Les Cahiers de droit

Defending Victims of Domestic Abuse who Kill : A Perspective from English Law

George Mousourakis

Volume 48, Number 3, 2007

URI: https://id.erudit.org/iderudit/043935ar
DOI: https://doi.org/10.7202/043935ar

See table of contents

Publisher(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (print)
1918-8218 (digital)

Explore this journal

Cite this article

Mousourakis, G. (2007). Defending Victims of Domestic Abuse who Kill : A Perspective from English Law. *Les Cahiers de droit*, *48*(3), 351–371. https://doi.org/10.7202/043935ar

Article abstract

The term "cumulative provocation" is used to describe cases involving a prolonged period of maltreatment of a person at the hands of another, which culminates in the killing of the abuser by her victim. Since the early 1990s there has been a plethora of academic commentary on the criminal law's response to such cases. More recently, the debate has been re-opened following the publication of the English Law Commission's proposals on the partial defences to murder. This article examines doctrinal issues that arise in relation to claims of extenuation stemming from the circumstances of cumulative provocation. It is argued that, given the scope and limitations of the provocation defence, one should view the circumstances of cumulative provocation as likely to bring about the conditions of different legal excuses. Identifying the relevant legal defence would require one to reflect on the nature of the excusing condition or conditions stemming from the circumstances of each particular case. Although the paper draws largely upon the doctrines of provocation and diminished responsibility as they operate in English law, it is hoped that the analysis offered has relevance to all systems where similar defences are recognized (or proposed to be introduced), and can make a useful contribution to the continuing moral debate that the partial excuses to murder generate.

Defending Victims of Domestic Abuse who Kill: A Perspective from English Law

George MOUSOURAKIS

The term "cumulative provocation" is used to describe cases involving a prolonged period of maltreatment of a person at the hands of another, which culminates in the killing of the abuser by her victim. Since the early 1990s there has been a plethora of academic commentary on the criminal law's response to such cases. More recently, the debate has been re-opened following the publication of the English Law Commission's proposals on the partial defences to murder. This article examines doctrinal issues that arise in relation to claims of extenuation stemming from the circumstances of cumulative provocation. It is argued that, given the scope and limitations of the provocation defence, one should view the circumstances of cumulative provocation as likely to bring about the conditions of different legal excuses. Identifying the relevant legal defence would require one to reflect on the nature of the excusing condition or conditions stemming from the circumstances of each particular case. Although the paper draws largely upon the doctrines of provocation and diminished responsibility as they operate in English law, it is hoped that the analysis offered has relevance to all systems where similar defences are recognized (or proposed to be introduced), and can make a useful contribution to the continuing moral debate that the partial excuses to murder generate.

La « provocation cumulative » désigne les instances de mauvais traitements, pendant une période prolongée, d'une personne par une autre et qui se terminent par le meurtre de l'auteur par la victime d'abus. Depuis

* Senior Lecturer in Law, University of Auckland; Associate Professor of Comparative Law, Niigata University.

Les Cahiers de Droit, vol. 48, nº 3, septembre 2007, p. 351-371

le début des années 90, la doctrine a abondamment commenté la manière dont le droit pénal appréhende de telles situations. Dernièrement, le débat a refait surface dans la foulée de la publication des propositions de la Law Commission d'Angleterre sur les moyens de défense partiels à l'accusation de meurtre. Le présent article examine les enjeux que soulève l'appel à des circonstances de provocation cumulative pour diminuer la responsabilité criminelle. Compte tenu de la portée et des limites inhérentes à la défense de provocation, il convient d'envisager les circonstances de la provocation cumulative comme étant susceptibles de fonder le recours à d'autres moyens de défense. Circonscrire le moyen de défense juridique le plus approprié nécessiterait de se pencher sur la nature de la condition ou des conditions disculpatoires qui découlent de chaque cas déterminé. Bien que cet article se fonde en grande partie sur les doctrines de la provocation et de la responsabilité diminuée telles qu'elles sont appliquées en droit anglais, il est à espérer que l'analyse proposée aura sa pertinence pour tous les régimes de droit qui reconnaissent l'existence de tels moyens de défense (ou qui se proposent de les mettre en œuvre) et qu'elle pourra être d'un apport utile au débat moral suscité par les moyens de défense partiels à l'accusation de meurtre .

The term "cumulative provocation" refers to cases involving a prolonged period of physical or psychological abuse of a person by someone with whom she has an intimate or familiar relationship, which culminates in the killing of the abuser by her victim. A long course of domestic violence which ends up in the killing of one spouse by the other provides the typical example here. In such cases the killer may plead provocation as her defence to murder, arguing that the provocation she was subjected to was the abuse she suffered at the victim's hands. She might claim that the abusive behav-

iour would have had the same effect on just anyone, or she might argue that, as a result of her previous experiences of maltreatment, she was provoked to lose self-control and kill by something which would not have provoked a reasonable or ordinary person. She might also claim, either alternatively or instead of this, that the abuse she suffered at the victim's hands had such an effect on her as to make her different from other people in some important respects, and that this should be taken into consideration when her plea is assessed. With regard to cumulative provocation, a distinction should be drawn between cases in which the accused's retaliation was immediately preceded and precipitated by some sort of provocative conduct, and cases in which no such final provocation did in fact occur. The accused's plea for a partial excuse in both types of cases turns upon the whole of the victim's abusive behaviour towards the accused; it does not hinge upon a single act of provocation deemed sufficient by itself to trigger off a punitive reaction likely to involve an intent to kill.

This paper examines doctrinal issues that arise in relation to claims of extenuation stemming from the circumstances of cumulative provocation. Some of these issues pertain to the incident or conduct relied upon as constituting provocation. The incident may be of a type that is not normally recognised as provocation, or it may not be a serious enough example of a recognised type. Another set of questions arise in relation to the way in which an accused has retaliated, even where a provocative event can be demonstrated. Indeed, of the cases of cumulative provocation the most problematic are those in which the immediacy requirement of provocation is not met. The accused may have responded calmly and after deliberating on what retaliatory action is required. Often the lapse of time between the last provocative incident and the accused's retaliation would appear to suggest that she acted with forethought and deliberation. Could the accused rely on a defence even if her response did not follow immediately upon the provocation, or if the accused did not lose her self-control, in the sense of ceasing to act calmly and rationally? It is argued that, given the limitations of the current definition of the provocation defence in English law, one should view the circumstances of cumulative provocation as likely to bring about the conditions of different legal excuses. Identifying the relevant legal defence would require one to reflect on the nature of the excusing condition or conditions stemming from the circumstances of each particular case.

