

PAPER DELIVERED FOR THE CRIMINAL BAR ASSOCIATION'S ANNUAL DINNER

Thank you for inviting me tonight to speak on provocation and the merits of the abolition of that defence in our law. I have also been give something of an open cheque book to say whatever I like about concerns I have in the administration of criminal. That is a very unsafe warrant to give me.

I am minded that my brief is limited to a little over half an hour so I will do away with a very academic treatment of the subjects; but I will concentrate on the main points I wish to make tonight about what I see as concerning developments and in some cases the absence of perspective about our criminal law and our criminal justice system.

Before I commence I would like to fondly remember Judge Ron Gilbert a champion and great supporter of the defence bar and this association, a clever barrister, and a fair Judge with whom I had the pleasure of working on the Evidence Law Reform Committee in the eighties on corroboration and other topics to which he made a significant practical contribution. I like to think that Ron would agree with some at least of what I have to say tonight.

Provocation

It is my view along with many other members of the criminal bar that the abolition of the defence of provocation which occurred yesterday was not only unwise but downright foolish. We will probably come to regret it, as deserving cases appear but for which provocation is no longer available to reduce murder to manslaughter. Provocation as a partial defence has been with us for a very long time. East's Pleas of the Crown (1803) Vol 1, p238 referred to various examples of what might suffice and used terminology such as;

“acts that might heat the blood to a proportionate degree of resentment and keep it boiling to the moment of the fact so that a party may rather be considered as having acted under temporary suspension of reason, than from any deliberate malicious motive.”

Mr Power, certainly likes to be seen to flex his muscles. In abolishing provocation overnight almost, he put an end to about three hundred years of experience and practice. He is reported as saying in today's Herald ;

“ The Government considered the law was flawed. It effectively provides a defence for lashing out in anger, not just anger but violent homicidal rage. It rewards lack of self control by enabling an intentional killing to be categorised as something other than murder.”

Provocation is not a reward. It is an age old defence rooted in the common law that murder committed in hot blood and under provocation, rather than from any deliberate malicious motive to cite East, merited special treatment. In the many years that have passed, various distinguished bodies to mention just a few have considered this defence and retained it. They are the House of Lords Select Committee (HMSO London 1989), para 83), The English Criminal Law Revision Committee (14th Report, 1980, para 76), The New South Wales Law Reform Commission (Partial Defences to Murder; Provocation and Infanticide, R 83, Sydney, 1997, and our own NZ Law Society supported retaining it, quite recently.

With respect to the Minister, it is not the rationale for the defence that is flawed; what is flawed is the reasoning of Mr Power for its abolition. He has demonstrated if today's Herald report is accurate, a lack of any real understanding of the defence. Even I doubt long standing proponents of abolition Dr Palmer and Dr Warren Young would support abolition for the reasons the Minister advanced.

The Herald also reported;

“ Labour, the Greens and the Maori Party supported the repeal bill and there were cries of “ shame” when Act MP David Garrett said his party said his party opposed it.

Mr Garrett said the central pointing the Weatherston case was that the defence failed.

Abolishing it suggests we don't trust juries, he said.

The repeal shifted the argument of provocation from juries to Judges, who can consider it in sentencing.

It makes more sense to put our trust in juries; he said.”

I agree in principle with Mr Garrett and I will take this up his point shortly.

There have been many different statutory formulae for essentially conveying the now repealed s 162 of the Crimes Act that embodied the hybrid notion of acts and words that in the circumstances of the case was sufficient to deprive a person having the power of self control of an ordinary person, but otherwise having the characteristics of the offender. This was a bit of a mouthful and from time to time Judges stumbled over it in their directions but essentially it was a concept that served justice well enough. Juries I suspect understood the concept well enough to apply the essence of what it means to the circumstances of the case.

The recommendation to abolish provocation was not new in this country. In 1989, the recommendation to abolish provocation was embodied in the Crimes Bill introduced in 1989 by the Labour Government of which Dr Palmer, now president of the Law Commission was the proponent. That was accompanied by a proposal also to abolish the crime of murder substituting for it a crime of culpable homicide with such issues being reserved for judicial consideration on sentence. That had also been mooted and rejected earlier in Australia in the Crimes Homicide Amendment Act 1982 which had abolished the mandatory life sentence for murder but rejected the notion of one crime of unlawful homicide on the basis it was important to retain the stigma attached to the term murder. I criticised the New Zealand proposals in a paper published shortly before I left for Australia in 1989 in the New Zealand Journal. [1989] NZLJ 235, at 237-238.

