

CRITIQUE AND COMMENT

IT'S A MAN'S WORLD: CLAIMS OF PROVOCATION AND AUTOMATISM IN 'INTIMATE' HOMICIDES

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[Men who kill in the context of 'sexual intimacy' may claim that they were provoked into losing self-control because of their estranged partner's words, infidelity or actions in leaving the relationship, or that they were unable to control their conduct because they received a 'psychological blow' that led to a state of dissociation. This article analyses a number of recent Australian cases dealing with provocation and automatism in order to address the question of whether a relationship breakdown should be considered a sufficient factor to exculpate an accused, either partially or totally, from criminal responsibility. It will examine the Victorian Law Reform Commission's recent recommendations that the defence of provocation should be abolished and the current law pertaining to automatism be retained. It is argued that the ambit of claims of provocation or automatism should be restricted such that the breakdown of a relationship should not be sufficient to enable an accused to be completely acquitted or partially excused from criminal responsibility.]

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I INTRODUCTION

In a study of 143 homicides that occurred in Victoria between 1 July 1997 and 30 June 2001, the Victorian Law Reform Commission ('VLRC') found that of

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those killings that were prosecuted, the largest category (31.5 per cent) were homicides occurring in the context of ‘sexual intimacy’.¹ Also emerging from the study were distinct patterns between the gender of victim and killer: female victims are more likely to be killed by an intimate male partner, whereas male victims are more likely to be killed by a friend or stranger.²

In a study conducted by Kenneth Polk, 79 per cent of the men who killed in the context of sexual intimacy did so out of jealousy or for control reasons.³ In comparison, when women killed their male intimate partner, it was most likely in response to violence.⁴ This finding has consistently been reported in other studies.⁵

The VLRC found that in those killings that proceeded to trial, provocation was one of the most commonly-argued defences and it was generally raised by men who killed in the context of sexual intimacy.⁶ The usual scenario portrayed in such cases depicts the accused losing self-control after his estranged partner taunts him about his lack of sexual prowess and compares him unfavourably with another man,⁷ or tries to convince the accused that the relationship is over.⁸

In comparison to provocation, automatism in the sense of involuntary conduct arising from a ‘psychological blow’ is rarely raised in homicide trials. When it is raised, it is usually by men who have killed their estranged partners,⁹ their estranged partners’ friend¹⁰ or a woman who has rejected their advances.¹¹

¹ VLRC, *Defences to Homicide: Options Paper* (2003) 26.

² Jenny Mouzos, *Homicidal Encounters: A Study of Homicide in Australia 1989–1998* (2000) 66.

³ Kenneth Polk, *When Men Kill: Scenarios of Masculine Violence* (1994) 23.

⁴ *Ibid.*

⁵ Jenny Morgan, VLRC, *Who Kills Whom and Why: Looking Beyond Legal Categories* (2002) 25–30.

⁶ VLRC, *Defences to Homicide: Options Paper*, above n 1, 51.

⁷ See, eg, *Moffa v The Queen* (1977) 138 CLR 601 (*‘Moffa’*), analysed in Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them’ (1997) 21 *Melbourne University Law Review* 237, 240; *DPP (Vic) v Leonboyer* (1999) 109 A Crim R 168; *R v Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004) (*‘Ramage’*).

⁸ Rebecca Bradfield, *The Treatment of Women Who Kill Their Violent Male Partners within the Australian Criminal Justice System* (PhD Thesis, University of Tasmania, 2002). In a study of intimate homicides between 1980 and 2000, Bradfield found that in eight of the 15 cases where men successfully relied on provocation, the provocative conduct was alleged to have been their separation or their partners’ infidelity: at 145.

⁹ See, eg, *R v K* [1971] 2 OR 401; *R v Wiseman* (Unreported, Supreme Court of Victoria, Norris AJ, 27 April 1972); *R v Pantelic* (1973) 1 ACTR 1; *R v Sproule* (1975) 26 CCC (2d) 92; *R v Mansfield* (Unreported, Supreme Court of Victoria, Hampel J, 5 May 1994) (acquittal); *R v Stone* [1999] 2 SCR 290; *DPP (Vic) v Leonboyer* (1999) 109 A Crim R 168; *R v King* (2004) 155 ACTR 55; *R v Singh* (Unreported, Supreme Court of South Australia, Doyle CJ, 22 March 2004) (acquittal); *R v Gojanovic* [2004] VSCA 118 (Unreported, Charles, Chernov and Eames JJA, 18 August 2004); *R v Gojanovic* [2005] VSC 97 (Unreported, Osborn J, 6 April 2005) (evidence led of provocation and hypoglycaemic episode to negate intention to kill); *R v Karageorges* [2005] VSC 193 (Unreported, Kaye J, 14 June 2005). The only reported case of a female accused attempting to raise automatism in a homicide trial (though the evidence was not put to the jury at the original trial) is that of *R v Falconer* (1990) 171 CLR 30. Dorothy Joudrie also raised automatism in relation to a charge of the attempted murder of her estranged husband: *R v Joudrie* (Unreported, Court of Queen’s Bench of Alberta, No 9501–1280–C6, 9 May 1996) (verdict of insane automatism). For an analysis of this case, see Bernadette McSherry, ‘Getting Away with Murder? Dissociative States and Criminal Responsibility’ (1998) 21 *International Journal of Law and Psychiatry* 163.

¹⁰ *R v Radford* (1986) 42 SASR 266; Paul Fairall, ‘Radford (No 2)’ (1987) 11 *Criminal Law Journal* 231.

Tasmania abolished the defence of provocation in 2003¹² and the VLRC has recommended its abolition,¹³ but in most jurisdictions it remains a 'partial defence' that serves to reduce murder to manslaughter. Automatism is not a defence in itself, but evidence of involuntary conduct can be used to cast doubt on the requirement that the prosecution prove that the physical act which caused the death was 'willed' or voluntary. An acquittal results if the prosecution fails to prove that the accused's actions were willed or voluntary.¹⁴

Provocation and 'psychological blow' automatism in intimate homicides both share a presumption that an accused can 'snap' in the face of some form of threat to self-esteem. Where the defence of provocation operates, the accused intends to kill and wills the act or acts causing death, but is excused for having lost self-control in response to the victim's words and/or conduct.¹⁵ In the case of automatism as a response to an external psychological blow, the accused is said to 'dissociate' to such an extent that he or she completely lacks the ability to control the ensuing conduct. The power of self-control is therefore viewed as an essential element of both provocation and automatism.¹⁶

In this article, I will analyse a number of recent cases dealing with provocation and automatism in order to address the question of whether a relationship breakdown should be considered a sufficient factor to exculpate an accused either partially or totally from criminal responsibility. The VLRC has recently canvassed a number of options for law reform in this area. It concluded that the defence of provocation should be abolished and the current law pertaining to automatism should be retained.¹⁷ I will analyse some of these options and argue that while it is timely to consider restricting the ambit of claims relating to the loss of or inability to control conduct in the context of a relationship breakdown, the abolition of the defence of provocation and the retention of the status quo in relation to automatism may not be the most appropriate response.

The next section sets out the current law relating to provocation and how various judges have sought to limit its relevance in cases of intimate homicide by serving a gatekeeping role in preventing the defence going to the jury. I will then outline how appellate judges have recently granted retrials on the basis that trial

¹¹ *Parnekar v The Queen* [1974] SCR 449; *R v Rabey* (1977) 17 OR (2d) 1; aff'd [1980] 2 SCR 513 (charge of causing bodily harm with intent to wound).

¹² *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

¹³ VLRC, *Defences to Homicide: Final Report* (2004) xlv. The defence of provocation has now been abolished in Victoria by the *Crimes (Homicide) Act 2005* (Vic).

¹⁴ Examples of where evidence of automatism has led to an acquittal are *R v K* [1971] 2 OR 401; *R v M* (Unreported, Supreme Court of Victoria, Hampel J, 18 March 1994); *R v Mansfield* (Unreported, Supreme Court of Victoria, Hampel J, 5 May 1994); *R v Yilmaz* (Unreported, Supreme Court of the Australian Capital Territory, Higgins J, 11 August 2000); *R v Singh* (Unreported, Supreme Court of South Australia, Doyle CJ, 22 March 2004).

¹⁵ The defence of provocation can be viewed as containing elements of both excuse and justification. It is excusatory in its focus on the accused's lack of self-control and justificatory in its focus on the provocative conduct of the victim and the acceptability of the accused's actions. Because of this combination of elements of excuse and justification, the conceptual basis for the defence of provocation is often confused.

¹⁶ Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 21.

¹⁷ VLRC, *Defences to Homicide: Final Report*, above n 13, xlv, lv.

judges have been making moral rather than legal judgments as to the scope of the defence. I will do this by examining the cases of Midas Conway and Mazin Yasso.

