PROVOCATION - RECHARACTERISATION OF "CHARACTERISTICS"

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I. INTRODUCTION

As every law student learns, it is at present the law that murder is reduced to manslaughter if the person who caused death[1] did so under provocation: Crimes Act 1961, s 169(1). It is regarded as "a notoriously difficult aspect of criminal law".[2]

This partial defence requires two conditions to be satisfied.

First, something must have been done or said which in fact deprived the offender of the power of self-control and thereby induced the killing: s 169(2)(b). In deciding whether this might have been the case the jury should have regard to any fact, circumstance and personal attribute or condition of the offender which made it more likely, including, for example, an offender's ill-temper, irascibility or voluntary intoxication.[3] It is not, however, possible to clearly describe what is involved in loss of "the power of self-control". Although it is a question of "fact", and the statutory formula is unqualified, it is a question of degree.[4] It may be negated if the offender acted with "deliberation", but positive descriptions of what is required always employ highly metaphorical language: for example, the offender must act "in hot blood", "in the heat of passion", while "not master of his or her mind".[5]

Secondly, what was done or said must have been, in the circumstances of the case, sufficient to deprive of the power of self-control "a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender": s 169(2)(a). The question is again one of degree and, although the statute does not make this explicit, the question is whether a person of ordinary self-control might have so lost control as to form a murderous intent and act on it in a way akin to the offender's reaction.[6] There is no rule requiring a reasonable relationship or proportion between the provocation and the offender's reaction, although this is "a factor, and indeed a weighty factor" to be considered by the jury,[7] or is at least "a consideration which may or may not commend itself to them".[8] It is relevant to the question whether an ordinary person might have acted as the

1 It seems plain that the requirements of the defence must be satisfied by the person who actually committed the offence, or "caused the death"; this would seem to have been an insuperable obstacle in *R v Gordon* (1993) 10 CRNZ 430 (CA), where a secondary party sought to rely on the defence without suggesting that it was available to the principal.

2 *R v Campbell* [1997] 1 NZLR 16, 27 (CA).

3 *R v Barton* [1977] 1 NZLR 295 (CA); *R v White (Shane)* [1988] 1 NZLR 122, 126 (CA); Orchard, "Provocation - The Subjective Element" [1977] NZLJ 77, 78-79.

4 *Phillips v The Queen* [1969] 2 AC 130, 137-138 (PC).

5 In *R v Muy Ky Chhay* (1994) 72 A Crim R 1, 9 (NSW CCA) the court found the need to resort to metaphor "disconcerting".

6 See, eg, *R v Anderson* [1965] NZLR 29 (CA); compare *Masciantonio v R* (1995) 129 ALR 575, 581.

7 *R v Noel* [1960] NZLR 212, 219 (CA); *R v Dougherty* [1966] NZLR 890 (CA); *R v Savage* [1991] 3 NZLR 155, 160 (CA).

8 See *Phillips*, above, note 4, p 138; compare *Johnson v R* (1976) 136 CLR 619.

accused did,[9] and it is also capable of assisting the determination of whether the accused acted "by reason of the provocation".[10]

To decide this second question the jury must consider the provocation in its context and assess its gravity. Section 169(2)(a) expressly incorporates "the circumstances of the case", meaning the "entire factual situation" in which the offender was placed.[11] Important aspects of this may be the history of the offender, and his or her past and present relationship with, and information about, the victim, for such matters may aggravate the effect of the ultimate provocation.[12] But insofar as the test requires that "the power of self-control of an ordinary person" might have been overcome it requires that facts be ignored when their only significance is to show that the offender had a lesser degree of self-control.

In 1961, however, Parliament refined the test by introducing the qualification "but otherwise having the characteristics of the offender". The avowed purpose was to overturn the effect of *Bedder v DPP*,[13] where it was held that the accused's impotence must be ignored in assessing an ordinary person's likely response to taunts of impotence. The Minister of Justice explained that it would remain irrelevant that an accused "had a more violent temper or lost control of himself more easily than an ordinary person", but that regard should at least be had to "physical peculiarities" when the provocation "related to those peculiarities".[14]

The Minister also described the innovation as an "important clarification", but in *R v McGregor*[15] the Court of Appeal thought that the "subjective" qualification of the "objective" test involved a "fusion of ... two discordant notions", and such "manifold difficulties" that it was necessary for the Court to give extensive guidance as to how it should be interpreted. Notwithstanding this guidance it was widely supposed that the law remained too hard for juries to comprehend, and this was one reason why it has been proposed that the defence of provocation should be abolished, provided the mandatory sentence for murder is also abandoned.[16]

These reforms have yet to be implemented. The present Minister of Justice has announced a further review of the mandatory sentence, but change may yet be some way off, and in *R v McCarthy*[17] the Court of Appeal decided that the dicta in *McGregor* should be reconsidered. It has been remarked that since then what was said in *McGregor* "has not been regarded as good law",[18] but the extent and effect of the revision in *McCarthy* requires clarification. This is particularly so after comments upon it in the Privy Council in *Luc Thiet Thuan v R*[19] and a seemingly inconsistent interpretation

