R. v. *THIBERT*: ARE THERE ANY ORDINARY PEOPLE LEFT?

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TABLE OF CONTENTS

I. INTRODUCTION 147

II. *THIBERT*: BEYOND *HILL* 149

A. *THE BASIS OF THE APPEAL* 149
B. *APPLICATION OF THE* CAMPLIN *TEST TO THE FACTS OF* THIBERT 151
C. *ANALYSIS OF* THIBERT: *BEYOND* HILL 154
D. LIMITS TO THE DEFENCE 157

III. *THIBERT* AND THE PRINCIPLES OF EQUALITY AND INDIVIDUAL RESPONSIBILITY 164

IV. CONCLUSION 169

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I. INTRODUCTION

A tension characterises the application of any system of rules to human behaviour. Rules are based on generalizations and are unable to take into account fully the richness of texture and the shadings of hue and colour that make up individual experience. The legal system also faces this tension, and the criminal law vividly illustrates it. In its fullness, the criminal law can be harsh and unforgiving, inflexible, unyielding and unremitting. People, however, can be stupid, blind, and fearful, their judgment and actions clouded by emotions that seem to possess them. They often find themselves in circumstances that defy our imagination about how we might react in a similar situation.

How does the criminal law set boundaries for unacceptable conduct, which are nevertheless tempered by a recognition of human frailty? How does it show some leniency? What behaviour will society condemn and punish, and under what circumstances will it accord some (if not a full) measure of remission?

One example in the *Criminal Code* is the defence of provocation.[1] It is "designed....to avoid the full rigour of a murder conviction and especially to escape the mandatory sentence of life imprisonment."[2] Available only for the offence of murder and applicable only after its elements have been established,[3] successfully put the defence requires reduction to a conviction of manslaughter.[4]

However, it is not without its problems. In particular, the appropriateness of its objective standard has drawn critical commentary, and the standard poses innumerable problems for judges and juries alike.[5] A number of high level court decisions over the past 15 years in Canada, England and Australia have turned on the issue of how to apply the objective test. The Supreme Court of Canada's recent decision in *R.* v. *Thibert*[6] effectively raises whether there continues to be a distinctive and functional objective test in Canadian law. The purpose of this paper is to examine the Court's decision, with a particular eye on how it has individualized even further the objective or ordinary person test, which it last examined at some length in *R.* v. *Hill*.[7]

In some respects *Thibert* is an unremarkable judgment: it is short, the work of a

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1 R.S.C. 1985, c. C-46, s. 232 [hereinafter the *Criminal Code*].

2 Tim Quigley, "Deciphering the Defence of Provocation" (1989) 38 U.N.B L.J. 11 at 11. See also the remarks of Martin J.A. in *R.* v. *Campbell* (1977), 17 O.R. (2d) 673 at 682, 38 C.C.C. (2d) 6 at 15 (C.A.).

3 Alan Mewett argues that the defence can apply only to murder as defined under s. 229(a)(i)(ii). "Murder and Intent: Self-defence and Provocation" (1985) 27 Crim. L.Q. 433 at 433. T. Quigley agrees with Mewett that invoking the defence in a case involving constructive murder would be implausible, though he disagrees that it would be impossible. *Supra* note 2 at 14.

4 *R.* v. *Tennant and Naccarato* (1975), 7 O.R. (2d) 687, 23 C.C.C. (2d) 80 (C.A.); *R.* v. *Leblanc* (1985), 11 O.A.C. 315, 22 C.C.C. (3d) 126 (Ont. C.A.); *R.* v. *Smith* (1990), 94 N.S.R. (2d) 361, 53 C.C.C. (3d) 97 (S.C.).

5 For a summary of the debate and issues see M. N. Rayf, "The Reasonable Man Test in the Defence of Provocation: What are the Reasonable Man's Attributes and Should the Test be Abolished?" (1987/88) 30 Crim. L.Q. 73. In "Provocation — A Cautionary Note" (1995) 22 J. L. & Soc'y 398 at 404, Sue Bandalli cites the *House of Lords Select Committee on Murder and Life Imprisonment*, in which a survey of judges revealed that the defence is unworkable, especially because of the ordinary person test.

6 [1996] 1 S.C.R. 37, 131 D.L.R. (4th) 675 [hereinafter *Thibert* cited to S.C.R.].

7 [1986] 1 S.C.R. 313 [hereinafter *Hill*].

reduced panel of the Court (only five members heard the appeal), and it consists of only two, not terribly well-argued sets of reasons.[8] Still, *Thibert* is significant on three counts. It is the first time in a decade that the Court has turned its attention in any concerted way to the defence of provocation since *Hill*.[9] In that period, the Court heard and rejected no fewer than 24 appeal applications on the defence. It remains an oft-used and controversial provision of the *Criminal Code*, and so the Court's development of its application merits attention and scrutiny.

Secondly, the judgment hinges on the ordinary person test, which was also the subject of the decision in *Hill*. *Thibert* thus raises the question of where the Court is now in its interpretation of the test, and in particular whether it has remained consistent with *Hill*.[10] A close reading of the decision suggests that it builds on the confusion which characterized *Hill*'s development of the ordinary person test, and represents a sharper individualization of the test. As such it breaks with its common law progenitor, *D.P.P.* v. *Camplin*[11], as well as with three other recent decisions, one British and the other two Australian, which confirm an emerging common law consensus on the ordinary person test.[12]

Finally, *Thibert* contains an interesting (though largely undeveloped) suggestion to exclude the application of the defence of provocation in cases involving domestic disputes. The suggestion comes in Major J.'s dissent and his view that "the break-up of a marriage due to an extra-marital affair cannot constitute such a wrongful act or insult" within the meaning of the defence.[13]

In what follows, I wish to examine to what extent and with what implications, particularly for the principles of equality and individual responsibility, affirmed in *Hill*, *Camplin*, *Stingel* and *Morhall*, the Court has individualized even further the ordinary person test. I shall argue that *Thibert* has eroded the significance of an objective standard for measuring the provocativeness of a wrongful act or insult, and that in fact

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[8] Cory J. (Sopinka and McLachlin JJ. concurring) wrote the majority judgment, while Major J. (Iacobucci J. concurring) penned the dissent.

[9] In 1990, the Supreme Court heard *R.* v. *Sheridan*, [1991] 2 S.C.R. 205, 65 C.C.C. (3d) 319, from the Alberta Court of Appeal, concerning the defence of provocation. However, in allowing the appeal, the Court's entire judgment consisted of the following: "This appeal came to us as of right on account of a dissent on a point of law in the Court of Appeal. We are all of the view to allow this appeal for the reasons Mr. Justice Foisy, dissenting in the Court of Appeal. The appeal is accordingly allowed and the verdict of the trial judge is restored." The appeal turned on the interpretation and application of the subjective test of the defence.

[10] In "Circumstances and Objectivity" (1996) 45 C.R. (4th) 24, D. Klimchuk has examined the significance of *Thibert* for this question, and although we both agree that it represents an extension of *Hill*, I believe that with respect to the question of the objective test *Thibert* has gone even farther in its individualization of the objective test than does Klimchuk.

[11] [1978] A.C. 705, [1978] 2 All E.R. 168 (H.L.) [hereinafter *Camplin* cited to A.C.].

[12] *R.* v. *Morhall*, [1995] 3 W.L.R. 331, [1995] All E.R. 659 (H.L.) [hereinafter *Morhall*]; *R.* v. *Stingel* (1990), 171 C.L.R. 312, 65 A.L.J.R. 141 (Aust. H.C.) [hereinafter *Stingel*]; *Masciantonio* v. *R.* (1995), 183 C.L.R. 58, 129 A.L.R. 575 (Aust. H.C.) [hereinafter *Masciantonio*].

[13] *Supra* note 6 at para. 64. Major J.'s suggestion is linked to an ongoing debate among academics about whether to retain the defence at all, since it has developed historically in the context of male anger and violence over, among other things, control of female spouses and partners.

the ordinary person used by the majority is invested with all the relevant characteristics of the appellant, including those affecting his expected power of self-control.