The Bill was also considered serious enough for Sir Robin Cooke to take the unusual step for a Judge to write a Judge's response to the proposals in the same volume of the Law Journal. [1989] NZLJ 235. Sir Robin as he was then was critical of the proposals also, saying of provocation and the importance of the jury input;

“Occasionally, in the eyes of some, juries may accept a provocation defence too lightly but that is their prerogative. Moreover, it is wholly consistent with confining the stigma of murder to the worst of killings. It is the very gravity of murder that justifies singling it out from the generality of offences where provocation bears on penalty only. I am not aware that any Judge now serving complains that summing up on provocation is too hard. Nor do I know of any cases where a jury has rejected a provocation defence unreasonably.

The Law Commission, however, in a very expansive later report on “Battered Defendants” in 2002, repeated the arguments for abolition of provocation, and also rejected diminished responsibility as a partial defence to murder. I again criticised this in a paper delivered at a Symposium on Criminal law held in Wellington, that year which I know was attended by Dr Warren Young also influential in the repeal of provocation. By that time I had the advantage of practising in Australia for the best part of a decade, including prosecuting provocation and diminished responsibility cases, and I had not changed my earlier views.

The Law Commission contrary to what Sir Robin had suggested considered that the defence of provocation had proved difficult in practice and that it would be simpler to take account of issues of this kind, provocation and diminished responsibility in mitigation of sentence for murder. It was the opinion of the Law Commission, like its predecessor in the 1989 Crimes Bill, that provocation should be confined to sentencing only.

The Weatherston case as we all know has led to the sad demise of provocation. I doubt in the history of this country's criminal jurisprudence, any proposal for reform has been announced by a Minister, with such indecent haste and so little, if any intelligent debate. It seems that the justification was the Law Commission view that is of Dr Palmer and Dr Young in favour of abolition. There has been no mention of any other view. No doubt the Minister and his advisers sought to take advantage at the clamour of public opinion against Mr Weatherston and wanted to be seen to be taking action. That is the very antithesis in my view of a rational and measured approach to law reform. You do not do away with long standing common law principles overnight.

No doubt the utilitarians in Justice and Treasury were behind this also. The fewer defences to murder the better, they would reason. This results in a saving on trial time and lawyers' fees, even though such cases for the most part occupy only a small amount of the Court's time because they are not everyday occurrences. Small though they may in numbers the partial defence of provocation was important for those offenders who in moments of hot blood had temporarily lost reason as a consequence of provocation.

The Law Commission and Justice had adopted the view that jury opinion is unnecessary in these kinds of case. Not only do I fundamentally disagree with their approach I think they overlook one important matter. Often as we saw in the Weatherston case and in the Ambach case considerable emotion is vented by relatives of victims, as well as sometimes the family of an accused. The media is quick to play this up. It makes good copy.

A jury acceptance of provocation was a firm indication for a judge that the community considered that the circumstances merited mitigation of murder not just mitigation in sentence. It was a community verdict and the judge was to that extent sheltered from the public criticism that we are seeing regularly occur in cases today where victim's families do not like the verdict or the sentences an offender receives.

If issues of mitigation as they will be now are left solely to a judge, judges are more likely to find themselves exposed to controversy about sentences imposed in this area than if they had the benefit of a verdict. This is a practical point which I made in my response at the Criminal law Symposium in 2002. I quoted then, and I do so again tonight the words of that famous English Judge Lord Patrick Devlin who in his Hamblyn lectures, "Trial By Jury", said that one of the great reasons for retaining trial by jury in the British constitution was that it helped to ensure the independence and the quality of the judges. Lord Devlin sagely reminded us that "for more than seven of the eight centuries during which the judges of the common law have administered justice in this country, trial by jury ensured that Englishman got the sort of justice they liked and not the sort of justice that the government or lawyers or any body of experts thought was good for them."

I do not consider that leaving provocation solely to judges is the right thing to do. Provocation should involve in my view jury community judgment in very serious criminal offending. That is where the balance should have remained. I believe in juries

and greatly value our system of trial by jury. It is important that the community participate in our adversary system of justice and determine issues of fact. The adversary system of trial I also have confidence in. As Professor Alan Dershowitz of Harvard and a celebrated appeal lawyer said of the adversary system' in his book "the Best Defence" Random House, 1983, (adopting a parallel from Sir Winston Churchill on democracy), it may be the worst system of justice "except' he says "for all the other systems that have been tried from time to time." There may well be a fundamental philosophical difference between academic lawyers like Dr Young and Dr Palmer and those of us who have been trial lawyers. I think it unlikely, in practice that there will be as meaningful discounts for provocation given by judges as generally have followed manslaughter verdicts.