I will then turn to an examination of the trial of James Ramage and consider how the jury's acceptance of provocation in returning a verdict of manslaughter gave impetus to the Victorian government's announcement that the defence would be abolished.¹⁸

The ensuing sections will deal with the law of automatism and its use in the trials of Dharmander Singh and Vasily Karageorges.

II THE DEFENCE OF PROVOCATION — THE CURRENT STATE OF PLAY

The elements of the defence of provocation are set out by the common law, which is currently followed in South Australia and Victoria, and are reflected in the statutory provisions of the Australian Capital Territory, New South Wales and the Northern Territory.¹⁹ The common law has also been held to apply to the interpretation of provocation under s 304 of the Queensland *Criminal Code*²⁰ and, by implication, to s 281 of the Western Australian *Criminal Code*.²¹

The leading High Court case dealing with the defence of provocation is *Stingel v The Queen*.²² Although the case concerned the then current provisions of the Tasmanian *Criminal Code*,²³ the High Court observed that there is a large degree of conformity in the law of provocation, whether it be common law or statutory.²⁴ The High Court subsequently affirmed that the test in *Stingel* equally applied to the common law.²⁵

The test for provocation consists of both subjective and objective elements.²⁶ There must be some evidence that the accused was in fact acting under provocation.²⁷ The content and extent of the provocative conduct is assessed from the viewpoint of the particular accused.²⁸ This is the subjective element of the defence. In addition, there is an objective requirement that the provocation be of such a nature that it could or might have moved an ordinary person to act as the accused did.²⁹

¹⁸ Crimes (Homicide) Bill 2005 (Vic).

¹⁹ *Crimes Act 1900* (ACT) s 13(2); *Crimes Act 1900* (NSW) s 23(2); Northern Territory *Criminal Code* s 34 (contained in sch 1 of the *Criminal Code Act* (NT)).

²⁰ Contained in sch 1 of the *Criminal Code Act 1899* (Qld).

²¹ Contained in sch 1 of the *Criminal Code Act Compilation Act 1913* (WA). See *Van Den Hoek v The Queen* (1986) 161 CLR 158, 168 (Mason J); *R v Johnson* [1964] Qd R 1, 6, 17 (Philp ACJ and Lucas AJ).

²² (1990) 171 CLR 312 ('*Stingel*').

²³ Contained in sch 1 of the *Criminal Code Act 1924* (Tas).

²⁴ *Stingel* (1990) 171 CLR 312, 320 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁵ *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ).

²⁶ *Stingel* (1990) 171 CLR 312, 324 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁷ *Ibid* 325.

²⁸ *Ibid* 326.

²⁹ *Ibid* 324.

The defence can thus be divided into three fundamental requirements:

- there must be provocative conduct;
- the accused must have lost self-control as a result of the provocation (the subjective test); and
- the provocation must be such that it was capable of causing an ordinary person to lose self-control and to act in the way the accused did (the objective test).

The trial judge must decide whether or not there is sufficient evidence of provocation for the defence to be considered by the jury. In *Stingel*, the High Court set out the test to be used as follows:

A trial judge must ... be mindful of the fact that the question is not whether he or she considers that there is a reasonable doubt that the killing was unprovoked. ... [T]hat is a question for the jury. The question for a trial judge is whether there is material in the evidence which is 'capable of constituting provocation'. The result is that the question for a trial judge ... [is] whether, *on the version of events most favourable to the accused* which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.³⁰

Despite this direction, for a time, judges in Victoria played a gatekeeping role in preventing the defence of provocation going to the jury in circumstances where an accused had killed his estranged partner. In doing so, these judges pointed to some of the underlying policy problems in allowing a partial defence to murder in circumstances of intimate homicides. The following is an outline of some of these cases.

A The Cases of Robert Parsons, Michael Leonboyer and Munesh Kumar

On 10 December 1997, Robert Parsons killed his estranged partner, Angela Graham, as she was walking toward the Dandenong Registry of the Family Court, where proceedings were scheduled concerning her application for child maintenance.³¹

Robert stabbed Angela 48 times, causing 41 wounds to the neck and upper body. Robert claimed the victim had smiled and laughed at him, saying 'we have got you now you bastard'. The trial judge, Cummins J, withdrew the defence of provocation from the jury and the accused was convicted of murder. He was sentenced to life imprisonment with a minimum nonparole period of 25 years.³²

On appeal, Brooking JA (with whom Phillips CJ and Hampel AJA agreed) held that the trial judge had been correct in withdrawing the defence.³³ An appeal against sentence was also dismissed. Phillips CJ said:

³⁰ Ibid 334 (emphasis added) (citations omitted).

³¹ The following facts are drawn from *DPP (Vic) v Parsons* [1999] VSC 192 (Unreported, Cummins J, 24 May 1999) and *R v Parsons* (2000) 1 VR 161.

³² *DPP (Vic) v Parsons* [1999] VSC 192 (Unreported, Cummins J, 24 May 1999) [25].

³³ *R v Parsons* (2000) 1 VR 161, 171.

No reasonable jury could have failed to be satisfied beyond reasonable doubt that the applicant's reaction to the victim's conduct fell below — indeed, fell a long, long way below — the minimum limits of the range of powers of self-control that must be attributed to the ordinary person. To hold that provocation arose in this case would be to encourage savagery at the expense of civilised behaviour.³⁴

On 6 May 1997, Michael Leonboyer stabbed his 19-year-old girlfriend Sandra Morales more than 20 times, after she allegedly told him she did not love him, that she was having an affair with someone else and that the other man 'did it better than what you did'.³⁵ Cummins J ruled that the defence of provocation should not go to the jury.³⁶ His Honour found that most of the cases on provocation involved not only words, but actions.³⁷ His Honour acknowledged that words could wound, but found that to allow the defence of provocation to go to the jury on the facts 'would be to significantly extend the law of provocation'.³⁸ Michael Leonboyer was sentenced to 18 years' imprisonment with a minimum nonparole period of 14 years.³⁹

On appeal, the majority (Phillips CJ and Charles JA) held that the trial judge had correctly withdrawn the defence of provocation from the jury.⁴⁰ Callaway JA, in dissent, would have allowed the appeal on a separate ground relating to automatism and did not consider the issue of provocation.⁴¹

On 7 February 1999, Munesh Kumar killed his estranged partner Raj Mani.⁴² The two had met in 1996, when they were working as machinists at a manufacturing plant in Queensland. Raj was then aged 33 and Munesh 18. In June 1998, the police were called to their flat after Munesh assaulted Raj. Shortly afterwards, Raj obtained a Permanent Protection Order under the *Domestic Violence (Family Protection) Act 1989* (Qld), which prohibited any violence by Munesh, but did not prohibit contact between the two. The police again attended the premises on 23 September 1998 as a result of a further assault. Raj finally left and moved to Melbourne. Munesh followed suit and discovered where she was living. He met her on a few occasions, but she refused to recommence a relationship with him.

On the morning of 7 February, Munesh went to Raj's home and demanded to be let in. She refused and called the police, who arrived shortly afterwards, but Munesh had gone. Half an hour later, Munesh returned with a large metal pipe

³⁴ Ibid 166–7.

³⁵ The following facts are drawn from *DPP (Vic) v Leonboyer* [1999] VSC 450 (Unreported, Cummins J, 20 October 1999), *DPP (Vic) v Leonboyer* [1999] VSC 422 (Unreported, Cummins J, 5 November 1999) and *DPP (Vic) v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001).

³⁶ *DPP (Vic) v Leonboyer* [1999] VSC 450 (Unreported, Cummins J, 20 October 1999) [22].

³⁷ Ibid [16].

³⁸ Ibid [22].

³⁹ *DPP (Vic) v Leonboyer* [1999] VSC 422 (Unreported, Cummins J, 5 November 1999) [13].

⁴⁰ *DPP (Vic) v Leonboyer* [2001] VSCA 149 (Unreported, Phillips CJ, Charles and Callaway JJA, 7 September 2001).

⁴¹ Ibid [153]–[155].

⁴² The following facts are drawn from *DPP (Vic) v Kumar* [2000] VSC 377 (Unreported, Cummins J, 21 September 2000) and *R v Kumar* (2002) 5 VR 193 ('Kumar').

and bashed in a large glass window. He entered the house, stabbed Raj approximately 20 times, then used a meat cleaver to cause 11 chopping injuries to her head, face and neck. Munesh alleged that Raj had called him and his family 'bastards' and 'of low caste'. The defence argued that the latter insult was extremely offensive to a man with the accused's Hindu background.