Secondly, I wish to focus on Major J.'s suggestion that the availability of the defence be beyond the reach of cases of domestic disputes. On what basis does he make the suggestion, and if accepted would it mean a complete gutting of the defence? Is there another way of arriving at the same conclusion without having to amend the law or declare it, as I feel Major J. does, on external policy grounds?

II. *THIBERT*: BEYOND *HILL*

A. *The Basis of the Appeal*

The appellant, Norman Thibert, was convicted of second degree murder in the shooting death of Alan Sherren, his estranged wife's lover. He appealed his conviction on a number of grounds, including the failure of the trial judge to instruct the jury that the onus of proof was on the Crown to prove beyond a reasonable doubt that he had not acted under provocation.[14]

Provocation is available as a partial defence in the context of murder where (1) a wrongful act or insult that is suddenly directed at the accused; (2) is sufficient to deprive an ordinary person of self-control and; (3) the accused acted in the heat of passion. At the heart of the defence is a finding that the accused caused death 'in the heat of passion' as a *result* of sudden provocation. The provision, though, is convoluted and slippery.[15]

In *R.* v. *Parnerkar*, Chief Justice Fauteux outlined the elements of the defence:

> Subsection (2), the definition section, states all of the constituent elements of provocation. Within the restrictive meaning given to that word by Parliament for the purposes of the section, it is:
>
> (i) a wrongful act or insult,
>
> (ii) which must satisfy
>
> (a) the objective test and then be sufficient to deprive an ordinary person, not confronted with all the same circumstances of the accused, of the power of self-control, and
>
> (b) the subjective test, i.e., of having caused the accused himself to act actually upon it,
>
> (iii) on the sudden and before there was time for his passion to cool.[16]

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[14] The onus is on the Crown to show beyond a reasonable doubt that the accused was not provoked. In charging the jury the judge is required to direct specifically that the jury must be satisfied beyond a reasonable doubt that the defence is not available to the accused. See *R.* v. *Linney*, [1978] 1 S.C.R. 646 at 652, 73 D.L.R. (3d) 4 at 8.

[15] For an extensive treatment of the defence's history in the common law, see J. Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992). A more succinct review of that same history is found in Bandalli, *supra* note 5 and T. Macklem, "Provocation and the Ordinary Person" (1987/88) 11 Dalhousie L.J. 126.

[16] [1974] S.C.R. 449 at 453-54, 33 D.L.R. (3d) 683 at 686 [hereinafter *Parnerkar* cited to S.C.R.]. See also *Hill*, *supra* note 7 at 318-19 for another statement of the defence. The provision requires that the wrongful act or insult be of such a nature that the "accused acted on it on the sudden and before there was time for his passion to cool". In *The Queen* v. *Tripodi*, [1955]

The Alberta Court of Appeal dismissed the appeal, the majority concluding that there had not been an air of reality to support putting the defence to the jury in the first place, so the failure to instruct properly was not a problem. In dissent, McClung J.A. found that there was at least some such evidence and therefore the judge's incomplete direction warranted a new trial.

In coming before the Supreme Court, then, the issue was whether there was any evidence to warrant putting the defence to the jury at all. As a matter of law, the judge must be satisfied that there is at least some evidence that the wrongful act or insult was sufficient to cause an ordinary person to lose self-control and that in fact it caused the accused to lose self-control. If there is no evidence, then the judge is not to put the defence to the jury.[17] By a three-two margin, the Court concluded that there was some evidence of provocation and therefore Mr. Thibert was entitled to a new trial.

The first hurdle Thibert had to clear, to convince the Court that there was at least some evidence upon which a jury acting judicially and properly instructed could find that there had been provocation, was the objective or ordinary person test. Were Alan Sherren's acts and words sufficient to cause an ordinary person to lose control and to kill in the heat of passion?

The objective test acts as a threshold that must be passed before the jury can consider the actual person and circumstances of the accused, and whether he acted as a result of the provocation.[18] If neither the judge, in deciding the question of law, nor the jury, in deciding the question of fact, thinks that the act or insult was sufficiently serious to deprive an ordinary person of self-control, then that is the end of the inquiry.

S.C.R. 438 at 443, 4 D.L.R. 445 at 446, Rand J. specified that suddenness must characterize both the wrongful act or insult and the accused's response: "What s. 261 of the Code provides for is the 'sudden provocation', and it must be acted upon by the accused 'on the sudden and before there has been time for his passion to cool'. 'Suddenness' must characterize both the insult and the act of retaliation." In addition, the accused must have killed because he was provoked, and not merely because there was provocation. As Dickson C.J. put it for the majority in *R.* v. *Hill*, "[T]he accused must have acted on the provocation on the sudden and before there was time for his or her passion to cool", *supra* note 7 at 324.

[17] *Parnerkar*, *supra* note 16 at 454, approved by the full Court in *R.* v. *Faid*, [1983] 1 S.C.R. 265 at 277, 145 D.L.R. (3d) 67 at 77.

[18] The ordinary person or objective test is not be confused with the reasonable person construct from the law of negligence. As the High Court of Australia put it in *Stingel*, "To make what the reasonable man of the law of negligence would have done in the circumstances the controlling standard of what might constitute a defence of provocation to a charge of murder would in effect be to abolish the defence since it is all but impossible to envisage circumstances in which a wrongful act or insult would so provoke the circumspect and careful reasonable man of the law of negligence that, not acting in self-defence, he would kill his neighbour in circumstances which would, but for the provocation, be murder", *supra* note 12 at 328. In other words, the expression "ordinary person", unlike that of the "reasonable person" who is endowed with capacities of foresight and self-possession, is by definition a person capable of losing his or her self-control. In an earlier decision, the Supreme Court of Canada, in a case involving criminal negligence, narrowly maintained a uniform objective test, while allowing for an exception in cases of incapacity. However, this exception and the dissenting opinion, which would have allowed for a much more contextualized objective test, suggest a trend toward an overall more flexible application of an objective test, depending on its purpose and function, *R.* v. *Creighton*, [1993] 3 S.C.R. 3., 105 D.L.R. (4th) 632. For a defence of the objective test in provocation, see Ian Leader-Elliott, "Sex, Race and Provocation: In Defence of Stingel" (1996) 20 Crim. L.J. 72.

There is no need to proceed further to determine in fact whether the accused acted upon the provocation.[19]

Until *Hill*, the Supreme Court of Canada interpreted the objective test very restrictively. In *R.* v. *Wright*, Fauteux J. (as he then was), speaking for the Court, said, "on the first branch of the enquiry [the objective test], the jury should be directed that no consideration should be given to the peculiar or abnormal characteristics with which the accused may personally be invested."[20] The standard was the reasonable or ordinary man, and none of the accused's personal characteristics or circumstances was to be factored in to determine whether the wrongful act or insult was sufficient to be provocative within the meaning of the defence.

Under the influence of the House of Lord's decision in *Camplin*,[21] the Court in *Hill* shifted ground and acknowledged that it was permissible "to ascribe to the ordinary person any general characteristics [of the accused] relevant to the provocation in question."[22] In passing to the subjective test, the question is whether in fact the provocation caused the accused to kill the deceased. It is at this stage that the Court has always recognized the validity of incorporating into the inquiry the particular circumstances and peculiar traits of the accused, including his background, temperament, and condition, for example, the effect of being drunk.[23]

A majority of the Court obviously thought that the objective test was satisfied, at least for the purpose of putting the defence to the jury. However, it seems such a conclusion depends on a thoroughly individualized ordinary person test, one that cannot be reconciled with the *Camplin* test, which was adopted by the Court in *Hill*. For the purpose of demonstrating this claim, I shall first see what conclusion a strict application of the *Camplin* test would have yielded. Then I shall examine the critical points where I believe the Court in *Thibert* has gone beyond *Hill* (and *Camplin*).

B. *Application of the* Camplin *Test to the Facts of* Thibert

The House of Lords' decision in *Camplin* is a touchstone in any consideration of the objective test, for it has influenced many other common law decisions involving the defence.[24] In his speech, Lord Diplock expressed the ordinary person test in the follow-

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[19] *R.* v. *Wright*, [1969] S.C.R. 335 at 340, 2 D.L.R. (3d) 529 at 533; *R.* v. *Perrault*, [1971] S.C.R. 196 at 202, 12 D.L.R. (3d) 480 at 485.