1 Cumulative Provocation and the Scope of the Provocation Defence

In England and other common law jurisdictions provocation operates as a mitigatory or partial defence to murder aimed at the reduction of that

offence to voluntary (or intentional) manslaughter[1]. For a plea of provocation to succeed the jury must be satisfied that the accused was deprived of her self-control at the time of the killing (the subjective test) and that this was the result of wrongful conduct serious enough to provoke an ordinary or reasonable person (the objective test). If there is no evidence to support a finding of provocation, the defence will fail, whether the accused lost her self-control or not. Moreover, even if the victim's conduct was such as to amount to provocation in law, the defence cannot be relied upon if evidence shows that the accused did not lose self-control as a result. Determining the threshold of legal provocation presupposes a moral judgment about what sort of offensive conduct is capable of arousing in a person such a degree of justified anger or indignation that might defeat her capacity for

1. According to the *Homicide Act, 1957* (U.K.), 5 & 6, Eliz. II, c. 11, s. 3: "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man." The Law Commission recently published a detailed Consultation Paper reviewing the present law and proposing a series of possible options for reform. See: U.K., LAW COMMISSION, *A New Homicide Act for England and Wales?, Consultation Paper No. 177* (2005), p. 171-176, [En ligne], [www.lawcom.gov.uk/docs/cp177_web.pdf] (19 September 2007) and U.K., LAW COMMISSION, *Partial Defences to Murder, Report No. 290* (2004), p. 30-72, [En ligne], [www.lawcom.gov.uk/docs/lc290pn.pdf] (19 September 2007). S. 232 of the Canadian *Criminal Code*, R.S.C. (1985), c. C-46 states:

> (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 an insult that is of such 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 on it on the sudden and before there was time for his passion to cool. (3) For the purposes of this section, the questions (a) whether a particular wrongful act or insult amounted to provocation, and (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received, are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.
>
> In Canada a person who is convicted of murder is subject to a fixed sentence of life imprisonment with a minimum period of parole ineligibility of twenty-five years where the person is found guilty of first degree murder and ten years where she is found guilty of second degree murder (ss. 235 and 745 Cr.C.). In contrast, as in other common law jurisdictions, where an accused is found guilty of manslaughter, the judge may impose any sentence up to a maximum period of life imprisonment (s. 236 Cr.C.).

self-control. Although legal wrongdoings of a significant nature should for the most part provide a sufficient basis for the defence, non-legal, moral wrongdoings may also be considered serious enough to pass the threshold of provocation in law. Over this threshold, provocations may vary from the less serious ones (*e.g.* verbal provocations) to those involving very serious wrongdoings (*e.g.* provocations involving physical violence). Provocations involving different forms and degrees of wrongdoing may equally support a partial defence to murder, provided that the requirement of loss of self-control is also satisfied[2].

The provocation defence is understood to hinge upon two interrelated elements: the wrongful act of provocation and impaired volition or loss of self-control. The first element is taken to be justificatory in character, for it focuses upon a condition that, on the face of it, is capable of affecting the wrongfulness of the actor's conduct quite independently of her state of mind. The second element, by placing the emphasis on the actor's state of mind and her inability to exercise control over her actions, is clearly excusative in nature. Because provocation rests upon both excusative and justificatory considerations, the rationale of the legal defence has been difficult to locate[3]. As Alldridge has remarked:

> The defence [of provocation] must be either a partial excuse (in which case the centre of the inquiry will be whether or not the defendant lost his/her self-control) or a partial justification (in which case the centre of the inquiry will be what was actually done by the deceased to the defendant — to what extent the deceased

2. In Canada the defence of provocation, as provided for by s. 232 Cr.C., has four elements: (a) a wrongful act or insult; (b) the wrongful act must be capable of depriving an ordinary person of the power of self-control; (c) the accused must have actually been provoked to lose her self-control by the wrongful act or insult; and (d) both the wrongful act or insult and the accused's response to it must have been sudden. This definition of the defence is more complex than the one adopted in England, although it is based on the English Draft Criminal Code of 1879: U.K., "Report of the Royal Commission on the Law relating to Indictable Offences", Command 2345 in *British Parliamentary Papers*, Shannon, Irish University Press, 1971, *Legal Administration: Criminal Law*, vol. 6 (1847-1879), "Appendix: Draft Criminal Code (Indictable Offences), 1879", p. 417, s. 176. See: D. Stuart, *Canadian Criminal Law*, 4th ed., Scarborough, Ont., Carswell, 2001, p. 533-544.

3. As Austin has noted, "It is arguable that we do not use the terms justification and excuse as we might; a miscellany of even less clear terms, such as "extenuation", "palliation", "mitigation", hovers uneasily between partial justification and partial excuse; and when we plead, say, provocation, there is genuine uncertainty or ambiguity as to what we mean – is *he* partly responsible, because he roused a violent passion in me, so that it wasn't truly or merely me acting "of my own accord" (excuse)? Or is it rather that, he having done me such injury, I was entitled to retaliate (justification)?": J.L. Austin, "A Plea for Excuses", in A.R. White (ed.), *The Philosophy of Action*, London, Oxford University Press, 1968, 19, p. 20..

> "asked for it") [...] It is interesting to note that both these conditions obtained at common law[4].

Although the justificatory element may have played a part in the shaping of the legal doctrine of provocation, its role in modern law is diminished. The idea that an act of revenge may be partially justified conflicts with fundamental presuppositions of the criminal law as a system whose very point is shifting the authority and moral basis of actions from the domain of subjective attitudes to general and impersonal norms of conduct[5]. Although for the defence of provocation to succeed it must be established that the accused was sufficiently wronged by her victim, the rationale of the defence in law is more satisfactorily explained in terms of the excuse theory. The real basis of the provocation defence, traditionally regarded as a concession to human frailty, lies in the actor's loss of self-control in circumstances in which any ordinary person might also have lost control[6]. In this respect, the wrongful act of provocation is seen as providing a morally acceptable explanation for the accused's loss of self-control and killing rather than a reason for directly reducing the wrongfulness of her actions.

