

PART III – PROVOCATION

I Introduction

A Relationship between Murder and Provocation

The relationship between a crime and its defences can be somewhat problematic. In the case of murder, successfully pleading not guilty to murder by means of the defence of provocation reduces the crime to manslaughter (which is considered to be admitted). Provocation is thus said to be a partial defence only (unlike self-defence).

B Onus of proof

At the outset of a trial, the onus of proof lies upon the prosecution to prove the elements of murder.

In relation to defences, an evidentiary burden lies upon the defence to draw evidence to a court's attention so as to demonstrate a prima facie case to be put to the jury in relation to that defence (this is not a particularly high standard).

Once the evidentiary burden is satisfied by the defence, two things occur:

- The judge must put the defence to the jury for decision (but only if the defence's burden is met)
- The prosecution now needs to prove beyond reasonable doubt that:
 - The elements of murder have been made out; and
 - The elements of provocation have *not* been made out

II Formal Structure

A Elements

The defence of provocation consists of three elements:

- 1 *Provocative conduct on the part of the victim or a third party; such that*
- 2 *The ordinary person would also have lost self-control to such an extent that it caused the formation of an intent as to death or grievous bodily harm; and*
- 3 *When the relevant act constituting the killing takes place, the accused must actually have lost self-control as a result of the provocative conduct*

B Provocative Conduct

The legal institution offers no set rules for what it regards as provocative conduct. What is intrinsic to conduct like adultery or homosexual advances that allows it to be regarded as

provocative? Such conduct seems to be indicative of the value structures of the legal institution and defence lawyers.

Contemporary assessments of conduct focus on its effect upon the person to whom it was addressed, rather than (as had occurred throughout the history of the law of provocation) the essential nature of the act itself.

- Words (*Moffa; Kumar*)
 - Must be of a 'violently provocative character' (*Holmes*)
- Adultery/sodomy
 - Confessions by the victim (perhaps false)
 - Discovery of the victim
- Is the conduct by the victim? (ie, can the killing of a third party be said to be 'provoked'?)
- Delusional hallucination
 - Victim's behaviour may be innocent, but the accused perceives as provocative
 - *Avulgleatis*
- Self-induced provocation (*Thorpe*)
- Sui generis provocative act, ignoring earlier indications that the accused wanted to kill someone (*Parker*)

Moffa:

Facts:

- A wife tells her husband that she is going to leave him and that she has been sleeping with other men
- She shows him photographs of her naked, which he thinks have been taken by other men; *Moffa* perceives this as a taunt of sexual inadequacy
- She throws a telephone at him, and calls him a 'black, fucking bastard'
- The husband leaves the room and returns with a lead bar, with which he beats and kills her

Issue:

- Is the wife's conduct provocative?

Reasoning:

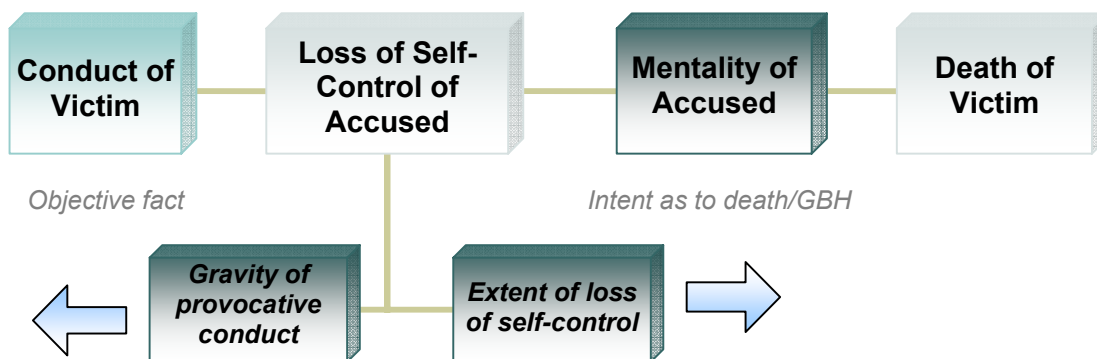
- Words must be 'violently provocative' to be considered provocative conduct in law
- In determining whether a conduct is provocative, the entire set of circumstances in the scene must be examined
 - This process necessarily involves the making of behavioural and cultural assumptions from which a story is told
- Can the wife's adultery be seen as a personal failure on the part of the husband? Is it provocative in the sense that it insults him sexually?
- The 'totality of the deceased's conduct' must be considered when deciding whether there was provocative conduct
 - The acts or words of the victim must be taken 'in combination, or cumulatively'

C Self-Control

The legal hierarchy of individual mentalities places reason above emotion, which is, in turn, above actions. When provoked, reason is eliminated from this hierarchy, leaving only emotion influencing an individual's actions – this is viewed as a loss of self-control.

- Self-control is a cognitive (rational) function, as opposed to an emotional (passionate, desiring) one
- Its loss is said to be *caused by* provocative conduct (gravity issue – typical objective person)
- This loss of control must cause an excessive reaction on the part of the accused; this reaction takes the form of an intent to kill and the killing of another person (extent issue – general objective person [only exception is age])

Actual loss of self-control by the accused is essential. Typically, such loss of control arises in situations where the accused 'just blacked out' – where they lost consciousness of their conduct (where they 'lost it').



