

ISLA MIRREN DOIDGE

**THE IMPLICIT LEGITIMISATION OF
VIOLENCE AGAINST WOMEN IN NEW
ZEALAND HOMICIDE CASES: DID
ABOLISHING PROVOCATION ADDRESS
PUBLIC CONCERNS?**

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The Implicit Legitimation of Violence against Women in New Zealand Homicide Cases: Did Abolishing Provocation Address Public Concerns?

The partial defence of provocation was inappropriately used by abusive men that killed their partners for challenging them. This led to concerns that provocation was implicitly legitimising violent reactions toward women who were perceived to have challenged their male partner's sexuality. Despite the abolition of provocation, this paper finds a continuation of the concerns that arose from the use of provocation in post-abolition homicide sentencing decisions. Specifically, the recognition of perceived lower culpability of men that had killed their female partners in the form of manslaughter verdicts, or through inappropriate mitigating features, continues to be an issue. For this reason, I argue that establishing the Sentencing Council, as recommended by the Law Commission, is the best way to address these concerns.

Key words: provocation, abolition, sentencing, homicide, abnormal jealousy, narcissism

I Introduction

In 2008 Clayton Weatherston killed his ex-partner Sophie Elliot by brutally stabbing her 216 times and then mutilating her corpse.¹ Weatherston claimed that Elliot had lunged at him with scissors and, against the history of their tumultuous relationship, he snapped.² At trial, Weatherston argued—using the partial defence of provocation—that he should be convicted of manslaughter rather than murder because Elliot had provoked him. Thankfully, the jury did not accept that Weatherston had been provoked by Elliot and he was convicted of murder.³ The case did, however, result in mass public concern about

¹ *R v Weatherston* CRI 2008-021-137, 15 September 2009 at [9].

² At [10].

³ At [10].

Weatherston's ability to raise the partial defence of provocation at trial.⁴ In particular, provocation was seen to allow Weatherston to unfairly denigrate Elliot, enabling him to present degrading evidence to move the focus of the trial onto the victim rather than the offender.⁵ Through the use of provocation Elliot became the villain in the story of her own murder—the argument essentially being that she was to blame for her own death because she challenged her male ex-partner.

Provocation as a partial defence functioned by allowing the defence to simply raise evidence indicating that the victim's actions were sufficiently provocative that they would deny a person of ordinary self-control of that self-control.⁶ It must be this provocative action that caused the offender to kill the victim.⁷ The jury then had to consider whether the prosecution had disproved the availability of provocation as a partial defence beyond reasonable doubt. If the prosecution was unable to do this, the partial defence would reduce the murder charge to one of manslaughter, reflecting the lower culpability of the offender.⁸

On two separate occasions, the Law Commission argued that provocation was irreparably broken and should be abolished.⁹ The disproportionate use of the defence to protect heterosexual men was noted by the Law Commission in 2007;¹⁰ a concern that echoed criticisms made by academics in the early 1990s.¹¹ Academics had been troubled by how provocation seemed to frame female victims killed by their male partners as authors of their own tragedy.¹² Provocation was used more often in defence of men who killed their female

⁴ Edward Gay "Partial defence of provocation set to be dumped" *The New Zealand Herald* (online ed, Auckland, 23 July 2009).

⁵ Gay, above n 4.

⁶ Crimes Act 1961, s 169(2)(a).

⁷ Crimes Act, s 169(2)(b).

⁸ Crimes Act, s 169(1).

⁹ New Zealand Law Commission *The Partial Defence of Provocation* (NZLC R98, Wellington, 2007) at [183]; New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, Wellington, 2001) at [120].

¹⁰ *The Partial Defence of Provocation*, above n 9, at [96].

¹¹ Elisabeth McDonald "Provocation, Sexuality and the Actions of 'Thoroughly Decent men'" (1993) 9(2) *Women's Studies Journal* 126.

¹² At 130.

partners, than it was used to defend battered women who killed their abusive male partners.¹³

The outcry following the *Weatherston* case re-emphasised many of the criticisms made by the Law Commission and other academics. Parliament took notice of these concerns and began moving to abolish provocation.¹⁴ In 2009 provocation was abolished by the Crimes (Provocation Repeal) Act. It was hoped that abolishing provocation would fix many of the concerns surrounding the defence and its problematic use by male offenders against their female partners.

I argue that simply abolishing provocation as a partial defence has not had the intended effect of quelling some the problematic gender bias in homicide cases. I demonstrate that inappropriate mitigating features—such as narcissism or abnormal jealousy—are still being used and imply that the victim was in part responsible for triggering their jealous partner into killing them. Furthermore, I show that in several cases, following the abolition of provocation, arguably inappropriate manslaughter verdicts have resulted when juries have attempted to partially protect sympathetic male offenders whose sexuality has been challenged by their less sympathetic female partner.

To begin this discussion, in Part II of this paper I consider some of the numerous criticisms of the partial defence of provocation, focusing particular attention on those raised by the Law Commission in their 2007 Report *The Partial Defence of Provocation* (“the Provocation Report”). I use these criticisms to illustrate why provocation was eventually abolished. In Part III I narrow my focus to criticisms of provocation concerning female victims killed by their abusive male partners. Using these criticisms, I highlight how the bias favouring heterosexual men in homicide cases was reinforced by provocation.

In Part IV I review potential solutions suggested by the Law Commission and the Family Violence Death Review Committee (“FVDRC”) to address the

¹³ *The Partial Defence of Provocation*, above n 9, at [121].

¹⁴ “Key Approves Scrapping Provocation” *Otago Daily Times* (online ed, Dunedin, 23 July 2009).

inevitable gap left by the abolition of provocation. In particular, I focus on the Law Commission's recommendation that a Sentencing Council be established to help guide sentencing judges and ensure a consistent approach to sentencing.¹⁵

Provocation did not completely disappear from the law when it was abolished, as it was recognised that in appropriate cases provocation might still be a relevant consideration at sentencing. In Part V I explore the shift of provocation from an issue considered by a jury at trial, to one considered at sentencing by a judge. I discuss how provocation is relevant at the sentencing stage of a murder case as a mitigating factor, and/or as a factor relevant to rebuttal of the presumption of life imprisonment.