In a number of provocation cases involving a history of abuse the jury was directed to take into account the previous maltreatment of the accused by her victim as relevant to assessing the gravity of the provocation offered. Thus an act which, on its own, may not be sufficient to amount to provocation, when considered in the light of previous provocative acts or words may be regarded as serious enough to cause the accused to lose her self-control[7]. Although considering the previous mistreatment

---

4. P. ALLDRIDGE, "The Coherence of Defences", [1983] *Crim. L. Rev.* 665, p. 669. See also: J. DRESSLER, "Rethinking Heat of Passion: A Defense in Search of a Rationale", (1982) 73 *J. Crim. L. & Criminology* 421; J. DRESSLER, "Provocation: Partial Justification or Partial Excuse?", (1988) 51 *Mod. L. Rev.* 467.
5. As Hirsch and Jareborg have pointed out, "although the [provoker] might deserve punishment, the actor lacks authority to inflict it. Penalizing malefactors is not a legitimate role for an individual; it is a state function, to be undertaken with appropriate due process safeguards": A.V. HIRSCH and N. JAREBORG, "Provocation and Culpability", in F. SCHOEMAN (ed.), *Responsibility, Character and the Emotions*, Cambridge, Cambridge University Press, 1987, p. 242.
6. As Lord Goddard C.J. pointed out in *R.* v. *Duffy*, [1949] 1 All E.R. 932, 932 (C.A.), "circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden and temporary loss of self-control, which is of the essence of provocation".
7. As Lord Widgery C.J. stated in *R.* v. *Davies*, [1975] Q.B. 691, 702 (C.A.), the "background is material to the provocation as the setting in which the state of mind of the defendant must be adjudged". Similarly, in *Luc Thiet Thuan* v. *R.*, [1996] 2 All E.R. 1003, 1047, Lord Goff stated: "it may be open to a defendant to establish provocation in circums-

of the accused by the victim may be relevant to assessing the seriousness of the provocation offered, such a consideration would be very difficult on its own to support a partial excuse on the basis of provocation. If a final wrongdoing triggering off the accused's reaction cannot be identified, the accused's claim that she was provoked would be difficult to accept. Even in some cases where a final act of provocation can be identified, it may seem questionable whether the accused's plea of provocation should succeed[8]. The assumption that the act of provocation was, in the circumstances, foreseeable, or that the accused was in a sense used to the victim's abusive behaviour, may seem to militate against the basic presuppositions of the provocation defence[9]. In general, evidence of planning and deliberation would be fatal to the accused's plea, as it would tend to negative the element of loss of control as required by the definition of the defence. Provoked killings are expected to be impulsive. They are also expected to happen quickly, following immediately upon the act of provocation. In several cases the position was adopted that a delay amounts to time in

---

tances in which the act of the deceased, though relatively unprovocative if taken in isolation, was the last of a series of acts which finally provoked the loss of self-control by the defendant and so precipitated his extreme reaction which led to the death of the deceased". And see: *R.* v. *Simpson*, [1957] Crim. L.R. 815; *R.* v. *Fantle*, [1959] Crim. L.R. 584; *R.* v. *McCarthy*, [1954] 2 Q.B. 105 (C.A.); *Bullard* v. *R.*, [1957] A.C. 635 (J.C.); *R.* v. *Humphreys*, [1995] 4 All E.R. 1008 (C.A.); *R.* v. *Weller*, [2004] 1 Cr. App. R. 1 (C.A.). Similarly, Canadian courts have interpreted both the objective and subjective elements in provocation in a broad manner, requiring that the trier of fact take into consideration all relevant factors, including the accused's mental condition and any prior relationship she may have had with the deceased, in determining whether the accused was actually provoked to lose her self-control. It is recognized that the test to be applied is whether an ordinary person of the same age and sex, and in the same situation or circumstances as the accused, would have been deprived of the power of self-control by the relevant wrongful act or insult. See *e.g.*: *R.* v. *Krawchuk* (1940), 75 C.C.C. 16, [1941] 2 D.L.R. 353, [1941] 3 W.W.R. 540 (S.C.C.); *Wright* v. *R.*, [1969] S.C.R. 335, 340; *R.* v. *Conway* (1985), 17 C.C.C. (3d) 481 (Ont. C.A.); *R.* v. *Hill*, [1986] 1 S.C.R. 313, p. 332-333; *R.* v. *Thibert*, [1996] 1 S.C.R. 37.

8. See: A. ASHWORTH, "Sentencing in Provocation Cases", [1975] *Crim. L. Rev.* 553.
9. According to Gordon, "It is doubtful whether a long course of provocative conduct can found a successful plea of provocation, unless there is also some final act of provocation which, albeit because it follows on the earlier provocation and is the last straw, actually provokes a loss of control — it is not sufficient that it should merely provide an occasion for [the accused] to exact revenge for the deceased's prior provocation. The fact that the deceased had indulged in a course of provocative conduct may indeed in some circumstances militate against the plea of provocation, as showing that [the accused] had become so used to this type of behaviour that it no longer affected his self-control": G.H. GORDON, *The Criminal Law of Scotland*, 2nd ed., Edinburg, Green, 1978, p. 766.

which the accused should have cooled down and regained her composure[10]. In *Thornton*[11], for example, the Court of Appeal took the view that loss of self-control following immediately after the provocative conduct of the deceased remained an essential element of the provocation defence. The same position was adopted in *Ahluwalia*[12], where the loss of self-control requirement was described as an essential ingredient of the provocation defence, serving to underline that the defence is concerned with the actions of an individual who is not, at the moment when she acts violently, master of her own mind[13]. It was pointed out in that case that a sudden and temporary loss of self-control at the time of the killing is vital to the defence[14].

10. See *e.g.*: *R.* v. *Duffy*, *supra*, note 6; *R.* v. *Brown*, [1972] 2 All E.R. 1328 (C.A.); *R.* v. *Davies*, *supra* note 7; *R.* v. *Ibrams* (1981), 74 Cr. App. R. 154 (C.A.); *R.* v. *Turner*, [1975] Q.B. 834, [1975] 1 All E.R. 70 (C.A.); *R.* v. *Burke* (1986), 82 Cr. App. R. 156 (C.A.); *R.* v. *Newell* (1980), 71 Cr. App. R. 331 (C.A.); *R.* v. *Raven*, [1982] Crim. L.R. 51; *R.* v. *Cocker*, [1989] Crim. L.R. 740 (C.A.). Similarly, courts in Canada have traditionally adopted the view that the suddenness requirement in relation to the accused's response to the provocative conduct will not be met if the accused had prior knowledge of the act or insult claimed to constitute provocation. As stated in *R.* v. *Tripodi*, [1955] S.C.R. 438, 443, for the suddenness requirement to be satisfied, the wrongful act or insult "must strike upon a mind unprepared for it [...] it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame".

11. *R.* v. *Thornton*, [1992] 1 All E.R. 306 (C.A.). In this case a woman suffering from "battered woman syndrome" went to the kitchen, took and sharpened a knife, and returned to stab her husband. She was convicted of murder and appealed on the grounds that instead of considering the final provocative incident, the jury should have been directed to consider the events over the years leading up to the killing. This argument was rejected, however, on the grounds that "in every such case the question for the jury is whether at the moment the fatal blow was struck the accused had been deprived for that moment of the self-control which previously he or she had been able to exercise" (per Beldam L.J.) (p. 314). But in *R.* v. *Thornton (No. 2)*, [1996] 2 All E.R. 1023 (C.A.), after examining new medical evidence, a retrial was ordered and the accused was convicted of manslaughter on the grounds of diminished responsibility.