9 *Phillips*, ibid, pp 137-138.
10 See, eg, *Savage*, above note 7, p 160; *Campbell*, above note 2, p 25; but an extreme reaction might sometimes suggest loss of self-control: *R v Squire* (1975) 26 CCC (2d) 219, 234-235 (Out CA), rev'd 29 CCC (2d) 497 (SCC); *Masciantonio v R* above note 6, p 582.
11 *R v Morhall* [1996] 1 AC 90, 98-99 (HL).
12 See, eg, *R v McGregor* [1962] NZLR 1069, 1080 (CA); *R v Pita* (1989) 4 CRNZ 660, 665-666 (CA); *R v White (Shane)*, above note 3; *Stingel v R* (1990) 171 CLR 312, 324-326; Briggs, "Provocation Re-assessed" (1996) 112 LQR 403.
13 [1954] 2 All ER 801 (HL).
14 (1961) 328 NZPD 2681.
15 Above note 12, pp 1077, 1080-1081.
16 Criminal Law Reform Committee, *Report on Culpable Homicide* (1976), pp 8-9; *Report of the Crimes Consultative Committee* (1991), pp 45-46.
17 [1992] 2 NZLR 550 (CA); see Brown, "Provocation Re-constructed: The *McCarthy*ization of *McGregor*" [1993] NZ Recent Law Review 329.
18 *R v Morhall*, above note 11, p 93, per Lord Steyn, in argument.
19 [1996] 2 All ER 1033.

in our Court of Appeal in *R v Campbell*.[20] In order to assess these developments it is necessary to go back to *McGregor*.

II. THE MCGREGOR INTERPRETATION

The dicta in this case cover three related matters.

1. The relevance of personal characteristics

The Court reasoned that what matters in the context of provocation is the ordinary person's reaction "in regard to the exercise of control", and that in order to give effect to the legislative intention to modify the objective test it was necessary to interpret s 169(2)(a) so that "characteristics" were relevant "in regard to self-control". It concluded that:

> The offender must be presumed to possess in general the power of self-control of the ordinary man, *save insofar as his power of self-control is weakened* because of some particular characteristic possessed by him.[21]

2. The scope of "characteristics"

The Court acknowledged that mental as well as physical qualities were included, and such attributes as colour, race and creed. But not every "trait or disposition" qualified. It had to be "something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind". Further, it must have "a sufficient degree of permanence" to be part of the offender's "character or personality". Pursuant to one or other of these requirements the Court ruled out a disposition to be unduly suspicious, bad-tempered, excitable or pugnacious, as well as temporary moods of depression, excitability or irascibility, and self-induced transitory states such as intoxication.

3. The relationship between the provocation and the characteristic

For the ordinary person test to be qualified there must be some "real" or "direct" connection between the nature of the provocation and the characteristic relied upon; the former must be "related to" the latter, or must be "directed at" it, so that the words or conduct are "exclusively or particularly provocative to the individual because, and only because, of the characteristic". "Special difficulties" arise if "purely mental peculiarities" are relied upon, and it will not suffice that the offender is in some general way "mentally deficient or weak-minded". "There must be something more, such as provocative words or acts directed to a particular phobia from which the offender suffers".[22]

III. CRITICISMS

Sir Francis Adams was severely critical of *McGregor*.[23] He argued that the clear meaning of "but otherwise" is that as far as the power of self-control is concerned the test remains that of the ordinary person, or "normal self-control". Personal characteristics of the offender remain irrelevant to

20 Above, note 2.
21 Above, note 12, p 1081, emphasis added.
22 Above, note 12, p 1082.
23 Adams, *Criminal Law and Practice in New Zealand* (2nd ed 1971) paras 1264-1269; see also Criminal Law Reform Committee, above note 16, pp 10-11.

this, but they are relevant to an assessment of how susceptible a person with ordinary self-control might be to the provocation in question. A personal characteristic might so aggravate the effect of provocation that even normal self-control might be overcome, although it would not be in the absence of the characteristic. Sir Francis thought it implicit in the word that a "characteristic" could not be something which was "merely temporary or transitory", but otherwise thought that the hypothetical person was to be endowed with all of the offender's idiosyncrasies, except any lack of an ordinary power of self-control. Further, once the Court confined relevant characteristics to those which relate to the provocative effect on the individual there was no reason for departing from the express terms of the statute.