I argue in Part VI of this paper that the troubling pattern of legitimised violence toward women killed by their male partners remains a problem at sentencing, despite the abolition of provocation. To expose this pattern I compare six representative homicide sentencing cases; two of which occurred before and four of which occurred after the abolition of provocation. Specifically, these cases all involved situations where a man killed their female partner or ex-partner after she had challenged him by either leaving him or insinuating she had been unfaithful. Using this analysis, I show that there has been no substantive change in the sentencing of these cases, despite the abolition of provocation. These results support that simply abolishing provocation as a partial defence only partly alleviated the problems in cases where female victims had been killed by their male ex-partner or partner.

Based on the lack of change revealed through my case comparisons, in Part VII I conclude that adopting the Law Commission's recommendation to introduce a Sentencing Council could play a vital role in helping to address some of the concerns raised in Part VI. In deciding not to establish the Sentencing Council, Parliament has failed to recognise and take action against the public concerns emphasised in *Weatherston*. Through this lack of action the problematic gender bias seen in homicide sentencing remains, allowing the legitimisation of

¹⁵ *The Partial Defence of Provocation*, above n 9, at [205].

violence toward women when they are perceived to have challenged their male partner or ex-partner.

II The Partial Defence of Provocation and the Rationale for its Abolition

In New Zealand provocation had been codified since 1893.¹⁶ However, most recently it was contained in s 169 of the Crimes Act 1961. Prior to its abolition, s 169 allowed the reduction of a charge from one of murder to manslaughter where the actions of the victim were deemed to be sufficiently provocative that they would deny a person of ordinary self-control of that self-control, all other circumstances remaining the same, and that it was this provocative action that caused them to kill the victim. For provocation to be introduced to the jury in a trial the judge had to decide as a matter of law whether there was sufficient evidence for provocation to be considered. The jury then considered whether the prosecution had disproved the availability of provocation as a partial defence beyond reasonable doubt. If the prosecution was unable to do this, the partial defence prevailed and manslaughter would result as the verdict.

In New Zealand provocation was a defence that primarily favoured heterosexual men.¹⁷ Provocation was very rarely relied on by woman—in part because woman commit fewer homicides—meaning that as a defence it disproportionately benefitted men.¹⁸ In addition, provocation was pled in circumstances in which a man perceived that their sexuality had been challenged.¹⁹ The Law Commission had reflected concerns about the continued existence of provocation as a partial defence as well, reviewing provocation twice since the year 2000, and in both cases calling for its abolition.²⁰ In the

¹⁶ Criminal Code Act 1893, s 65.

¹⁷ *The Partial Defence of Provocation*, above n 9, at [121].

¹⁸ McDonald, above n 11, at 127.

¹⁹ At 128.

²⁰ *The Partial Defence of Provocation*, above n 9, at [183]; *Some Criminal Defences with Particular Reference to Battered Defendants*, above n 9, at [120].

Provocation Report, the Law Commission gave four key reasons that helped establish why provocation was irreparably flawed.²¹

The first criticism was that provocation distinguished between an offender's self-control (which was assessed objectively), and an offender's perception of the gravity of the provocation (which was assessed subjectively).²² This objective/subjective test allowed for characteristics that affected the perceived severity of a provocative action to be considered, but not characteristics that could alter a person's self-control. Provocation as a defence was meant to recognise human frailty as a factor that lowered a person's culpability.²³ Therefore it seemed illogical that an offender was unable to raise uncontrollable characteristics that lowered their capacity for self-control. Problematically, however, recognising characteristics that modulated self-control would cause provocation to lose the normative objective self-control aspect of the defence that Parliament was attempting to achieve in s 169.²⁴ In other words, no real solution could be forged to fix the objective/subjective split.

Secondly, the foundational assumption made by the partial defence that it was, in fact, possible to lose self-control was questioned.²⁵ As a phenomenon there is still debate surrounding what factors influence self-control and whether self-control truly exists. For example, it is currently unclear whether self-control is simply a biophysical response (an automatic/uncontrollable response) or is in fact moderated by reason (a more controlled/rational response).²⁶ This introduces more complicating factors around how fair or logical it is to consider self-control objectively as it is impossible for the law to determine whether the offender had any control over their response.

²¹ At [78].

²² At [83].

²³ Kate Fitz-Gibbon *Homicide Law Reform, Gender and the Provocation Defence a Comparative Perspective* (Palgrave Macmillan, England, 2014) at 8.

²⁴ *The Partial Defence of Provocation*, above n 9, at [86].

²⁵ At [88].

²⁶ At [88].

Thirdly, it was noted that killing a person in response to a provocative action was the response of an extraordinary, rather than ordinary person.²⁷ Comparing a killer's level of self-control against that of an ordinary person does not make sense, because an ordinary person would not lose their self-control to such an extent that they killed another person. Furthermore, a violent or homicidal reaction to a perceived provocation is not a reaction that either Parliament or society should want to recognise as less culpable.

Finally, the Provocation Report recognised that the partial defence was biased in favour of heterosexual men.²⁸ When provocation was pleaded by a man that killed a woman, often there was a romantic or sexual relationship between the victim and the offender, and some challenge had been raised to the offender's sexuality.²⁹ Furthermore provocation had been successfully pled in several cases where homosexual men had been killed by heterosexual men for making a non-violent sexual advance.³⁰ In addition, even if the defence was not accepted by the jury, the introduction of provocation still supported the notion that violence was an appropriate response in cases where a man's sexuality had been challenged by their partner.³¹

Provocation as a partial defence primarily focused on the frailty of humanity, and the recognition that in some circumstances the provocative actions of the victim were sufficiently serious to lower the culpability of the offender.³² The primary justification for allowing a reduced charge in these circumstances was that historically murder had been punishable by death or, more recently, life imprisonment, and such punishments would be too harsh in these cases.³³

The Sentencing Act 2002 put this fear to rest, because it changed what had historically been a mandatory life sentence for murder to a presumption of life

²⁷ At [89].