[20] *Supra* note 17 at 341. See *Salamon v. R.*, [1959] S.C.R. 404, 17 D.L.R. (2d) 685 [hereinafter *Salamon* cited to S.C.R.]; *Taylor v. R.*, [1947] S.C.R. 462, [1948] 1 D.L.R. 545; *Parnerkar*, *supra* note 16.

[21] *Supra* note 11.

[22] *Hill*, *supra* note 7 at 331. However, in *Hill* the Court did not hold that judges be required to instruct the jury to takes these factors into account during the objective branch of the inquiry, which is a weakness of the judgment.

[23] See for example *Salamon*, *supra* note 20 at 410.

[24] See e.g. *Stingel* and *Masciantonio*, *supra* note 12; *Hill*, *supra* note 7; *R.* v. *Ly* (1987), 33 C.C.C. (3d) 31 (B.C. C.A.); *R.* v. *Hansford* (1987), 75 A.R. 86, 33 C.C.C. (3d) 74 (Alta. C.A.); *R.* v. *Valley* (1986), 13 O.A.C., 26 C.C.C. (3d) 207 (Ont. C.A.); *R.* v. *Daniels*, [1983] N.W.T.R. 193, 7 C.C.C. (3d) 542 (N.W.T. C.A.) [hereinafter *Daniels* cited to N.W.T.R]; *R.* v. *Trounson*, [1991] 3 N.Z.L.R. 690 (C.A.). While the court in *Trounson* did not follow *Camplin*, it did so on the grounds that it was unnecessary in order to decide the case; however, it left open the possibility of revisiting the *Camplin* test.

ing terms:

> [The] reasonable man referred to in [the statutory definition of the defence] is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they [the jury] think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.[25]

The *Camplin* ordinary person test established a structured and precise distinction between, on the one hand, a general standard for assessing the adequacy of the powers of self-control and, on the other hand, an individualized standard for determining the gravity of the provocation in question. Only the age, in cases of immaturity, and the sex[26] of the accused are permitted to affect the expected level of self-control of an ordinary person of normal temperament, with all other characteristics and circumstances to be excluded. In judging the gravity of the provocation, though, a jury must apply an individualized standard that takes into account the accused's circumstances and characteristics, which give the provocation meaning and weight for him or her. The decision in *Camplin* and its adoption, at least in principle, by the Supreme Court of Canada raises the question of whether its strict application to the facts in *Thibert* would yield the same result.

The question for the Court to determine was the following: is there any evidence upon which to conclude that if the defence of provocation was left with members of the jury they could be persuaded beyond a reasonable doubt that the deceased's words or conduct could not have caused an ordinary person to lose control and act as the accused had acted? In other words, is there any evidence to suggest that an ordinary man of normal temperament and powers of self-control could have reacted as Thibert did, faced with the same set of circumstances? If yes, then the Court would then have to determine whether there is any evidence that in fact Thibert did act as a result of provocation. If so, then it was correct for the trial judge to have left the defence with the jury and thus the appeal would succeed. However, if there was no evidence to satisfy even the ordinary person test, then the defence should not have been left with the jury and the appeal would fail.

The first step in answering the question would be to determine whether there was any evidence that, from Norman Thibert's point of view, the deceased's conduct was wrongful and words were insulting.[27] Here the jury would be entitled to assess Sherren's holding of Mrs. Thibert and rocking her back and forth as he approached her husband, inviting him to shoot, against the background of the latter's attempts to speak to his wife privately and persuade her to return to him. Moreover, the jury would also be entitled

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[25] *Camplin*, *supra* note 11 at 718.

[26] The application of this factor has been rejected by the High Court of Australia in *Stingel* and the Supreme Court of Canada in *Hill*.

[27] The definition of what is legally insulting within the meaning of the defence was given by the Court in *Taylor*, *supra* note 20 at 475, and affirmed in *Thibert*, *supra* note 6 at 44: "[An insult is] an act, or the action, of attacking or assailing; an open and sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity."

to view Sherren's actions and words in light of the emotional distress and lack of sleep from which Mr. Thibert was suffering as a result of his wife's affair.

Sherren knew Thibert was upset and distraught, but instead of attempting to defuse the situation by retreating back into the office building he advanced on him with the words, "Come on big fellow, shoot me. You want to shoot me? Go ahead and shoot me". The record also indicates that he was laughing and grinning as he advanced toward Thibert. Within this context, then, of a husband whose wife is having an affair, who is facing the breakup of his marriage and who has been unsuccessful in his attempts to speak privately with her away from the influence of her lover, a jury could reasonably have concluded that the deceased's actions and words were highly insulting from Thibert's point of view and within the meaning of the law of provocation.

The objective test hinges, though, on a second issue, for which there must also be at least some evidence before the defence can be put to the jury. Assuming the gravity of Sherren's actions and words, could a jury have entertained a reasonable doubt that these actions and words could not have caused an ordinary person to lose self-control? If no jury would entertain such a reasonable doubt, then the objective test is failed and the defence should not be put to the jury. On the principles established in *Camplin*, in addressing themselves to this part of the objective test jury members would be required to bracket any consideration of the fact that he was married, that he was deeply distressed and agitated by his wife's affair with Sherren, that he was very frustrated at being unable to speak with her privately, that when he killed Sherren he had not slept in the previous 34 hours. Instead, the main question they would have to answer is, given the gravity of the provocation that Thibert faced, how would an ordinary person of normal temperament react? Could the jury be convinced beyond a reasonable doubt that an ordinary person in these circumstances could not have reacted as the accused did?

On the evidence, it seems no jury would have been able to sustain any such reasonable doubt. Given the rocky history of the marriage, the persistent refusal of Mrs. Thibert to return to the marital home or to speak further with her husband about a possible reconciliation, the fact that Thibert followed his wife back to her place of employment where he knew his wife's lover also worked, an ordinary person could hardly be surprised to see Sherren come out to the parking lot to escort her back into the office building away from his unwanted advances.

However, it was not the mere presence or sight of Sherren that Thibert alleges was provocative, but rather the former's taunting him to shoot, his laughing at him, and his advancing toward him using Joan Thibert as a shield. It was as a result of these actions and words of Sherren that Thibert claims to have lost control. On his own admission, though, Thibert acknowledged he took a rifle from the trunk of his car only to frighten his wife and Sherren into taking him more seriously and to persuade his wife to accompany him so that they might speak privately. It was a bluff, a deliberate attempt to use the threat of force and violence to get his own way in the face of his wife's intransigence. Given his wife's prior resolve not to speak with him or to be alone with him, and the previous experience of Sherren accompanying her to the meeting at the restaurant a week earlier, an ordinary person could not have been startled or taken aback that neither his wife nor her lover would capitulate immediately to his demands but instead assert in some manner their intention to resist his attempt to control the situation and the outcome. This was, after all, a confrontation, a clash of wills, with a long history of conflict — one side (Norman Thibert) trying to control the other (Joan

Thibert), and the other resisting with the support of Sherren — all of which Thibert knew.

In view of this history and the accused's acknowledgement that he was in the midst of a struggle in which he felt it necessary to 'bluff' in order to get his way, there is no doubt that a person of ordinary self-control would have recognized that the situation was reaching an impasse and that Sherren's actions and gestures were a response to his own escalation of the situation in producing the rifle. No jury, then, could have failed to be satisfied beyond a reasonable doubt that Sherren's actions and words were not sufficiently provocative to deprive an ordinary person of the power of self-control such that Thibert would fire the rifle and kill him.

A rigorous application of the *Camplin* test suggests, then, that the trial judge was incorrect in leaving the defence of provocation with the jury. While there was certainly evidence that Sherren's actions and words were gravely insulting within the meaning of the law, there was no evidence that a jury would have been able to sustain a reasonable doubt that an ordinary person could not have lost his power of self-control as a result. Thus, the objective test would be failed and the defence should not have been left with the jury.