As in the earlier cases, Cummins J refused to allow the defence of provocation to go to the jury. Munesh was convicted of murder and sentenced to 20 years' imprisonment with a minimum nonparole period of 16 years.⁴³

On appeal, the majority of the Victorian Court of Appeal held that the trial judge had been correct in withdrawing the defence of provocation from the jury.⁴⁴ Batt JA and O'Bryan AJA held that Munesh's reaction fell far below the minimum limits of the range of powers of self-control to be attributed to the hypothetical ordinary person of 20 years of age.⁴⁵

Eames JA in dissent thought the trial judge had erred in law and would have ordered a retrial.⁴⁶ His Honour referred to a number of reasons why trial judges should be cautious about preventing evidence of provocation going to the jury. First, Eames JA pointed out that there may be a danger that in not leaving provocation to be considered by the jury, the trial judge will usurp the jury's fact-finding role.⁴⁷ Eames JA referred⁴⁸ to Brennan CJ's statement in *Green v The Queen*, where his Honour reasoned that factual questions about the motivations of the accused and the significance of words uttered by the deceased were 'matters for the jury to evaluate in determining the degree of provocation experienced by the [accused].'⁴⁹

Secondly, Eames JA stated that the objective (ordinary person) test in provocation invited disagreement among judges regarding whether or not to leave the issue of provocation to the jury.⁵⁰ His Honour observed that

there is a real risk that the decision whether the defence should be left to the jury will be affected by the judges' views of what a reasonable person should or should not do when confronted by the suggested provocation — that is, by a moral judgment of what minimal standard of self-control ought to be applied — rather than by reference to what a reasonable jury might regard as being the ordinary person's reaction to the suggested provocation.⁵¹

Finally, Eames JA pointed to the practical problem that if a judge refuses to leave the defence of provocation to the jury, it is likely that there will be an appeal and possibly a retrial. He stated that this was 'a consequence which

⁴³ *DPP (Vic) v Kumar* [2000] VSC 377 (Unreported, Cummins J, 21 September 2000) [33].

⁴⁴ *Kumar* (2002) 5 VR 193, 194 (Batt JA), 228 (O'Bryan AJA).

⁴⁵ *Ibid* 194 (Batt JA), 229 (O'Bryan AJA).

⁴⁶ *Ibid* 224–5.

⁴⁷ *Ibid* 222.

⁴⁸ *Ibid* 222–3.

⁴⁹ (1997) 191 CLR 334, 345.

⁵⁰ *Kumar* (2002) 5 VR 193, 217.

⁵¹ *Ibid*.

no-one would desire and which causes great inconvenience and anguish to the families of victims and to parties, witnesses and the administration of the courts'.⁵²

The refusal of Cummins J to allow the defence of provocation to go to the jury in the cases of Robert Parsons, Michael Leonboyer and Munesh Kumar demonstrates an attempt to delineate the boundaries of the defence of provocation in circumstances of intimate homicides. However, since *Kumar*, it appears that Eames JA's dissenting approach has won majority support in the Victorian Court of Appeal. This has significance for the way in which trial judges treat evidence of provocation. The following two cases exemplify this approach.

B *The Cases of Midas Conway and Mazin Yasso*

In 1999, Midas Conway and Lisa Richardson were living together and engaged to be married.⁵³ The following year, Midas was charged and remanded in custody for drug offences. At first, Lisa regularly visited Midas in prison, but in the middle of 2000 she established a relationship with another man. Lisa told Midas that she had met someone else, but continued to visit Midas despite returning the engagement ring and some belongings. Midas suffered depression that necessitated treatment in prison.

On 9 October 2000, Midas was released on bail and went to live with his mother and sister. He visited Lisa at the unit where she was living with friends and at a jeans shop where she occasionally worked. Midas arranged to meet Lisa at the shop on 18 October 2000. Before leaving home, he took a knife from a kitchen drawer and concealed it in his clothes. Midas and Lisa talked in the staff room for a few minutes before he took out the knife and grabbed Lisa. She called for help. A shop assistant, Suzanne Thobis, tackled Midas and the knife broke in the scuffle. Midas then picked up another knife from a nearby table and stabbed Lisa in a frenzied attack while Suzanne ran for help. Lisa died as a result of her injuries.

Midas claimed that he had gone to the shop hoping to re-establish a relationship with Lisa and if she said no, his intention was to kill himself. He claimed that when Lisa said there was no hope, he told her he would kill himself and she laughed and said '[i]f you want to kill yourself, what do I care?'

At trial, Teague J ruled that the defence of provocation should not go to the jury.⁵⁴ His Honour quoted⁵⁵ Lord Hoffman's statement in *R v Smith (Morgan)* that '[m]ale possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide'.⁵⁶ He was of the opinion that even if the victim had laughed and uttered 'words of a scornful, derisive or taunting kind', the reaction of the accused would have fallen below the 'mini-

⁵² Ibid 223.

⁵³ The following facts are drawn from *R v Conway* [2002] VSC 383 (Unreported, Teague J, 28 October 2002), *R v Conway* [2002] VSC 486 (Unreported, Teague J, 14 November 2002) and *R v Conway* (2004) 149 A Crim R 206.

⁵⁴ *R v Conway* [2002] VSC 383 (Unreported, Teague J, 28 October 2002) [33].

⁵⁵ Ibid [7].

⁵⁶ [2001] 1 AC 146, 169.

ordinary person.⁵⁷ Midas Conway was found guilty of murder and sentenced to 19 years' imprisonment with a nonparole period of 14 years.⁵⁸

This time, an appeal against the decision not to allow the defence of provocation to go to the jury was successful and a retrial was ordered.⁵⁹ Callaway JA, with whom Buchanan and Eames JJA agreed, referred to the victim's alleged words '[i]f you want to kill yourself, what do I care?' as mocking the grief of Midas over their relationship breakdown. Callaway JA stated that a 'more dangerous taunt could hardly be imagined.'⁶⁰ Eames JA reiterated his approach in *Kumar* by adding that a trial judge must apply a legal test in relation to provocation and not pass judgment on the morality of the conduct.⁶¹ He commented that a 'judge who takes the issue away from a jury assumes a grave responsibility' because of the stress that a retrial causes to all those involved in the trial process.⁶²

At his retrial, Midas Conway was once again convicted of murder, despite the defence of provocation being raised. Bell J gave exactly the same sentence as Teague J had given at the first trial: 19 years' imprisonment with a nonparole period of 14 years.⁶³ In sentencing Midas, Bell J stated:

You murdered Ms Richardson in a state of possessive male rage. Your view was that if you could not have her, no-one else would. You took from Ms Richardson the most important of her human rights, the right to personal security, the right to life itself. These actions require denunciation by the court in the strongest possible terms and I give that denunciation.⁶⁴

The case of Mazin Yasso followed a similar procedural pattern to that of Midas Conway. Mazin Yasso married Eman Hermiz in Baghdad in March 1990.⁶⁵ In 1997, Mazin went to London with the intention that Eman would follow him there. Instead, she obtained a 'Women at Risk' visa and her sister sponsored her move to Australia on 11 August 1999. Mazin followed her to Melbourne in October 1999 and lived with Eman and her sister for about five months. During this time, there were arguments about Mazin's gambling habits.

Mazin and Eman then moved to Glenroy, where Eman worked as a hairdresser and Mazin as a gardener and cleaner. In 2000, Mazin became suspicious that Eman was having an affair with Nasir Haba, a man she had met at the Broadmeadows Language Centre. He forbade Eman from working as a hairdresser, visiting her sister or attending English classes.

⁵⁷ *R v Conway* [2002] VSC 383 (Unreported, Teague J, 28 October 2002) [7].

⁵⁸ *R v Conway* [2002] VSC 486 (Unreported, Teague J, 14 November 2002) [9].

⁵⁹ *R v Conway* (2004) 149 A Crim R 206, 211 (Callaway JA, Buchanan and Eames JJA agreeing).

⁶⁰ *Ibid* 210.

⁶¹ *Ibid* 212.

⁶² *Ibid*.

⁶³ *R v Conway* [2005] VSC 205 (Unreported, Bell J, 10 June 2005) [24].

⁶⁴ *Ibid* [8]–[9].

⁶⁵ The following facts are drawn from *R v Yasso* (2002) 6 VR 239, *R v Yasso* [2002] VSC 468 (Unreported, Coldrey J, 20 September 2002), *R v Yasso* (2004) 148 A Crim R 369 and *R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005).

On 10 March 2001, Eman left Mazin to live with her sister, to whom she spoke of her fear of Mazin. On 13 March she obtained an interim intervention order against Mazin and this was later made operative for a period of two years. Eman also withdrew her nomination for Mazin's permanent residency, and his application was refused on 11 April 2001. He was given 28 days to leave Australia. On 4 May, Eman rang the Department of Immigration and Multicultural Affairs, trying to ascertain Mazin's status in the country, stating that she felt in danger from him.

