

CUMULATIVE PROVOCATION AND PARTIAL DEFENCES IN ENGLISH CRIMINAL LAW

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SUMMARY

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 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.

1 INTRODUCTION

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

¹ According to s 3 of the English Homicide Act 1957: "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 Law Commission Consultation Paper No 177 *A New Homicide Act for England and Wales?* (2005) 171-176; and Law Commission Report No 290 *Partial Defences to Murder* (2004) 30-72. On the treatment of provocation in other common law jurisdictions see, eg, s 169 of the New Zealand Crimes Act 1961; s 232 of the Canadian Criminal Code; s 23 of the New South Wales Crimes Act 1900; s 304 of the Queensland Criminal Code; and ss 281 and 245 of the Criminal Code of Western Australia.

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 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 (for example, verbal provocations) to those involving very serious wrongdoings (for example, 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.

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. 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 behaviour 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. What is the basis of any decision that a certain form of behaviour can or cannot amount to provocation in law? Further, even where

a single incident of provocation can be identified, a history of abuse might be relevant to assessing the gravity of the provocation offered by putting it into context. Are these approaches to defining provocation compatible with the current understanding of the defence in law? 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 the 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, 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.

2 CUMULATIVE PROVOCATION AND THE SCOPE OF THE PROVOCATION DEFENCE

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.² Although considering the previous mistreatment 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.³

² As Widgery CJ stated in *Davies* [1975] QB 691, the "background is material to the provocation as the setting in which the state of mind of the defendant must be judged" (702). Similarly, in *Luc Thiet Thuan* [1996] 2 All ER 1003, Lord Goff stated that "it may be open to a defendant to establish provocation in circumstances 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" (1047). See also *Simpson* [1957] Crim LR 815; *Fantle* [1959] Crim LR 584; *McCarthy* [1954] 2 QB 105; *Bullard* [1957] AC 635; *Humphreys* [1995] 4 All ER 1008; and *Weller* [2004] 1 Cr App R 1.

³ As Ashworth "Sentencing in Provocation Cases" 1975 *Criminal LR* 553 556-557 points out in relation to sentencing that "the circumstances of cumulative provocation may be considered as either a mitigating or an aggravating factor, although the former seems more likely".

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.⁴ In general, evidence of planning and deliberation would be fatal to the accused's plea, as it would tend to negate 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 which the accused should have cooled down and regained her composure.⁵ In *Thornton*,⁶ 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*,⁷ 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.⁸ 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.⁹

⁴ According to Gordon *Criminal Law* 2ed (1978) 766 "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."

⁵ See, eg, *Duffy* [1949] 1 All ER 932; *Brown* [1972] 2 All ER 1328; *Davies* [1975] 1 All ER 890; *Ibrams* (1981) 74 Cr App Rep 154; *Turner* [1975] QB 834, [1975] All ER 70; *Burke* [1987] Crim LR 336; *Newell* [1980] 71 Cr App Rep 331; *Raven* [1982] Crim LR 51; and *Cocker* [1989] Crim LR 740.

⁶ *Thornton* [1992] 1 All ER 306. 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. According to Beldam LJ, 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". But in *Thornton* (No 2) (1996) 2 AER 1023, after examining new medical evidence, a retrial was ordered and the accused was convicted of manslaughter on the ground of diminished responsibility.

⁷ [1992] 4 All ER 889. 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.

⁸ Lord Taylor stated: "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 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" (*Ahluwalia supra* 897-898).

⁹ And see CLRC, 14th Rep (1980) par 84.

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.¹⁰ 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.¹¹ 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.

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*,¹² 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 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 have acted under provocation.¹³

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

¹⁰ 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" ("Cumulative Provocation and Domestic Killing" 1982 *Criminal LR* 29 34-35).

¹¹ See Wasik 1982 *Criminal LR* 37; and see CLRC, 14th Rep (1980) par 15, 19 and 84.

¹² 1980-08-20 *The Times*; 1980-11-18, 19, 20, 21 and 22 *The Times*; 1980-12-4, 15 and 16 *The Times*.