On this conclusion, Thibert's appeal would have been dismissed, since the trial judge's failure to instruct the jury completely on the defence of provocation is immaterial insofar as the defence should not have been left with it in the first place. This was not the majority view of the Supreme Court. What can account for the difference?

C. *Analysis of* Thibert*: Beyond* Hill

The reasons for the judgment are short, consisting of a mere 35 paragraphs. Writing for a majority of three, Cory J. starts with a brief history of the defence of provocation. Fully 11 paragraphs — almost a third of the judgment — are given over to an analysis of the history of the objective test, a signal that this part of the defence is the most problematic and has been subject to the most critique and historical development. It is also an indication that this is where Cory J. feels the appeal will be decided.

In two different places Cory J. states what he considers to be the purpose of the objective test.

> I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence.[28]

Later in the judgment, echoing Dickson C.J. in *Hill*, he writes, "It has been properly recognized that the objective element of the test exists to ensure that the criminal law encourages reasonable and responsible behaviour."[29]

While acknowledging the role of holding individuals accountable to a standard that protects society from violence and which encourages reasonable behaviour, Cory J. is equally, if not more, impressed with the need to apply the test in a manner that is attuned

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[28] *Thibert, supra* note 6 at 43.

[29] *Ibid.* at 46.

to the circumstances and the characteristics of the accused. In a significant passage he writes:

> ....if the test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered. In the context of other cases it may properly be found that other factors should be considered. It is how *such an "ordinary" person* with those characteristics *would react* to the situation which confronted the accused that should be used as the basis for considering the objective element.[30]

What is decisive for Cory J. in applying the objective test is the requirement to take into account the past history between the accused and the deceased and all the circumstances surrounding their relationship, which give the deceased's actions and words their full measure and significance in assessing them for their gravity. Here he is simply following *Camplin*. He seizes upon the fact that Thibert was distraught because his wife had left him; he had not slept in 34 hours; he was suicidal and had contemplated killing his wife and her lover and on a previous occasion Sherren had frustrated his attempt to see his wife in private and was doing so again in the parking lot. All of these factors, according to Cory J., were evidence upon which a jury could reasonably have concluded that Sherren's actions and words were provocative. In addition, though, in trying to gauge how an ordinary person might react to the deceased's provocation, Cory J. invests the construct with the characteristics and history of the accused. It is how *such* an 'ordinary' person might react to the situation which confronted the accused that should be used as the basis for considering the objective element.

The ordinary person Cory J. appeals to is one who was "a married man, faced with the break-up of his marriage".[31] In other words, the measure of self-control expected, which he applies to the facts, is that of an ordinary person with the characteristics of the accused himself. On this basis, he concludes that there was some evidence that an ordinary person could have been provoked by the actions of the deceased so as to cause him or her to lose his or her power of self-control, thus satisfying the objective test.

This development and application of the objective test represent a step beyond the Court in *Hill*, and a clear departure from the *Camplin* test and its application in *Morhall*,

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[30] *Ibid.* at 46-47 [emphasis added]. Later in the judgment he develops in other terms this very contextualized and individualized approach to the objective test: "The provincial courts have widened I believe correctly the approach to the objective element in order to consider the background relationship between the deceased and the accused. In *R.* v. *Daniels* [*supra* note 24 at 205-206], Laycraft J.A., for the court, acknowledged that the personal attributes of an accused should be excluded from the objective test but held that the background events should be taken into consideration....The 'ordinary person' must be of the same age, and sex, and share with the accused such other factors as would give the act or insult in question a special significance and have experienced the same series of acts or insults as those experienced by the accused." *Ibid.* at 48-49. While this interpretation is consistent with the *Camplin* test and *Hill*, as far as it goes, it is nonetheless another signal that Cory J.'s optic is that of the accused, at least primarily if not exclusively.

[31] *Thibert, supra* note 6 at 52.

Stingel, Masciantonio.[32]

The majority judgment in *Hill* was not a model of clarity in adopting the *Camplin* reasoning. At one point, Chief Justice Dickson, for the majority, seems to have grasped and adopted the *Camplin* distinction between, on the one hand, the uniform level of self-control expected of all people of the age and gender of the accused, and the need, on the other hand, to construct the ordinary person in terms similar to the accused's background in order to assess the gravity of the provocation:

> I think it is clear that there is widespread agreement that the ordinary or reasonable person has a normal temperament and level of self-control. It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness. In terms of other characteristics of the ordinary person, it seems to me that the "collective good sense" of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question.[33]

However, later in his reasons he seems to have lost sight of the distinction in determining what features of the accused to include in constructing the ordinary person, reducing the standard to an assessment of the gravity of the provocation: "[T]he central criterion is the relevance of the particular feature to the provocation in question."[34] Thus, the focus in the ordinary person test would be on investing the ordinary person with the features of the accused, to assess accurately the provocativeness of the wrongful act or insult and the level of self-control of such a person in those circumstances.

Moreover, in his conclusion Dickson C.J. was of the opinion that the trial judge had not erred in law in failing to specify in his charge to the jury that the expected level of self-control was of an ordinary person of the accused's age and gender. In the Chief Justice's view, it could be assumed that the jury was intelligent enough to include Gordon Hill's age and sex in constructing the appropriate ordinary person for the purposes of the objective test in the circumstances of the case. The result was that Hill's appeal failed and his conviction for murder was upheld. More significantly, the majority appears to have understated the significance of the *Camplin* distinction, which if taken seriously would have required a specific instruction to the jury that the level of control expected was to be restricted to that of an ordinary person of the accused's age and gender.[35]

The failure of the majority in *Hill* to keep clearly in focus the two dimensions of the *Camplin* ordinary person test is illustrated in the Australian High Court's unanimous judgment in *R.* v. *Stingel.* In that decision, the High Court embraced the *Camplin* ordinary person test and drew on Wilson J.'s elucidation of it in her dissent in *Hill.* In presenting the objective test, the High Court laid out its terms in the following manner:

> [The function of the ordinary person test] is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may

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[32] *Supra* note 12.

[33] *Hill, supra* at note 7 at 331.

[34] *Ibid.* at 332.

[35] This aspect of the decision has been especially criticised. See, T. Quigley, *supra* note 2 at 25; T. L. Archibald and P. K. Tait, "A Postscript to *R.* v. *Hill*: Whiter Goest Provocation" (1986/87) 29 Crim. L.Q. 172 at 174.

> be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical "ordinary person". Subject to a qualification in relation to age, the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused.[36]

Thus, while the ordinary person can be invested with the personal characteristics and circumstances of the accused in order to assess the provocative gravity of a wrongful act or insult, no such individualization of the level of self-control expected of the ordinary person is allowed. As the High Court in *Stingel* put it:

> The principle of equality before the law requires, however, that the differences between classes or groups be reflected only in the *limits* within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.[37]

This uniform standard of self-control, which makes up the heart of the objective test, is subject only to the qualification of immaturity due to youthfulness.

Perhaps it is not surprising, given the Court's judgment in *Hill*, to see it ten years later blur even further the *Camplin* distinction and invest the ordinary person's expected power of self-control with the characteristics and history of the accused. While the majority in *Hill* was prepared to include age in the determination of the ordinary person, *Thibert* provides a clear signal that other factors can be included for the same purpose. For Cory J., the expected level of self-control is that of a "married man, faced with the break-up of his marriage".[38] This marks a clear individualization of the ordinary person test, beyond where the Court had left things in *Hill*. It is precisely this difference, then, which allows the majority in *Thibert* to conclude that there is some evidence upon which a jury could have entertained a reasonable doubt about the possibility of an ordinary person acting as Norman Thibert did on the morning he shot Alan Sherren.

Thibert is significant for another reason, because of a suggestion by Major J. to exclude the availability of the defence in cases involving domestic disputes.

D. *Limits to the Defence*

In his dissent, Major J. was of the opinion that there was no evidence to meet either the objective or subjective tests, therefore the defence should not have been put to the jury.[39] He did not dwell on the objective test itself, nor did he address himself to the majority's extension of the test of expected self-control to include the characteristics and history of the accused. Instead, he concentrated on a more limited question: can the break-up of a marriage due to an extra-marital affair constitute a wrongful act or insult within the meaning of section 232? His answer was a clear 'no'. He concluded: "[I]t would be a dangerous precedent to characterize involvement in an extra-marital affair

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[36] *Stingel, supra* note 12 at 327.