On 8 May 2001, Mazin tracked Eman to the Meadow Heights Shopping Centre where he stabbed her approximately 20 times with a kitchen knife, causing her death. He claimed that he had asked Eman to meet him the next day to return a gold necklace he had given her and his passport. He said he wanted Eman to give him her handbag and mobile phone as a guarantee that she would meet him. She handed over the handbag, but refused to hand over her phone. He claimed Eman then spat at him, which was a grave affront to a man of his ethnic background and which had caused him to go into 'an hysterical situation'.⁶⁶

Coldrey J refused to allow the defence of provocation to go to the jury.⁶⁷ He stated:

Cultural values inevitably change over time. In our modern society persons frequently leave relationships and form new ones. Whilst this behaviour may cause a former partner to feel hurt, disappointment and anger, there is nothing abnormal about it.

What is abnormal is the reaction to this conduct in those small percentage of instances where that former partner (almost inevitably a male) loses self control and perpetuates fatal violence with an intention to kill or to cause serious bodily injury.⁶⁸

Coldrey J sentenced Mazin to 20 years' imprisonment with a minimum nonparole period of 15 years.⁶⁹ On appeal, a majority of the Victorian Court of Appeal held that provocation should have been left to the jury.⁷⁰ Charles JA, with whom Batt JA agreed, found that the trial judge had not considered the version of events most favourable to Mazin, and that it should have been up to a jury to assess the cultural significance of the alleged spitting.⁷¹ Vincent JA, in dissent, was of the view that it had been open to the trial judge to find that the reaction to Eman's alleged conduct fell a long way short of the minimum limits of an ordinary person's powers of self-control.⁷²

A retrial was ordered and the defence of provocation was left to the jury. The jury rejected this defence and found Mazin Yasso guilty of murder. Holling-

⁶⁶ *R v Yasso* (2002) 6 VR 239, 241 (Coldrey J).

⁶⁷ *Ibid* 243.

⁶⁸ *Ibid*.

⁶⁹ *R v Yasso* [2002] VSC 468 (Unreported, Coldrey J, 20 September 2002) [78].

⁷⁰ *R v Yasso* (2004) 148 A Crim R 369.

⁷¹ *Ibid* 385–6.

⁷² *Ibid* 392.

worth J gave him the same sentence as before: 20 years' imprisonment with a 15-year minimum nonparole period.⁷³

The cases of Midas Conway and Mazin Yasso suggest that attempts by trial judges to act as 'gatekeepers' in relation to the defence of provocation will no longer be tolerated by the Court of Appeal. In all of the five cases outlined, trial judges have sought to delineate the boundaries of the defence of provocation in intimate homicides. They have exercised a 'normative' function in this regard. In the latter two appeal cases, this function has been viewed as usurping the role of the jury.

The cases outlined demonstrate the unease of trial judges and some Court of Appeal judges in relation to the interpretation that the five accused men placed on their victims' alleged conduct. Ultimately, all five cases have culminated in verdicts of murder. Is it necessary then to be concerned with the place of the defence of provocation in intimate homicides? Do these cases stand for the proposition that even if the defence of provocation is allowed to go to the jury in trials involving intimate homicides, the jury will simply reject it?

Victoria Nourse argues that the decision to allow the defence of provocation to go to the jury has in itself a legal meaning.⁷⁴ Allowing a jury to consider the defence indicates at the very least what behaviour judges consider can amount to provocative conduct. Thus, mere words or spitting at the accused are viewed as sufficient provocation for a man to lose self-control.

The following case may perhaps be seen as the exception to the general rule, but it does raise concerns about how juries may perceive a woman's attempt to leave a relationship and start a new one. It is this case that has provided the impetus in Victoria for 'something to be done' about the defence of provocation in intimate homicides.

C *The Case of James Ramage*

Julie Garrett and James Ramage had been married for almost 23 years and had two children together.⁷⁵ There had been a separation for several months early in the marriage and 'some incidents' of violence.⁷⁶ Since around 2001, Julie had become increasingly unhappy in the marriage, complaining to her family that James' behaviour was controlling and oppressive. In May 2003, Julie and her

⁷³ *R v Yasso* [2005] VSC 75 (Unreported, Hollingworth J, 21 March 2005) [82].

⁷⁴ Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) 106 *Yale Law Journal* 1331, 1357.

⁷⁵ The following facts are drawn from *Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004) and *R v Ramage* [2004] VSC 391 (Unreported, Osborn J, 8 October 2004).

⁷⁶ *Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004) [3]. In *R v Ramage* [2004] VSC 391 (Unreported, Osborn J, 8 October 2004), Osborn J ruled that evidence relating to James 'head butting' Julie in the early years of their marriage was inadmissible because of its prejudicial nature, but that evidence from witnesses concerning James breaking glasses to intimidate Julie and pushing her off their bed 18 months prior to the killing was admissible: at [39], [40], [46]. Hearsay evidence from Julie's twin sister that Julie had to be sexually compliant due to threats of violence or anger was also excluded: at [63]. For a comprehensive and impassioned overview of the background to this case, see Phil Cleary, *Getting Away with Murder: The True Story of Julie Ramage's Death* (2005).

daughter moved out of the family home in Melbourne's middle-class suburb of Balwyn, while her husband was overseas.

James experienced Julie's moving out of the family home as totally unexpected and tried desperately to re-establish their relationship, attending counselling sessions with Julie and meeting with her each week for meals. In the meantime, Julie met another man with whom she formed a relationship and she told James about this relationship in mid-June 2003.

On 21 July 2003, around midday, Julie went to visit James at the family home in Balwyn. That morning, she had told her workmates how happy she was in her new relationship and that she wanted to bring things out into the open.

James' evidence was that during this meeting, Julie told him: 'I'm over you. I should have left you 10 years ago', and that her new friend cared for her. She then allegedly said that sex with James repulsed her and implied how much better her new friend was.

James said that he lost control and attacked Julie. He hit her at least twice in the face, knocking her to the ground where she struck her head severely. James then strangled her until she died. James cleaned the scene with detergent and drove Julie's body to a remote area in the country, where he buried it and concealed it with bush litter. He returned to Melbourne, washing his car on the way, and went to a shop to order granite tops for kitchen benches. He then washed his clothes at home, told his daughter he didn't know where Julie was, visited a lawyer friend, and finally handed himself into the police.

At James Ramage's trial for murder, the main defence raised was that of provocation. A number of witnesses, including mental health professionals, testified that James had been 'extremely anxious, obsessed and emotionally fraught' at the disintegration of his marriage.⁷⁷

The trial judge, Osborn J, no doubt aware of the Court of Appeal decisions in *R v Conway* and *R v Yasso*, left the defence of provocation to the jury. However, unlike the outcome of the retrials in those cases, the jury in *R v Ramage* considered that the prosecution had not disproved the defence beyond reasonable doubt and found James Ramage guilty of manslaughter. He was sentenced to 11 years' imprisonment with a nonparole period of eight years.⁷⁸

Unsurprisingly, the trial of James Ramage and his subsequent conviction for the manslaughter of his estranged wife was widely reported in the Victorian media.⁷⁹ It provided the catalyst for the Victorian government's efforts to abolish the defence of provocation.⁸⁰

The significance of this case is that it indicates that when judges stop acting as gatekeepers, and allow juries to consider the defence of provocation in circumstances of intimate homicides, juries may differ in their perceptions of what constitutes provocative conduct and the hypothetical ordinary person's reaction

⁷⁷ *Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004) [29].

⁷⁸ *Ibid* [56]. The maximum penalty for manslaughter in Victoria is 20 years' imprisonment: *Crimes Act 1958* (Vic) s 5.

⁷⁹ See, eg, Karen Kissane, 'Honour Killing in the Suburbs', *Insight, The Age* (Melbourne), 6 November 2004, 4–5.

⁸⁰ Farrah Tomazin, 'Provocation Defence to Be Removed', *The Age* (Melbourne), 21 January 2005, 5. The *Crimes (Homicide) Act 2005* (Vic) has recently been passed.

to it. As pointed out above, Eames JA was concerned that the ordinary person test invited disagreement among judges in deciding whether or not to leave the defence of provocation for the jury to consider.⁸¹ However, it could also be argued that the ordinary person test may lead to differing jury verdicts, as exemplified by the verdicts in relation to Midas Conway and Mazin Yasso on the one hand, and James Ramage on the other.

