sensitive to individual circumstances, it satisfies the principle on which the defence of provocation is based — the need to grant a concession to human infirmity in extreme circumstances.

All this is no more than to say that the ordinary person exists in a context. To refuse to acknowledge that context is to hold the accused to

83. (1956), N.T.J. 317 (S.C.). See also Howard, *What Colour is the "Reasonable Man"?*, [1961] Crim. L. Rev. 41 and *R. v. Balir Balir* (1959), N.T.J. 633 (S.C.):

Similarly, I think a jury may say that something a white man might not regard as provocation might be so regarded as an Aboriginal. To that extent, I think one can draw a distinction between Aboriginals and whites, not by a different law, but by a different application of the same law. I have to give you the same law for people who are black in colour as for those who are white in colour. The law is that if a person acts under the stimulus of provocation, the provocative acts being sufficient to cause the average ordinary person to lose self-control, and death results from the actions of the provoked person, that death is not to be regarded as murder, but only as manslaughter, because of the provocation. I tell you that you are entitled to use your knowledge of Aboriginals and to consider that although a white person may have cooled down, an Aboriginal might not, that a white person would not have resorted to a knife for retaliation, but an Aboriginal might. If you think that is a reasonable view to take of the circumstances of this case, you are entitled to bring in a verdict of manslaughter.

a standard of behaviour that the judge regards as conventional. To acknowledge that context, on the other hand, is no more than to recognize that values are relative, and that within the general moral and criminal standard set by the Canadian community and expected of its members there is necessarily scope for different understandings of what is and is not provocation. In my opinion, the objectivity of the legal definition of provocation is not reduced by making it flexible in this way.

V. *R. v. Hill*^{83a}

Gordon Hill was a 16-year-old youth who had met and befriended an older man, Verne Pegg, through the Big Brothers organization. The two had known each other for about a year and Hill was spending the night on Pegg's sofa when, according to his testimony, he awoke to find Pegg caressing him. Shocked and enraged, he fled toward the bathroom for safety. When Pegg pursued him, he grabbed a hatchet, which was lying nearby with some camping equipment, and swung it, inflicting a deep gash in Pegg's head. He then fled the apartment, clad only in his underwear, returning a few minutes later to see if Pegg was all right. Pegg, however, threatened to kill him, and in response Hill took two steak knives from the kitchen and stabbed Pegg to death.

At Hill's trial for murder, Walsh J. charged the jury as follows:

First, the actual words must be such as would deprive an ordinary person of self-control. In considering this part of the defence you are not to consider the particular mental make-up of the accused; rather the standard is that of the ordinary person. You will ask yourselves would the words or acts in this case have caused an ordinary person to lose his self-control.

If you find that they were, you will then secondly consider whether the accused acted on the provocation on the sudden before there was time for his passion to cool. In deciding this question you are not restricted to the standard of the ordinary person. You will take into account the mental, the emotional, the physical characteristics and the age of this accused.⁸⁴

Defence counsel objected to the charge and contended that the ordinary person should have been defined as a person of the same age and sex as the accused. Accordingly he invited Walsh J. to recharge the jury by defining the ordinary person as "an ordinary person in the circumstances of the accused". The judge refused and Hill was convicted of second degree murder.

The Ontario Court of Appeal ordered a new trial.⁸⁵ Brooke J.A. (Martin and Morden J.J.A. concurring) held that the trial judge had erred

83a. *Supra*, note 4.

84. *Id.* at 341.

85. (1982), 2 C.C.C. (3d) 394.

in refusing to define the ordinary person as a person of the same age and sex as the accused. Age and sex, he reasoned, are not “peculiar characteristics” to be excluded from consideration of the ordinary person in the objective test:

The effect of the charge was that an ordinary person did not include a 16-year-old or youth and may well have established as the standard an ordinary person more experienced and mature than the ordinary 16-year-old or youth.⁸⁶

He held, therefore, that the judge’s misdirection might well have seriously prejudiced Hill and so his conviction could not stand.

