THE ANATOMY OF PROVOCATION

I

Section 184 of the Crimes Act 1908 provides:

(1) Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

(2) Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation if the offender acts upon it on the sudden and before there has been time for his passion to cool.

(3) Whether any particular wrongful act or insult amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation he received, are questions of fact.

(4) No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

It is clear from subsections (2) and (4) that it is only in certain circumstances that provocation is sufficient to reduce murder to manslaughter. This article is concerned with subsection (2) and the reference therein to an "ordinary person".

The Crimes Act does not define "provocation" but uses the word as a non-technical term of generally accepted meaning. In s. 184, however, it is used in two distinct ways, first emphasizing one element and then another. In subsection (2) a wrongful act or insult may "be" provocation, and in subsection (1) passion is caused "by" sudden provocation. Here the essence of "provocation" is the external situation to which a person reacts. But subsection (3) refers to "the person provoked" and "the provocation he received", and subsection (4) speaks of giving provocation to others. This usage brings to the fore, not

the factors in the external situation, but its subjective impact. This surreptitious language-change does not occasion any difficulty in applying s. 184, but it shows that provocation is a term for a complex network of ideas in which stimulus and response are intertwined.

II

Every wrongful act or insult does not produce a violently hostile reaction. The act or insult, though "provocative", may not actually have caused severe emotional stress or any stress at all; or the person provoked, though under emotional stress, may have kept his feelings under control. If provocation is to be admitted in mitigation its boundaries need to be defined with regard to both these aspects. It should be possible to plead provocation(1) if the act or insult was an outrage, not if it was a mere discourtesy. It should be possible to plead provocation if a reasonable effort was made to maintain self-control, not if no such attempt was made. Section 184 (2) is a provision touching both these aspects. For policy reasons the common law adopted(2), and the statute maintains, the test of the general standard of behaviour, the probable conduct of the "ordinary person" (or, at common law, the reasonable man). A wrongful act or insult cannot constitute provocation under this section unless it is "of such a nature as to be sufficient to deprive an ordinary person of the power of self-control." On analysis this concentrated formula is found to include reference to all the essential ingredients of provocation: the external situation, the emotional impact, and the response.

Whatever the provoking incident may be, its chief characteristic is the emotional disturbance which it produces. The external situation can be assessed only by reference to the effect it had on the accused and would have had on an ordinary person. In this article it will be considered solely from the point of view of the emotional disturbance.

III

Murder committed under provocation is reduced to manslaughter under the provisions of s. 184 (set out above) if

(a) the accused caused death in the heat of passion caused by sudden provocation which deprived him of self-control, and

(b) the wrongful act or insult by which he was provoked was of such a nature as to be sufficient to deprive an ordinary person of the power of self-control.

The first requirement excludes a defence of provocation where the accused, for any reason at all, was not in fact overwhelmed by passion. To this extent a purely subjective test is used. If he was in fact overwhelmed, provocation may be a defence. But under the second requirement it is a defence only if it would have sufficed to deprive an ordinary person of the power of self-control. Here an objective test is applied.

In most cases the standard so fixed is not in any way uncertain or ambiguous. Opinions will frequently differ on particular facts, but the test to be applied will be understood by every juror. He must consider the provocative nature of the situation. He must estimate the intensity of feeling the provoking conduct would probably have induced if an ordinary person had been subjected to it. He must determine to the best of his ability whether under such stress the normal restraints of an ordinary person would have been suddenly overwhelmed(3).

The question can arise in either of two ways. It may be found, for instance, that the situation was one which would not be likely to produce violent emotions in an ordinary person; or it may be found that by the exercise of reasonable self-control an ordinary person would have been able to restrain the emotional impulses set off by the provocation. The accused is thus to be judged as if he had average powers of self-control and average emotional sensitivity. He is to be made answerable for failing to come up to the standard of self-restraint generally achieved in the community. The jury must disregard his temperamental failings, his defective control and want of balance, even if these arise directly from physical causes beyond his control. This rule of the criminal law has not gone without criticism(4) but at least it is clear and has much to be said in its favour. There is no doubt whatever that this is the established rule at common law in England(5) and under the provisions of s. 184 (2) of the Crimes Act in New Zealand.