James Ramage relied solely on Julie's words as grounds for provocation. That raises the question: why should words alone be considered sufficient to deprive an 'ordinary person' of the power of self-control? It also raises a number of issues that have been of concern to trial judges in the previous cases outlined. Why should killing in anger be tolerated, yet not killing based on other emotions such as compassion or fear of future abuse? Santo De Pasquale has made the point that cases where men have killed their ex-partners involve '[s]pecific cultural assumptions about unruly women being somehow blameworthy or partially deserving of their own deaths'.⁸²

Basing provocation on a loss of self-control implies that men like James Ramage *could have* controlled themselves, but lacked the strength of will to do so. This raises the issue as to whether the criminal law should be about setting standards of self-control and punishing those who breach them, rather than partially excusing people from criminal responsibility because they killed in anger. With that in mind, I now turn to a consideration of some of the options for law reform in this area.

III OPTIONS FOR REFORMING THE DEFENCE OF PROVOCATION

The two main options for reform in this area are either to abolish provocation as a defence or to develop a more stringent but workable test. I will discuss each option in turn.

A Abolition

There is a wealth of academic literature calling for the abolition of the defence of provocation.⁸³ In 1992, after a thorough examination of the history and social background of the doctrine of provocation, Jeremy Horder concluded that the defence of provocation should be abolished and instead evidence of provocation should be considered as a matter for mitigation in sentencing.⁸⁴

⁸¹ *Kumar* (2002) 5 VR 193, 217. See above Part II(A).

⁸² Santo De Pasquale, 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) 26 *Melbourne University Law Review* 110, 117.

⁸³ See, eg, Jeremy Horder, *Provocation and Responsibility* (1992); Graeme Coss, 'Lethal Violence by Men' (1996) 20 *Criminal Law Journal* 305; Graeme Coss, 'Revisiting Lethal Violence by Men' (1998) 22 *Criminal Law Journal* 5; Graeme Coss, 'A Reply to Tom Molomby' (1998) 22 *Criminal Law Journal* 119; Adrian Howe, 'The Provocation Defence: Finally Provoking Its Own Demise?' (1998) 22 *Melbourne University Law Review* 466; Adrian Howe, 'Reforming Provocation (More or Less)' (1999) 12 *Australian Feminist Law Journal* 127; Celia Wells, 'Provocation: The Case for Abolition' in Andrew Ashworth and Barry Mitchell (eds), *Rethinking English Homicide Law* (2000) 85; Luke Neal and Mirko Bagaric, 'Provocation: The Ongoing Subservience of Principle to Tradition' (2003) 67 *Journal of Criminal Law* 237.

⁸⁴ Horder, above n 83, 197.

The Australian Model Criminal Code Officers Committee also recommended that the defence of provocation be abolished.⁸⁵ Like Horder, the Committee argued that evidence of provocation could be reflected in sentencing. Both Horder and the Committee were concerned that the doctrine of provocation predominantly excuses male anger and violence against women. The VLRC also recommended the defence's abolition. This was primarily because, like Horder, it was of the view that the factors leading to killing in anger could be taken into account in mitigation of sentence.⁸⁶

The main problem with considering explanations for violent conduct at the sentencing stage is that judges would still have to ascertain the basis for the killing. This undermines the role of the jury in apportioning criminal responsibility, which was considered fundamental in the Court of Appeal's decisions in *R v Conway* and *R v Yasso*. The normative approach to defences in general also needs to be considered. Andrew Ashworth has pointed out that whether provocation should exist as a defence is closely related to issues of stigma and fair labelling.⁸⁷ He argues that the label 'murder' should relate to the most heinous of killings and these do not include unpremeditated, provoked ones.⁸⁸

There is also a concern that if provocation is abolished as a defence, it will close off an avenue of defence for women who have killed their partners after a history of domestic violence.⁸⁹ This is particularly salient if there is no defence of excessive self-defence available to women who kill their abusive partners.

Overall, it may be preferable to work towards circumscribing the scope of the defence and providing a workable objective component than to abandon it entirely. The next section outlines some options for developing a more stringent test.

B *Restricting the Boundaries of Provocation as a Defence*

From a historical perspective, Alan Norrie has argued that the move from the idea of provocation as a justifiable exercise of righteous anger to a 'concession to human frailty' has meant that 'provocation has moved from a matter of moral judgment to a question of psychological fact'.⁹⁰ Nourse has similarly made the point that provocation as a defence of 'passion' has moved through various stages: 'Once an honor code, then heated blood, now a state of mind, the idea of passion has moved steadily inward.'⁹¹

Norrie argues that trying to particularise the individual in provocation cases by, for example, taking into account the accused's characteristics, leads to a lack of clearly-articulated moral boundaries for the defence. This helps explain why trial

⁸⁵ Model Criminal Code Officers Committee, *Chapter 5: Fatal Offences against the Person Discussion Paper* (1998) 107.

⁸⁶ VLRC, *Defences to Homicide: Final Report*, above n 13, 55.

⁸⁷ Andrew Ashworth, *Principles of Criminal Law* (4th ed, 2003) 278.

⁸⁸ *Ibid* 279.

⁸⁹ VLRC, *Defences to Homicide: Final Report*, above n 13, 38–9.

⁹⁰ Alan Norrie, *Law and the Beautiful Soul* (2005) 125.

⁹¹ Nourse, above n 74, 1384.

judges have taken on a gatekeeping role in order to attempt to 'supplement the legal categories with the additional moral information that is necessary'.⁹²

The challenge in relation to the defence of provocation is to try to imbue it with a substantive moral context without relying on judges or jury members to do this in an ad hoc fashion. One option in this regard is to ensure that the 'ordinary person' test is expressed more clearly as a normative standard. Wilson J stated in the Canadian case of *R v Hill*:

The objective standard ... may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.⁹³

The current provocation test with its two limbs is exceptionally difficult to apply in practice. The jury must take into account the accused's characteristics when measuring the gravity of the provocation, yet dismiss all of them except for age in relation to whether an ordinary person would have lost self-control and acted in the way the accused did.⁹⁴ Concentrating on providing a workable ordinary person test would go a long way to strengthening the normative basis of the defence.

Another way of imbuing the defence of provocation with a substantive moral context is to set out legislatively that 'mere words' are insufficient to amount to provocation. There is some controversy over whether or not mere words are currently sufficient to amount to provocation. The case of *Moffa* is often cited as authority for the proposition that mere words are insufficient. In that case, Mason J stated that

a case of provocation by words may be more easily invented than a case of provocation by conduct, particularly when the victim was the wife of the accused. There is, therefore, an element of public policy as well as common sense requiring the close scrutiny of claims of provocation founded in words, rather than conduct.⁹⁵

However, the majority judgments in *Moffa* seem to imply that insulting words may amount to provocation if they are violently provocative or of an 'exceptional' character. In *Ramage*, Julie allegedly told James: 'I'm over you. I should have left you 10 years ago'. She then allegedly said that sex with James repulsed her and implied how much better her new friend was.⁹⁶ These words can be seen as insulting, but are they 'violently' provocative or of an 'exceptional' character? The Queensland Court of Appeal in *Buttigieg v The Queen* held that words alone,

⁹² Norrie, above n 90, 129.

⁹³ [1986] 1 SCR 313, 343.

⁹⁴ *Stingel* (1990) 171 CLR 312, 329 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁹⁵ (1977) 138 CLR 601, 620–1.

⁹⁶ *Ramage* [2004] VSC 508 (Unreported, Osborn J, 9 December 2004) [18], [22].

no matter how insulting or upsetting, cannot amount to sufficient provocation to murder.⁹⁷ If this were clearly set out in legislation, then it would immediately restrict the use of this defence.

Finally, the circumstances in which provocation may be raised could be limited so that evidence of provocation is unavailable where the victim ‘has left, attempted to leave or threatened to leave an intimate sexual relationship.’⁹⁸ Curtailing the ambit of a claim of loss of self-control in such circumstances would recognise a presumption that individuals ought to take appropriate steps to maintain self-control. Nourse has outlined how reforms to the law of provocation in the United States have led to the placing of all the normative questions about killing in a state of ‘extreme emotional disturbance’ into ‘the form of questions about the qualities and attributes of persons’.⁹⁹ Her solution is to propose a defence of ‘warranted excuse’ that would exclude claims of killing based on a partner leaving a relationship and would change the focus from the characteristics of the accused to the circumstances of the killing.¹⁰⁰ This proposal bears further consideration from those seeking to reform the law in this area.

Steven Yannoulidis has pointed out that provocation satisfies the conceptual underpinnings of exculpatory defences.¹⁰¹ It may be that the better approach is to concentrate on developing a circumscribed, but workable, test of provocation rather than wiping the slate clean.

I turn now to an analysis of two recent automatism cases and the issues they raise for cases of intimate homicides.