A Crown appeal was allowed by the Supreme Court of Canada. Although five separate reasons for judgement were delivered, six members of the Court agreed with the Chief Justice’s exposition of the law. Of the remainder, Le Dain J. (dissenting) adopted a position very similar to that taken in *Camplin*, while Wilson J., also dissenting, offered a modified version of the *Camplin* approach.

After reviewing the case law, Dickson C.J. set out his own views as to the appropriate content of the ordinary person standard. In terms of mental characteristics he observed:

I think it is clear that there is widespread agreement that the ordinary or reasonable person has a normal temperament and level of self-control. It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness.⁸⁷

As to physical characteristics he held:

In terms of other characteristics of the ordinary person, it seems to me that the “collective good sense” of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. . . . Features such as sex, age, or race, do not detract from a person’s characterization as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation.⁸⁸

He concluded:

Thus the central criterion is the relevance of the particular feature to the provocation in question. With this in mind, I think it is fair to conclude that age will be a relevant consideration when we are dealing with a young accused person.⁸⁹

None of this is terribly helpful, to say the least. It is difficult to see in what way our understanding of the word “ordinary” has been enlarged

86. *Id.* at 396.

87. *Id.* at 331.

88. *Id.*

89. *Id.* at 332.

by the Chief Justice's equation of it with the terms "normal", "not exceptional", "general" and "not peculiar or idiosyncratic". He tells us, first, that the ordinary person has a normal *temperament* and hence is not exceptionally excitable, pugnacious or drunk. This, of course, simply begs the question of what is ordinary. It does not begin to tell us what a normal temperament is, or what it means to be exceptionally excitable. Second, Dickson C.J. tells us that an ordinary person has such other *general* characteristics as are relevant to the provocation in question, and goes on to treat "general characteristics" as equivalent to "particular characteristics that are not peculiar or idiosyncratic". Again, to say that the ordinary person has general characteristics, and that he is not peculiar or idiosyncratic verges on the tautological and is certainly far from enlightening. We are left knowing little more than that the ordinary person has a sex, an age, and a race, as long as those features are relevant to the insult in question. Even this, however, is cast in doubt by Dickson C.J.'s conclusion that "age will be a relevant consideration when we are dealing with a young accused person." No mention is made here of a connection between age and the insult in question.

The best conclusion seems to be that the question of ordinariness is to be resolved by the collective good sense of the jury. Dickson C.J. points out that

. . . in applying their common sense to the factual determination of the objective test, jury members will quite naturally and properly ascribe certain characteristics to the "ordinary person".⁹⁰

And later:

I have the greatest of confidence in the level of intelligence and plain common sense of the average Canadian jury sitting on a criminal case. Juries are perfectly capable of sizing the matter up. In my experience as a trial judge I cannot recall a single instance in which a jury returned to the courtroom to ask for further instructions on the provocation portion of a murder charge. A jury frequently seeks further guidance on the distinction between first degree murder, second degree murder and manslaughter, but rarely, if ever, on provocation.⁹¹

This last passage may be contrasted to the following comment in *Linney v. The Queen*, where Dickson J. (as he then was) wrote:

Provocation, in the relevant sense, is a technical concept and not easy to apprehend. The jury was clearly in a state of some doubt as it asked for further direction on provocation.⁹²

90. *Id.*

91. *Id.* at 334.

92. *Supra*, note 1 at 652.

It may also be contrasted with the majority decision in *Parnerkar*, where Fauteux C.J. held that the question of whether there was any evidence of a wrongful act or insult such as to deprive an ordinary person of his self-control was one for the trial judge:

If, then, the record is denuded of any evidence potentially enabling a reasonable jury acting judicially to find a wrongful act or insult of the nature and effect set forth in s.203 (3) (a) and (b), it is then, as a matter of law, within the area exclusively reserved to the trial judge to so decide and his duty to refrain from putting the defence of provocation to the jury.⁹³

In many cases, therefore, a judge could not follow the advice given in *Hill* without shirking the responsibility cast upon him by *Parnerkar*.