[37] *Ibid.*, at 329 [Emphasis added].

[38] *Thibert, supra* note 6 at 52.

[39] Iacobucci J. concurring.

as conduct capable of grounding provocation, even when coupled with the deceased's reactions to the dangerous situation he faced."[40]

Major J.'s reasoning is more conclusory than argued. At one point he asserts, "In my opinion, in this case there is no evidence of a wrongful act or insult sufficient to deprive an ordinary person of the power of self-control."[41] A few sentences later he continues, referring to Alan Sherren's actions and words as he faced Norman Thibert in the parking lot, "Those actions are not contemptuous or scornful; they are legitimate reactions to a dangerous situation. It would be improper to require victims to respond in a certain way when faced with armed, threatening individuals."[42] Here and throughout his reasons, Major J. makes little attempt at trying to understand what could have been going through the mind of Norman Thibert just prior to his firing of the gun. He seems not at all interested in trying to assess the gravity of Sherren's actions from Thibert's point of view.

For Major J., the "events leading to the breakup of [the] relationship are not factors going to provocation", and thus he concludes categorically that "[t]he breakup of a marriage due to an extra-marital affair *cannot* constitute such a wrongful act or insult."[43] If the majority has individualized even further the objective test, Major J. seems to be completely inured to the implications of *Camplin* and *Hill*. Significantly, his discussion of the objective test omits entirely reference to these two cases, instead relying on *Taylor* v. *The King* [1947] and *R.* v. *Parnerkar* [1974].[44] *Parnerkar* is, in some sense, the apogee of the Court's rigid and completely acontextual approach to the objective test, as it pointedly refused to take into account the colour of the accused in weighing the significance for an ordinary person of the deceased's remark that she would not marry him because he was black. As commentators, and indeed the Court itself in *Hill*, have pointed out, the impact of such a statement on a white person may be entirely different from what it would be for a person of colour.

The significance of Major J.'s opinion is not his analysis of the defence of provocation, then, much less his understanding and application of the objective test.[45] Rather, it is his rejection of the defence's availability to those accused of killing as a result of a domestic dispute. His reasons raise an interesting policy question, particularly in light of the history of the use of the defence of provocation in killings arising out of domestic disputes. As Cory J. himself pointed out, "many of the Canadian cases

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[40] *Thibert*, *supra* note 6 at 65.

[41] *Ibid.* at 64.

[42] *Ibid.* at 65.

[43] *Ibid.* at 65-66 [Emphasis added].

[44] *Taylor*, *supra* note 20; *Parnerkar*, *supra* note 16.

[45] Here I disagree with D. Klimchuk's analysis of Mr. Justice Major's dissent. I interpret the dissent as being based on a policy perspective, while Klimchuk views it in terms of the structure of the defence. Klimchuk claims that Major J. concludes that it is forbidden for the court or jury to take into account the individual background of the accused and his relationship with the deceased. If Klimchuk is correct, then Major J. has misconstrued the first arm of the objective test established by *Camplin* and adopted by the Supreme Court in *Hill*. On the contrary, the only reason for such a restriction of the test's application must be on a policy ground, unrelated to the structure of the defence, and I think this is the more plausible explanation for Major J.'s application of the objective test to these set of facts. In fact, the dissent contains virtually no discussion of the objective test or a considered application of it to the facts of the case. See Klimchuk, *supra* note 10.

which have considered the applicability of the defence arise from such situations [of domestic dispute]."[46] Are there grounds for excluding the defence of provocation from murders that arise in the context of domestic disputes? More specifically, are there policy reasons for excluding the defence from killings where the victim is the wife or partner of the accused? Section 232(3) already contains two internal limitations on the application of the defence. Why not, either through legislation or through the common law, effectively say that where men kill their women partners because of jealousy or other possessory-induced rages, then the law will not accord any measure of excuse or pardon?[47]

Major J. puts the policy issue directly: "At law, no one has either an emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the appellant exhibited."[48] Given the history of this defence and the extent to which it was in its original intention and use a male-centred provision to excuse angry and out-of-control men, it seems that it should no longer be allowed to excuse in law the abuse and killing of women or those close to them, particularly when that killing is an expression of a man's proprietary and possessory claims against a woman.

In this he joins a number of academic commentators who are calling for the limitation of the defence in certain killings, or for some, its entire elimination. Recently, Sue Bandalli expressed the concern in the following terms:

> The law of provocation was devised by men for men in the context of male homicides and has been shown to have considerable gender problems born of its origins....
> The use of provocation in spousal homicides should be raising questions about its acceptability, not its extension. As a gender concern, the message its very *existence* gives to men should not be ignored — if the reasonable man might kill his erring or nagging wife, surely he might knock her about a bit too?[49]

Bandalli does not advocate the elimination of the defence in all instances. Rather, her cautionary point is that the defence should not be made more easily available, particularly in the absence of a rigorous assessment of the implications for women of its "fundamental masculinity".[50] Moreover, as her concluding remarks, cited above,

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[46] *Thibert, supra* note 6 at 51. According to the Canadian Centre for Justice Statistics, in 1995 spousal homicides accounted for one out of every six solved homicides. This represented a total of 90 homicides, and 69 (77%) of the victims were women. From 1985 through 1994, 110 victims were on average killed annually by a spouse; women represented 75% of these victims. The data also show that women are six times more likely to be killed by a spouse than by a stranger. The Centre defines a spouse as those in registered or common-law marriages, as well as persons separated or divorced. See O. Fedorowycz, "Homicide in Canada — 1995" (1996) 16:11 Juristat 8.

[47] Such exclusion would extend also to the killing of their spouse's lover, as is the case here.

[48] *Thibert, supra* note 6 at 65.

[49] Bandalli, *supra* note 5 at 405 (Emphasis in original). In a discussion paper on provocation for the New South Wales Law Reform Commission, the authors found that "...there is also evidence that the defence operates primarily as an excuse for men who kill women." New South Wales Law Reform Commission, *Provocation, Diminished Responsibility and Infanticide: Discussion Paper 31* (1993).

[50] Bandalli, *supra* note 5 at 399.

intimate, the very existence of the defence in cases of spousal homicides should be seriously called into question.

Jeremy Horder is not so equivocal. He argues that the

> doctrine of provocation should be abolished, and the effect of provocation in murder cases left as a matter for mitigation in sentence, should the mandatory life sentence for murder ever be abolished. The morality of retribution will then be left to the institutions of state punishment and we shall say to the provoked killer, 'Provocation ought no more to be regarded as inviting personal retaliation than a woman's style of dress invites rape. It is one thing to feel great anger at great provocation; but quite another (ethical) thing to experience and express that anger in retaliatory form. For you there can be no mitigation of the offence.'[51]

Horder's position is an ethical one of zero tolerance: it is ethically unacceptable to express one's anger in the form of retaliation, no matter how justified that anger might be in view of the provocation. What seems to clinch Horder's position in his own mind, though, is the fact that use of the provocation defence is preponderantly by men in the exercise of sexual domination over women. Men have had recourse to the defence to mitigate the violence they have used to secure the unconditional and unequivocal attention of women.

> From a feminist perspective the existence of such mitigation simply reinforces in the law that which public institutions ought in fact to be seeking to eradicate, namely, the acceptance that there is something natural, inevitable, and hence in some (legal) sense-to-be-recognized forgivable about men's violence against women, and their violence in general.[52]

For Horder, such a conclusion is ethically untenable and therefore the defence must go.

This is not Major J.'s position in *Thibert*. His is a middle ground, seeking to limit the application of the defence in the manner Bandalli urges and basically for policy reasons. The law should not be solicitous of, or party to, excusing men's violence in furtherance of their possessory or proprietary claims against women, especially when other social institutions seek to banish such behaviour. While Major J. does not set forth a proposal for excluding the availability of the defence in cases of spousal homicide; to do so would clearly require legislative reform. Specifically, it would entail an extension of the provision's internal limitation of what legally constitutes provocation to include leaving a relationship and the exercise of every other manner of sexual freedom.[53]

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[51] Horder, *supra* note 15 at 197.