Having previously noted these criticisms,[24] the Court of Appeal acted upon them in *R v McCarthy*.[25] In this case the accused had been an uninvited guest at a party who had seized a knife and stabbed the victim after the latter had assaulted him and wrongly accused him of breaking a window. The accused had previously suffered permanent brain damage, and had been drinking. The Court said that at trial difficulty had been experienced in applying s 169(2)(a), largely because of the observations in *McGregor*. Having said that these had to be weighed against Adams' arguments, it clearly disapproved of much of what was said in *McGregor*, which may have "unduly restricted" the defence, had "added needless complexity", and had not been found workable in practice. More particularly, the suggestion that the provocation must be "directed at" the characteristic in question was disapproved and, having quoted the whole of the passage requiring the two to be related, the Court cited a number of cases as showing that "these observations have caused continual difficulty".

More positively, while adhering to the view that a "transitory" condition does not qualify (so that intoxication was to be ignored), as examples of characteristics to be attributed to the hypothetical person the Court instanced the accused's race, age, sex, mental deficiency, or a tendency to excessive emotionalism as a result of brain injury. It was also said of *McGregor* that:

> The added observations appear to have been influenced by the view that diminished responsibility had not been accepted by the New Zealand Parliament; yet, within a limited field, this may be seen as the inevitable and deliberate effect of the statutory changes ..."

On the other hand, the Court clearly recognised that on the qualified objective question personal characteristics are not relevant on the basis that they weaken the power of self-control. In *McCarthy* the jury was to have regard to "the accused's brain damage and any personality consequences that it may have *except as to the power of self-control*"; the question was "whether a person with the accused's characteristics *other than any lack of the ordinary power of self-control* could have reacted in the same way".[26]

The *McCarthy* dicta combine a wide view of the meaning of "characteristics" with adherence to the statutory measure of "the power of self-control of an ordinary person". They leave, however, some room for confusion. This arises particularly from the rather cryptic reference to diminished responsibility, and the Court's failure to articulate how or why an

24 *R v Tai* [1976] 1 NZLR 102, 105-106 (CA); *R v Trounson* [1991] 3 NZLR 690, 693 (CA).
25 Above, note 17, pp 557-558, per Cooke P.
26 Ibid, p 558, emphasis added.

individual's characteristics may be relevant in any particular case, although this is of central importance.[27]

IV. CHARACTERISTICS AND DIMINISHED RESPONSIBILITY

In *Luc Thiet Thuan v R*[28] the accused had killed by stabbing the victim after she had allegedly taunted him about his sexual prowess. There was also medical evidence that the accused had suffered brain damage which may have impaired his ability to control impulses. It was held that for the purposes of the Hong Kong equivalent of s 3 of the Homicide Act 1957 (UK) the hypothetical "reasonable man" should be invested with such of the accused's characteristics as in the jury's view would affect the gravity of the provocation to the accused; but an accused's mental infirmity which does not have such an effect, but which reduces his or her power of self-control, should not be taken into account in applying the objective test.[29] Lord Steyn dissented, arguing that although "minor abnormalities of character", such as irascibility or pugnacity, should be ignored, justice requires the objective test to be modified if the accused suffered from a condition such as brain damage (or post-natal depression, battered woman's syndrome or a "personality disorder"), which he or she had not been at fault in inducing, even though it may be relevant only because it affects the degree of self-control of the accused.[30]

Of particular interest in this country is their Lordships' interpretation of *McCarthy*, an interpretation which might be thought the more influential because Sir Michael Hardie Boys was one of the majority. In developing an argument that New Zealand cases interpreting s 169 no longer provide safe guidance elsewhere, Lord Goff cited the brief reference to diminished responsibility as being "significant". He took it to mean that in New Zealand an accused's mental infirmity may "as such" be taken into account for the purpose of the objective test, because it was the intention of Parliament to achieve a partial recognition of the defence of diminished responsibility. This could not have been so in England or Hong Kong, where legislative modification of provocation was accompanied by a separate general provision that diminished responsibility reduced murder to manslaughter.[31]

There are difficulties in accepting that this is a proper interpretation of s 169(2)(a). In a sense "diminished responsibility" is recognised whenever an accused's mental infirmity is accepted as a characteristic relevant to the defence of provocation, for the guilt of the accused may be reduced because of an effect of mental infirmity. To that extent the two defences overlap, but in all cases the only important question (in New Zealand) is whether the requirements of provocation have been met.[32] However, the Privy Council interpretation of the *McCarthy* dictum appears to mean that a mental infirmity may be taken into account even though it does not affect the nature

27 *R v Hill* (1986) 25 CCC (3d) 322, 335-336 (SCC), per Dickson CJC.

28 Above, note 19.

29 Applying, in particular, *DPP v Camplin* [1978] AC 705; *Stingel v R*, above note 12; and *Masciantonio v R*, above note 6.

30 Lord Steyn did not attempt an exhaustive description of conditions which could qualify the objective test, the "dictates of justice" being his primary concern; it may well be that he would not insist that the condition not be self-induced, a requirement which does not apply if the characteristic affects the sting of the provocation: *R v Morhall*, above note 11 (addiction to glue sniffing, about which the deceased had chided the accused).