²⁸ At [96].

²⁹ McDonald, above n 11, at 127.

³⁰ *The Partial Defence of Provocation*, above n 9, at [97].

³¹ McDonald, above n 11, at 128.

³² Fitz-Gibbon, above n 23, at 8.

³³ At 8.

imprisonment. Section 102 provides that if it can be shown that a life sentence would be considered “manifestly unjust” in the circumstances, then the presumption is rebutted and a lower sentence may be applied.³⁴ Section 102 therefore made it possible for the recognition of lower culpability in cases where the provocative actions of the victim might be relevant. This wider discretion reduced the need for the provocation defence, as the inability to apply a sentence lower than life was no longer a concern.

Provocation rose in public infamy for its treatment of female victims during 2009 when Clayton Weatherston was being tried for the murder of Sophie Elliot.³⁵ This was not the first time concerns had arisen about how provocation legitimised violence by men against their female partners. In the Part III below I further discuss the issues faced in cases where a male offender killed their female partner or ex-partner after their sexuality had been challenged.

III Problems Arising from the Use of Provocation in Cases Involving Challenges to Male Sexuality

Provocation in part began as a defence of the scorned husband.³⁶ Men would claim that their wives or ex-wives had somehow provoked their own murder through actions that were perceived to be threatening.³⁷ In fact, this threat was often not a physical one, but rather a challenge to male sexuality through perceived or real infidelity, threats to leave, or insults.³⁸

When provocation was left to juries in cases of sexual jealousy, it reduced women to possessory objects by normalising violent reactions to non-violent romantic or sexual contexts that were perceived as threatening by the man in question.³⁹ In the context of domestic homicides, provocation ultimately defended a man’s ‘right’ to his female partner’s body—either by denying her the right to

³⁴ Sentencing Act 2002, s 102.

³⁵ Gay, above n 4.

³⁶ McDonald, above n 11, at 128.

³⁷ At 128.

³⁸ At 128.

³⁹ At 135.

leave the relationship, or to sleep with others if she chose. Provocation essentially legitimised a violent reaction when the victim was seen to be less worthy of respect. This was sometimes reflected in the language used by judges when discussing possible infidelity. Emphasis was often placed on whether there was a legitimate claim of unfaithfulness—the implication being that victims who had been unfaithful were more ‘deserving’ of the violence inflicted upon them.⁴⁰ Indeed, because provocation compared the offender’s self-control against that of the ordinary person it implicitly prescribed appropriate ‘non-triggering’ behaviour for women to adhere to if they wished to ensure their safety from their male partners.⁴¹

As a partial defence, provocation was only available when the offender was accused of murder. This was problematic because normally the only witnesses to the events leading up to the victim’s death were the victim themselves and the offender. Because the offender was required to present evidence of the provocative actions of the victim, the lack of corroborating witnesses allowed the offender to tell his side of the story without contradiction.⁴² This could mean that ultimately a possibly untrue, and negative image of the victim could remain described in the case—sometimes even transferring through into sentencing and the public record.⁴³

Provocation also tended to move the focus of the trial from the guilt of the offender to the behaviour of the victim. This could lead to evidence of possible sexual betrayal by the victim being emphasised, while evidence of the victim attempting to leave the offender was lost.⁴⁴ This was problematic because it painted the victim as a villain, while taking the spotlight off the offender’s controlling and violent behaviour.⁴⁵

⁴⁰ At 131.

⁴¹ Jenny Morgan, “Critique and Comment: Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them” (1997) 21 MULR 237 at 274.

⁴² At 242.

⁴³ At 247.

⁴⁴ At 248.

⁴⁵ At 248.

I argue that although the partial defence of provocation has been abolished, juries and Judges are still attempting to recognise the perceived lower culpability of offenders in cases where either a less ‘deserving’ victim was killed, or where the male offender was particularly sympathetic. This shows a continuing underlying bias protecting or favouring male sexuality in homicide cases, beyond provocation as a partial defence. I argue that provocation was simply a symptom of a larger problem surrounding the perception of the place of a woman in a relationship with a man, and how the law systemically reduces women in these cases to possessory objects.

When provocation was abolished, it was hoped that many of these issues would disappear with the defence. Provocation, however, was to remain in the law as a consideration at sentencing. In Part IV I discuss the recommendation that the Law Commission made to help ensure that provocation transitioned smoothly from a partial defence to a sentencing consideration.

IV Potential Solutions to Address the Gap Left by the Abolition of Provocation

The Provocation Report raised concerns about the possibility that offenders who would previously have succeeded in pleading the defence of provocation would face harsher sentences following the repeal of s 169.⁴⁶ To ensure fairness and consistency in the sentence length of murder cases that involved an element of provocation, the Law Commission recommended that the Sentencing Council and corresponding Sentencing Guidelines should be created.⁴⁷

The Sentencing Council was meant to be an independent statutory body established by the Sentencing Council Act 2007. Its function would have been to help develop sentencing policy. The Council would have comprised ten members:

⁴⁶ *The Partial Defence of Provocation*, above n 9, at [195].

⁴⁷ At [205].

four judges, the head of the parole board, and five non-judicial members with other relevant expertise.⁴⁸

One of the main functions of the Council would have been to help draft sentencing guidelines. The Law Commission stated in their 2006 *Sentencing Guidelines and Parole Reform* Report that sentencing guidelines were meant to be able to help guide judges in both the kind and the length of the sentence to be imposed.⁴⁹ Courts would have to follow any relevant guidelines, unless doing so would not be in the interests of justice.⁵⁰ This would ensure consistency between most sentencing cases, while still allowing for a degree of flexibility in exceptional cases.