[52] *Ibid.* at 194.

[53] Currently, the provision reads: "no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being" (*Criminal Code*, s. 232(3)). One might be tempted to conclude that the present provision would prevent the exercise of sexual freedom from being considered provocation since it states that "no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do." However, the courts have interpreted 'legal right' restrictively to mean a right sanctioned by law, which given the provision makes sense since

Such a reform would not be immune from criticism. If the defence's application is limited in cases of spousal homicide, then why not also in cases involving non-violent homosexual advances[54], racial prejudice, or religious bigotry. In short, once certain exemptions are allowed in the availability of the defence we are quickly brought to the position of Horder. Is it ethically tenable to have such a defence at all if the purpose of the criminal law is to dissuade citizens from engaging in violent behaviour? Put in other terms, should the criminal law not be consistent, both internally and in relation to other social institutions, in promoting the peaceful resolution of social conflict and not excusing, even if only partially, the use of violence? The law can be expected to promote racial, sexual and religious harmony, and therefore it should not sanction or excuse in any manner behaviour that violates such harmony. The criticism of this kind of reform, then, would involve its rejection in favour of the abolition of the defence altogether.

Another line of criticism goes to a larger debate about the purpose of the defence, namely, whether it is excusatory or justificatory in nature. Dennis Klimchuk, in a review essay of Jeremy Horder's *Provocation and Responsibility*, and Joshua Dressler, in his response to Robert Mison, both make the point that provocation is fundamentally an excuse-based defence and that policy concerns about limiting the defence's application in order to promote some other social good misconceive its purpose.[55] Dressler frames and resolves the debate in the following terms:

> [I]t is wrong to say that the message of the defence is that the decedent was entitled to less respect, or that his death was a more acceptable outcome than the death of a heterosexual person. Rather, all the excuse defence says in this instance is that people are prepared to mitigate the offence because the actor lost his self-control under circumstances in which ordinary, law-abiding people might also act rashly.[56]

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otherwise an insult would not be able to be considered as provocation. On the interpretation of 'legal right' see, *R.* v. *Louison*, [1975] 6 W.W.R. 289 at 310-11, 26 C.C.C. (2d) 266 at 288 (Sask. C.A.), aff'd [1979] 1 S.C.R. 100, 51 S.C.C. (2d) 479; *R.* v. *Haight* (1976), 30 C.C.C. (2d) 168 at 175 (Ont. C.A.); *R.* v. *Galgay*, [1972] 2 O.R. 630 at 644, 6 C.C.C. (2d) 539 at 552 (Ont. C.A.). Thus, a reformed provision might read as follows: "no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, *or by exercising any legitimate personal freedom within a sexual or domestic relationship,* or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being."

[54] This is the position taken by R. Mison, "Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation" (1992) 80 Cal. L. Rev. 133. Mison concludes, "For too long the judiciary and the public have remained complacent as this defense escaped legal and ethical scrutiny. This Comment has attempted to expose some of the legal, practical and ethical problems inherent in provocation theory as applied in the homosexual-advance defense. A better understanding of these shortcomings will hopefully enable judges and prosecutors to eliminate a defense that does little more than play on jury prejudices and legitimize the continued denigration of gay men and lesbians" at 178. For a response to and critique of Mison's position, see J. Dressler, "When 'Heterosexual' Men Kill 'Homosexual' Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard" (1995) 85 The J. of Crim. Law & Criminology 726.

[55] D. Klimchuk, "Outrage, Self-Control and Culpability" (1994) 44 U.T.L.J. 441; Dressler, *supra* note 54.

[56] Dressler, *supra* note 54 at 750.

As Dressler goes on to argue, the purpose of the criminal law is not exclusively deterrence, but also involves the differentiation between more and less serious offenses, as well as the protection of offenders against excessive and disproportionate punishment. Thus he concludes,

> These goals of the criminal law require consideration of matters of personal culpability. That is why most states divide murder into degrees, and why provocation is recognized as a partial excuse. It is also why the law recognizes the insanity defence and other complete and partial excuses. A system of laws that refuses to recognize any excusing condition might deter violence and, therefore, might be justifiable in a purely utilitarian system. But excuses, including provocation, are recognized for a non-utilitarian (even counter-utilitarian) reason: they stem from the commitment to afford justice to individual wrongdoers — ensuring that they are not blamed and punished in excess of their personal desert.[57]

Klimchuk makes a similar point when he states that "the legal claim [of the defence of provocation] is not that actions in anger are justifiable and thus potentially laudable, but instead that they are not praiseworthy but merely pardoned."[58]

On this view of the defence, favouring excluding its availability in certain kinds of homicide rests on the assumption that some retaliatory violence resulting in death is justified and other kinds are not, and therefore on the basis of this distinction the defence can be applied in some cases and should not be in others. Dressler and Klimchuk would respond, though, that the assumption is wrong, for the defence does not justify or recognize as justifiable any form of retaliatory violence, but instead focuses on the individual accused and asks whether there are any circumstances that might warrant mitigating the legal significance in the conviction and sentencing as a result of his actions. Thus, carving out spheres in which the defence is available and not is misplaced, since its purpose is mitigation, pardon and partial excuse and not justification and exoneration.

Klimchuk, more so than Dressler, does grapple with the significance of the ordinary person test, which he argues functions as a policy-level constraint on the defence's range of application. While he would not support internal limitations to the defence's availability he does maintain that the ordinary person sets out a boundary for its application. As he puts it,

> ....the objective test (the reasonable person test) functions to determine whether the accused is a candidate for seeking mitigation of conviction and sentence with the defence of provocation. We may say that passing this candidacy test places the accused's actions among those considered by the law to be....'pardonable' or, in certain circumstances, 'understandable'.[59]

The parameters of the boundary are established by the ordinary person test's underlying principles of equality and individual responsibility, which Lord Diplock alluded to in *Camplin* and Wilson J. expressed more clearly in her dissent in *Hill*:

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[57] *Ibid.* at 751.

[58] Klimchuk, *supra* note 55 at 466.

[59] *Ibid.* at 459.

> The objective standard, therefore, 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. The success of a provocation defence rests on establishing the accused's act as one which any ordinary person might have done in the circumstances and not upon eliciting the court's compassion for an accused whose act was unjustified but who could not control himself in the way expected of an ordinary person. It is evident that any deviation from this objective standard against which an accused's level of self-control is measured necessarily introduces an element of inequality in the way in which the actions of different persons are evaluated and must therefore be avoided if the underlying principle that all persons are equally responsible for their actions is to be maintained.[60]

Applying these principles to cases of spousal homicide, Klimchuk concludes that "violent actions in response to such provocation [women exercising their sexual freedom within the context of relationships] ought to fall outside the boundaries of the defence of provocation...."[61] His argument is that such violent actions breach the principle of equality because they are based on an inequitable view of the relationship between men and women, which gives rise to a claim on the part of men to a different standard of behaviour. Because men feel they own women or have a possessory claim against them, within the context of such relationships, they should be held to a different level of expected self-control from other circumstances or from women. Thus, Klimchuk argues, a more thoroughgoing application of the principles of equality and individual responsibility would weed out those violent actions that do not deserve to benefit from the defence of provocation, at least as it is currently structured and in light of the functional role of the ordinary person test. There is no need for any special policy-based limitations of the defence's application, since the defence is equipped to establish the boundaries of its application.

Klimchuk's analysis, as well as Horder's, Mison's, and Major J.'s respective attempts at limiting (and in the case of Horder, eliminating) the defence's availability, raises an important question about the function of the objective test within the overall structure and purpose of the defence. In point of fact there is no readily discernible consensus about the purpose that the ordinary person test serves. Cory J., in *Thibert*, characterizes it as "...ensur[ing] that the criminal law encourages reasonable and responsible behaviour."[62] In this he was simply echoing Dickson C.J. in *Hill*.[63] However, Lord Diplock described the purpose of the ordinary person test as a policy one intended to "reduce the incidence of fatal violence by preventing a person relying on his own exceptional pugnacity or excitability as an excuse for loss of self-control."[64] This view was endorsed by the House of Lords in *Morhall* and adopted by the High Court of

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60 *Hill, supra* note 7 at 343-44.