IV

Until 1954 it was never suggested that the test of the "ordinary person" or the "reasonable man" meant anything more than this. But in Bedder v. Director of Public Prosecutions, [1954] 1 W.L.R. 1119; [1954] 2 All E.R. 801, the House of Lords announced a new rule, which the Lord Chancellor purported to discover in previous decisions on the subject of provocation. The case was concerned with alleged provocation consisting, in part, of jeering at a man for a physical defect from which he suffered (sexual impotence). The House of Lords held that the physical defect had to be disregarded, and that the jury should consider what effect the words used would have had on a person who suffered from no such defect at all. This decision is astonishing from every point of view. The Lord Chancellor said that the contrary view, submitted by counsel for the appellant, would make nonsense of the test. But examination of the decision of the House leads to a very different conclusion as to who has made nonsense of it.

In Bedder's case the jury were directed that infirmity of body is not material in testing whether there has been provocation sufficient to reduce murder to manslaughter. This direction was contained in a summing-up which the House of Lords held to be "impeccable". The jury are therefore required to determine how an ordinary person with no physical defect would respond if "twitted with infirmity". Having estimated (with such assistance as a summing-up can give them) what degree of sudden passion would ensue in such circumstances the jury can then determine whether the action of the accused was provoked or unprovoked. We can imagine a juror who is sound in mind and limb conscientiously putting to himself the question: "If someone taunted me with bodily infirmity would I lose my self-control?" The juror, knowing the allegation to be false, would perhaps have been mildly annoyed. The accused, on the other hand, may have been deeply hurt by the imputation precisely because it was true. Under the decision in Bedder's case words and actions used in derision and capable of inflaming the emotions of a sufferer are to be judged in the light of similar words and actions addressed to a person to whom they are by their very nature inapplicable. Only if an

ordinary person, healthy and whole, would find them overwhelmingly provocative can they be considered as provocation to the accused. When the juror grasps what it is that he is required to do when the accused has some physical infirmity, he may well wonder whether he has not joined Alice in one of her adventures.

It is not enough that the accused may have exercised self-control as great as that of any ordinary man: he is to suffer, without flinching, the most outrageous provocations, so long as they ridicule infirmities from which the "ordinary", the "reasonable" man is spared. Oh Milton and the legion of the blind, the reasonable man has eyes, and eyes that see!

As F.J. Odgers has pointed out, the jury must, of course, recognize that there are some things that can be done to one man and not to another: "A clean-shaven man cannot be dragged downstairs by his beard; a two-eyed man cannot be enraged by an attempt to gouge out his only eye; a two-legged man cannot be hit on the head with his own artificial limb. These things, all of which have happened . . . can only be done to bearded, one-eyed, or one-legged men"(6). Why should not the reactions of such individuals be judged by the standard of the ordinary individual subject to comparable pain and insult?

Counsel for the appellant in Bedder's case submitted that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed, but must also invest him with the personal physical peculiarities of the accused. The hypothetical reasonable man, it was said, must be confronted with all the same circumstances as the accused, and this cannot fairly be done unless he is also invested with the peculiar characteristics of the accused. These submissions the House rejected. Drawing no distinction between deficient self-control (which cannot be pleaded, and which the test of the "ordinary person" was designed to exclude) and other individual characteristics having nothing to do with defective self-control, the House held that individual physical characteristics in which the accused departed from normal must be ignored.

With respect, this decision is gravely unsatisfactory. The appellant's submission in no way destroys the value of the objective test in its proper sphere, whereas the decision of the House carries the "reasonable man" test into a sphere in which it is inappropriate to attempt to apply it. If someone were to say that the Lord Chancellor knows no law the remark would be insulting and defamatory; would it not also be provocative? Admittedly it would not be provocative to say of the ordinary man that he knows no law, but what of that? The "ordinary man" supplies the test of proper self-control under provocation, but it cannot be applied without first discovering what provocation was received. The public interest does not demand that the jury shut their eyes to the facts, but that they should determine how a person with ordinary control over his emotions would have reacted to a corresponding affront or injury. The accused must have exercised reasonable control under stress, but one cannot intelligently judge whether he did so without attempting to estimate the stress he was under. One has to consider the facts of his situation. But if the test is to be interpreted and applied as in Bedder's case it will operate, in cases such as that, to destroy the defence of provocation completely, regardless of the fact that the accused may have been no more excitable or pugnacious than the trial Judge.