The starting point when considering provocation is the conduct of the victim. The presence of this conduct is an objective fact.

Now, the loss of self-control of the accused is assessed by reference to the gravity of the conduct of the victim (in this sense, it is a backwards-looking assessment). Here, the question is asked 'would the conduct of the victim cause an ordinary typical person in the circumstances of the accused to have lost control?' The ordinary person at this stage of the enquiry is a 'subjective ordinary person' (see below).

Once it is established that the ordinary person would – in light of the gravity of the victim's provocative conduct – lose self-control, the extent of the actual accused's loss of self-control must be assessed against the extent to which the ordinary person would be expected to do so. Here, the question is asked, 'would the ordinary reasonable person have lost self-control to the extent that a prohibited mentality [as to death or GBH] is formed as a result?'

Ultimately, the enquiry is about determining whether the conduct of the victim is sufficient to excuse liability for their murder and reduce the offence with which the accused is charged to manslaughter.

Parker:Facts/Reasoning:

- Minority narrative assumes the genre of the ‘he started it’ story
 - See Dixon CJ in relation to adultery
 - The seduction of the accused’s wife by another is seen as taking away ‘his’ possession, equivalent to theft; the accused’s honour is at stake
 - View adultery as sufficient provocation for murder
- Taylor and Owen JJ:
 - Characterise more as a separation assault
 - Attempt to shift the focus back onto the accused
 - Morgan, Mariny: rather than see these scenarios as sexual provocation (value-laden), they should be characterised as a separation assault – the attack on a woman’s body to force her to return (coercing her into a relationship)

On the procedural question of whether provocation should be left to the jury, *Stingel* notes that ‘as a matter of practicality a trial judge is likely to lean towards leaving provocation if he or she can’.

An examination of the factual scenarios in which the law of provocation is applied indicates its gendered structure. Typically, a male wants to retain a female object at her expense, and kills her in frustration or anger. In the context of ‘battered wife syndrome’, an abused spouse may also be driven to kill.

Similarly, *Moffa* highlights its racial structure. Differing racial standards are employed in a climate of multiculturalism, but these standards are (and can only be) based on stereotypes. *Green* highlights its sexual structure in the context of homosexual advances.

Kumar:Facts:

- Accused stalks ex-girlfriend, despite being under an apprehended violence order; he approaches her in her flat, but he is kicked out; he waits out in the street for some 10 minutes, before returning to her flat, breaking down the door, and fatally stabbing her

D *The Ordinary Person*

There are two *distinct* questions of provocation, each answered by reference to two *different* standards.

- 1 *Would the **typical ordinary person** lose self-control in response to the victim’s conduct?*

Eg, ‘typical student’, ‘typical woman’, ‘typical Italian’
Varies by social context but not by personal characteristics

Camplin:Facts:

- A 15 year old boy kills a middle-aged Pakistani
- A says victim abused him and laughed at his shame
- He claims he was provoked to hit him over the head with a chapatti pan
- Note emotions; shame, anger (male v female), fear (female v male)

Issue:

- What standard is to be applied to the accused?

Reasoning:

- Trial judge: the standard is that of a reasonable, adult man – not a 15 year old
- House of Lords agree with Court of Appeal, who overturns the ruling of the trial judge
- Lord Morris (1978):
 - It is 'utterly unreal' to not consider race as a factor in the reasonable person standard
 - The effect of an insult depends on race, gender, age, inter alia

Decision:

- After *Camplin*, a plural set of objective standards for race, gender, age, etc, is applied to the question of whether the typical person in the position of the accused would have lost control
- Cf Murphy J in *Moffa*:
 - Should only be a subjective standard, not objective, typical, or general
 - Heterogeneity of society makes the notion of any objective standard absurd
 - Abolish the objective standard and simply assess the individual accused by reference to their own characteristics

Masciantonio reiterates this approach, and highlights the differences between these two objective standards.

Masciantonio:Facts:

- Son-in-law of the accused is married to the daughter of the accused; their marriage is unhappy, with the son-in-law oppressing and abusing the daughter; the accused attempts to talk to her husband, but all approaches are rejected
- On the day in question, the accused attempts to talk with him again, whereupon he is shoved by the son-in-law; the accused fights back, stabs him with a knife while he is lying on the pavement

Issue:

- What is the correct formulation of provocation and when should it be left to the jury?

Decision:

- Following *Stingel*, the formulation of provocation may be stated as follows:
 - *[T]he question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention*

as the accused did, so as to give effect to it

- It is also remarked that the question that the trial judge must consider when deciding whether to leave provocation to the jury is
 - *whether, on the version of the events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense*
- Note minority (McHugh J):
 - Apply 'typical' standard at both stages to avoid discrimination in situations where the gender or ethnicity of the accused is relevant to the extent of their loss of self-control

However, also note comments in *Tuncay* to the effect that

[t]he intellectualisation of the relevant tests for provocation has not aided a sensible approach to the reasonable evaluation of the excesses of human behaviour of this kind.