61 Klimchuk, *supra* note 55 at 462.

62 *Thibert, supra* note 6 at 46.

63 *Supra* note 7 at 324.

64 *Camplin, supra* note 11 at 173.

Australia in *Stingel*.[65]

This latter characterisation of the ordinary person test, in England and Australia, is closer to Klimchuk's than that which is found in the Canadian courts. However, whether intended to encourage (or discourage) certain behaviour, or to serve a vetting role in the availability of the defence, there is no question that the objective test restricts what actions can receive the mitigating benefits of the defence and what cannot. In other words, while the overall purpose of the defence may be to pardon or mitigate, only certain actions are eligible for such consideration and the objective test serves to demarcate what they are. Society is willing to go so far in extending mercy, understanding and compassion toward an accused; once that limit is reached mercy will be extended no farther. It is the role of the objective test to establish that limit.

Major J. (as well as Bandalli and Horder) argues that the limit needs to be drawn on this side of homicidal violence within the context of domestic conflict, so that such behaviour falls beyond the pale of the defence. Mison, who deals with this question in terms of homophobic killing, adopts a similar position. Klimchuk, though, holds that there is no need for an explicit, policy-motivated limitation, since the principles of equality and individual responsibility, which undergird the objective test, provide the basis for making such a limitation on a case by case basis. However, what is lost sight of is the fundamentally excusatory nature of the defence and, what Dressler points out is another purpose of the criminal law, the need to ensure that an accused is judged equitably, so that his conviction and sentence are not beyond his moral guilt and responsibility.

Which brings us to another question: what is the legacy of *Thibert* for the principles of individual equality and responsibility before the law, which the House of Lords (*Camplin* and *Morhall*), the Supreme Court of Canada (*Hill*) and the High Court of Australia (*Stingel*) have each affirmed as integral to the objective test?

III. *THIBERT* AND THE PRINCIPLES OF EQUALITY AND INDIVIDUAL RESPONSIBILITY

In the wake of the Supreme Court's decision in *Thibert* the ordinary person test has been significantly altered. The Court has effectively rejected the distinction between an individualized test for assessing the gravity of a provocation and a uniform standard of expected self-control. The Court is also unprepared to limit *a priori* the applicability of the defence, even in cases of spousal homicide. In this respect, the majority is consistent in its adoption of an expanded view of the defence's availability, on the one hand individualizing the objective test and on the other hand refusing to limit its application.

Exploring the impact of *Thibert* on the underlying principles of equality and individual responsibility raises another question, namely, what do these principles demand and imply? One way of characterizing them is that they serve an essentially social, one might say politically socializing, role by promoting a level of "self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is

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[65] *Stingel*, *supra* note 12 at 146. "The function of the test is only to introduce, as a matter of policy, a standard of self-control which has to be complied with if provocation is to be established in law" (*per* Lord Goff of Chieveley, *Morhall*, *supra* note 12 at 336).

today."[66] Everyone has a right to expect of everyone else a certain measure of self-control and mutual respect, within and according to the standards of a given society. The principle of equality requires of everyone that their actions promote equitable relations between and among people, and that such equality of treatment and respect be reflected in the laws of society.

Within the legal realm, equality can mean what some have called 'rule formalism'; in the application of a valid law, treat all similar cases alike in accordance with the law. On such a view, equality of the law is "symbolized by Lady Justice's blindfold, of a law that applies without fear or favour, that knows not persons, that recognizes no plurality of sorts and conditions of humankind but treats persons, as it were, anonymously and fungibly."[67] However, equality can also mean that the law respond and be sensitive to "socially significant personal attributes like race, gender and class."[68] As Frank Michelman goes on to say about this view of equality, "With such knowledge comes the sense that a just order must sometimes attend to, rather than ignore, the actual salience in our social experience of group-based [and, I would add, personal] identity."[69]

Richard McKeon makes an analogous point when he describes the concept of responsibility as relating "actions to agents by a causal tie and [applying] a judgment of value to both. It involves assumptions, therefore, about the agent and about the social context in which he acts." As McKeon later points out, the concept of responsibility also includes the idea of understanding, which "may operate to transform the civil and criminal laws which determine accountability and to shift the emphasis in conventions and agreements from the calculation of interests to mutual understanding of values...." He concludes, "The exercise of responsibility in the sense of accountability and imputability [imputation of causal responsibility] in [an] enlarged political and cultural context constitutes a means of developing the moral character which is imputed to the individual and which is at once a sensitivity to moral issues in the agent and an explanation of his decisions and choices in the minds of other."[70]

Against the horizon of these two principles, the defence of provocation contains within itself the seeds of a paradox — in establishing a diminished culpability of an accused in proportion to his or her responsibility for his or her violent behaviour it seems to deny the very responsibility which is the basis for assigning culpability. The paradox, like all paradoxes, is a function of the perspective the defence forces the court to adopt vis-à-vis the situation that has given rise to the murder and its aftermath. On the one hand, the court must be convinced beyond a reasonable doubt that an ordinary person could not have been provoked by the wrongful actions or insults of the deceased. There is a presumption in favour of the accused if there is any evidence at all of provocation; if the court accepts the defence then the accused is accorded diminished culpability in proportion to his moral responsibility. The High Court of Australia in *Stingel* put it as follows:

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[66] *Camplin, supra* note 11 at 174, *per* Lord Diplock.

[67] F. Michelman, "The Meaning of Legal Equality" in F. E. McArdle, ed., *The Cambridge Lectures: 1985* (Montreal: Les Editions Yvon Blais Inc., 1987) 85 at 86, but compare at 87.

[68] *Ibid.* at 86.

[69] *Ibid.* at 89.

[70] R. McKeon, "The Development and the Significance of the Concept of Responsibility" in Z.K. McKeon, ed., *Freedom and History and Other Essays: An Introduction to the Thought of Richard McKeon* (Chicago: The University of Chicago Press, 1990) 62 at 82-83.

> In determining the answer to [the] question [of whether there is any evidence to warrant putting the defence to the jury], a trial judge must be mindful of the fact that, where provocation is raised by the evidence, the ultimate question for the consideration of the jury must be framed by reference to the onus of proof resting upon the prosecution. So framed, that ultimate question would be whether the jury are satisfied beyond reasonable doubt of the absence of provocation, that is to say, that the killing was unprovoked in the relevant sense.[71]

On the other hand, the court is also required to weigh in the balance the mutually shared understanding and practice of self-control and mutual respect expected of all members of a given society. There is a presumption that the accused is to be held to full accountability for maintaining and respecting a relationship of equality with and respect for the deceased, even if the deceased is a stranger. Underlying the paradox is another question, namely, whether the equality, and its correlative principle of responsibility, at issue is distributive or corrective?

At the risk of stating the obvious, the paradox is resolved through a judgment, for to apportion responsibility there must be true understanding of the situation. This is McKeon's point. However, what does this require? The court must keep uppermost in mind that at the heart of the principles of equality and individual responsibility is the preservation of equitable relations between people and as complete an understanding of individual actions as possible. Within the context of the defence of provocation this means making a judgment of culpability and punishment in a situation in which the relationship between the accused and the deceased has been violently ruptured. What level of self-control on the part of the accused was the deceased entitled to expect? How serious was the provocation, from the point of view of the accused? To what extent did the deceased's provocation upset the relationship with the accused? Was the wrongful act or insult capable of provoking an ordinary person to the degree and kind of violence that the accused used and which resulted in the death of the deceased? These are key questions, which must be asked in determining to what degree the accused must shoulder blame for the rupture of the relationship which resulted in the death of the victim and to what extent, if at all, the court will extend the measure of excuse and pardon available under the defence.

The court's perspective, then, involves more than simply seeing things from the accused's point of view. Rather it entails a balancing of good, the good of a society which has the capacity to weigh and judge flexibly and with compassion the responsibility of an individual towards itself and others, and the good of a society and its members that comes from a shared understanding and practice of self-control and mutual respect. Both goods redound to individuals, however in different measures according to their varied circumstances and needs.