12. *R.* v. *Ahluwalia*, [1992] 4 All E.R. 889 (C.A.). As in *Thornton*, following the accused's conviction of murder at first instance, a retrial was ordered and, when the defence of diminished responsibility was put, the accused was convicted of manslaughter.

13. Lord Taylor said in that case: "Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control. The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation. In some cases, such an interval may wholly undermine the defence of provocation; that, however, depends entirely on the facts of the individual case and is not a principle of law" (*R.* v. *Ahluwalia*, *supra*, note 12, 895-896).

14. Also see: U.K., Criminal Law Revision Committee, *Offenses Against the Person: Homicide, 14th Report*, London, H.M.S.O., 1980, para. 84 [hereinafter: *14th Report*].

The above approach has been criticised on the grounds that it overlooks the important requirement that a conviction of murder should be avoided unless the accused fully deserves to be stigmatised as a murderer. In some cases of cumulative provocation, evidence of planning and deliberation is not sufficient to warrant, morally, the accused's conviction of murder[15]. It is pointed out that the position that the scope of the crime of murder should be narrowed down to include only those killings which deserve to be stigmatised as murders militates against the outright rejection of the provocation defence where the immediacy requirement is not met. Strict adherence to this requirement may lead, in some cases of cumulative provocation, to convictions of murder that may be regarded as morally questionable[16]. Since *Ahluwalia*, in cases of battered women who kill, a lapse of time of itself is no longer sufficient to negate provocation. It is now recognized that where the provocation is cumulative, especially in those circumstances where the accused is found to have suffered domestic violence from the victim over a long period of time, the required loss of self-control may not be sudden as some persons experience a "slow-burn" reaction and appear calm[17].

In general, the tendency in English law is towards treating the accused in cases involving cumulative provocation with leniency. Often the judge is prepared to accept the accused's plea of not guilty to murder but guilty to manslaughter directly. There have been cases in which the accused was found guilty of manslaughter only, in spite of evidence suggesting that she did not kill her victim "on the spur of the moment". For example, in *Maw and Maw*[18], the accused, two sisters, killed their violent and drunken father by stabbing him with a kitchen knife. On the night of the killing, the father assaulted and abused the accused and their mother. In the fight that

15. According to Wasik, "in defining the ambit of the defence [of provocation] a balance has to be struck between the reflection of contemporary attitudes of sympathy towards the defendants in such cases [of cumulative provocation] and the duty of self-control upon every citizen by the law": M. WASIK, "Cumulative Provocation and Domestic Killing", [1982] *Crim. L. Rev.* 29, 35.
16. See: M. WASIK, *loc. cit.*, 37; *14th Report*, *supra*, note 14, para. 15, 19, 84.
17. Similarly, in Canada the strictness of the suddenness requirement appears to have been relaxed in recent years. See *e.g.*: *R.* v. *Thibert*, *supra*, note 7 (in this case the Supreme Court accepted that the provocation defence was a viable one despite the fact that the accused's behaviour prior to the killing did not preclude a degree of forethought). It has been suggested by some commentators, however, that the recent decision of the Supreme Court in *R.* v. *Parent*, [2001] 1 S.C.R. 761, points towards a return to a stricter suddenness requirement. See: D. STUART, "Annotation – *R.* v. *Parent*", (2001) 41 C.R. (5th) 200; W. GORMAN, "Comment: *R.* v. *Parent*", (2002) 45 *Crim. L.Q.* 412.
18. *Maw and Maw*, *The Times*, August 20, November18, 19, 20, 21, 22, Dec. 4, 15,16 (1980).

followed he was struck on the head by a heavy mirror and was knocked unconscious. While he was unconscious the accused agreed that, if he used violence on them or their mother again, they would kill him. When the victim regained consciousness and began using violence, he was stabbed to death by one of the sisters with a knife. The jury found the two accused guilty of manslaughter and not murder on the grounds that they had acted under provocation[19].

But what is the precise nature of the legal defence or defences that may stem from the circumstances of cumulative provocation ? Wasik puts forward three possible ways in which this question may be answered. First, cases of cumulative provocation may be dealt with under the existing defence of provocation. This, he argues, would presuppose an interpretation of the provocation defence that would place sufficient emphasis on the justificatory as well as on the excusative element in provocation. Under this broader interpretation, provocation would not always depend upon a sudden and temporary loss of self-control. Despite evidence of forethought and deliberation, the defence could succeed if the accused's resentment against the victim is justified in the light of the abuse she suffered at the latter's hands. Secondly, cases involving cumulative provocation may be treated under the defence of diminished responsibility or, perhaps, under a combined defence of provocation and diminished responsibility. However, according to Wasik, such an approach to the matter might result in a misunderstanding as regards the rationale and purpose of the diminished responsibility defence. Thirdly, such cases might be dealt with under a separate defence to murder. The ambit of such a defence should be drawn wide enough to encompass a variety of extenuating circumstances that may justify the reduction of culpability for homicide[20]. Wasik regards the first of these three possible approaches to the problem of cumulative provocation as comparatively the least troublesome[21].

It seems difficult, however, to view all cases of cumulative provocation as capable of being treated under a single legal defence. Rather, cumulative provocation should be regarded as a situation likely to give rise to the conditions of different legal defences. Instead of widening the scope of the existing defence categories in order to accommodate all cumulative

19. See also: *Wright*, *The Times*, October 14 (1975); *Ratcliffe*, *The Times*, May 13 (1980); *Bangert*, *The Times*, April 28 (1977); *Pulling*, *The Times*, April 27 (1977); *Fuller*, *The Times*, November 19 (1980).

20. Consider *e.g.* the American Model Penal Code's defence of "extreme emotional disturbance": AMERICAN LAW INSTITUTE, *Model Penal Code and Commentaries*, Philadelphia, The Institute, 1980, para. 210.3 (1) (b).

21. M. WASIK, *loc. cit.*, note 15, 35-36.

provocation cases, it would perhaps be better if we distinguished between different possible pleas that may arise in such cases. Those pleas might be either for extenuation or, possibly in some cases, exoneration, depending upon the nature of the particular defence or defences raised[22]. It may be