IV AUTOMATISM — THE CURRENT STATE OF PLAY

‘Automatism’ is the term generally used to refer at law to involuntary conduct resulting from some form of impaired consciousness. While sometimes referred to as a separate ‘defence’, in most jurisdictions the doctrine operates to create an evidentiary onus: once the accused raises evidence that the act was involuntary, the prosecution must rebut that evidence beyond reasonable doubt.¹⁰²

The courts have accepted evidence of automatism as arising from a blow to the head,¹⁰³ sleep disorders,¹⁰⁴ the consumption of alcohol or other drugs,¹⁰⁵ neurological disorders,¹⁰⁶ hypoglycaemia,¹⁰⁷ epilepsy¹⁰⁸ and dissociation arising from extraordinary external stress.¹⁰⁹

⁹⁷ (1993) 69 A Crim R 21, 37 (Fitzgerald P, Pincus JA and Thomas J).

⁹⁸ VLRC, *Defences to Homicide: Options Paper*, above n 1, 90, referring to a submission by Helen Brown.

⁹⁹ Nourse, above n 74, 1337.

¹⁰⁰ *Ibid* 1392–403.

¹⁰¹ Steven Yannoulidis, ‘Excusing Fleeting Mental States: Provocation, Involuntariness and Normative Practice’ (2005) 12 *Psychiatry, Psychology and Law* 23, 29.

¹⁰² In Canada, a majority of the Supreme Court in *R v Stone* [1999] 2 SCR 290, 293 (L’Heureux-Dubé, Gonthier, Cory, McLachlin and Bastarache JJ) held that the legal burden is on the defence to prove involuntariness on a balance of probabilities.

¹⁰³ *R v Minor* (1955) 112 CCC 29; *R v Stripp* (1978) 69 Cr App R 318, 323 (Ormrod LJ); *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279.

¹⁰⁴ *Kroon v The Queen* (1990) 55 SASR 476.

¹⁰⁵ *R v O’Connor* (1980) 146 CLR 64.

¹⁰⁶ *Police v Bannin* [1991] 2 NZLR 237 (Kleine-Levin syndrome).

While there have been some cases where automatism has been equated with a complete lack of consciousness,¹¹⁰ because automatism is related to the concept of involuntariness rather than consciousness, a degree of awareness or cognitive function is not necessarily fatal to automatism being accepted by the trier of fact.¹¹¹ In *Ryan v The Queen*, Barwick CJ stated:

it is important ... not to regard [automatism] as of the essence of the discussion, however convenient an expression automatism may be to comprehend involuntary deeds where the lack of concomitant or controlling will to act is due to diverse causes. It is that lack which is the relevant determinant. ... It is of course the absence of the will to act or, perhaps, more precisely of its exercise rather than lack of knowledge or consciousness which ... decides criminal liability.¹¹²

The most controversial automatism cases concern evidence of dissociative states brought about by some form of psychological blow. Marlene Steinberg writes that '[d]uring a dissociative episode, the mental contents that are dissociated from full consciousness remain on some peripheral level of awareness; from this perspective, dissociation can also be defined as a fragmentation of consciousness.'¹¹³

Evidence of dissociation may be raised not only to negate the element of voluntary behaviour but also to support a separate defence of having a mental disorder. The division between 'sane automatism' and 'insane automatism' is a complex one and depends upon whether or not the condition alleged by the accused is a recognised mental disorder. The law has developed two tests to establish whether or not the condition of automatism is a mental disorder: the 'internal cause theory' set out by Martin JA in *Rabey v The Queen*,¹¹⁴ and the 'continuing danger theory' referred to by La Forest J in *R v Parks*.¹¹⁵ In *R v Stone*, Bastarache J found that both approaches are relevant factors in determining the category in which a condition falls.¹¹⁶ Other policy factors may also be taken into account to provide a 'holistic' approach.¹¹⁷

Automatism in the sense of dissociation arising from a psychological blow is rarely raised in homicide trials and, when it is, it is seldom successful. Nevertheless, there have been cases where men who have killed their estranged partners have been acquitted after successfully raising evidence of automatism. The most recent of these cases is that of Dharmander Singh.

¹⁰⁷ *Broome v Perkins* (1986) 85 Cr App R 321; *R v Hennessy* [1989] 1 WLR 287.

¹⁰⁸ *Youssef v The Queen* (1990) 50 A Crim R 1.

¹⁰⁹ *R v Falconer* (1990) 171 CLR 30.

¹¹⁰ See, eg, *R v Joyce* (1970) SASR 184; *R v Burr* [1969] NZLR 736; *Broome v Perkins* (1987) 85 Cr App R 321; *R v Isitt* (1977) 67 Cr App R 44.

¹¹¹ See, eg, *R v Radford* (1986) 42 SASR 266, 275–6 (King CJ); *R v Burr* [1969] NZLR 736, 745 (North P).

¹¹² (1967) 121 CLR 205, 214.

¹¹³ Marlene Steinberg, *Handbook for the Assessment of Dissociation: A Clinical Guide* (1995) 23.

¹¹⁴ (1977) 17 OR (2d) 1, 22.

¹¹⁵ [1992] 2 SCR 871, 901.

¹¹⁶ [1999] 2 SCR 290, 396–8.

¹¹⁷ *Ibid.*

A *The Case of Dharmander Singh*

On 22 June 2001, after a two-and-a-half year separation, Dharmander Singh shot and killed his estranged wife, Linda Bartley.¹¹⁸

Dharmander and Linda's daughter, Savannah, had been born in 1999 after their separation. On 28 January 2000, the Family Court confirmed an order that Savannah reside with Linda. Dharmander was allowed supervised contact with Savannah twice a week for two hours. The contact was to be supervised by Linda's stepfather.¹¹⁹ On 29 May 2000, the Family Court varied the order so that contact would take place in Dharmander's home town of Berri, South Australia, and the supervisors would be his friend, Daniel Singh (no relation), and Linda's friend, Jacqui Warland.

There was a long history of acrimony during the separation. Linda obtained a domestic violence order on 5 January 2000, which restrained Dharmander from entering her premises and from assaulting, harassing or threatening her. The Magistrates' Court also ordered that any firearm in Dharmander's possession be confiscated. Jacqui Warland said that during one contact visit, Dharmander kicked the door of Linda's car onto her leg as she was entering it, and the police were contacted.

In mid-2000, Linda refused to allow Dharmander to have contact with their daughter. Dharmander went to the Family Court claiming that Linda had contravened the contact orders. The matter was transferred to the Federal Magistrates' Court and on 21 June 2001 the Court found that Linda had contravened the orders. The penalty was that Linda enter into a recognisance in the sum of \$1000 for a period of 18 months, the condition being that she was to comply with all the orders of the Family Court and the Federal Magistrates' Court.

The fatal shooting occurred during a contact visit in Berri on the day after the Federal Magistrates' Court hearing. Savannah, who has cerebral palsy, started screaming as Dharmander put her in the car. Linda was talking on her mobile telephone and when she saw her distressed daughter, she started abusing Dharmander and allegedly hit him with the telephone.

Dharmander said that he had no recollection of what happened next, but 'came to' in Sydney over 24 hours later. In fact, he had taken a rifle from his car (he said it had been in the car since December 2000) and shot Linda four times. He subsequently drove to Bordertown to see a friend who was not at home, replaced the number plates on his car with New South Wales plates and drove to Sydney. A police manhunt ensued and he was arrested on 23 June 2001.

At his trial for the murder of Linda Bartley, the defence argued that Dharmander had not acted voluntarily because he was in a state of impaired conscious-

¹¹⁸ The following facts are drawn from *R v Singh* (2003) 86 SASR 473.

¹¹⁹ In a disturbing twist to this case, after Savannah was placed in the care of Valerie Bartley, Linda's mother, it was discovered that Valerie's partner, Paul Lawes, was a convicted paedophile: ABC Television, 'Authorities Allow Child to Live with Convicted Paedophile', *Stateline South Australia*, 26 March 2004 <http://www.abc.net.au/stateline/sa/content/StatelineSAArchive_March2004.htm>. Paul Lawes had concealed his convictions for indecently assaulting children (one of whom was his daughter) from the Family Court in order to supervise Dharmander Singh's contact visits.

ness. In the alternative, the defence raised provocation, citing Linda's yelling at him and hitting him with the mobile telephone as causing him to lose self-control.

The jury rejected both provocation and automatism and convicted Dharmander of murder. He was sentenced to life imprisonment with a minimum nonparole period of 24 years. In sentencing the accused, Lander J was quoted as stating that custody disputes 'should never be resolved by physical violence and mothers must be assured the Court will protect them from this violence'.¹²⁰ On appeal, the Supreme Court of South Australia held that the trial judge had misdirected the jury in relation to the burden of proof and ordered a retrial.¹²¹

At his retrial for murder, a psychiatrist, Dr Bruce Westmore, gave evidence that Dharmander was in a state of 'dissociative amnesia' caused by external stress when he fired the shots, and therefore his actions were involuntary. This is explained further below. In the alternative, the defence again relied on the partial defence of provocation.