Each sentencing guideline would have been made up of a combination of both numerical and narrative sections. The numerical elements of the guidelines were to be prescriptive sections that were detailed and presented possible penalties depending on the nature of the offence or action.⁵¹ The narrative elements of the guidelines would focus less on the punishment, and give more detail on the purpose or rationale behind penalties or offences. This would have allowed for balance between a consistent and flexible approach.⁵²

The Law Commission in the Provocation Report states that one way to ensure that provocation would still be considered a mitigating feature in appropriate cases would be to draft a sentencing guideline.⁵³ The guidelines were meant to be more detailed than legislation, therefore allowing for an appropriate way to determine and provide guidance on circumstances where the presumption in favour of life imprisonment should be rebutted, or where provocation should be considered a mitigating feature.⁵⁴

⁴⁸ New Zealand Law Commission *Sentencing Guidelines and Parole Reform*, (NZLC R94, Wellington, 2006) at [84].

⁴⁹ At [75].

⁵⁰ At [116].

⁵¹ At [95].

⁵² At [95].

⁵³ *The Partial Defence of Provocation*, above n 9, at [208].

⁵⁴ At [206].

This was in part a response to the concern that provocation could cut both ways when battered women were involved. When a battered woman was the killer, provocation could be helpful in showing lower culpability, but when a battered woman was the victim, provocation being pled by their abuser could implicitly devalue their loss of life.⁵⁵ Pre-abolition provocation simply classified any successful cases as less culpable by reducing the charge to one of manslaughter. A sentencing guideline would be more nuanced, allowing for shades of culpability to be recognised along with descriptions of issues that might arise in more complex cases. Therefore, a sentencing guideline would hopefully help to ensure that victims of domestic violence were not further victimised by an arguably biased sentencing system.

The creation of sentencing guidelines would be done in consultation with the public.⁵⁶ This would have allowed for both public discussion and education on what should be included in each sentencing guideline. In relation to provocation this would have meant that the public would be involved in guiding what forms of conduct could reduce the culpability of the offender. This would hopefully mean that in cases where the deceased was a victim of family violence, the public would reject the relevance of both the conduct of the victim and characteristics like narcissism or jealousy as mitigating features.

Implementing sentencing guidelines in the way suggested by the Law Commission was hoped to provide greater protection for victims of family violence as both defendants and victims of homicide. However, commentators have argued in response that simply allowing greater discretion in the length of sentences in murder cases is not sufficient to recognise the lower culpability of defendants that kill their abuser.⁵⁷ This is because the stigma attached to murder remains when a partial defence like provocation is not available to reduce the charge to manslaughter.⁵⁸ As well as this, considering provocation at sentencing

⁵⁵ At [207].

⁵⁶ At [207].

⁵⁷ Julia Tolmie “Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation” (2005) NZ Law Review 25 at 27.

⁵⁸ At 29.

rather than trial takes the decision away from the jury making it seem like a more secretive and private process; it is harder to appeal and more difficult to identify injustices.⁵⁹

Supporting these arguments the Family Violence Death Review Committee (FVDRC) issued their Fourth Annual Report in 2014 that raised concerns about the possible lengthy sentences that victims of family violence would face after they killed their primary abuser.⁶⁰ The 2014 Report argued that because self-defence is narrowly applied in New Zealand many of these defendants would be unable to rely on the defence.⁶¹ In addition, the abolition of provocation left victims of family violence unable to reduce a murder charge to one of manslaughter.⁶² Finally, even if the defendant is able to rebut the presumption of life in prison, they are still likely to face a prison sentence longer than if they had been convicted of manslaughter.⁶³

The FVDRC made three main recommendations about how the law should be changed to support victims of domestic violence that kill their primary abuser. The first was that s 48 of the Crimes Act should be modified so that the test for self-defence is accessible to defendants that are victims of domestic violence that kill their primary abuser. The second was that a new partial defence akin to provocation that is only available to victims of family violence, rather than the abuser be created. Finally the FVDRC suggested that the Government should form an advisory group of relevant experts to help guide their discussions on how to remedy the gap left by the abolition of provocation.⁶⁴

Following the publication of the FVDRC's recommendations the Law Commission are reconsidering if the law appropriately protects victims of family

⁵⁹ At 36.

⁶⁰ Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission, June 2014) at 102.

⁶¹ At 103.

⁶² At 121.

⁶³ At 121.

⁶⁴ At 104.

violence that kill their abusive partners now that provocation has been repealed.⁶⁵ The Law Commission is specifically looking at whether the test for self-defence should be modified, whether a new partial defence is necessary, and whether current sentencing practices sufficiently protect victims of domestic violence that kill their abusers.

V Provocation as a Sentencing Consideration in Murder and Manslaughter Cases

Following the abolition of provocation the Law Commission's recommendation to establish a Sentencing Council was never fully implemented. This left the judiciary to establish how provocation would be treated at the sentencing stage of a trial.

Historically in New Zealand a murder conviction required that the offender be sentenced to life in prison, with variation in the length of the minimum non-parole period being allowed to recognise the mitigating and aggravating features of the crime. However, from 2002 onward s 102 of the Sentencing Act allowed for a sentence less than life imprisonment if life in prison would be considered "manifestly unjust". The Court of Appeal in *R v Rapira* accepted that the "manifestly unjust" standard would only be met in exceptional cases and that it was a high threshold.⁶⁶

The Court of Appeal held in *Hamidzadeh v R* that an offender's justified loss of control could be taken into account when determining whether the offender had displaced the presumption in favour of life imprisonment by meeting the "manifestly unjust" threshold.⁶⁷ This was because the Court recognised that the general purposes of sentencing were still relevant to murder cases, even though there was a more restrictive sentencing regime. In particular, the Court found s

⁶⁵ New Zealand Law Commission *Victims of Family Violence that Commit Homicide* (forthcoming).