V

If we imagine an ordinary person (i.e. a person with normal self-control) to be confronted with the provocation that the accused received (i.e. subjected to an emotional stress such as he in fact experienced) we can apply the "ordinary person" test in a way that gives full effect to it while enabling us to take into account every relevant circumstance. The House of Lords would have it otherwise. It was held that a physical defect was irrelevant. What would their Lordships say about the education or professional status of the accused, or his language or nationality? What about his age, sex, or mental condition? Does the "ordinary person" have specific characteristics under all these headings(7)?

The characteristics of the accused, whatever they may be, are irrelevant if they merely contributed to a lower

threshold of tolerance. But it is submitted that every individual characteristic is relevant if it is in any other way linked with the question of provocation. To ignore the personal characteristics of the accused is to compel the jury to regard insulting remarks as innocuous. Words which injured the accused because they were false may be true of most people. Words which wounded because they were true may be harmless (because false) when addressed to most people. Words that are highly provocative to some individuals leave most people unmoved simply because the remarks are not applicable to them at all. But the rule in Bedder's case would crush all these distinctions into the dust.

When it was being debated whether a confession of adultery might constitute provocation it did not occur to anyone to enquire: "Is the reasonable man married?" or "Does he speak English?" If an inflammatory expression in Maori were used to a Maori, could this ever constitute provocation? Is it irrelevant that a man who is called a scab is a waterside worker? These absurdities could be multiplied by taking examples of all the possible individual traits and characteristics which may be significant in making a situation provocative. Such questions have never arisen in the past because the "ordinary man" test has not been used to blind the jury to these essential facts.

VI

The harshness of the new doctrine is a further reason why it has little to commend it. An attack on a wounded man or an old person is, under this rule, no more provocative than a similar attack on a person who is perfectly fit and healthy. To insult a man on the score of some impediment or deformity would never - according to Bedder - constitute provocation. When it comes to the criminal trial the law will severely discriminate against the person who suffers from some defect and who in consequence is vulnerable to attacks which could not be made upon others.

VII

The Lord Chancellor in Bedder's case said that no other conclusion was open to their Lordships in view of the recent cases of Mancini (supra) and Holmes, [1946] A.C. 588; [1946]

2 All E.R. 124. Neither of those cases was in any way concerned with the question that arose in Bedder's case, and the passages cited by the Lord Chancellor merely restated the law as it had been understood for a century. They referred to a "reasonable man", the expression long used for a person with normal control over his passions. In those cases it was recognized to be a mitigation if the accused acted while smarting under a provocation so gross that no ordinary person could be expected to endure it. The reiteration of this view (with the exclusion of the unusually excitable or pugnacious person) in Mancini and Holmes did not appear (before Bedder's case) to have the slightest bearing on the relevance of other characteristics of the accused.

For the proposition that such characteristics are relevant the Lord Chancellor said he knew of no authority. But the absence of authority had a significance that does not seem to have been appreciated. The actual circumstances of the accused at the time of the killing would always be taken into account by the jury unless they were directed otherwise. His physical disabilities, for example, would be regarded as relevant, and so would his temperament. There were decisions that required the jury to disregard temperamental factors. There were no decisions similarly directing them to disregard physical characteristics. The proper inference from this should be that there was no rule of exclusion in this respect, and that the jury could give to such evidence the weight to which it was properly entitled.

VIII

The Lord Chancellor adduced other reasons for his decision. Two in particular must be noticed.

It was "plainly illogical", he said, not to recognize an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic. What appears "plainly illogical" at first glance does not appear so on closer examination. The pugnacious temperament which is disregarded necessarily implies a lack of normal self-control. An unusual physical characteristic

does not. Temperamental factors are concerned with the response to a provocative situation; physical factors may be essential ingredients in the provocative situation itself, and may be accompanied by no defect of temperament. If physical characteristics are recognized it is not for the same purpose as temperamental abnormality. Taking them into account involves no departure from the general objective standard of emotional restraint.

The other reason given for the decision was this: the proposed distinction (it was said) ignored the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation is, or may be, itself conditioned by some physical defect. It was said to be too subtle a refinement to say that the temper may be ignored but the physical defect taken into account. But this again overlooks the different purposes for which evidence of physical characteristics may be relevant. If, by reason of physical defect, a person's temper is affected, it is not suggested that evidence of the physical defect is for that reason admissible or in any way relevant under the existing law as to provocation. If it were, the law would indeed be plainly illogical. But the physical defect is relevant (it is submitted) where the provocation was directed at, or aggravated by, that defect. It is relevant if without it one cannot see what provocation was received. The characteristics of the accused, whether they be common or uncommon, may be essential elements of the provocative situation, as much a part of it as the acts or words of the deceased. If so, they should be taken into account, not because a person with such characteristics is permitted any special dispensation whatever, but because only thus can one answer the question, was this more than a reasonably equable person could endure?