Nor do I share the view that the defence should be in only a limited category of case. The essence of the defence is loss of self control caused by provocation. It is for the jury to decide whether the defence is made out on the circumstances of the case and I think it unwise to attempt to restrict the application of the principle in a fact specific way.

I turn to diminished responsibility for a moment. It would appear that Mr Weatherston with his grandiosity and pomposity displayed traits of the worst facets of narcissism which can be a very dangerous psychological condition. One cannot help feeling that he was a very sick young man. Was he bad or mad, or a combination of both. That brings me on to diminished responsibility. I suspect that his case may have lent itself more to diminished responsibility which like provocation reduces murder to manslaughter where it is considered that the offender had a substantial abnormality of mind which substantially impaired his or her mental responsibility for the acts or omissions.

In the United Kingdom and in Australia, most medical defences involve diminished responsibility not insanity as we know it. I am not saying Mr Weatherston would have been successful and I do not know what the psychiatric opinion was but I think it reasonable to assume that diminished responsibility would have been a better vehicle than provocation in the circumstances of that case, had that defence been available in this country. It is a defence which for example features in a wide category of case, severe depression often qualifying for consideration and perhaps there was enough in Weatherston' make up to have satisfied the threshold requirement of substantial abnormality of mind.

The practical fact is that although the Law Commission in 2002 rejected diminished responsibility also preferring judicial mitigation only, the reality is I suspect that mitigation will be rarely if ever given here. This was demonstrated recently in a case of mine Al Amery. He was a young man who was a refugee who had been tortured and sentenced to death under Saddam Hussein. He came from a good family, was reasonably well educated, and was spirited out of prison and eventually made his way to this country. Life here was a series of set backs of one sort or another and he became very depressed over a period of years. His relationship with a young Chinese woman fell apart and in an effort to see her after he had been excluded from their apartment as a consequence of an earlier domestic incident he killed two men. Over a period of days he had plainly ruminated, and eventually very depressed in an effort to secure admission to

her apartment on a high level of an apartment building he killed the men, the manager and a friend who was staying with him. They were brutal explosive killings (what provoked him to such violence was unclear) and he later went to his girlfriend's flat but could not kill her. He surrendered to police having threatened to commit suicide. Dr Simpson of the Mason clinic examined him and we had no defence to murder. But the Doctor was of the opinion that diminished responsibility based upon his depression and personality make-up would have been at least arguably available elsewhere. This report and the submissions based on it were tendered on sentence but no consideration for this was given by the sentencing judge who was no doubt adversely affected by the brutal killings, and the victim impact reports. The fact remained there was little to suggest Al Amery was of generally violent disposition, and most unlikely ever to offend again. He received a minimum 18 year period, and life. For all his failings, he was not what I could describe as a bad man. He was in my view a very troubled and a sick young man.

I suspect that in all but very clear cases, it is likely there will be little meaningful mitigation for provocation in homicide cases in other than the most obvious case. Another factor that limits mitigation anyway is that in cases of murder today judges are constrained, as was the case of Al Amery (a double homicide) by very long statutory minimum periods which in most cases will negate mitigating features and also mean that discounts even for guilty pleas are less meaningful than in other criminal cases. Contrary to the view expressed by the Law Commission that the absence of the death sentence and mandatory life meant there is less reason for the partial defence to murder; in my view the reason has not diminished, at all. Sentences are now for murder so long that the advantage of a verdict of manslaughter and jury recognition that mitigation is merited becomes obvious.

I have said enough about provocation. Abolition was not in my view a good decision. I leave the Minister with these words of Professor Holdworth (also cited by Lord Devlin),

“that the jury system has for hundreds of years been consistently bringing the rules of law to the touchstone of contemporary commonsense.”

Sentencing

I will now go to another issue which troubles me, and that is sentencing. It is plain that we probably are and if not certainly will shortly have a significant long term prison population because of changes to sentencing tariffs in cases like Fatu which have a much wider influence inevitably than just drugs. They tend eventually to lift the bench mark for other crimes. Mako and robbery tariffs may have to be revised, and we perhaps can expect a revision upwards by the Court of Appeal which favour guideline decisions in the light of Judge Wade's recent well publicised opinion. Minimum sentences obviously will significantly contribute to this problem.

It is I think offensive for any country that regards itself as civilised that containers be used for example to house prisoners even if they are enhanced. It gives the wrong

message. Dame Sian Elias to her credit came out about this; and was criticised for expressing her view. Nor do I agree with privatising prisons. Provision of penal institutions in my view is a fundamental responsibility of the State. There is a certain arrogance or I rather suspect inexperience about some ministers which is disturbing. We see the rise again I suspect of the "young Turks", flexing their muscles which may not be a happy portent for the future if the past was anything to judge about young Turks.