31 Above, note 19, pp 1043-1044; Lord Goff also thought that *R v Taaka* [1982] 1 NZLR 198 (CA) and *R v Leilua* [1986] NZ Recent Law 118 (CA) supported his understanding of New Zealand law.

32 Stanish, "Whither Provocation?" (1993) 7 Auck ULR 381, 390-391.

or gravity of the provocation. If the jury were to ask how such an infirmity may be relevant, it would not be adequate or helpful to tell them that it was relevant "as such". It seems to be implicit that, at least in most cases, the appropriate answer would be that it might reduce the power of self-control otherwise to be expected of an ordinary person. When legislation explicitly provides for diminished responsibility that is one important way in which mental abnormality may support that defence.[33]

However, it is submitted that this is not a tenable interpretation of s 169. It is contrary to the clear meaning of the words of the section, and the recognition in *McCarthy* that any lack of the ordinary power of self-control is not a relevant characteristic. Moreover, the intention attributed to Parliament is hardly consistent with what was said and done during debate on the Bill. Immediately before explaining the provocation provisions, the Minister of Justice referred to the separate defence of diminished responsibility which was then also provided for, and said that it would be deleted if the House rejected capital punishment.[34] In due course this was done, and there is no hint that nevertheless the same concept was meant to survive in the context of provoked killings. Accordingly, it is submitted that in *R v Campbell*[35] it was right for the Court of Appeal to ignore this aspect of *Luc Thiet Thuan*, in holding that since *McCarthy* it is "clear" that characteristics can be taken into account only in assessing sensitivity or susceptibility to the provocation, and not in relation to the power of self-control that is to be supposed under s 169(2)(a). Contrary to Lord Goff's understanding of the position, the Court added that New Zealand law is now in harmony with the majority approach in *Luc Thiet Thuan*, and with the law in England,[36] and Australia.[37]

V. CHARACTERISTICS: MEANING

There is no doubt that since *McCarthy* much of what was said about "characteristics" in *McGregor* is no longer authoritative. There remain, however, a number of dubious propositions which have yet to be expressly disapproved, and further clarification will be necessary.

The requirement that a characteristic must be "something definite" might wrongly imply that it must be capable of precise definition, and the suggestion that it must "make the offender a different person from the ordinary run of mankind" is misconceived. It presupposes that it is possible and fruitful to imagine a person who is of the "ordinary run", perhaps in all respects, a task which is not made more realistic when the concept is amended to "an ordinary person in terms of [our] mixed society".[38] It is not necessary that a characteristic makes the offender someone different from a notional but unimaginable being known as an "ordinary person". What is required is an assessment of the possible effect of particular provocation, the nature and gravity of which must be determined by reference to all relevant facts, upon someone who has one particular human capacity - an "ordinary" power of self-control.[39]

33 *R v Byrne* [1960] 2 QB 396, 403; *Rose v R* [1961] AC 496, 507.
34 See (1961) 328 NZPD 2680, 2990-2991.
35 Above, note 2, p 25.
36 See *R v Morhall*, above note 11.
37 See *Stingel v R*, above note 12; *Masciantonio v R*, above note 6.
38 *R v Tai*, above note 24, p 106.
39 *Masciantonio v R*, above note 6, p 581; *R v Morhall*, above note 11, pp 97-98.

Further, although in *McCarthy* it is assumed that a "transitory" condition cannot qualify, this is based on the view that it is implicit in the word "characteristics" that is be part of the accused's "character or personality", and that this requires a degree of permanence. Linguistically this is a narrow view, which introduces a question of degree on which useful guidance is probably impossible. How long-lasting must an attribute be before it qualifies? It is the time of the killing that is important, and a personal condition may have a significant impact on the sting of particular provocative conduct even though it is temporary; or, indeed, particularly because it is temporary, for the accused will have had less opportunity to become accustomed to the condition.[40] The better view is that of Lord Goff in *R v Morhall*,[41] that a temporary condition may be a characteristic (eczema being given as an example), although at present intoxication on the occasion of the killing is excluded as a matter of policy.[42]

The idea that the provocation must be "directed at" the characteristic was expressly regarded as unjustifiable in *McCarthy*, and insofar as it might be taken to mean that the provoker must have had the characteristic in mind it must certainly be rejected.[43] There may also be cases where language requiring some "connection" or "relationship" between the provocation and a characteristic will not be appropriate or helpful, but rejection of the associated suggestion that the characteristic must make the conduct "particularly provocative" to the offender is another matter (although no doubt the Court in *McGregor* went too far in supposing that enhancement of provocative effect must arise solely from the characteristic).