22. If the provoked agent loses her self-control to such an extent as to be unaware of the nature or quality of her act, or unable to exercise control over her bodily movements, then she may be entitled to full acquittal on the basis of a lack of *actus reus* or *mens rea* defence. Other things being equal, if the provoked agent suffers a total loss of self-control, automatism may provide the appropriate basis for a complete defence to the charge of murder. As Archibald has remarked, "it may be possible to argue in extremely exceptional cases where there is some evidence pointing towards the inference that the accused suffered a total loss of control, that his conduct was involuntary and unconscious; therefore, the actus reus of the crime might be negatived and the accused could be acquitted on the basis that the automatic conduct gives rise to the defence of automatism": T. ARCHIBALD, "The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-Control", (1985-86) 28 *Crim. L.Q.* 454, 454-455. In those cases of provocation where the actor is totally deprived of her ability to control her conduct, the victim's provocation might be regarded as a triggering factor of the excusing condition — i.e. automatism — providing the basis of the defence to murder. Thus, although another excuse takes priority over provocation here, the latter might be granted a role peripheral to or supportive of the defence relied on. Consider here the Canadian Supreme Court's decision in *R. v. Stone*, [1999] 2 S.C.R. 290. Furthermore, in some cases of cumulative provocation the accused may be able to plead self-defence. Killing in self-defence may be justified if the accused believed that she was under an attack posing an immediate threat on her life. In England an accused's plea of self-defence is judged in the light of the facts that existed or that the accused believed to exist, whether they actually existed or not. It is recognised that the accused's belief need not be reasonable, just honest. If the accused honestly believed that she was being attacked, or about to be attacked, even though that was not in fact the case, the jury will be invited to consider whether her use of force was proportionate to the threat which the accused believed to be created by the attack under which she believed herself to be (see *e.g.*: *R.* v. *Williams* (1983), 78 Cr. App. R. 276 (C.A.); *R.* v. *Jackson*, [1985] R.T.R. 257 (C.A.); *R.* v. *Asbury*, [1986] Crim. L.R. 258 (C.A.); *R.* v. *Fisher*, [1987] Crim. L.R. 334 (C.A.); *Beckford* v. *R.*, [1988] A.C. 130, [1987] 3 All E.R. 425 (P.C.)). The reasonableness of the force used in defence is a question of fact to be determined by the jury. It is upon them to decide whether the prosecution has proved, beyond reasonable doubt, that the accused exceeded the degree of force needed to avert the (real or anticipated) attack. It is important to note that the question of whether the degree of force used in defence was reasonable or not is answered in the light of the circumstances in which the accused decided to use force (see *e.g.*: *Palmer* v. *R.*, [1971] A.C. 814 (P.C.); *R.* v. *Shannon* (1980), 71 Cr. App. R. 192 (C.A.); *R.* v. *Whyte*, [1987] 3 All E.R. 416 (C.A.)). The jury may be directed to take into account that, under the stress of the situation, the accused might not have been able to make out the exact degree of force needed to ward off the attack. In so far as the reasonableness of the accused's response to an attack is assessed by reference to her state of mind in the circumstances, self-defence would appear to hinge on considerations that are clearly excusative in nature. If the accused had been acting in a state of fear, panic or extreme anger, no blame is attributed to her for exceeding the limits of necessary force in self-defence. In *R.* v. *Lavallée*, [1990] 1 S.C.R. 852, the Supreme Court of Canada held that

true that the majority of the claims stemming from the circumstances of cumulative provocation would meet the conditions of provocation and diminished responsibility or, probably, of an intermediate defence sharing characteristics of both (such as a general defence of extreme emotional disturbance). Nevertheless, neither provocation nor diminished responsibility on its own appears capable of providing a single basis for dealing with all cases of cumulative provocation in law. One would have too high a price to pay, in terms of loss of coherence and consistency, if the scope of either defence were stretched beyond a certain point to cover the variety of claims likely to arise from the circumstances of cumulative provocation.

In a case involving cumulative provocation, a plea for mitigation on grounds of provocation should not be accepted unless all the conditions of the defence are satisfied. As was indicated before, from the point of view of the excuse theory, this would presuppose that the accused has retaliated in the heat of passion and that her reaction was triggered off by a provocative incident of some sort. The gravity of that final provocative incident or, to put it otherwise, the accused's judgment of certain conduct or words as gravely provocative, should be assessed in the light of previous provocations from the same source. According to Ashworth:

> the significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased's final act and the accused's retaliation should continue to tell against him. The point is that the significance of the deceased's final act and its effect upon the accused — and indeed the relation of the retaliation to that act — can be neither understood nor evaluated without reference to previous dealings between the parties[23].

In a case of cumulative provocation, the final act of provocation, however trivial it might appear to have been, should be regarded as in a

---

the defence of self-defence under s. 34(2) Cr.C. could be available to a woman who shot her abusive husband as he was leaving the room, after he threatened to kill her. The Court recognized that the requirements of the defence must be interpreted and applied in a way that made sense in the context of the accused's history of abuse at the victim's hands. In *R.* v. *Pétel*, [1994] 1 S.C.R. 3, the Supreme Court held that, when self-defence is raised, the jury should consider whether the accused reasonably believed in the circumstances that she was being unlawfully attacked – a reasonable mistake about whether she was actually being attacked does not preclude the defence. It was stated, moreover, that the attack need not be imminent (imminence is a factor relevant to determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not avoid the threat without using lethal force against her attacker). Consider also *R.* v. *Cinous*, [2002] 2 S.C.R. 3.

23. A. ASHWORTH, *loc. cit.*, note 8, 558-559.

sense epitomising or reflecting in the accused's eyes all the previous abuse she suffered at the victim's hands. In this respect, such a provocation may be seen as being serious enough to support a partial excuse. It seems clear that, in so far as the accused's plea in such cases pertains to her loss of control, the wrongfulness of the victim's conduct can only be taken to provide a good reason or explanation for the accused's giving way to anger. Evidence of planning should cut against a claim of loss of self-control, provided that such planning must be of the kind that results from the distinctive exercise of the faculty of self-control. The fact that the accused in *Thornton*, on receiving new provocation, went to the kitchen to arm herself with a knife and then spent some time sharpening it, should not have counted against her claim that she had lost her self-control. In contrast, an elaborate plan to avoid detection should be fatal to the defence[24].

2 Cumulative Provocation and Diminished Responsibility

Some degree of planning and deliberation is not necessarily incompatible with the loss of self-control requirement. However, if the accused appears to have regained her composure at the time of the killing her plea of provocation should normally fail. In such a case the accused may be able to rely on a different kind of legal defence, such as diminished responsibility[25], but surely not on one that rests on the assumption that she is a "normal" or "reasonable" person[26]. Diminished responsibility is classified as an excusatory defence, as it recognizes that, although an illegal act was committed, the accused's moral culpability is reduced due to her mental instability[27].