⁶⁶ *R v Rapira* [2003] 3 NZLR 794 at [121].

⁶⁷ *Hamidzadeh v R* [2012] NZCA 550 at [59].

8(a) of the Sentencing Act 2002 to be relevant.⁶⁸ This section states that the degree of culpability of the offender impacts the gravity of the offence from a sentencing perspective. The Court similarly accepted that a loss of control in circumstances where the loss of control was justified could lower the culpability of an offender so that it would be manifestly unjust to impose a life sentence.⁶⁹

Even if s 102 is not satisfied by the defendant the conduct of the victim can still be relevant under s 9(2)(c) as a mitigating feature when determining the minimum non-parole period the offender will face.⁷⁰ More recently s 9(2)(c) has been interpreted in *Wairau v R* as not being the same objective/subjective test used under s 169.⁷¹ Rather a sudden and justified loss of control might make an offender less culpable than an offender who was calculated and controlled in their response.⁷²

Possible factors that would help establish whether a sufficiently provocative action has occurred were set out in *Hamidzadeh*. These would help determine whether the “manifestly unjust” threshold of s 102 has been met, or to what extent the provocative action lowered the culpability of the offender as a mitigating factor under s 9(2)(c). The factors included the nature, duration, and gravity of the provocative conduct involved; whether the response was proportionate in reference to the nature, duration and gravity of the provocation; whether the provocation is/was an operative cause of the offender’s response; and whether in all circumstances the provocative conduct was sufficient to reduce the offender’s culpability.⁷³ It was noted that mental/intellectual impairment, previous physical/sexual abuse, or a fear-based rather than anger-based reaction may also impact the offender’s overall level of culpability.⁷⁴ The Court stated that the assessment of provocation at sentencing must be a fact-dependent investigation.⁷⁵

⁶⁸ At [53].

⁶⁹ At [56].

⁷⁰ At [54].

⁷¹ *Wairau v R* [2015] NZCA 215 at [29].

⁷² *Hamidzadeh v R*, above n 67, at [60].

⁷³ At [62].

⁷⁴ At [63].

⁷⁵ At [62].

These factors were explicitly stated as not being conclusive, as the “manifestly unjust” threshold must remain flexible.⁷⁶

The Court stated that although a provocative action of the victim could be taken into account when considering if it would be manifestly unjust to impose a life sentence, it was not an easy standard to reach.⁷⁷ Rather, it was only in exceptional cases that the conduct of the victim justified a sentence less than life. In *Wairau v R* it was stressed that the provocative conduct of the victim does not justify a violent result, rather the question was whether it reduced the culpability of the offender.⁷⁸ In addition, a transfer of affection by itself was not sufficient to mitigate offending, unless in exceptional circumstances.⁷⁹

The high level of provocation required to reach the “manifestly unjust” threshold under s 102 of the Crimes Act should ideally stop a sentence lower than life resulting in cases where male offender killed their female partner after a challenge his sexuality. Unfortunately, mitigating factors such as narcissism and jealousy are not directly related to the conduct of the victim and therefore do not fall within *Hamidzadeh*. Furthermore, these factors only apply to sentencing judges—juries are still able to recognise the perceived lower culpability of an offender through a manslaughter verdict. In part VI I use a pre- and post-abolition homicide case comparison to help establish that a problematic gender bias still exists within homicide cases, despite the abolition of provocation.

VI Case Comparisons Before and After the Abolition of Provocation

A Challenges to Male Sexuality Reducing an Offender’s Culpability in Manslaughter Verdicts

The partial defence of provocation worked by reducing a murder charge to one of manslaughter when the prosecution could not negate the contention that the

⁷⁶ At [63].

⁷⁷ At [67].

⁷⁸ *Wairau v R*, above n 71, at [31].

⁷⁹ At [39].

offender had been provoked. Historically a challenge to a man's sexuality—such as a threat of separation or the perception of an affair—frequently formed the basis for a plea of provocation.⁸⁰ Through this mechanism, provocation protected the 'right' of a man to defend his male honour by inflicting legitimised violence against the source of his provocation.

I argue that following the abolition of provocation, juries and sentencing judges in manslaughter cases continue to inappropriately protect the construct of male sexuality when it is perceived to have been threatened. To support this argument I analyse one pre-abolition and two post-abolition manslaughter cases in which a female partner has challenged her male partner's sexuality, either by leaving him, or insinuating she has been unfaithful. I will show that manslaughter was arguably an inappropriate verdict in all three cases, and that simply abolishing provocation has not quelled concerns about the bias toward heterosexual men in homicide cases.

R v Rerekura is an example of a case in which provocation was accepted as a partial defence resulting in a manslaughter rather than murder conviction.⁸¹ Rerekura did occur 27 years ago, but is still useful as an example of a successful provocation defence. In February 1987 Rerekura retrieved a shotgun from his car and killed his partner, Carol Ahipere, after he claimed that she told him she no longer loved him and could get a man to have sex with her any time she wanted.⁸² Rerekura was charged with and tried for the murder of Ahipere. At trial Rerekura raised the partial defence of provocation, claiming that Ahipere's alleged comment about being able to get other men enraged him to the point that a person of ordinary self-control would lose that self-control. The jury accepted that Rerekura had been provoked and he received only six years imprisonment for manslaughter.⁸³

⁸⁰ McDonald, above n 11, at 127.

⁸¹ *R v Rerekura* CA361/87, 21 June 1988 at 1.

⁸² At 2.

⁸³ At 3.