With the exception of any lack of the power of self-control of an ordinary person, "characteristics" should include all of the attributes and idiosyncrasies of the accused. These may or may not be "ordinary" and, it is submitted, they may be either permanent or temporary, although there at present remains a rule of policy that intoxication on the occasion of the killing is to be ignored for the purposes of s 169(2)(a).[44] But in any particular case a personal characteristic should be taken into account only if it is relevant.[45]

VI. CHARACTERISTICS: RELEVANCE

For a characteristic to be relevant it must make it more likely that a person with ordinary self-control would have lost self-control and reacted as the accused did, and it must make this more likely for some reason other than that it reduced that power of self-control. This is consistent with the terms of s 169, with how the question was ultimately described in *McCarthy*, and appears to be confirmed by the judgment in *R v Campbell*.[46] Where there is evidence of a characteristic which might have such an effect, this should be explained to the jury.[47]

40 Brown, "Killings Non Sedato Animo" [1962] NZLJ 489, 491.
41 Above, note 11, pp 99-100.
42 As to intoxication, see further below: "Intoxication".
43 *Luc Thiet Thuan v R*, above note 19, p 1048; *R v Campbell*, above note 2, p 25; perhaps the alternative formulation, "directed to", did not so clearly imply such a requirement.
44 However, see below, "Intoxication"; the mere fact that a condition was self-induced, and may be regarded as discreditable, will not exclude it: *R v Morhall*, above note 11 (addiction to glue sniffing).
45 *R v Hill*, above note 27.
46 Above, note 2, p 25.
47 *R v Morhall*, above note 11, p 100; *R v Thornton (No 2)* [1996] 2 All ER 1023, 1031; contrast *R v Hill*, above note 27.

It follows that even if something is a "characteristic" it should be disregarded if it would not affect the impact of the provocation in question, and to the extent that it constitutes, or causes the accused to have, a power of self-control that is less than ordinary it should also be disregarded (for the purposes of paragraph (a), but not (b), of s 169(2)). This may include, for example, a personality disorder the effect of which is, in substance, to make the accused unusually short-tempered, pugnacious or "explosive".[48] The principle will apply even though the characteristic might involve "diminished responsibility".

Central to an understanding of the meaning of s 169(2)(a) is the point made by Adams,[49] that:

> A homicide committed under provocation results from a conflict between (a) the offender's sensitivity or susceptibility to the provocation, and (b) his power of self-control.

Under s 169(2)(a) a "characteristic" is relevant only insofar as it may affect the first of these factors - the nature and degree of a person's mental or emotional response to the provocation. Once that is assessed, the question is whether a person so affected, but with ordinary self-control unimpaired by the characteristic, might have been unable to exercise restraint and might have reacted as the accused did. The distinction drawn might well be artificial. In the case of any actual person, as the emotional impact of provocation increases, so the power of self-control may decrease. However, this does not seem a fatal objection. The objective test is not concerned with how or why an actual person might behave. Rather the purpose of the test is to impose a standard, and to deny the defence when, in the view of the jury, the provocation was not calculated to so stir the accused's emotions that a level of self-control which is "ordinary", or normal, might be overcome.[50]

In many cases the relevance of a characteristic will be aptly and adequately explained on the basis that the jury might find that it increased the gravity of the provocation to the offender, simply because its existence increased the expected emotional impact of the conduct.[51] However, in *Stingel v R*[52] the High Court of Australia was careful to say that a personal attribute would be relevant if it helped identify the "gravity", "implications" or "content" of the provocation. In some cases the very nature of the provocation cannot be properly understood without regard being had to personal attributes of the accused. For example, the gender of the parties will always be relevant to an assessment of the provocative nature and effect of a sexual assault or advance.[53] If abusive words are relied upon it will probably be essential that the accused understood the language used, and evidence of the significance of the words to people of the accused's ethnic or cultural background will make that a relevant characteristic as well.[54]

When the nature of the provocation has been determined, and the jury comes to assess its gravity, then as with evidence of the provocative conduct itself, and the surrounding circumstances, the relevance of evidence of a characteristic always arises from an expected effect on the mind and emotions

48 *R v Fryer* [1981] 1 NZLR 748, 752-753 (CA); *R v Humphreys* [1995] 4 All ER 1008, 1021.
49 Above, note 23, para 1267.
50 In *R v Hill*, above note 27, Wilson J justified the imposition of an objective and unvarying standard of self-control by reference to principles of "equality and individual responsibility".
51 Compare, eg, *DPP v Camplin*, above note 29; *R v Morhall*, above note 11.
52 Above, note 12.
53 *R v Hill*, above note 27.
54 *R v Lafaele* (1987) 2 CRNZ 677 (CA).

of the accused and the hypothetical person of ordinary self-control.[55] This can never be quantified in other than the most general terms but the potential for a characteristic to affect the gravity of the provocation will often be a matter of common sense, although no doubt the Judge's directions should still identify any such characteristics.[56] This will be so, for example, where verbal taunts or threats referred to a physical condition, habit or addiction, or a common and well-understood emotional need.[57]