---

24. In the 10th edition of his textbook on *Criminal Law*, Professor Smith wrote: "It seems that the words 'sudden and temporary', imply only that the act must not be premeditated. It is the loss of control which must be 'sudden', which does not mean 'immediate'" (J.C. SMITH and B. HOGAN, *Criminal Law*, 10th ed. by J.C. Smith, London, Butterworths, 2002, p. 368).
25. This defence is provided for by the *Homicide Act, 1957*, s. 2.
26. In Ashworth's words, "The defence of provocation is for those who are in a broad sense mentally normal. Those suffering from some form of mental abnormality should be brought within the defence of diminished responsibility": A.J. ASHWORTH, "The Doctrine of Provocation", (1976) 35 *Cambridge L.J.* 292, 312. Also see: *R.* v. *Ward*, [1956] 1 Q.B. 351 (C.A.); *Attorney General for Jersey v. Holley*, [2005] 2 A.C. 580 (P.C.). Consider also U.K., LAW COMMISSION, *A New Homicide Act for England and Wales?*, *op. cit.*, note 1, p. 171-176.
27. Canada does not have a diminished responsibility defence similar to that provided for by s. 2 of the English *Homicide Act, 1957* that would operate to reduce what would otherwise be a conviction for murder to manslaughter on the basis that the accused suffered from an abnormality of mind that substantially impaired her responsibility for the offence. Furthermore, courts in Canada have consistently refused to allow a

As with provocation, when an accused pleads diminished responsibility it must first be established that, at the time of the killing, the accused had an intention to kill or cause grievous bodily harm (the *mens rea* of murder in English Law) before the defence is put to the jury. For the defence to succeed it is important that medical evidence is brought forward to support the claim that the accused was suffering from an "abnormality of mind[28]". If the medical evidence supports a finding of diminished responsibility, the jury must find the accused guilty of manslaughter only. The question

---

common law defence of diminished responsibility. See *e.g.*: *Bigaouette* v. *R.*, [1927] S.C.R. 112; *R.* v. *Kasperek* (1951), 101 C.C.C. 375 (Ont. C.A.); *Chartrand* v. *R.*, [1977] 1 S.C.R. 314, 318. The only statutory recognition of reduced criminal culpability on the basis of mental disturbance arises in cases of infanticide, where murder may be reduced to the lesser offence of infanticide (ss. 233 and 662 (3) Cr.C.). There are some decisions, however, that appear to have recognized mental impairment less than that required under the s. 16 mental disorder defence (prior to 1992 the latter defence was known as the defence of insanity). Such an impairment was held to be relevant to determining whether the accused actually formed the intent for murder, or whether the murder was planned and deliberate. See *e.g.*: *R.* v. *Swain*, [1991] 1 S.C.R. 933, 987; *R.* v. *Jacquard*, [1997] 1 S.C.R. 314, 333. There also appears to be growing recognition of the combined use of other failed defences (such as provocation, self-defence and intoxication) where the defendant may not be able to rely on any particular defence, but the cumulative effect of the defences is sufficient to raise a doubt as to the existence of the mental state required for the offence. See *e.g.*: *R.* v. *Campbell* (1977), 17 O.R. (2d) 673 (Ont. C.A.); *R.* v. *Clow*, [1985] O.J. No. 43, 44 C.R. (3d) 228 at 231 (Ont. C.A.); *R.* v. *Nealy* (1986), 30 C.C.C. (3d) 460 (Ont. C.A.); *R.* v. *Robinson*, [1996] 1 S.C.R. 683; *R.* v. *Faid*, [1983] 1 S.C.R. 265. However, it would be a mistake to refer to these developments as pointing towards the recognition of a diminished responsibility doctrine, for what is the focus of the inquiry here is the question of whether the accused had the necessary *mens rea* to be convicted of murder. The diminished responsibility defence, by contrast, arises only when the mental element of murder is present to reduce the offence to manslaughter. See on this point: R.C. TOPP, "A Concept of Diminished Responsibility for Canadian Criminal Law", (1975) 33 *U. T. Fac. L.R.* 205; M. GANNAGE, "The Defence of Diminished Responsibility in Canadian Criminal Law", (1981) 19 *Osgoode Hall L.J.* 301. The incorporation of a diminished responsibility defence into Canadian criminal law has been recommended by a number of commentators. It has been argued that the introduction of such a defence is necessary in order to acknowledge the fact that an offender who is legally sane but who nevertheless suffers from some deficiency of the mind reducing her moral responsibility for her actions should not be punished as severely as a sane offender. See: J. CASSELLS, "Diminished Responsibility", (1964) 7 *Can. Bar J.* 8; LAW REFORM COMMISSION OF CANADA, *Criminal Law. The general part: liability and defences*, *Working Paper 29*, Ottawa, Minister of Supply and Services, 1982, p. 50-54. In general, however, there is currently little support in Canada for reforming the law to include a diminished responsibility defence. It is argued that the introduction of such a defence is not necessary given the broad scope of the mental disorder defence in Canada and in view of the problems surrounding the application of diminished responsibility in other jurisdictions. See: D. STUART, *op. cit.*, note 2, p. 549.

28. See: *R.* v. *Dix* (1981), 74 Cr. App. R. 306 (C.A.).

of whether the accused was suffering from an abnormality of mind is ultimately one for the jury, not the medical expert, to decide. In *Byrne*[29] the term "abnormality of mind" was defined by Lord Parker C.J. as follows:

> "Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naghten Rules "defect of reason", means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment[30].

As this statement suggests, an irresistible urge, or an inability or extraordinary difficulty to hold one's impulses in check, could be treated under the diminished responsibility defence. In *Byrne* the Court of Appeal recognised that mental responsibility for the accused's acts requires consideration by the jury "of the extent to which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will-power to control his physical acts[31]". This question, as being of one degree, can only be decided by the jury. In Lord Parker's words:

> Medical evidence is, of course, relevant, but the question involves a decision not merely as to whether there was some impairment of the mental responsibility of the accused for his acts, but whether such impairment can properly be called "substantial," a matter upon which juries may quite legitimately differ from doctors[32].

In *Byrne* the Court accepted that the accused's condition was described as "partial insanity" or as a condition "bordering on insanity". Judges used similar expressions in their directions to juries in subsequent cases, but such expressions may lead to confusion as they appear to link diminished responsibility with insanity. Thus, in *Seers*[33], the Court of Appeal adopted the position that judges should avoid comparing diminished responsibility to insanity for there may be cases in which the abnormality of mind upon which the accused's defence is based has nothing to do with any of the conditions relating to the insanity defence[34]. For example, a depressive

29. *R.* v. *Byrne*, [1960] 2 Q.B. 396 (C.A.).
30. *Id.*, 403.
31. *Ibid.*
32. *Id.*, 404.
33. *R.* v. *Seers* (1984), 79 Cr. App. R. 261 (C.A.).
34. See also: *Rose* v. *R.*, [1961] AC 496; [1961] 1 All E.R. 859 (P.C.). In this case it was held that if the word insanity is used in relation to diminished responsibility it must be used in "its broad popular sense" (p. 864).

condition may provide a sufficient basis for the defence of diminished responsibility, although the sufferer could not be described as insane or partially insane[35].