Arguably, this is because there *is no sensible approach* to an examination of fundamentally irrational, emotionally-driven conduct. Reinterpreting conduct and circumstances through a legal or other rational filter can only introduce further layers of bias and uncertainty, clouding the real basis on which the accused acted as they did and obscuring the normative foundations on which legal assessments of the legitimacy of that basis are made.

Green:

Facts:

- [See RY Casebook]

Issues:

- Can a homosexual advance be considered provocative conduct?
- What is the extent to which conduct must be provocative before an accused will be excused for murder in response to it?

Decision:

- *Green* reiterates the approach of *Stingel*
- However, note Kirby J (minority):
 - Objective standard functions to set the minimum standard of self-control, and is in this way a threshold
 - This threshold is set way too low, not just due to the definition, but due to the way it is applied
 - The minimum is homophobic and heteronormative
 - It is out of step with society, which would not the threshold so low
 - Kirby J argues against the threshold level, but not the definitional elements of provocation
 - If the standard is set too low, any woman would be entitled to kill a man for engaging in a process of seduction.

Osland:Facts:

- Accused has suffered repeated and prolonged abuse at the hands of her husband
- She wants that abuse introduced as evidence to explain her loss of self-control such as to cause her to drug him during dinner and hit him over the head whilst asleep, killing him

Issue:

- Is evidence of battered wife syndrome relevant to the determination of the response of a typical person?

Reasoning:

- The syndrome argument has been most commonly advanced by feminist activists
 - Its primary characteristic is long-term physical/verbal abuse, leading the recipient of the abuse to live in a state of being out of control
- Because establishing a defence of provocation based on a syndrome argument requires expert evidence, such feminist arguments are often rejected

- 2 *Would the **general ordinary man** have been provoked to the extent of the accused such as to form illegal intent as to death or grievous bodily harm?*

This is a universal standard

The ordinary person has been constructed in various ways throughout the 20th and 21st centuries.

Stingel:Facts:

- 19 year old stalks ex-girlfriend; on the night in question, discovers her having intercourse with her current boyfriend in their car; whereupon he kills her

Issue:

- What is the relevant standard to be applied to assessments of provocation?

Reasoning:

- The objective standard is 'a person with powers of self-control within the range or limits of what is "ordinary" for a person of the relevant age'
 - The fact that the particular accused lacks the power of self-control of an ordinary person by reason of some attribute or characteristic ... will not affect the reference point of the objective test ... of self-control of a hypothetical "ordinary person"
 - This standard objective and uniform; it is a representation of 'the minimum powers of self-control which must be observed'
 - The extent to which the wrongful act or insult (whose gravity is assessed by reference to the particular accused) can be said to cause a loss of control is determined by reference to this objective standard
- The 'ordinary person' in provocation is not the same as the 'reasonable man' of negligence because the reasonable man would never lose control and thus be driven to

kill for reasons other than self-defence, whereas the 'ordinary' person is simply a protagonist embodying the 'ordinary or common range of human temperaments' and thereby delineating the boundaries of what the law considers a reasonable reaction to provocation

Decision:

- A combination of general and typical standards should be applied
- Thus: would the ordinary 19 year old person (*general*) have lost self-control to the extent that he would form an intent to kill and do so?

Bedler:

Facts:

- An 18 year old, the accused, is impotent; he visits a prostitute, who mocks him
- He tries to stop her leaving; she reacts by slapping him and kicking him in the groin (a common defensive manoeuvre)
- The accused kills her, and pleads provocation

Issue:

- Should the sexual impotence of the accused be factored into the reasonable man standard?

Reasoning:

- Trial judge:
 - No, it is irrelevant to the question of the extent to which a reasonable man would have lost self-control when faced with this conduct
- Reasonable man standard is a single and uniform yardstick (a 'general' person) against which the self-control of an accused is measured
- Personal characteristics are only relevant in two circumstances:
 - When asking whether the individual accused *actually* lost control
 - When determining the gravity of the provocative conduct on a person of the accused's age, sex, race, religion, etc
- Personal characteristics of the accused (impotence) are irrelevant when asking whether a reasonable person would have lost control to the extent of forming an intent to kill or cause grievous bodily harm
 - Only age is relevant to that enquiry
- Problems:
 - The reasonable man standard *is* racialised, gendered: white middle-class person
 - It assesses women/blacks against what they are not
 - See Krierold J's 'ordinary aboriginal standard'
 - Attributes of someone who lived in the bush
 - *Contra Bedler*, since there is not a uniform, singular standard

E *Reform*

The Victorian Law Reform Commission will probably make the recommendation that the defence of provocation should be abolished; however, its complete abolition is unlikely.

More likely is that it will be relegated to sentencing matters (which occurs at present), and, as a result, will further lessen controls over the permissible bounds of judicial reasoning.

Such an abolition of the defence could also impact battered women by preventing them from raising the defence at all. (However, this complaint could be alleviated by reforming self-defence so as to allow it to be more easily pleaded by battered spouses.)