IX

Some writers in England (possibly feeling that criticism of a House of Lords decision in England was unprofitable) have simply recorded the decision without comment (8). Some have regarded it as merely restating what had been laid down in previous cases(9). Some have criticized it on grounds other than those discussed in this

article(10). But the Editor of the Law Quarterly Review criticized the decision from substantially the same standpoint as that adopted above. In an editorial note(11) this passage appears:

> It was argued that a peculiar infirmity of the body might be a circumstance which effected the degree of provocation. Thus, it might be said, that a physical defect or illness, e.g. gout, which merely increased the degree of irritability or bad temper cannot be taken into consideration, but that a physical defect which increases the provocation by making it more insulting is of a different character. Their Lordships held that this distinction could not be accepted . . . With the greatest respect, it may be suggested that a jury might reach the conclusion that an act which was not offensive to an ordinary man would be peculiarly offensive to a man who suffered from a special physical defect. The Lord Chancellor said (at 1123) that: "It would be plainly illogical not to recognize an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another." With the greatest respect, it may be doubtful whether this is a question of logic in the ordinary sense of that term, for there is no conflict in holding that a physical defect, in so far as it affects the prisoner's temper and character, is immaterial, but that it is material in so far as it affects the nature of the provocation. Perhaps the following illustration will make this clear. If an ordinary man receives a slight slap on the back it cannot be said that this would be such provocation as would reduce murder to manslaughter, and that therefore an accused would not be able to argue that he suffered from a peculiarly violent temper. On the other hand a slight slap on the back of a man who was a hunchback might be so peculiarly offensive that it could be argued that in the circumstances of the case it constituted provocation. The question therefore would be whether or not a reasonable man who was a hunchback would have regarded such a slap as extreme provocation. The test

would still be objective, viz., the conduct of a reasonable man, but it would include in the determination of what was reasonable the physical defects of the individual in the particular case under consideration.

X

Is the decision in Bedder v. Director of Public Prosecutions law in New Zealand? A reasoned solution to this difficult question would take at least as many pages again, and in the end it would be found that no positive answer could be given.

In support of the view that the decision does apply in New Zealand the principal argument would be that it is a final and authoritative exposition of the common law; that the Crimes Act codified the common law (with certain exceptions not here relevant)(12); and that the exposition by the House of Lords is therefore the appropriate interpretation of s. 184 of the Crimes Act 1908.

The contrary contention is based on the view that this is really a new rule, which was not part of the common law in 1893 (or at all events was not then understood to be part of the common law) and consequently was not embodied in the Criminal Code Act. The physical disabilities of the prisoner had been taken into account in Hopkins (1866), 31 J.P. 105, 10 Cox C.C. 229, and no case before 1954 had thrown any doubt on the propriety of doing so. In Jackson, [1918] N.Z. L.R. 363; [1918] G.L.R. 11, Chapman J. said that in order to understand the nature of the act relied on as provocation the family history of the accused could properly be considered. It would certainly have been difficult for the jury if they had had to refer to the family history of the reasonable man. There is nothing in the wording of s. 184 (2) to make it necessary to follow Bedder's case.

In Jackson (supra), dealing with the defence of provocation where a deadly weapon had been used by the accused, Chapman J. said that although the Courts in England had laid down a general rule on that question the Legislature in New Zealand (by s. 184 (2)) had confided to the jury the determination of the whole question of the sufficiency of

provocation by wrongful act or insult. For the same reason it should be for the jury, unfettered by legal fictions invented in England, to determine the sufficiency of provocation in the light of the facts as a whole (excluding only the temperamental idiosyncrasies of the accused).

Bedder's case, being a decision of the House of Lords on a question of common law, is not automatically applicable in New Zealand(13) and it is submitted that there are strong reasons for declining to regard it as decisive or even persuasive on the correct interpretation of s. 184 of the Crimes Act. To summarize, it is an unsatisfactory decision because the hypothetical question which it poses for the jury is either absurd or misleading; it ignores adequate self-control on the part of the accused; it fails to distinguish between deficient self-control and other characteristics unrelated to self-control; it carries the "ordinary man" test into a sphere in which it is inappropriate and unnecessary; it excludes from consideration the physical characteristics of the accused although his age, sex, marital condition and other characteristics are relevant; Mancini and Holmes did not establish the rule which the Lord Chancellor ascribed to them; the absence of earlier decisions on the question tends to show that such evidence had hitherto been taken into consideration; there was a failure to distinguish between the purposes for which evidence of temperament and evidence of other characteristics may be tendered; the rule is harsh and arbitrary; no useful purpose is achieved by the rule, which does nothing to afford protection to human life.