In some cases, however, expert evidence may also be relied upon, and will sometimes be necessary to establish the existence of a characteristic, and its nature and effect.[58] For example, this is likely to be the case if brain damage or "purely mental peculiarities" are relied upon. In *McGregor*[59] the Court recognised that "special difficulties" arise in such cases. More generally, when the nature and effect of a characteristic is beyond ordinary experience the jury's task will be significantly more difficult, and how clearly the characteristic might affect the nature and gravity of the provocation will depend on the expert's diagnosis and description of the condition. For example, in *R v Taaka*[60] had the expert evidence not gone beyond describing the accused as having "an obsessively compulsive personality" it might have merely suggested a low level of self-control, but the psychiatrist's further conclusion that it was "directed to his wife, his child [and the deceased]" indicated how it might have aggravated the provocative effect of the deceased's attempted intercourse with the accused's wife.

In *Stingel v R*[61] it was noted that "a particular difficulty" arises when a characteristic is relevant to an assessment of the gravity of the provocation, but is also something which diminishes a person's power of self-control.[62] Artificial though it might be, the existence of the objective requirement in its present form demands that the latter effect (diminished self-control) is ignored, although the former (enhanced provocative effect) is to be taken into account. However, it seems that the distinction becomes unsustainable if the characteristic is such that it is to be inferred that it would cause a person to feel all or any provocation unusually deeply. In such a case its effect can hardly be distinguished from a reduction in the power of self-control below a level which is "ordinary", and the statute does not allow effect to be given to that.[63] The conceptual distinction required by the present law appears to place a premium on the potential of a characteristic to cause some particular instances of provocative conduct to be felt more deeply than others, and this will sometimes depend on an expert's description of the diagnosed characteristic.

55 From which it follows that a distinction between physical and mental conditions could not be maintained: compare *Bedder v DPP*, above note 13, pp 803-804.

56 See above, note 47.

57 For example, *Bedder v DPP*, above note 13 (impotence); *R v Morhall*, above note 11 (addiction to glue sniffing); *R v Nepia* [1983] NZLR 754 (CA) (access to one's children).

58 As a general rule such evidence should not extend to an opinion as to how a person of ordinary self-control might react to the provocation: *R v Turner* [1975] QB 834; *DPP v Camplin*, above note 29, p 716 per Lord Diplock, p 727 per Lord Simon; but in exceptional cases an expert may be unable to adequately describe a condition without reference to its possible effect on self-control: see *R v Campbell*, above note 2.

59 Above, note 12, p 1082.

60 [1982] 2 NZLR 198 (CA); Brown, "Provocation, 'Characteristics' and Diminished Responsibility" (1983) 10 NZULR 398; compare *R v Dryden* [1995] 4 All ER 987.

61 Above, note 12, p 332.

62 *R v Campbell*, above note 2, is an acute example of such a case; see below.

63 Compare *R v Fryer*, above note 48; other possible examples include *R v McCarthy*, above note 17 ("excessive emotionalism as a result of brain injury"), and *R v Aston* (1989) 4 CRNZ 241 (CA) (a "paranoid disorder" which may have resulted in the accused "distorting his grievances"); compare *R v Leilua* [1986] NZ Recent Law 118 (CA); Stanish, above note 32, pp 393, 395; Sir John Smith [1995] Crim LR 891-892.

VII. Characteristics and an Accused's Perception

In most cases a characteristic becomes relevant simply because it may affect the nature or degree of a person's feelings about provocative conduct, but there are cases where a characteristic may also affect how conduct is perceived or interpreted. It has been held that when the provocative effect of conduct may have been influenced by the accused's belief about the circumstances, it is essential that an "ordinary person" might have held the same belief, and the ordinary person is not to be assumed to have had the accused's view "however far-fetched".[64] This must be qualified if the accused had a characteristic which might affect his or her perception or interpretation of events. For example, in *R v Oakes*[65] the Court's explanation of the relevance of battered woman's syndrome was in terms which allow inclusion of its possible effect on how certain conduct may be interpreted: "provocation may be in the form of threatening words or actions, and the heightened awareness of or sensitivity to threats or threatening behaviour that is a feature of the syndrome may be a relevant characteristic in the light of which the accused's response is to be judged".[66] There may even be cases where the relevance of a characteristic arises at least in part from a delusion which it produces. In *R v Campbell*[67] there was expert evidence that the lasting effects of sexual abuse as a child may have had the result that when a male placed his hand on the accused's thigh the accused experienced a "flashback", in which he interpreted the act as a homosexual advance, by his childhood abuser. This was to be attributed to the hypothetical person possessed of ordinary self-control.