It is required, further, that the abnormality of mind from which the accused claims to have suffered arose from one of the causes laid down by s. 2 (1) of the *Homicide Act* (arrested or retarded development of mind, disease, injury and other inherent causes)[36]. Although no clear description is given of the causes referred to in s. 2, it appears that "disease or injury" most likely pertains to physical injury or illness and that "inherent cause" includes functional mental disorder[37]. Examples of abnormalities of mind that were sufficient for the defence of diminished responsibility to be put to the jury range from arrested intellectual development combined with psychopathic tendencies[38], a disorder of personality induced by psychological injury[39], reactive depression caused by marital difficulties[40], chronic alcoholism[41], and "Otello syndrome", described as morbid jealousy for which there was no cause[42]. Intoxication by drugs or alcohol is generally excluded as a basis of the diminished responsibility defence[43]. Alcoholism or the use of drugs may however be relevant if there is evidence suggesting that they have caused damage to the accused's brain amounting to "disease or injury[44]". Although emotions such as envy, anger or resentment are not

35. But there is still much confusion surrounding the definition of mental abnormality in the context of the diminished responsibility defence. This confusion stems, in part, from the difficulties in drawing clear distinctions between different mental and psychological states and assessing them in terms of moral responsibility. See *e.g.*: S.J. MORSE, "Undiminished Confusion in Diminished Capacity", (1984) 75 *J. Crim. L. Criminology* 1; also see: Dressler's reply: J. DRESSLER, "Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse", (1984) 75 *J. Crim. L. Criminology* 953.
36. See *e.g.*: *R.* v. *King*, [1965] 1 Q.B. 443, 450 (C.A.).
37. See: *R.* v. *Sanderson* (1993), 98 Cr. App. R. 325 (C.A.); *R.* v. *Fenton* (1975), 61 Cr. App. R. 261 (C.A.); *R.* v. *Gittens* [1984], Q.B. 698. See also: *R.* v. *Tandy*, [1989] 1 W.L.R. 350 (C.A.); *R.* v. *Inseal*, [1992] Crim. L.R. 35 (C.A.); *R.* v. *Egan*, [1992] 4 All E.R. 470 (C.A.).
38. *R.* v. *Egan*, *ibid.*
39. *R.* v. *Gittens*, *supra*, note 37.
40. *R.* v. *Sanders* (1991); 93 Cr. App. R. 245 (C.A.).
41. *R.* v. *Tandy*, *supra*, note 37.
42. *R.* v. *Vinagre* (1979); 69 Cr. App. R. 104 (C.A.).
43. *R.* v. *Tandy*, *supra*, note 37; *R.* v. *Egan*, *supra*, note 37.
44. As stated in *R.* v. *Tandy*, *supra*, note 37, alcoholism will only assist the accused if it "had reached the level at which her brain had been injured by the repeated insult from intoxicants so that there was gross impairment of her judgment and emotional responses" (p. 356). See also: *R.* v. *Inseal*, *supra*, note 37.

supposed to come under s. 2, there have been cases in which such emotions were deemed sufficient to support a diminished responsibility defence[45].

The defence of diminished responsibility operates as a partial excuse on the assumption that the accused's impaired capacity reduces her moral responsibility for her actions. But this does not mean that a third, intermediate level, between full responsibility and complete lack of responsibility should be recognised. Speaking of a substantial impairment of the capacity for rational judgment and self-control does not imply that the actor could only "partially" perceive the wrongful character of her act, or that she could only "partially" control her actions. Diminished responsibility refers, rather, to a special type of being responsible, one that presupposes a capacity for both perception and control. Due to the actor's mental condition, however, perceiving the character of her actions correctly, or exercising self-control, is regarded as being extraordinarily difficult, that is "as compared to normal people normally placed[46]". This is precisely what justifies the reduction of culpability and, consequently, legal liability in such cases. According to E. Griew, for the defence of diminished responsibility to be accepted, it must be demonstrated that:

> the defendant had an abnormality of mind (of appropriate origin). This had a substantial effect upon one or more relevant functions or capacities (of perception, understanding, judgment, feeling, control). In the context of the case this justifies the view that his culpability is substantially reduced. His liability is on that account to be diminished. More shortly: his abnormality of mind is of such consequence in the context of this offence that his legal liability for it ought to be reduced[47].

For the defence to succeed, it is required that the accused's difficulty in exercising control over her conduct was substantially greater than that of a reasonable or normal person. In determining whether the accused's responsibility for the killing was "substantially impaired" the jury are expected

45. See *e.g.*: *Miller*, *The Times*, May 16, 1972; *Asher*, *The Times*, June 9, 1981; *Coles*, [1980] 144 J.P.N. 528.

46. H.L.A. HART, *Punishment and Responsibility: Essays in the Philosophy of Law*, New York, Oxford University Press, 1968 ("Prolegomenon to the Principles of Punishment", p. 15). When we say that one's capacity to exercise self-control is diminished we do not mean to say that loss of self-control is a matter of degree. Loss of self-control cannot be diminished without being entirely lost: one either keeps it intact, or loses it altogether. The model is not that of a dial that can be turned down, but of a rubber band that can be stretched and then will break. It is the model that we implicitly use when we say that something inside us "snapped" or "cracked".

47. E. GRIEW, "The Future of Diminished Responsibility", [1988] *Crim. L. Rev.* 75, 82. See also: G.E. DIX, "Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like", (1971) 62 *J. Crim. L. Criminology* 313; R.F. SPARKS, "'Diminished Responsibility' in Theory and Practice", (1964) 27 *Mod. L. Rev.* 9.

to adopt a broad, commonsense approach. In general, "substantial impairment" means an impairment that is more than minimal but less than total impairment[48].

In practice, when the defence of diminished responsibility is raised, its success or failure depends, largely, on whether the jury believes that the accused deserves to be convicted as a murderer. This, in turn, depends upon the extent of their sympathy for the accused and the circumstances and gravity of the killing. As Glanville Williams has remarked, "the defence [...] is interpreted in accordance with the morality of the case rather than as an application of psychiatric concepts. Where sympathy is evoked [...] it seems to be dissolving into what is virtually the equivalent of a mitigating circumstance[49]". This explains why the defence has been accepted, despite the absence of clear evidence of abnormality of mind, in some cases involving mercy-killings, or killings committed in conditions of reactive depression or association, where the accused has killed in response to extreme grief, stress or anxiety.