It would be well nevertheless if s. 184 were amended to put it beyond doubt that this development of the common law is not part of the law of New Zealand.

I. D. CAMPBELL

---

(1) For simplicity of exposition provocation will be discussed in terms of a possible defence. But it must be remembered that it is for the prosecution in a murder case to satisfy the jury that the killing was unprovoked. There is no onus on the accused to prove that it was provoked.

This is of vital importance where the evidence is inconclusive. Unless the jury are satisfied that the killing was unprovoked the verdict should be manslaughter: R. v. Prince 28 Cr. App. R. 60; [1941] 3 All E.R. 37.

(2) The first unequivocal enunciation of the principle seems to have been in R. v. Welsh (1869), 11 Cox C.C. 336.

(3) The statute refers to the "ordinary person". This formulation of the rule is identical, in effect, with a rule adopting the standard of the "reasonable man". Under provocation, emotion rather than reason dictates conduct. A burst of anger suddenly takes charge. To deny that this can happen to the "reasonable man" is to deny that he is a man. (But for a different view see Dr Glanville Williams, "Provocation and the Reasonable Man" [1954] Crim. L.R. 740.)

(4) See the examination of this subject in the Report of the Royal Commission on Capital Punishment, 1953 (Cmd. 8932), paras. 124-153.

(5) E.g., Mancini v. Director of Public Prosecutions, [1942] A.C. 1; [1941] 3 All E.R. 272.

(6) [1954] Camb.L.J. 165.

(7) In Kwaku Mensah v. R., [1946] A.C. 83, 93, the Privy Council, giving its advice on an appeal from the Gold Coast, held that the tests had to be applied to "the ordinary West African villager." The "ordinary person" was thus endowed with the appropriate characteristics, i.e., those of the accused.

(8) See, for example, 220 L.T. 78; 105 L.J. 404.

(9) Thus F.J. Odgers, in the article previously cited, says that the jury was directed in the classical formula of the "reasonable man" and that no other direction could have been given in view of earlier decisions of the House of Lords. The decision in Bedder's case he describes as "no doubt inevitable". A.B. Harvey Q.C. in (1955) 33 Can.B.R. 93 thinks there is nothing in the decision with which any

court in Canada would be likely to disagree. J.E. Hall Williams in (1954) 17 Mod.L.R. 457 finds "nothing really new" in the speech of Lord Simonds.

(10) See the articles by Dr Glanville Williams and J.LL.J. Edwards respectively in [1954] Crim.L.R. 740, 898. The latter writer says (at 905): ". . . it is interesting to conjecture whether the law would have been developed along the same lines if the courts had been concerned . . . with cases in which the physical peculiarity of the accused had been, say, the absence of a limb, or blindness or a hunchback. Supposing an unfortunate person suffering from such a deformity had been subjected to cruel and continuous taunts until he finally retaliated with fatal results, can it be said with certainty that the courts would have directed the jury to disregard the accused person's physical abnormality?"

(11) 70 L.Q.R. 442, by Sir Arthur Goodhart.

(12) On the relationship between statutory codes and the common law rules on provocation see R. v. Jackson, [1918] N.Z.L.R. 363, [1918] G.L.R. 11; R. v. Sabri Isa, [1952] S.R. (Q.) 269.

(13) On the unsettled question of the effect in New Zealand of a decision of the House of Lords on a question of common law where the New Zealand law is not statutory see Cooke, "The Supreme Tribunal of the British Commonwealth?" (1956) 32 N.Z.L.J. 233; Davis, "Judicial Precedent", ibid. 296. On the corresponding question where the New Zealand law has been codified cf. Iliffe, "Provocation in Homicide and Assault Cases: The Common Law and the Criminal Codes" (1954) 3 Int. & Comp.L.Q. 23. Iliffe suggests that to hold that a decision of the House of Lords is authoritative means that a House of Lords decision can alter or interpret a Dominion statute. (But in suggesting that alteration of a statute may be involved he overstates his case.)