McMullin J describes how Rerekura loved his now deceased partner very much and that he has deprived himself of his partner's company.⁸⁴ These statements paint Ahipere as belonging to Rerekura; that her loss of life was a punishment in of itself to Rerekura even though Ahipere was the one that died. This questionably sympathetic tone continues throughout the whole judgement—the trial judge even calling Rerekura a 'thoroughly decent man'.⁸⁵

Following provocation being abolished as a partial defence in December 2009 there have been several manslaughter cases in which the female victim had performed allegedly provocative conduct just prior to death which resulted in the male offender killing them. Because these are jury trials it is impossible to tell conclusively why the jury felt that the offender was guilty of manslaughter rather than murder. I argue, however, that the verdicts in these cases were in part borne out of the jury's desire to protect the perceived rights of the male offenders in their respective relationships, while blaming the female victims for their own deaths because they acted against these norms.

R v Bevan is a good example of a post-abolition case in which the manslaughter verdict reached by the jury is questionable.⁸⁶ In 2011 Bevan and his girlfriend, Lake, had had a fight which resulted in Bevan hitting Lake and vandalising the inside of their home. Bevan then left the house to collect a firearm that was hidden at a family farm. He returned and began playing with the firearm, removing the magazine in the process. He then stood next to Lake on the bed, who was lying with her eyes closed. Bevan aimed the gun at Lake's head and told her to clean the house. He then pulled the trigger, killing Lake.

At trial Bevan claimed that he did not know the gun was loaded and that he thought it was safe.⁸⁷ Bevan was convicted of manslaughter rather than

⁸⁴ At 4.

⁸⁵ At 3.

⁸⁶ *R v Bevan* [2012] NZHC 2969.

⁸⁷ At [15].

murder, presumably because the jury felt he lacked murderous intent.⁸⁸ Bevan was sentenced to five years and eight months in prison for Lake's manslaughter.⁸⁹

During sentencing Mallon J said that she did not accept that the firearm was discharged without anger or aggression and that it was implausible that Bevan would point the gun at Lake and ask her to clean the house in a non-threatening manner.⁹⁰ The fact that Bevan was still angry when he pointed the gun at Lake's head supports that he did so in an attempt to control Lake's behaviour by forcing her to clean the house after he had damaged it. This 'attempt to control' shows the relevant power construct that I argue the jury was attempting to protect through their verdict that Bevan was only guilty of manslaughter. Essentially, it is an implicit approval of Bevan's position as the dominating partner in the relationship, as well as a recognition of Bevan as a sympathetic offender who killed a less sympathetic victim.

Rerekura and *Bevan* are factually similar. Both cases involve the retrieval of a weapon, the dangerous use of a firearm in response to a direct challenge by their partner, and finally the death of their partner sparked by their non-compliant actions. Additionally similarities arise in the offenders' descriptions of their own grief—with the insinuation that they have suffered a great loss or deprivation by killing the women that they loved. The language in both cases focuses on the loss shouldered by the offender, while failing to recognise the complete loss that the female partner has suffered through their death. In *Rerekura* McMullin J explicitly says that Rerekura has denied himself the company of his partner,⁹¹ whereas Bevan himself, in *R v Bevan*, discusses how he killed the woman he loved and deprived his children of their mother.⁹²

Like *Bevan*, *R v Wawatai* is a post-abolition case in which it is difficult to accept how the jury reached the conclusion that there was no intention to kill the

⁸⁸ At [3].

⁸⁹ At [38].

⁹⁰ At [33].

⁹¹ *R v Rerekura*, above n 81, at 4.

⁹² *R v Bevan*, above n 86, at [25].

victim.⁹³ In this case Wawatai's partner of 30 years, Akuhata, was attempting to leave him by walking down the road with her bags. Wawatai found her and returned with her to their house. Wawatai then retrieved a container of petrol and splashed it through the bedroom in which Akuhata was standing. He then set the room on fire. Akuhata caught on fire and ran from the room into the lounge where she collapsed and died.

At trial, Wawatai was convicted of arson, indicating that the jury believed that the prosecution had shown beyond reasonable doubt that Wawatai set fire to his house in circumstances where he either knew or ought to have known that he was likely to endanger Akuhata's life.⁹⁴ Nevertheless, Wawatai was acquitted of murder and instead convicted of manslaughter. Wawatai was sentenced to 13 years for the manslaughter of Akuhata.⁹⁵

What is immediately apparent in the language used by Collins J in *Wawatai* is that he struggles to understand the manslaughter verdict returned by the jury.⁹⁶ He states that Wawatai being found guilty of arson was difficult to reconcile with a manslaughter verdict.⁹⁷ I agree with this assessment as it is incredibly challenging to see how a jury construed Wawatai's actions as either unintentional or without reckless disregard for Akuhata's life. Mallon J in *Bevan* does not discuss her thoughts on whether the verdict of the jury is difficult to understand, but does mention that Bevan pointed the gun at his girlfriend out of anger.⁹⁸ Both cases have facts that suggest some form of intention or reckless disregard for life that the jury seems to think falls short of the standard required for murder. I argue that this is because simply abolishing provocation has not had the desired effect of removing all bias in favour of heterosexual men in homicide cases. Juries appear to remain attached to the norm of the dominant man who has been slighted by his less sympathetic partner, and the 'appropriate use of

⁹³ *R v Wawatai* [2014] NZHC 2374.

⁹⁴ At [3].

⁹⁵ At [46].

⁹⁶ At [5].

⁹⁷ At [5].

⁹⁸ *R v Bevan*, above n 86, at [33].

violence’ resulting from this interaction. I remain deeply concerned at this continuing pattern.

Provocation is no longer available as a partial defence, but in this part I have demonstrated that juries continue to recognise a lower level of culpability by returning a manslaughter verdict in cases where a woman has challenged a man’s sexuality. I suggest that the juries in cases like *Bevan*, *Rerekura*, and *Wawatai* have shifted part of the blame for the homicide back onto the victim. Unfortunately this indicates that the abolition of provocation was not sufficient by itself to remove the gender bias within homicide cases.