VIII. Characteristics and Other "Relevant Factors"

It appears that a personal characteristic might qualify any aspect of the objective test, other than the requirement that the provocation be sufficient to overcome an ordinary power of self-control. For example, if the jury are invited to treat the degree of proportion between the provocation and the accused's reaction as relevant to the question whether an ordinary person might have acted as the accused did, the judge will need to make it clear that it is the provocation as affected by any relevant characteristic which needs to be considered.[68]

A characteristic may sometimes also be relevant to an issue of "cooling time". There is no rule that the defence necessarily fails if the killing was not an immediate response to the provocation.[69] Nevertheless, the amount of time which elapsed, and how the accused behaved during that time, may sometimes show that the accused was not in fact deprived of the power of self-control at the time of the killing.[70] Alternatively the defence will sometimes fail because the passage of time, and events during that period,

64 *R v White (Shane)*, above note 3, p 126 per Cooke P, p 127 per Casey J.

65 [1995] 2 NZLR 673 (CA).

66 Ibid, p 676, per Hardie Boys J. Immediately before this the syndrome's "very similar" significance to self-defence was explained as being that the accused may perceive events differently than would others; controversially, the Court concluded that the jury would have understood its relevance without this being explained by the trial judge.

67 Above, note 2; see also *R v Mita* [1996] 1 NZLR 95, 101-102.

68 *R v Campbell*, above note 2, pp 26-27, although in this "highly unusual" case the Court found it "difficult to suggest a sensible direction incorporating the notion of proportionality of response".

69 For example, *R v McGregor*, above note 12, p 1079; compare (1961) 328 NZPD 2681.

70 For example, *R v Mita*, above note 67, p 101; in this case Fisher J also suggests that it is essential that from the provocation to the killing the accused was in a "continuous state" of "uncontrolled hot blood", but this may be doubted.

meant that "there was clearly time and occasion for the passion of an ordinary person to cool".[71] However, on this question regard should no doubt be had to any characteristic of the accused (and to any background or contextual circumstances) which might make it reasonable to expect delay before a "sudden" loss of control. If there is evidence supporting the conclusion, there may be cases where race[72] or gender[73] are characteristics which are relevant in this way.

IX. AGE, GENDER AND RACE

Once it is accepted that a characteristic need not be something "peculiar" or extraordinary there is no difficulty in recognising that such attributes as an accused's age, gender and race are "characteristics" within s 169(2)(a).[74] Whether any such factor will be relevant in any particular case is another matter. It will be if (perhaps exceptionally) it might have affected the nature or gravity of the provocation, or the expected speed of reaction, but the general rule would require the jury to ignore it in determining or imagining the level of self-control of an ordinary person.

One exception has been widely recognised. In England, Canada and Australia it is established that when the offender is young the applicable standard is the power of self-control of an ordinary person of the offender's age. To justify this judges have variously relied on the law's compassion which underlies the defence,[75] the fact that development from childhood to maturity is common to all, an "aspect of ordinariness",[76] and the common practice of the law to ascribe reduced rights and responsibilities to young persons.[77] A combination of the second and third of these reasons perhaps allows age, in the case of youthfulness and, perhaps, old age, to be isolated as a unique exception to the general rule. Presumably these authorities can be applied in New Zealand, so that the accused's age may be attributed to the "ordinary person" in s 169(2)(a). Even so, there seems to be no doubt that age could be significant to the assessment of the power of self-control of an ordinary person only "at the extremes of senility or obvious youthful immaturity".[78]

It has sometimes been suggested that there are other personal attributes which should be taken into account in determining the required power of self-control. For example, abnormal immaturity,[79] or other abnormal conditions for which the accused was not to blame.[80] There has also been support for like treatment of such ordinary attributes as gender[81] and race, or "ethnic or cultural background".[82] It is not clear that the subjectivisation process would, or could, stop there, and such proposals are essentially

71 *R v Erutoe* [1990] 2 NZLR 28, 35 (CA).
72 Compare *R v Tai*, above note 24, p 107.
73 Nicholson and Sanghvi, "Battered Women and Provocation" [1993] Crim LR 728; Tarrant, "The 'Specific Triggering Incident' in Provocation: Is the Law Gender Biased?" (1996) 26 UWAL Rev 190. In *Van Den Hoek v R* (1986) 161 CLR 158 it was held that the emotion prompting loss of self-control may be fear or panic, rather than anger, in which case the comparative strength of the parties may also be relevant; cp *R v Oakes*, above note 65.
74 *R v McCarthy*, above note 17, p 558.
75 *DPP v Camplin*, above note 29, pp 717-718, per Lord Diplock.
76 *Stingel v R*, above note 12, pp 329-331.
77 *R v Hill*, above note 27, pp 350-351 per Wilson J.
78 *R v Trounson*, above note 24, p 693.
79 *R v Raven* [1982] Crim LR 51; compare *R v Humphreys*, above note 48.
80 *Luc Thiet Thuan v R*, above note 19, pp 1048-1049, per Lord Steyn, dissenting.
81 *DPP v Camplin*, above note 29, p 718, per Lord Diplock; for an acerbic, if paternalistic, response, see Glanville Williams, *Textbook of Criminal Law* (2nd ed), 538-539.
82 *Masciantonio v R*, above note 6, p 586-587, per McHugh J, dissenting.

inconsistent with the objective test imposed by the present law. In some cases gender and race will be relevant to the nature and gravity of the provocation, or the expected speed of reaction, but the idea that a higher or lower level of self-control should apply according to such attributes involves unacceptable discrimination, is probably based on stereotyping or unprovable supposition, and would add even more uncertainty to the jury's task, which is already highly speculative.

