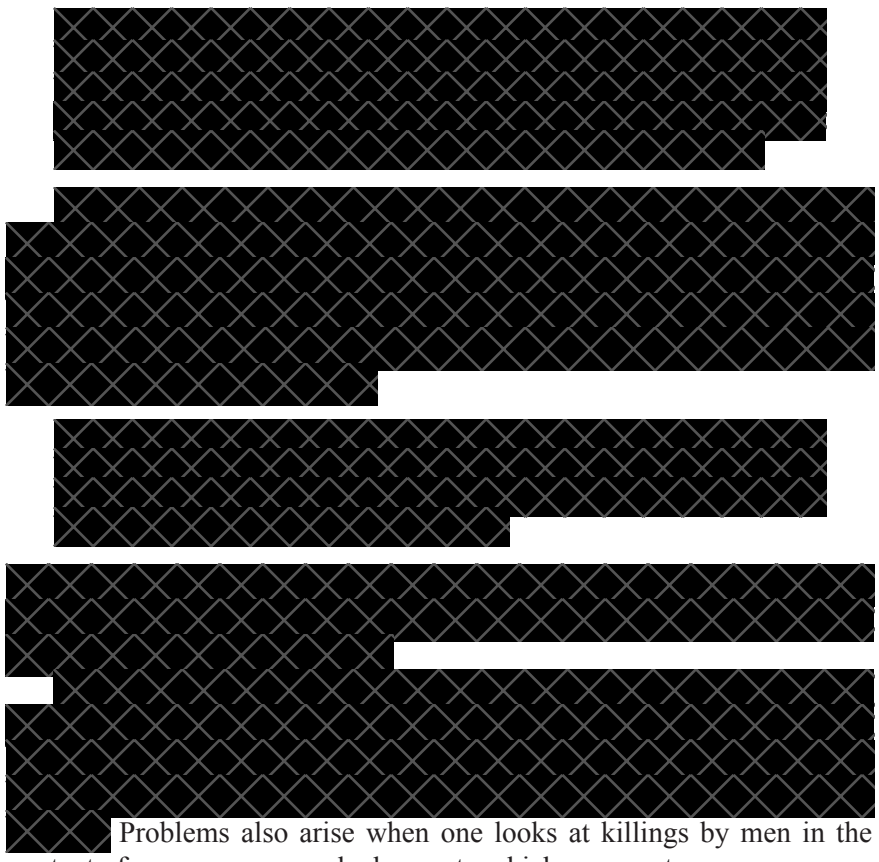
Isabel Grant Allard School of Law at the University of British Columbia
Debra Parkes, Allard School of Law at the University of British Columbia



Problems also arise when one looks at killings by men in the context of a same-sex sexual advance to which we now turn.

5. *Provocation and "Homosexual Panic"*

As mentioned earlier, the Court in *Tran* stated that homophobia is not a characteristic that should be attributed to the ordinary person. Yet post-*Tran*, judges have found an air of reality to the defence of provocation raised by accused men in relation to vicious attacks on men they allege sexually assaulted them. We have seen three such cases, post-*Tran*, where provocation was raised and where the verdict was manslaughter or the case was sent back for new trial.[95] In one of these cases, *R. v. Bouchard*,[96]

91. *Ibid* at 125.
92. In *R v Daniels*, [1983] NWTJ No 29 (CA) [*Daniels*] the court recognized this kind of slow fuse provocation after a long period of abuse by the accused's spouse, but this case is exceptional.
93. (1996), 30 OR (3d) 609 (CA), aff'd [1998] 1 SCR 123.
94. Sheehy, *Defending Battered Women*, *supra* note 11 at 271.
95. *R v Peterson*, 2012 MBQB 305, 285 Man R (2d) 172 [*Peterson*]; *R v Bouchard*, 2013 ONCA 791, 305 CCC (3d) 240, 314 OAC 113 [*Bouchard* ONCA], aff'd 2014 SCC 64, [2014] 3 SCR 283 [*Bouchard* SCC] new trial ordered; *Rasberry*, *supra* note 49.
96. *Bouchard* ONCA, *ibid*.