Even assuming, however, that the issue of provocation is one that can be left to the jury, and assuming too that juries are normally less doubtful than they were in *Linney*, what conclusion are we to draw from the fact that they do not seek further instructions? Clearly they are sure of their conclusion, but can we be as sure of its justice? As long as the provocation in question relates to a feature of the accused that can be reasonably regarded as “general” or “normal”, to use the Chief Justice’s words, a feature that the accused and the jury share in common, injustice is unlikely. But if, as indicated above, the jury does not share or is not sympathetic to the accused’s sensitivity, an injustice may well arise, an injustice that will be no less for the certainty with which a jury may commit it.

Wilson J. took a different approach to the problem, one more closely related to that adopted in *Camplin*. She based her interpretation of the objective or ordinary person standard on the principle of equality of responsibility. That principle would be violated, she reasoned, if an accused were entitled to have a level of self-control lower than that possessed by the ordinary person taken into account as part of the objective standard. The principle would not be violated, however, if a jury were permitted to take into account those characteristics of the accused, mental or physical, that are relevant to the gravity of the insult. Accordingly she concluded that for the purposes of a provocation defence the objective standard should be that of the ordinary person similarly situated and similarly insulted.

In my view, however, this analysis ignores the true meaning of equality. Equality of responsibility is the purpose, not merely of the objective standard, but of the criminal process as a whole. Because equality of responsibility does not mean identity of treatment, that process ensures that different responses are provided for different

93. *Supra*, note 43, [1974] SCR 449 at 454.

situations. Thus, though offences on their face apply identically to all who fall within their definition, equality of result is ensured by the provision of discretion in sentencing. In the case of provocation, *both* the subjective and the objective standards contribute to this goal of equality of responsibility.

The problem with the traditional interpretation of the ordinary person standard is that it gives that standard a *fixed content* instead of a fixed weight. In my view, the ordinary person standard is an abstraction, and represents the degree (or minimum standard) of society's expectations. Those expectations apply equally, *but not identically*, to all of us. Thus to give the ordinary person standard a fixed, albeit nominally neutral, content in the shape of Everyman is to violate the principle of true equality of responsibility, not to fulfill it. As I see it, Madame Justice Wilson's judgement narrows the scope but does not alter the nature of the traditional interpretation of the word "ordinary" and so fails to satisfy the principle on which it purports to base itself.

In her judgement, Wilson J. states:

The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured.⁹⁴

It is true that there should be no fluctuating standard, but in my view there *should* be a fluctuating content to that standard. The standard of self-control is, as I said, an abstraction. In any particular case its content must be established in light of the circumstances, though the degree of responsibility will remain the same.

It also seems to me that Madame Justice Wilson's definition of the objective standard is, as I indicated above, inaccessible to a jury. At an abstract level one may be able to distinguish between the gravity of an insult and the capacity of a person to resist it, but in practice I do not think that it is possible to do so. Self-control of the kind we are talking about in the context of provocation is not like good or bad temper. It is something much more fundamental than an ordinary quality of character, as is clear from the fact that its loss leaves a person in a state of blind, murderous rage. In my view, one's degree of control in this sense is not a general characteristic, but depends on the threat or insult in question. As I argued above, in many if not all cases it is impossible to say whether a person's susceptibility to provocation is a measure of the gravity of the insult to him or of his poor self-control in relation to that issue. I do not see how a judge could explain this distinction to the jury and relate the evidence to it without in effect deciding the issue. If he

94. *Supra*, note 4 at 343.

holds that a response is a measure of the insult the defence may succeed; if he holds that it is a measure of the accused's poor self-control, it will almost certainly fail.