Diminished responsibility may provide the legal basis for dealing with cases of cumulative provocation that cannot be treated under the provocation defence. Having been subjected to a long course of cruel and violent behaviour, the accused may claim that she was experiencing such grave distress or depression as to substantially diminish her capacity for self-control and, hence, her moral responsibility for her actions[50]. Pleading diminished responsibility, instead of provocation, in a case involving a long history of abuse would seem more appropriate where no final provocative incident, occurring immediately prior to the killing, can be demonstrated, or where the accused's retaliation was preceded by planning and deliberation[51]. The same approach might be adopted in a case where the conduct that triggered off the accused's fatal response is not regarded as being capable of amounting to provocation (*i.e.* on the basis of the objective test as it applies in the circumstances of cumulative provocation). Here the circumstances of cumulative provocation may provide a sufficient basis

48. See: *R.* v. *Simcox*, [1964] Crim. L.R. 402; *R.* v. *Lloyd*, [1967] 1 Q.B. 175 (C.A.); *R.* v. *Gittens*, *supra*, note 37; *R.* v. *Campbell* (1986), 84 Cr. App. R. 255 (C.A.); *R.* v. *Egan*, *supra*, note 37.

49. G. WILLIAMS, *Textbook of Criminal Law*, 2nd ed., London, Stevens, 1983, p. 693.

50. Crimes of passion are often the result of intense anxiety or depression leading into a psychotic state of morbid resentment or jealousy.

51. Thus in *Ahluwalia*, *supra*, note 12, although the defence of provocation was rejected, the accused's appeal was allowed and a retrial ordered on the grounds that diminished responsibility had not been raised at her trial despite medical evidence suggesting that she was suffering from an abnormality of mind (endogenous depression) when the offence was committed.

for supporting the accused's plea of diminished responsibility, even in those cases where no clear evidence of an abnormality of mind (in a strict medical sense) can be brought forward.

3 Pleading Provocation and Diminished Responsibility Together

In some cases involving cumulative provocation the accused may be able to plead a combined defence of provocation and diminished responsibility. The practical effect of raising such a combined defence would be the reduction of the offence from murder to manslaughter if it is established that the accused was suffering from an abnormality of mind and was provoked to lose her self-control. The problem with reducing the accused's legal liability on the grounds of both provocation and diminished responsibility is that the basic assumptions upon which these defences are based appear to be incompatible: provocation presupposes a reasonable or normal person driven to the act of killing by angry passion; diminished responsibility presupposes a person suffering from an abnormality of mind and who, for that reason, cannot be called "normal" or "reasonable". Nevertheless, a number of cases may be cited in which this problem has not prevented the courts from accepting such a combined defence[52]. In *Matheson*[53] the Court of Criminal Appeal adopted the position that when a combined defence is raised the jury, in returning a verdict of manslaughter, should state the ground upon which their decision is based. According to Lord Goddard C.J.:

> It may happen that on an indictment for murder the defence may ask for a verdict of manslaughter on the ground of diminished responsibility and also on some other ground such as provocation. If the jury returns a verdict of manslaughter the judge may and generally should ask them whether their verdict is based on diminished responsibility or on the other ground or on both[54].

As a defence strategy, pleading provocation and diminished responsibility together is considered to be to the accused's advantage. As was indicated above, the reduction of murder to manslaughter in such cases rests on the assumption that the accused suffered from an abnormality of mind and was provoked. This would render admissible medical or psychiatric testimony that the jury would not be allowed to consider if the accused had chosen to rely on provocation alone[55]. A combined plea of provocation

52. See *e.g.*: *McPherson*, *The Times*, June 18, 1963; *Holford*, *The Times*, March 29, 30, 1963; *Whyburd*, [1979] 143 J.P.N. 492.
53. *R.* v. *Matheson*, [1958] 2 All E.R. 87 (C.A.).
54. *Id.*, 90. Also see: *R.* v. *Solomon and Triumph*, (1984) 6 Cr. App. R. (S) 120 (C.A.).
55. See: R.D. MACKAY, "Pleading Provocation and Diminished Responsibility Together", [1988] *Crim. L. Rev.* 411, 422. Also see: *R.* v. *Campbell*, *supra*, note 48.

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

In a case where the accused chooses to plead a combined defence of provocation and diminished responsibility, it is recognised that she should bear the burden of proof only as to the latter defence. It should be noted, however, that in most cases where provocation and diminished responsibility are raised together the jury may find it difficult to keep the two issues separate. This seems true, particularly with regard to some cases of cumulative provocation in which the elements of provocation, abnormality of mind and loss of self-control appear to be interrelated or interdependent.

One reason for pleading provocation and diminished responsibility together has to do with the uncertainty that surrounds the application of the objective test in provocation. This uncertainty is often the result of the difficulty in differentiating between individual characteristics or peculiarities of the accused that may be taken into account as modifying the reasonable person test and those peculiarities that lie outside the scope of the test. Thus, pleading a combined defence of provocation and diminished responsibility would be a better defence strategy in a case where it is unclear whether the reasonable person may be endowed with a particular mental characteristic of the accused or not.

There may be cases in which the accused's plea of provocation may be accepted independently of the fact that she was suffering from an abnormality of mind — *i.e.* where the provocation is deemed serious enough to provoke an ordinary person to lose self-control and kill. However, in those cases where the provocation was not serious enough to provoke an ordinary person, the acceptance of the accused's claim that she was provoked to lose control may be seen as in a sense conditional upon establishing diminished responsibility. In such cases the accused may be able to rely on a partial excuse if it is accepted that she was provoked to lose self-control precisely because she suffered from an abnormality of mind that substantially impaired her ability to control her behaviour. Here, however, the legal excuse turns primarily on the conditions of diminished responsibility rather than on those of provocation. Provocation may be regarded as a factor triggering off the accused's reaction, but not as the true basis for the reduction of culpability for homicide.

A verdict accepting the accused's plea for extenuation on the grounds of both provocation and diminished responsibility might be more appropriate where the conditions of both defences are satisfied. One might envisage a case in which evidence suggests that the accused was suffering from an abnormality of mind and was sufficiently provoked — *i.e.* according to the objective test, as it applies to normal people. In such a case it is

clear that if the accused had chosen to rely only on provocation her plea would have been successful on this ground alone. The same would be the case if the accused had raised diminished responsibility only. Unless the accused's loss of control is somehow attributed the conditions of one of these defences exclusively, a verdict reducing murder to manslaughter on both grounds would be the best way of dealing with the accused's plea here.

Conclusion

The fact that the accused did not act entirely impulsively in some cases of cumulative provocation, especially in cases involving domestic violence, is taken to militate against the availability of the provocation defence. However, evidence of planning or the lapse of some time between the final provocative event and the accused's response should not necessary cut against a claim of loss of self-control in such cases. On the other hand, where there is no evidence suggesting that the accused was provoked, or that she acted in the heat of passion as a result, as required for the provocation defence to apply, the accused may still be entitled to a partial defence on different grounds, such as diminished responsibility or a new defence of extreme emotional disturbance. If evidence suggests that the accused suffered from an abnormality of mind and was provoked, provocation and diminished responsibility may be pleaded together. Such a combined defence may be accepted either on the basis of provocation or on that of diminished responsibility or, possibly, on both. The latter should be the case where the requirements of both defences appear to be satisfied.