This time, the retrial resulted in a majority verdict acquitting Dharmander of murder, presumably on the basis of the psychiatric evidence. The acquittal was widely reported in the media.¹²² Dharmander was later deported to India after he was refused a bridging visa to pursue custody of Savannah.¹²³

The acquittal of Dharmander Singh is of great concern given the circumstances leading up to the killing. The case raises issues about the use of expert evidence by mental health professionals in explaining an accused's reaction to a relationship breakdown. In automatism cases, much more than in provocation cases, the defence will rely on expert evidence about the accused's mental state at the time of the killing.

The defence counsel in Dharmander Singh's retrial called evidence from one psychiatrist that was not challenged by other expert evidence. Dr Westmore saw Dharmander on 28 February 2004 and read the transcript of the evidence given during the retrial. He honed in on Dharmander's inability to recall the killing as being consistent with dissociative amnesia (formerly called 'psychogenic amnesia'), a clinical condition 'closely related in time to a traumatic event'.¹²⁴

Dr Westmore said that Dharmander had previously had two episodes of memory disturbances occurring in response to stress, although these were complicated by the fact that they were related to self-harming attempts caused by overdoses on minor tranquillisers.¹²⁵ Under cross-examination, Dr Westmore agreed that there was no test that could be conducted to differentiate between

¹²⁰ *Domestic Violence Group Applauds Murder Sentence* (18 February 2003) ABC NewsOnline <<http://www.abc.net.au/news/newsitems/200302/s786939.htm>>.

¹²¹ *R v Singh* (2003) 86 SASR 473, 515 (Mullighan J).

¹²² See, eg, Michael Owen-Brown, 'Wife Killer Acquitted', *The Advertiser* (Adelaide), 23 March 2004, 1, 6; Michael Owen-Brown, 'Custody Dispute Stress Led to Mental Condition', *The Advertiser* (Adelaide), 24 March 2004, 7; Editorial, 'The Fine Balance between Justice and Compassion', *The Advertiser* (Adelaide), 24 March 2004, 16.

¹²³ 'Wife Killer Sent Back to India', *The Advertiser* (Adelaide), 20 May 2004, 15.

¹²⁴ Transcript of Evidence, *R v Singh* (Supreme Court of South Australia, Doyle CJ, 17 March 2004) 672.

¹²⁵ *Ibid* 678.

dissociative amnesia and malingering,¹²⁶ and that a person in a dissociative state can act purposefully in a goal-directed manner.¹²⁷

A number of questions arise from this case. First, how can mental health professionals distinguish between a dissociative state that occurs *during* the killing from one that occurs *as a response* to the killing? Secondly, if an accused can act purposefully in a goal-directed manner in a dissociative state, how can his or her actions be considered involuntary? Thirdly, to what extent should mental health professionals rely on an inability to recall events as indicative of dissociation, given that they are necessarily relying on the accused's version of events?

It is apparent that dissociative state automatism cases can give rise to a 'battle of the experts', causing the jury to weigh up conflicting expert versions of the evidence. The following case exemplifies this tendency.

B *The Case of Vasily Karageorges*

Vasily and Tina Karageorges married in 1974 at the ages of 22 and 18, respectively.¹²⁸ They had a daughter and two sons, and on most accounts the marriage was a harmonious one.

Vasily had rigid principles about family loyalty and throughout the marriage there were incidents suggesting that Vasily was prone to wrongly believing that Tina was unfaithful. On 8 March 2003, Vasily noticed what he thought was bruising on Tina's inner thighs. She said it was a rash, but Vasily insisted it was a sign that she had been unfaithful.

An argument ensued with Tina denying any allegations of infidelity. According to Vasily, Tina then confessed to affairs with other men and said that their eldest son may not have been his. He went outside to get some air and then walked into the kitchen to get some water. Vasily said he remembered nothing after that.

In fact, Vasily had picked up a knife from the kitchen and stabbed Tina at least 27 times, causing her death. He said he came to with Tina on the ground, a knife protruding from her stomach. He pulled the knife out, telephoned the 000 emergency line and told the operator that he thought he had stabbed his wife.

The prosecution relied on three expert witnesses: two forensic psychiatrists, Professor Paul Mullens and Dr Debra Wood, and a forensic psychologist, Professor James Ogloff, who testified that it was not uncommon for spouses who kill their partners to lack the ability to recall the event. Both Dr Wood and Professor Ogloff had interviewed Vasily on two occasions.

Dr Wood said that while Vasily may have been in a dissociative state, the sequence of actions performed by him indicated that the actions were purposeful and goal-oriented. That is, the actions themselves demonstrated Vasily's capacity for choice and were voluntary.¹²⁹ Professor Ogloff said that Vasily had killed Tina during an experience of rage brought on by extreme feelings of betrayal,

¹²⁶ Ibid 679.

¹²⁷ Ibid 689.

¹²⁸ The following facts are drawn from *R v Karageorges* [2005] VSC 193 (Unreported, Kaye J, 14 June 2005).

¹²⁹ Transcript of Proceedings, *R v Karageorges* (Supreme Court of Victoria, Kaye J, 1 June 2005) 655.

which included jealousy and a perceived lack of control over his wife's behaviour.¹³⁰ A lack of memory did not mean that Vasily had been in a dissociative state at the time of the killing, but even if he had been in such a state, there can be degrees of conscious awareness and control of behaviour.¹³¹

Professor Mullens had not interviewed Vasily, nor had he read the transcript of evidence. Instead, he gave evidence of a general nature about dissociative disorders. He stated that a disruption of mental function can occur in certain instances such as after concussion or after civil disasters caused by earthquakes and the like, but the more 'novel' the behaviour, the less likely it could be considered involuntary.¹³²

The defence called a forensic psychiatrist, Professor Graham Burrows, who interviewed Vasily on three occasions. During one session, he hypnotised Vasily and found him to be in the top 10 per cent of individuals capable of being hypnotised. It was his opinion that Vasily was dissociated because of this high level of hypnotisability and because of a history of sleepwalking in childhood, night terrors and amnesia for childhood events that had upset him. Professor Burrows said that Vasily had dissociated to the extent that he had not known what he was doing.¹³³

During the trial, Kaye J ruled that the evidence did not raise the defence of mental impairment under s 22 of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic).¹³⁴ The experts who had interviewed Vasily were all of the opinion that he did not suffer from a mental disorder, and there was no evidence that any dissociative state he may have been in was prone to recur.

The jury returned a verdict of murder and Kaye J sentenced Vasily Karageorges to 18 years' imprisonment with a minimum nonparole period of 14 years.¹³⁵

In this trial, as in the trial of Michael Leonboyer¹³⁶ who raised the issue of automatism as well as provocation, the prosecution was able to rely on expert opinion to argue that being in a dissociative state does not necessarily lead to involuntary conduct. In the absence of such strong expert evidence, it may be difficult for the prosecution to prove beyond reasonable doubt that the accused's conduct was voluntary.

I turn now to consider some of the options for reform of the law relating to automatism.

V OPTIONS FOR THE REFORM OF AUTOMATISM

In *R v Szymusiak*, Schroeder JA described evidence of 'psychological blow' automatism as 'the last refuge of a scoundrel'.¹³⁷ It is of particular concern in cases where men kill their estranged partners because, if such evidence is not

¹³⁰ Ibid 656.

¹³¹ Ibid 657.

¹³² Ibid 659.

¹³³ Ibid 392–3, 799, 808.

¹³⁴ *R v Karageorges* (Unreported, Supreme Court of Victoria, Kaye J, 27 May 2005) [2].

¹³⁵ *R v Karageorges* [2005] VSC 193 (Unreported, Kaye J, 14 June 2005) [28].

¹³⁶ *DPP (Vic) v Leonboyer* (1999) 109 A Crim R 168.

¹³⁷ [1972] 3 OR 602, 608.

disproved beyond reasonable doubt, a complete acquittal results. The fact that Dharmander Singh was originally convicted of the murder of his ex-wife and given a nonparole period of 24 years, yet was acquitted at his retrial on the basis of a dissociative state, raises serious concerns about the current state of the law in relation to sane automatism.

Involuntary conduct arising from dissociative states also raises concerns about the use of expert evidence in criminal trials. As the case of Vasily Karageorges demonstrates, some expert witnesses may give evidence that a dissociative state is synonymous with involuntary action. Others may rebut the presumption that dissociation necessarily renders a person deprived of the capacity to act voluntarily. These different approaches to the *effect* of dissociation may very well be intractable, and therefore trials in which evidence of sane automatism is raised can become a ‘battle of the experts’. One way around this could be to tighten up the rules relating to expert evidence to ensure mental health professionals do not give evidence as to the ‘ultimate issue’ of the voluntariness of the accused’s behaviour.