¹³ See also Wright 1975-10-14 *The Times*; Ratcliffe 1980-05-13 *The Times*; Bangert 1977-04-28 *The Times*; Pulling 1977-04-27 *The Times*; Fuller 1980-11-19 *The Times*. Quoted by Wasik 1982 *Criminal LR* 34-35.

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.¹⁴ Wasik regards the first of these three possible approaches to the problem of cumulative provocation as comparatively the least troublesome.¹⁵

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 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 raised.¹⁶ It may be 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

¹⁴ Consider, *eg*, the American Model Penal Code's defence of "extreme emotional disturbance". MPC par 210.3(1)(b) (1980).

¹⁵ Wasik 1982 *Criminal LR* 35-36.

¹⁶ In some cases of cumulative provocation the accused may be able to plead, *eg*, self-defence, or insanity.

provocative, should be assessed in the light of previous provocations from the same source. In this regard Ashworth opines as follows:

“[T]he significance of the deceased’s final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act. This is not to argue that the basic distinction between sudden provoked killings and revenge killings should be blurred, for the lapse of time between the deceased’s final act and the accused’s retaliation should continue to tell against him. The point is that the significance of the deceased’s final act and its effect upon the accused – and indeed the relation of the retaliation to that act – can be neither understood nor evaluated without reference to previous dealings between the parties”.¹⁷

In a case of cumulative provocation, the final act of provocation, however trivial it might appear to have been, should be regarded as in a sense 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.¹⁸

3 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,¹⁹ but surely not on one that rests on the assumption that she is a “normal” or “reasonable” person.²⁰ Diminished responsibility is classified as an excusatory defence, as it recognizes that, although an illegal act was

¹⁷ Ashworth 1975 *Criminal LR* 558-559.

¹⁸ Smith *Criminal Law* 10ed (2002) 368 stated: “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’.”

¹⁹ This defence is provided for by s 2 of the Homicide Act 1957.

²⁰ In the words of Ashworth “The Doctrine of Provocation” 1976 35 *Criminal LJ* 292 312: “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.” See *Ward* [1956] 1 QB 351; and *Attorney General for Jersey v Holley* [2005] 2 AC 580. Consider also the Law Commission Consultation Paper No 177 *A New Homicide Act for England and Wales?* (2005) 187.

committed, the accused's moral culpability is reduced due to her mental instability.

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) 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".²¹ If the medical evidence supports a finding of diminished responsibility, the jury must find the accused guilty of manslaughter only. The question 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*²² the term "abnormality of mind" was defined by Lord Parker CJ 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. 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 include a consideration of the extent of his ability to exercise will-power to control his physical acts". This question, as being one of degree, can only be decided by the jury. Lord Parker held that medical evidence was relevant, but that the question involved a decision not merely as to whether there was some impairment of the mental responsibility of the accused, but whether such impairment could properly be called "substantial", a matter upon which juries might quite legitimately differ from the judgment of medical practitioners.²³

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*,²⁴ 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

²¹ See *Dix* (1981) 74 Cr App R 306.

²² [1960] 2 QB 396.

²³ *Byrne supra* 403.

²⁴ (1984) 79 Cr App Rep 261.

relating to the insanity defence.²⁵ For example, a depressive condition may provide a sufficient basis for the defence of diminished responsibility, although the sufferer could not be described as insane or partially insane.²⁶

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 section 2(1) (arrested or retarded development of mind, disease, injury and other inherent causes).²⁷ Although no clear description is given of the causes referred to in section 2, it appears that “disease or injury” most likely pertains to physical injury or illness and that “inherent cause” includes functional mental disorder.²⁸ 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,²⁹ a disorder of personality induced by psychological injury,³⁰ reactive depression caused by marital difficulties,³¹ chronic alcoholism,³² and “Othello syndrome”, described as morbid jealousy for which there was no cause.³³

Intoxication by drugs or alcohol is generally excluded as a basis of the diminished responsibility defence.³⁴ 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”.³⁵ Although emotions such as envy, anger or resentment are not supposed to come under section 2, there have been cases in which such emotions were deemed sufficient to support a diminished responsibility defence.³⁶

The defence of diminished responsibility operates as a partial excuse on the assumption that the accused's impaired capacity reduces her moral

²⁵ See also *Rose v R* [1961] AC 496; [1961] 1 All ER 859. In this case it was held that if the word insanity is used in relation to diminished responsibility it must be used in “its broad popular sense”.