X. INTOXICATION

The courts have consistently held that an accused's intoxication is to be ignored when the jury decide whether an ordinary person might have acted as the accused acted,[83] and in both *McGregor*[84] and *McCarthy*[85] intoxication was excluded from "characteristics". As previously mentioned, the reason given was the temporary nature of the condition, although it is suggested that a preferable explanation is that it is a special rule of policy derived from the general principle that intoxication does not itself excuse offending.

In *R v Morhall*[86] Lord Goff favoured this explanation, but had no doubt that on one ground or the other intoxication on the occasion of the killing was "plainly excluded", although an addiction, or even intoxication on a previous occasion, could be taken into account if relevant to the gravity of the provocation. However, the justification for maintaining any such special rule may be doubted.

In many, if not most, cases there will be no need for a special rule to render intoxication irrelevant for the purposes of s 169(2)(a), for its only significant effect will have been to reduce the accused's power of self-control below that of an "ordinary person". If, however, the nature of the provocation was such that intoxication would be expected to significantly affect the gravity or emotional impact of the provocation, or the evidence suggests that it might have influenced the accused's perception of the conduct in question, it could be regarded as a relevant characteristic in the usual way. The only effect of considering it would be to allow it to be a factor supporting reduction of murder to manslaughter. Even in jurisdictions which confine the relevance of voluntary intoxication to crimes of specific intent such a verdict is appropriate if voluntary intoxication might have led to an absence of murderous intent. It may be doubted whether there is any compelling reason for denying intoxication like effect in the context of the objective test in provocation, especially as it may contribute to such a result when the subjective test is considered. Moreover, should the intoxication be involuntary there seems to be no policy reason for ignoring it.

XI. CONCLUSION

The present law of provocation is open to criticism on a number of counts. The question posed by the objective test is speculative and the jury may find it conceptually difficult. It is artificial in isolating one aspect of human personality - the power of self-control - which must be supposed to be unaffected by personal characteristics, although the latter may be relevant to the assessment of how a person with such self-control might experience,

83 *R v McCarthy* [1954] 2 QB 105; but it is relevant to the subjective issue under s 169(2)(b): *R v Barton*, above note 3.

84 Above, note 12, p 1081.

85 Above, note 17, p 558.

86 Above, note 11, pp 99-100; for a principled note on the issue, highlighting the difficulties, see Sir John Smith [1995] Crim LR 891-892.

and therefore might react to, the provocation in question. It may also be unrealistic to expect a jury to ignore some factors in deciding the objective question while having regard to them on the subjective issue.[87] Insofar as the jury succeeds in doing this, the result may sometimes be unfair in that an incapacity for which the accused was not to blame will be discounted.

Such difficulties are unavoidable as long as the law requires an accused's conduct to be assessed by reference to an "ordinary" or "normal" level of self-control. Simple abolition of this is, however, problematic, for the courts have not been able to provide a clear description of what is involved when something "did in fact deprive the offender of the power of self-control". In practice it may mean little more than that for the accused the exercise of self-restraint was a matter of abnormal difficulty.[88] If the defence is retained, but without the present form of objective control, it may well be thought necessary to continue to explicitly require a moral judgment of the jury. So, for example, clause 58 of the Draft Criminal Code for England and Wales does not retain the "ordinary person" test, but still imposes two requirements:

(a) that the offender killed when provoked to lose self-control; and
(b) that the provocation was "in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control".[89]

87 *Luc Thiet Thuan v R*, above note 19, p 1049 per Lord Steyn, dissenting; Orchard, above note 3, p 79. It is suggested that such difficulties will be reduced if the jury are invited to proceed by 3 distinct steps: first, by assessing the nature and seriousness of the provocation to the accused; secondly, by deciding whether the subjective requirement under s 169(2)(b) might have been met; and thirdly, if so, by deciding whether the qualified objective test in s 169(2)(a) might have been satisfied. Compare *R v McCarthy*, above note 17, p 558.

88 HLA Hart, *Punishment and Responsibility* (1968), 153.

89 This clause would give effect to the recommendation of the Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person* (1980) Cmnd 7844. At p 35 the Committee commented: "This formulation has some advantage over the present law in that it omits reference to the entirely notional 'reasonable man', directing the jury's attention instead to what they themselves consider reasonable - which has always been the real question".