There are three main options for reform in relation to sane automatism. The first is to retain the legal status quo, but strengthen the rules relating to expert evidence. The second is to adopt a more limited definition of automatism. The third is to restrict involuntariness to reflex actions or spasms and subsume evidence of dissociation into a broad defence of mental impairment. I will deal with each of these options in turn.

A Retaining the Status Quo

The VLRC has recommended that the doctrine of automatism should remain unchanged.¹³⁸ It reached this recommendation primarily because of the pragmatic reason that evidence of automatism is rarely raised in criminal trials.¹³⁹ It decided that the jury should be the final arbiter of whether or not the acts of the accused were voluntary.¹⁴⁰ While Dharmander Singh’s case was mentioned briefly by the Commission, it seems that it was misinterpreted as a case dealing with lack of intention rather than automatism.¹⁴¹

The notion that an accused must have acted ‘voluntarily’ (in the sense of having willed his or her actions) and must have possessed a subjective fault element such as intention before a serious offence can be proved, has been part of the criminal law for centuries. It is understandable that the VLRC declined to interfere with this notion. However, some of the options listed below do not necessarily interfere with the division between involuntariness and subjective fault.

There is also nothing to prevent retaining the status quo while clarifying the rules of expert evidence. I have argued elsewhere that the ‘ultimate issue’ rule in

¹³⁸ VLRC, *Defences to Homicide: Final Report*, above n 13, 252.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.* 251.

relation to expert evidence is in need of revival.¹⁴² Perhaps a simple solution is to prevent expert testimony on the ultimate issue as to whether or not the accused's actions were involuntary. Evidence of dissociation could be led, but the jury should be left to decide this ultimate issue. The problem, of course, is that this may not have prevented Dharmander Singh being acquitted, and the push to have experts give evidence on involuntariness appears unstoppable.

B *A Limited Definition of Automatism*

One way around some of the problems discussed above is to proffer a limited definition of automatism. This could read as follows:

Automatism means involuntary behaviour that occurs in an altered state of consciousness and which is compulsive, repetitive and simple. It does not mean goal-directed or purposive behaviour performed when in an altered state of consciousness.

The problem with this definition is that it only enacts one approach to sane automatism: that usually given by expert witnesses called by the prosecution. It takes into account just one philosophical perspective and defence expert witnesses would no doubt take exception to it.

Nevertheless, the scope of automatism is a legal rather than a medical matter. An analogy may be drawn with the term 'disease of the mind' under the *M'Naghten* rules.¹⁴³ This term bore no relation to medical thinking, but, through interpretation by the courts, served to limit the type of conditions that could give rise to the cognitive defence of insanity. There is nothing to prevent the legislature defining what is meant by automatism in such a manner as described above. Such a definition would certainly make it more difficult for a man such as Dharmander Singh to argue his actions were involuntary, because picking up the gun and shooting his wife four times can be viewed as goal-directed or purposive behaviour.

C *A Broad Defence of Mental Impairment*

The Canadian Psychiatric Association has suggested that automatism be subsumed within the existing Canadian defence of 'not criminally responsible on account of mental disorder'.¹⁴⁴ I have argued elsewhere that a broadened defence of mental impairment, perhaps called a defence of 'cognitive dysfunction', could encompass states of dissociation.¹⁴⁵ Such a defence could read as follows: 'A person is not criminally responsible for an offence if he or she was suffering

¹⁴² Bernadette McSherry, 'Expert Testimony and the Effects of Mental Impairment: Reviving the Ultimate Issue Rule' (2001) 24 *International Journal of Law and Psychiatry* 13.

¹⁴³ *Re M'Naghten's Case* (1843) 10 Cl & F 200, 209–11; 8 ER 718, 722–3 (Tindal CJ).

¹⁴⁴ *Criminal Code*, RSC 1985, c C-46, s 672.34, discussed in Canadian Psychiatric Association, *Brief to the House of Commons Standing Committee on Justice and the Solicitor General, Subcommittee on the Reform of the General Part of the Criminal Code* (9 November 1992).

¹⁴⁵ Bernadette McSherry, 'Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach' (2003) 21 *Behavioral Sciences and the Law* 581, 597.

from a mental impairment at the time of the commission of the offence such that his or her ability to reason was substantially impaired.’

‘Mental impairment’ could then be defined broadly to include mental illness, intellectual disability, or a condition of severely impaired consciousness.¹⁴⁶ Dissociative states could fall within the latter category.

A primary benefit of having a broad defence is that the requirement for voluntariness and subjective fault to be proved beyond reasonable doubt remains intact. If conditions such as dissociative states, epilepsy, somnambulism or hypoglycaemia were seen as potentially affecting reasoning processes in a similar way to severe mental illnesses, the courts would no longer have to rely on unworkable and artificial tests dividing internal and external causes. Because there are now more flexible options for those found not guilty on the ground of mental impairment or mental disorder, a person like Dharmander Singh could be assessed at the dispositional stage to determine whether or not he should be discharged absolutely or on conditions, or be subject to some form of medical treatment.

However, Andrew Carroll and Andrew Forrester have expressed concerns that a broad mental impairment defence would mean attempting to diagnose ‘fleeting mental states’ rather than mental illnesses that extend over a considerable period of time.¹⁴⁷ They note that there is a clear distinction between brief mental *states* such as anger (and presumably dissociation) and temporally-prolonged mental *disorders*.¹⁴⁸

On balance, it may be more appropriate to look toward legislatively delineating the scope of automatism rather than subsuming it within a broad defence of mental impairment. What remains of concern is that evidence of dissociation may lead to a complete acquittal in circumstances of intimate homicide. Tightening up the evidence that mental health professionals are expected to give in such cases may be a first step, but relying on the status quo in the absence of this is no real solution.

VI CONCLUSION

The criminal law relating to the defence of provocation and the doctrine of automatism is exceedingly complex. If either area of the law is tightened up, defence counsel would no doubt be able to find other avenues for argument. For example, if restrictions were placed on evidence relating to dissociation and involuntary conduct, defence counsel may turn to raising evidence of certain mental states to argue a lack of intention.¹⁴⁹

¹⁴⁶ Bernadette McSherry and Bronwyn Naylor, *Australian Criminal Laws: Critical Perspectives* (2004) 517.

¹⁴⁷ Andrew Carroll and Andrew Forrester, ‘Depressive Rage and Criminal Responsibility’ (2005) 12 *Psychiatry, Psychology and Law* 36, 41.

¹⁴⁸ *Ibid* 40.

¹⁴⁹ In *Hawkins v The Queen* (1994) 179 CLR 500, 517 (Mason, Brennan, Deane, Dawson and Gaudron JJ), the High Court held that evidence of ‘mental disease’ could be raised to question whether or not an act was done with a specific intent.

I have outlined how in a number of recent Victorian provocation cases, trial judges served a gatekeeping role, but since the appeal court cases of *Midas Conway* and *Mazin Yasso* it is unlikely that this will continue. There is indeed a question as to whether judges should be serving a normative role at all in relation to delineating the scope of the defence of provocation. While it is necessary to imbue the defence with a substantive moral context, it is preferable to do so through legislation rather than relying on judges or juries to do this in an ad hoc fashion. Nourse's idea of a reformulated defence of 'warranted excuse' may be a starting point in this regard.

The cases of *Dharmander Singh* and *Vasily Karageorges* demonstrate how expert evidence from mental health professionals is essential to the outcome of automatism trials. There is some reason to believe that even if a person is in a dissociative state at the time of the killing, some goal-directed or purposeful behaviour can be carried out. A person who dissociates in response to 'the ordinary stresses and disappointments of life',¹⁵⁰ such as a relationship breakdown, therefore should not be afforded a total acquittal as occurred in *Dharmander Singh's* case. In *R v Stone*, McEachern CJ has pointed out that 'it is unusual, to say the least, for a person without some disease of the mind to react ... violently to a verbal attack'¹⁵¹ and 'a sudden violent response to abuse certainly raises a concern about the danger threshold of the appellant'.¹⁵²

It is timely to consider restricting the ambit of claims of provocation or automatism in order to provide a more principled way of dealing with those who 'snap' due to stress such as verbal abuse in the context of a relationship breakdown. A presumption should exist that individuals ought to take appropriate steps to maintain self-control. The breakdown of a relationship should not be sufficient to enable an accused to be completely acquitted or partially excused from criminal responsibility.

¹⁵⁰ *R v Rabey* (1977) 17 OR (2d) 1, 22 (Martin JA).

¹⁵¹ (1997) 113 CCC (3d) 158, 168.

¹⁵² *Ibid* 169.