Having set a standard of ordinary control to which all accuseds are subject, Madame Justice Wilson then made an exception to it in the case before her. Young people, she reasoned, are entitled to a reduced standard of responsibility that reflects their age and level of development, not out of any compassion on the part of the law for human infirmity, but as a reflection of the rights and responsibilities of children in our legal system.⁹⁵ Personally, however, I am not at all convinced that, in addition to its general provisions for young offenders, the law ought to make a parallel provision for youth in the defence of provocation as long as it denies that provision to other equally vulnerable members of society. Assuming, without accepting, that children are more prone to murderous rage than adults, I do not see why a 16-year-old should be permitted a personal standard of self-control that is denied to those, for example, who are mentally or emotionally handicapped.

Finally, Madame Justice Wilson concluded her judgement by holding that the appropriate measure of the objective standard in this case was the ordinary 16-year-old male subjected to a homosexual assault. This strikes me as being inconsistent with her earlier conclusion that the objective standard should be that of the ordinary person similarly situated and similarly insulted. The facts of this case were that the accused, clad only in his underwear, was sleeping on the sofa of a man who was acting as his Big Brother when he awoke to find that man stroking his thigh. That situation, involving as it does the grossest betrayal of trust and confidence, seems to me entirely different from the kind of situation in which an accused is subjected to a homosexual assault by a stranger in a public place. A person of ordinary control might react very differently in the two situations. In my view, to be consistent Madame Justice Wilson should have said that the ordinary person in this case should be placed in the exact circumstances of the accused, with all his characteristics except his self-control, which should be that of the ordinary 16-year-old.

VI. *Conclusion*

Ultimately, as I have said, the majority decision in *Hill* does no more than tell us that, where relevant, the ordinary person has a sex, an age and a race. Because of the decision's limited scope and the frequency with which the provocation defence is raised, the issue will almost certainly come before the Supreme Court again. If and when it does, one can only

95. *Id.* at 351.

hope that the Court will adopt a more flexible approach to the question of ordinariness, one more in line with our society and its notions of the human will, perhaps along the lines suggested above. If life cannot be breathed into the ordinary person test in this way, it should in my view be abrogated by statute, either in favour of a purely subjective approach, as Law Reform Commissions in Victoria and South Australia have recommended, or in favour of a discretionary sentence for provoked homicide, as the Law Reform Commission of Canada has proposed. Then at least we would not be in the position of purchasing propriety at the price of injustice.

In summary, the ordinary person standard is based on a common understanding of what constitutes a mortal insult and should consequently be available in all cases where the accused and the object of his insult can reasonably be taken to share that understanding. As it now rests, the effect of the standard is to deny the benefits of the defence of provocation to minority groups, and to create a privileged position in our criminal justice system for the white Anglo-Saxon (or in Quebec, the white Gallic) majority. In recommending that this privilege be abolished, and the conventional approach to the concept of the ordinary person be abandoned in favour of a more flexible, shared-understanding approach, I am not, I should add, expressing any kind of reluctance to call killers to account. I do not doubt that while some Canadians, generally labelled "liberal", might assume a more lenient approach to the defence of provocation, many others, generally labelled "conservative", would support a more stringent application of it. There is no reason that I can see, however, why either group should interpret the defence in such a way that only the majority can benefit from it. I am not taking sides, therefore, on the law and order issue. In my view, there is no conflict between a commitment to accountability and a commitment to relativism.

It must be remembered that the defence of provocation was designed as a limited act of clemency toward those whose predicament called for our sympathy, and not as a device for imposing a national moral standard. It follows that the values the ordinary person test invokes, however stringently they may be applied, should not, except *prima facie*, be those of the Canadian community as a whole (whatever they may be), but rather those of the community of understanding shared by the victim and his insulter. The former, more rigid national community approach was only valid as long as it could be presumed that the defendant, the victim and the jury all shared, or ought to have shared, this community. Our legal history has clearly confirmed what our social instincts might already have told us, that this is no longer the case.