In the end there is no formula for resolving the paradox once and for all; instead it appears every time a court is faced with the decision of whether to accept or not the defence of provocation. Is it good for society for the court to extend the measure of understanding and pardon called for in the defence? Will such a decision help an accused and society to understand the truth of what has happened in the taking of this life? Or will such a decision obscure the equality of treatment and mutual respect that everyone in society has a right to expect from others?

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[71] *Stingel*, *supra* note 12 at 333.

In expanding the scope of the defence by individualizing the ordinary person test, the majority in *Thibert* does not disregard these questions, but rather seeks to establish more precisely their answers in order to give higher resolution to the relationship and the circumstances leading to its breakdown. In so doing the criminal law will be able to hold Norman Thibert more truly accountable for his actions and his part in the rupture of the relationship with Alan Sherren.

In a striking passage, Cory J. identifies the balance that the Court was trying to maintain and, it seems to me, the innovation of *Thibert* in respect of the principles of equality and individual responsibility:

> [I]f the [objective] test is to be applied sensibly and with sensitivity, then the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered....It is how such an "ordinary" person with those characteristics would react to the situation which confronted the accused that should be used as the basis for considering the objective element.[72]

The task before the Court is the application of the objective test "sensibly and with sensitivity", to determine how "such an ordinary person" with the characteristics of the accused would *react* to the provocation. As Cory J. points out later in his judgment, the defence of provocation does no more than recognize human frailties.[73] The principles of equality and individual responsibility at work in this passage and in the majority judgment as a whole are the ability to judge a particular case with an eye to all the individual circumstances of person and situation that make it up, and to allow for an apportionment of blame that is commensurate with those circumstances.

Thibert stands for the proposition that strict justice based on the application of rules is not, in the end, what the principles of equality and individual responsibility call for. Rather, within the context of the judicial process these principles urge a flexible rule and sympathetic understanding of a "...world of imperfect human efforts and of complex obstacles to doing well, a world in which humans sometimes deliberately do wrong, but sometimes also get tripped up by ignorance, poverty, passion, bad education or circumstantial constraints of various sorts."[74] The judgment represents a further widening of the breach created by *Camplin*, which admitted that the expected power of self-control is conditioned by the factors of age and sex. But if these can be admitted as determining factors in the standard of self-control expected of an "ordinary person", then why not take into account other factors such as ethnicity, religious tradition, and class? In stating that it "is how such an 'ordinary' person with those characteristics would *react* to the situation which confronted the accused that should be used as the basis for considering the objective element"[75], the majority is saying, indeed, why not take these other factors into account. And so, in the end, Cory J. holds Norman Thibert accountable to the

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[72] *Thibert, supra* note 6 at 46-47.

[73] *Ibid.* at 51.

[74] M. Nussbaum, "Equity and Mercy" in A.J. Simmons *et al*, eds. *Punishment* (Princeton: Princeton University Press, 1995) 145 at 153.

[75] *Thibert, supra* note 6 at 47.

standard of an "ordinary person who was a married man".[76]

Such a view fits very well with provocation as an excuse based defence. Equality and individual responsibility do not require that everyone be treated identically,[77] but that every effort be made to take into account all relevant circumstances in determining culpability and punishment. In this way everyone is held to a socially determined standard of self-control in proportion to his or her circumstances and personal background, as the judicial process determines whether and in what measure an accused should benefit from its power to excuse and pardon. The proper measure of equality is not rectificatory but distributive; what is at stake is a decision about the imputation of mercy or not. The measuring of responsibility requires as full an understanding of the individual's circumstances, values, background and situation as is possible; on this basis, and this basis alone, can a true judgment of imputation and accountability be made that reflects the moral character of the accused behaviour.

There is, however, a troubling aspect to the judgment, which seems to undermine the very principles of equality and individual responsibility it seeks to uphold. Major J., in his dissent, hits on the problem when he states, "At law, no one has either an emotional or proprietary right or interest in a spouse that would justify the loss of self-control that the appellant exhibited."[78] Yet, the majority judgment vindicates such a claim, thus reinforcing a view of sexual relationships in which a man can legitimately lose his self-control at the first signs of a woman's expression of autonomy.[79] Horder's and Bandalli's critiques of provocation seem amply illustrated in this decision — the defence is male-centred and confirms men in their view that they can control women through the use of death-dealing violence with relative impunity.

What is troubling, even on the expanded principles of the defence, is that the Court does not maintain the tension of the paradox, losing sight of the balance of good, thus undermining the very principles of equality and individual responsibility at the heart of the defence. The measure of the Court's failure to maintain the paradox gains in perspective against the backdrop of McKeon's observation that

> [t]he idea of *moral* responsibility originated and developed in the context of the evolution of political and cultural responsibility. There was no moral responsibility until there were communities in which men were held accountable for their actions and in which actions were imputed to individual men....
>
> The exercise of responsibility in the sense of accountability and imputability in this enlarged political and cultural context constitutes a means of developing the moral

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[76] *Ibid.* at 52.

[77] On this point see T. Macklem, *supra* note 15. Macklem also argues that the expected level of self-control should be assessed against the background of the accused's relationship with the deceased and what the latter could reasonably have been expected to have known about the former's personality and circumstances. What the deceased knew about the accused will affect the standard of control expected of the ordinary person, as applied to the circumstances of the accused. The Supreme Court has recognized that testing for equality in the application of a law cannot happen through the application of a "fixed rule or formula.... Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application." *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 168, 56 D.L.R. (4th) 1 at 13, McIntyre J.

[78] *Thibert*, *supra* note 6 at 65.

[79] Compare Klimchuk's analysis of Major J.'s treatment of this question, *supra* note 10.

> character which is imputed to the individual and which is at once a sensitivity to moral issues in the agent and an explanation of his decisions and choices in the minds of others.[80]

In other words, the Court has lost sight of the need to understand the moral significance of Thibert's relationship with his wife, Alan Sherren, as well as his response to Sherren's provocation, within their social and cultural context, one which has been struggling to rid itself of inequality between men and women. Only in keeping such an intellectual requirement in mind, as integral to the judicial process of rendering a judgment and maintaining the paradoxical tension inherent in the defence, would the court be able to apply the defence properly to this set of facts.

The evidence points to Norman Thibert seeking to maintain an unequal relationship of domination of his wife, a refusal on his part to recognize and accept her freedom within the relationship, including the freedom to leave it for another man. In other words, Thibert's actions leading up to the murder betray the democratic and universal ideal of gender equality, which provide the social and cultural context within which to assess his responsibility for Sherren's murder.

The Court's disposition of the appeal was not a necessary outcome of its expansion of the defence. Instead, it could have developed its individualized ordinary person test and still have rejected Norman Thibert's appeal on the ground that his killing of Alan Sherren was part of an overall effort on his part to maintain his wife in an unequal relationship, and that the use of the defence in this instance would have served that purpose and aided him in evading full responsibility for his actions, which alone is the basis for a finding of diminished culpability, and undermined other dimensions of equality to which individuals, especially women, are entitled to have respected.

IV. CONCLUSION

I have argued that the Supreme Court in *Thibert* has actually moved the defence of provocation onto significantly new ground. It has rejected the distinction between a uniform standard of self-control and an individualized test of the gravity of the provocation, preferring instead a thoroughly individualized ordinary person test. Moreover, it has rejected any suggestion of restricting the availability of the defence for specified categories of killings, in particular killings that occur in the context of domestic disputes.

In so doing, the Court has expanded the scope of the defence while attempting to retain a commitment to the principles of equality and individual responsibility. However, the notions of equality and individual responsibility have themselves been altered, with a clearer focus on, on the one hand, the particular aspects of the relationship from which emerged the killing, and on the other hand, the social and cultural context which gives meaning to the moral responsibility of the accused and to the

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[80] McKeon, *supra* note 70 at 84-85.

equality at play. At stake in the defence is a distributive form of equality, which does not require a uniform application of rules in order for there to be justice. Unfortunately, the Court failed to apply the principles consistently to the particulars of the case before it, with the result that once again the defence appears as a vindication of men's use of violence to dominate women.