But that is what we can expect as a consequence of a penal policy that has become steadily harsher and prison driven. Politicians of the left and the right have been falling over each other it seems to show just how tough they are. It of course secures votes. One bright spot is home detention for at least short term serving prisoners. We should have retained the suspended sentence, also as an alternative to prison.

Probably the most over-rated word in penal language is the word deterrence. Judges have been using this word for centuries but I suspect it has little real effect on the incidence of crime. I do not doubt that people who suffer serious crime have to be punished, and some are so dangerous they have to be confined for long periods and some indefinitely; but I doubt prison has ever really reformed many people, or the prospect of it deterred many people from committing crime and we should I think be looking at placing far greater weight on non - custodial and or shorter sentences for those who have not displayed a history of recidivism, or who are not a demonstrable threat to society, albeit they may have been involved in quite serious criminal offending.

If we do not adopt such an approach we will pay a real price, as other countries such as Britain and the US have found. Already I suspect Treasury are understanding that the cost of present policies on sentencing is too high. I say too high not just for economic reasons but for human reasons as well. People do not rehabilitate in prison; it is a myth that they do, and for many prison is an isolating existence and destructive experience from which they never escape. The great risk is that prisoners become institutionalised and, once there for a long period, are unlikely to effectively integrate back into society.

We would be better placed adopting a presumption that persons should go to prison for the least possible time. This may cause the public concern but the response requires a measure of education, and an honest explanation that we simply cannot afford the high costs of a high long term serving prison population. Take the case of a drug offender sentenced as some have been recently to 18 year minimum periods in a foreign gaol. That means approximately \$1.8 million on today's figures would be spent on his or her prison maintenance and related costs before eligibility for parole. Yet we are a nation that has very poor drug and alcohol rehabilitation centres, and savings gained from shorter though still meaningful sentences could be better spent on these facilities, and other areas of justice such as probation.

It is unfortunate I think that so much credence has been given to that body known as the Sensible Sentencing Trust whose views seem to me to be often not very sensible but rather unhappy projections of a red neck philosophy that politicians like to be associated with because they like to be seen to be tough on crime. I was saddened to see our PM this

week laud his government's policies on law and order because the Sensible Sentencing Trust was happy with his government's performance in that regard. That is a very good reason not to be happy, in my view, and indeed to be very wary. One thing I am happy about is we are not yet exposed to the Sentencing Council which was to be made up I believe of judges, criminologists and others. There is absolutely no need for that kind of body.

I am well aware that this is not an easy area but I do think in the long term interests of both offenders and the community that there must be a reconsideration of penal policies, the balance in sentencing, and the overall cost to the wider community of long prison sentences.

Perhaps we ought to consider our approach to drugs and their use, also. Opium was used widely and quite lawfully by some great literary figures in the nineteenth century. We might never have had Kubla Khan for example but for the effect of opiates. A certain Baker Street detective was also known to indulge. Civilisations from ancient times have resorted to mind altering substances. I cannot help feeling that our whole approach to drugs and their use has been a disaster, moving drug use underground, precipitating the movement into more dangerous synthetic drugs as one drug replaces another and overall one that encourages rather than reduces criminal activity. It is time to rethink all of this and see if there cannot be a better way.

Law Reform.

We have all been witness to a large number of acts passed in recent years as a consequence of the activity of the Law Commission. I do not think that much of the reform has been of truly great value.

The Evidence Act for example is a rather ordinary document in my view and always was, although it had a very long gestation. I think it wrong for example that a person cannot give or ask a police officer questions designed to show that he or she has no previous convictions, or that a hostile witness who recants can have his or her statement admitted as evidence, or that spouses or those in relationships can be compelled to give evidence against their spouses or partners even when they do not want to do so. As Rupert Cross would have said those witnesses are on the sword of a trilemma; perjury, contempt and or failure of the relationship. These are just a few of the emerging problem areas. Quite significant changes seemed to sneak through in that Act. Perhaps we were not vigilant enough.

Much of the legislation passed can be said to be a reflection of existing practice as it has developed in any event and to that extent one questions whether much of the legislation has been necessary. There have been developments that have been good if used sensibly such as CCTV in child sex cases, and it certainly is not all bad. But I do not think the legislation will greatly affect costs or the shorten lists. What is really required are more courts and more judges to do the ever increasing work.