B Challenges to Male Sexuality Reducing Culpability an Offender’s Culpability in Murder Verdicts

Without clear instructions following the abolition of provocation—like the guidance that would have been provided by the Sentencing Council—there is a risk that the same concerns surrounding the legitimisation of violence towards women that occurred through provocation might remain a problem in sentencing. To confirm this argument, this part focuses on comparing one pre-abolition provocation murder case with two post-abolition murder cases. In particular, this part focuses on establishing the use of inappropriate mitigating factors by sentencing judges. I argue that these factors have the effect of legitimising violence and controlling conduct toward the victim when the offender is predisposed to jealous behaviour.

R v Weatherston was a high profile pre-abolition murder case in which provocation was pled by the defence.⁹⁹ In this case Clayton Weatherston and Sophie Elliot had been in a volatile relationship for around six months when Elliot broke it off in late 2007. On the day of the murder Weatherston drove to Elliot’s home with a number of items he was going to return to her, as well as a kitchen knife he bought from his home. Weatherston was let into the house and accompanied Elliot to her room to talk. Weatherston claimed that Elliot had lunged at him with scissors, and he had then snapped. Elliot’s mother heard her

⁹⁹ *R v Weatherston*, above n 1.

screaming and ran to her room only to find the door locked. Elliot's mother rang the police, but in the time it took them to reach the scene Weatherston had stabbed Elliot 216 times and mutilated her corpse.

Weatherston raised provocation as a partial defence at trial. He claimed that Elliot had lunged at him with scissors, and against the difficult background of the relationship he was provoked.¹⁰⁰ Weatherston also claimed that his narcissistic personality disorder was a special characteristic under s 169 that would have made the provocation more severe to him.¹⁰¹ The jury rejected provocation as a partial defence and Weatherston was convicted of murder.¹⁰²

In sentencing Weatherston, Potter J stated that a minimum non-parole period of 19 years would be sufficient to encapsulate the aggravating features present in the case.¹⁰³ Potter J considered Weatherston's prior lack of convictions, the support of his family, his good chance at rehabilitation, and his diminished understanding of the offending due to his narcissistic personality disorder as mitigating features to the offence.¹⁰⁴ Therefore Potter J discounted Weatherston's minimum non-parole period to 18 years.¹⁰⁵

The *Weatherston* trial received enormous public attention. In particular, there was outrage at Weatherston's ability to claim that Elliot had provoked him into committing a truly brutal murder.¹⁰⁶ This was compounded by his claim that his narcissism was a special characteristic under s 169 of the Crimes Act that reduced his ability to deal with her rejection.

Narcissism was also considered as a mitigating feature following the abolition of provocation in *R v Malik*.¹⁰⁷ Ishrat Malik was married to Farhat Malik

¹⁰⁰ At [10].

¹⁰¹ At [17].

¹⁰² At [1].

¹⁰³ At [52].

¹⁰⁴ At [49].

¹⁰⁵ At [52].

¹⁰⁶ Editorial "Provocation defence has run its course" *New Zealand Herald* (online ed, Auckland, 10 August 2009).

¹⁰⁷ *R v Malik* [2015] NZHC 466.

in an unhappy marriage. The relationship had been spotted with incidents of domestic violence and Ms Malik left the family home with their 18-year-old daughter Sidra Malik.

Malik seemed unable to handle the relationship breakdown. One night when Ms Malik was staying over (in a different room) he began to think about killing her and their daughter. In the morning he rang work, telling them he was sick and wouldn't be coming in. He then took a knife and entered his estranged wife's room and stabbed her 31 times while she was sleeping. He then entered his daughter's room, who woke up and realised what was happening. She tried to escape, but Malik overpowered her and stabbed her 25 times.

Malik pled guilty to both the murder of his wife and his daughter. Moore J began with a starting point of a minimum non-parole period of 21 years because this was both a double homicide and a brutal killing.¹⁰⁸ However, this length was reduced to 18.5 years on the grounds this was Malik's first offence, that he showed some remorse, and that he had been diagnosed with narcissistic personality disorder.¹⁰⁹ The judge felt that being narcissistic would have contributed to his offending and would make prison life particularly difficult for him.¹¹⁰

In both *Weatherston* and *Malik* narcissistic personality disorder was considered to be a mitigating factor in the killing of their respective ex-partners.¹¹¹ The continued acceptance of narcissism as a mitigating factor through both pre- and post-abolition cases is an implicit recognition of a lower level of culpability due to the particularly jealous nature of these men. By recognising the offenders' reduced ability to cope with the victims' behaviour, the court implicitly saddled the victims with some of responsibility for their own deaths. This concern was reflected in earlier critiques of the partial defence of provocation, and has unfortunately continued unchanged in law despite the abolition of provocation.

¹⁰⁸ At [47]

¹⁰⁹ At [65].

¹¹⁰ At [58].

¹¹¹ *R v Weatherston*, above n 1, at [49]; *R v Malik*, above n 107, at [91].

The case *R v Dawood* considers a more explicit form of jealousy as a mitigating factor.¹¹² Like in *Malik*, Najeeb Dawood's relationship with his wife, Eman Hurmiz, was characterised by violent and controlling behaviour. Most of the violent behaviour toward his wife was borne from the irrelevant and unsubstantiated belief that Hurmiz was cheating on him. Dawood engaged in monitoring behaviours in an attempt to catch Hurmiz's supposed cheating, so he installed software on his computer to record the family's home phone conversations. Through this method he discovered that Hurmiz was planning to leave him.

Following this discovery, Dawood convinced Hurmiz to go to a shed outside with him. Dawood played Hurmiz the recordings he had made of her on the telephone stating she wanted to leave him. He then tied one of Hurmiz's arms to the chair, and stabbed her repeatedly. Hurmiz's children heard her screaming and came to try help her. Dawood stabbed his daughter in the leg. Dawood then pushed Hurmiz down on the concrete floor and continued to stab her as she curled into foetal position. Dawood then called the police and tried to kill himself.