²⁶ 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, eg, Morse “Undiminished Confusion in Diminished Capacity” 1984 75 *Journal of Criminal Law and Criminology* 1; and see Dressler's reply in “Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse” 1984 *Journal of Criminal Law and Criminology* 75.

²⁷ See, eg, *King* [1965] 1 QB 443 450.

²⁸ See *Sanderson* (1993) 98 Cr App Rep 325; *Fenton* (1975) 61 Cr App Rep 261; and *Gittens* [1984] QB 698. See also *Tandy* (1987) 87 Cr App Rep 45; *Inseal* [1992] Crim LR 35; and *Egan* [1993] Crim LR 131.

²⁹ *Egan* [1992] 4 All ER 470.

³⁰ *Gittens supra*.

³¹ *Sanders* (1991) 93 Cr App Rep 245.

³² *Tandy* [1989] 1 WLR 350.

³³ *Vinagre* (1979) 69 Cr App Rep 104.

³⁴ *Tandy* [1989] *supra* 350; *Egan* [1993] *supra* 131.

³⁵ As was stated in *Tandy* [1989] *supra* 356 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”. See also *Inseal supra* 35.

³⁶ See, eg, *Miller* 1972-05-16 *The Times*; *Asher* 1981-06-09 *The Times*; and *Coles* (1980) 144 JPN 528.

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. Owing 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”.³⁷ This is precisely what justifies the reduction of culpability and, consequently, legal liability in such cases. According to 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”.³⁸

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 to adopt a broad, commonsense approach. In general, “substantial impairment” means an impairment that is more than minimal but less than total impairment.³⁹

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 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

³⁷ Hart “Prolegomenon to the Principles of Punishment” in Hart *Punishment and Responsibility* (1968) 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”.

³⁸ Griew “The Future of Diminished Responsibility” 1988 *Criminal LR* 75 82. See also Dix “Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like” 1971 *Journal of Criminal Law, Criminology and Police Science* 313; and Sparks “Diminished Responsibility in Theory and Practice” 1964 27 *Modern LR* 9.

³⁹ See *Simcox* [1964] *Crim LR* 402; *Lloyd* [1967] 1 *QB* 575; *Gittens supra* 698; *Campbell* (1987) 84 *Cr App Rep* 255; and *Egan* [1992] *supra* 470.

circumstance".⁴⁰ 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.⁴¹ 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.⁴² 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 (that is, 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 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.

4 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

⁴⁰ Williams *Textbook of Criminal Law* 2ed (1983) 693.

⁴¹ Crimes of passion are often the result of intense anxiety or depression leading into a psychotic state of morbid resentment or jealousy.

⁴² Thus in *Ahluwalia*, 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.

courts from accepting such a combined defence.⁴³ In *Matheson*⁴⁴ 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 CJ

“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.”⁴⁵

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.⁴⁶ A combined plea of provocation and diminished responsibility entails a further advantage for the accused as regards the sentence imposed for the lesser offence of manslaughter.

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 – that is, where the provocation is deemed serious enough to provoke an ordinary person to lose self-control and kill. However,

⁴³ See, eg, *McPherson* 1963-06-18 *The Times*; *Holford* 1963-03-29 *The Times*; *Whyburd* (1979) 143 JPN 492.

⁴⁴ [1958] 2 All ER 87.

⁴⁵ *Matheson supra* 90; and see *Solomon and Triumph* (1984) 6 Cr App Rep (S) 120.

⁴⁶ See MacKay “Pleading Provocation and Diminished Responsibility Together” 1988 *Criminal LR* 411 422; and see *Campbell* (1987) 84 Cr App Rep 255; [1987] Crim LR 257.

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 – that is, 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.

5 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 necessarily 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.