I am concerned at any more change in the area of sexual offending. We hear clamour for change regularly; much of it ill-informed. The approach in these cases is light years different from what it was when I commenced practising. I was a member of the Evidence law Reform Committee which after months of consideration recommended the abolition of corroboration in sexual offending in 1984. That was a very significant reform. There have been other reforms in this area since then. In my view however the presumption of innocence should be retained and so should the adversary system. Both are under constant challenge. The present system has for some years concentrated with some justification on improving the lot of victims. However, it must not be lost sight of that the criminal trial process is there not only to support victims but to ensure that innocent people are not wrongly convicted, and that accused persons have a fair trial.

The Public Perception of us.

I want to say something about a facet of New Zealand that disturbs me. It is the increasing disdain in which criminal defence lawyers are held in this country by some of the public. Defending criminals is not a popular cause as Professor Dershowitz points out in "Best Defence"; but the public perception now is troubling. I believe this attitude has been encouraged by politicians as the system which has had too little money spent on it has creaked under the weight of a larger and more diverse population, and failed economic models and probably the dislocation of the family unit as we once knew it. One sees this commonly amongst our clients and in probation reports. I believe because we have not in recent years had practising criminal lawyers in influential positions in government that we have gone backwards. People like Martin Findlay and Doug Graham who had practiced law and in the courts were more receptive to us than those who have not had that experience.

We did not create this mess. We struggle with the human wreckage and carnage of government policies which have created in some areas of low employment, and poor community facilities a kind of Dickensian poverty amongst sectors of New Zealand society.

We are seeing also the effects of more diverse crime now which inevitably follow significant immigration which we have had for some years now. All this affects the incidence of crime. We are at the coal face of this, and it is a difficult existence.

Our position is compounded by a rather rabid sensation seeking press who do their best to denigrate criminal lawyers and encourage the public to confuse us with our clients. Some do let us down. We are not a perfect profession but most criminal lawyers try very hard. Indeed, if there is one area I support the Law Commission in and that is with the issue of suppression of name. There is no need to reform this area of law. It has been well worked over by the Courts and the boundaries well settled, and some control over newspaper excess is required.

We have had little support I feel either over the years from Law Societies, whether local or national as a body. We are at the poor end of town. Indeed, it is partly as a consequence of this that Peter Williams QC with a handful of others formed the Criminal Bar Association over twenty years ago. I was there that night. I doubt that things have really changed. That is why we must stick together in a collegiate way.

I want to say a few words about South Auckland. South Auckland practitioners received their share of brick bats but I found plenty to admire in the several joint trials I had out there last year which culminated in a very lively and spontaneous bar dinner after one long trial and the delight of appearing with some of my former students. The work out there is hard, and often thankless. You often have to be lawyer and a mentor. It is a very busy and difficult court.

Practice at the coal face of the law can be relenting. It can take a toll on ones health and family life. We have a great responsibility to keep a vigilant watch to ensure that the legacy we have been given of liberty and a rational and fair process of criminal law (sometimes developed by the actions of lawyers of great courage and sacrifice) is not ridden over roughshod by politicians or those who have some axe to grind, whether real or imagined about the system. As Professor Alan Dershowitz has also said in the closing pages of his book "Best Defence", "There are few prizes or honours ever bestowed on defence lawyers for their zealousness. Having made that point, he went on to conclude;

"The late Supreme Court Justice Felix Frankfurter once commented that he knew of no title more honourable than that of Professor of the Harvard Law School."

To which Professor Dershowitz added, "I know of none more honourable than defence attorney."

I must conclude now but may I suggest this to you Dame Margaret Bazley when you have finished with us, take a good look at legal aid in the family courts and indigenous land claims, You will find the private criminal bar on the whole is pretty responsible and the community gets quite good value for its money. We have had to adjust to change; pre-trials, written submissions, numerous mentions and now telephone conferences and an increasing quagmire of legislation.

I have no idea what you may do, and where this concept of a public defender will go or what the legal aid scheme will look like in the future. However when you are finished with the private criminal bar I suggest you might also like to examine the Crown's position, and work your rationalising wand on that entity and its functions. Should we not have an independent Director of Prosecutions, state salaried prosecutors and a transparent selection of prosecutors as in other Commonwealth jurisdictions. Or is this just another sacred cow?

Above all, I urge you and those law reformers and politicians in Wellington in the penetrating language of a great US president Theodore Roosevelt to have some respect

for those who are actually in “the arena” of the criminal law, those who spend their lives “in a worthy cause”, and if they fail or come up short “will never be with those cold and timid souls who know neither victory nor defeat.”

Charles Cato,

Barrister
November 2009.