Dawood pled guilty to the murder of his wife and wounding his daughter. Miller J began with a starting point of a minimum non-parole period of 19 years because of the planned, brutal nature of the attack, as well as the injury caused to Dawood's daughter.¹¹³ The minimum non-parole period was reduced from 19 years to 17 years after Miller J took the mitigating features of the offence into account.¹¹⁴ These included an early guilty plea, Dawood's depression and abnormal jealousy.

What was particularly interesting about *Dawood* was that Miller J expressly stated that this was not a case where the conduct of the victim was explicitly relevant to sentencing.¹¹⁵ I argue, however, that it is impossible to recognise Dawood's propensity for jealousy as a mitigating feature without also

¹¹² *R v Dawood* [2013] NZHC 122 at [36].

¹¹³ At [34].

¹¹⁴ At [39].

¹¹⁵ At [36].

recognising the role his wife's actions playing in triggering his deadly response. In this way Hurmiz was indirectly blamed for her own death by attempting to leave her 'abnormally jealous' husband. This shift in blame from the jealous offender to the female victim is representative of the concerns that previously existed in relation to the partial defence of provocation. The fact this transfer of blame is still occurring in our law under a different name is deeply concerning as it highlights an underlying issue about how we view women in controlling or violent relationships.

The sentencing discounts in each of these three cases are indeed modest. However, the message behind the continued recognition of narcissism and abnormal jealousy as mitigating features is that, in cases where a man has a propensity for jealousy, a woman is partly to blame for triggering her own death if she in any way challenges him. Having abolished provocation in an attempt to remove some of the bias toward heterosexual men that existed in the partial defence, it is concerning that this bias still exists in the considerations of sentencing judges.

In this part I have demonstrated that both judges and juries have continued to recognise the perceived lower culpability of men that killed their female partners when they were challenged. This is concerning, considering the substantial public dismay surrounding *Weatherston* and his ability to claim that his narcissistic personality made him less able to cope with the allegedly provocative actions of Elliot. This continuing protection of the concept of heterosexual male sexuality is exactly what the Law Commission criticised about the partial defence of provocation. The abolition by itself has been unable to fully address concerns about the dominance of male sexuality in homicide cases. An inclination to feel jealous or react explosively when challenged by a romantic partner should not impact the length of the sentence an offender will face. For this reason I propose that adopting the suggestion made in the Provocation Report—that a Sentencing Council be created—is the best way to address the concerns set out above.

VII Conclusion

The time for provocation's abolition had long been passed when it was finally repealed. As a defence it was confusing, archaic, and favoured heterosexual men. I argue that it legitimised violence toward women when they were perceived to have challenged their male partner. It allowed for the trial to focus upon the negative actions of the victim, while minimising the actions of the offender who was actually on trial. Provocation treated women as mere possessory objects, presenting a woman as more deserving of violence if she had either attempted to leave, or cheated on her partner. When provocation was finally abolished, there was hope that the narrative of the 'taunted husband' would also fade from our law.

Following the abolition of provocation, *Hamidzadeh* and *Wairau* gave good guidance on how the conduct of the victim was relevant as a mitigating factor, and in determining whether it would be manifestly unjust for an offender to face life in prison. However, factors like narcissism and abnormal jealousy are not directly related to the conduct of the victim and therefore fall outside the scope of these cases. I have demonstrated through my case comparisons that these mitigating features serve the same protective function in relation to male sexuality that provocation did by causing the conduct of the victim to be indirectly scrutinised in relation to the special characteristic that the offender possessed. The continued recognition of mitigating factors such as narcissism and abnormal jealousy in murder cases where violent offenders have killed their female partners remains deeply concerning. These two factors are likely to only be considered mitigating factors in the context of a romantic relationship, and in essence provide an implicit acceptance of a man's right to dominate his partner's sexuality. This is clearly an inappropriate consideration that belonged to prior generations in which a woman was seen to be her husband's chattel.

Furthermore, juries and sentencing judges in manslaughter cases continue to inappropriately protect the construct of male sexuality when it is perceived to have been threatened. This is apparent in cases like *Bevan* or *Wawatai* that

resulted in manslaughter verdicts where it seems to be clear that there must have been some element of an intention to kill. In both cases manslaughter was arguably an inappropriate verdict considering the weapon had to be found, taken to the victim, and then be used in a way that was intended to threaten. I argue that in both cases the victim elicited less sympathy because they challenged their male partner, and offender was comparatively seen in a more sympathetic light. These results suggest that there is a more systemic gender bias in homicide cases, and that simply removing provocation has not fixed this issue.

In my view, implementing the Law Commission's recommendation to establish the Sentencing Council and associated sentencing guidelines would have provided much needed detailed guidance on how to appropriately deal with provocation at sentencing. I argue that had the Sentencing Council been established, and had they created the recommended guidelines we would see less of the continued problematic recognition of lower culpability in cases where a man's sexuality has been challenged. This is because the sentencing guideline would deal with appropriate aggravating and mitigating factors, and the circumstances in which life in prison would be manifestly unjust in cases with elements of provocation.

In the process of creating these sentencing guidelines, the Sentencing Council would have been required to consult with the public. During the *Weatherston* trial there was significant community concern that Weatherston was able to claim that Elliot's rejection of him was more provocative because he was a narcissist.¹¹⁶ Had public consultation been undertaken in creating a draft guideline, I believe factors like narcissism and abnormal jealousy would have been excluded as possible mitigating features. Therefore, the sentencing guideline would have helped establish an objective benchmark for judges, helping to reduce unintended bias in sexual jealousy cases.

The failure by Parliament to establish the Sentencing Council has resulted in a failure to recognise and take action against the public concerns emphasised in

¹¹⁶ Gay, above n 4.

Weatherston. Challenges to male sexuality still result in the recognition of the lower culpability of the offender by sentencing judges and juries. I remain deeply troubled that the gender bias in homicide sentencing remains, and that by doing nothing the legitimisation of violence toward women who have challenged their male partner or ex-partner is still occurring.

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