the new trial was granted on the basis that the provocation was relevant to a lack of *mens rea*, and in another, *R. v. Rasberry*,[97] the accused also testified that the victim threatened to sexually assault both him and his wife. As further discussed below, in these three cases, as well as one known as *KRB*,[98] decided shortly before *Tran*, and *R. v. Rothgordt*[99] in which the defence was found to have an air of reality at the accused's first trial, the assumed ordinariness of homophobic rage played a role. Self-defence would have been a more appropriate defence in all of these cases, but the decisions are based on provocation because the excessive force used precluded self-defence. In the light of recent judicial and legislative efforts to limit the defence of provocation, it is important to consider the continued salience of "homosexual panic" as a basis for the defence, even though these cases are not numerous.

In *R. v. Peterson*,[100] the accused testified that he killed his friend and associate in the drug trade after the accused awoke one evening and found the victim, another man, attempting to perform oral sex on him. The accused struck the victim at least nine times with a hammer, crushing his skull. The forensic evidence showed that the victim was either incapacitated or unconscious when many of the blows were struck. Provocation was left with the jury and they convicted the accused of manslaughter. In the course of her reasons for sentence, the judge stated that the jury must have concluded that the victim attempting to perform oral sex on the accused "would have caused a reasonable person in his circumstances to lose self-control."[101]

In *Rothgordt* the accused killed a man he met in an online chat room for men interested in sex with other men.[102] The accused did not testify but the defence relied on his statement to the police in which he alleged that the victim had come on to him without his consent. At the first trial, provocation was left with the jury, along with intoxication and self-defence,

97. *Rasberry*, *supra* note 49.

98. *R v KRB,* 2007 NBQB 359, 321 NBR (2d) 371, [2007] NBJ No 413 (QL) [*KRB*]. The accused successfully raised provocation in a judge-alone trial. He testified that the victim, another man who was his friend, sexually assaulted him while asleep in the friend's car. KBR testified that he pushed the friend away, jumped out of the car and grabbed a sawed-off .22 caliber rifle from the backseat, fatally shooting his friend in the chest. The reasons for decision do not indicate the nature of the alleged sexual assault.

99. In *R v Rothgordt*, 2013 BCCA 37 [*Rothgordt*], the defence was left with the jury at the accused's first trial, but failed on the merits. The second trial was by judge alone and Justice Arnold-Bailey found no basis for provocation. The accused has again appealed his conviction for second degree murder.

100. *Peterson*, *supra* note 95.

101. *Ibid* at para 22.

102. *R v Rothgordt*, *supra* note 99.

but the jury convicted him of second degree murder.[103] As in *Peterson*, the killing was very violent: the accused struck the victim numerous times in the head with a hammer.[104]

Even when provocation fails, evidence that an accused was provoked is relevant to *mens rea* and may have the impact of reducing a murder conviction to manslaughter. In *Bouchard*,[105] for example, the accused and the victim were former coworkers and friends who often drank together. There was some evidence of prior sexual activity between the two men. On the night of the killing, the two men had gone to a concert and become "quite drunk" by the time the concert ended. The victim had allegedly made several sexual advances earlier in the evening that had been rebuffed. The provoking act occurred when the victim planted a "wet kiss" on the accused's cheek and told the accused that he loved him. The accused then stomped the victim to death, leaving him in tall grass several metres from the road. The accused testified that the "wet kiss" brought back memories of a babysitter who had sexually assaulted him as a child. Two defences were put to the jury: a lack of *mens rea* for murder and provocation. The jury rejected both defences and convicted the accused of second degree murder. Again, we question putting provocation to the jury in this case. Is a single kiss, and a protestation of love, evidence of an insult that is sufficiently serious that it could generate a loss of self-control in an ordinary person? The jury evidently answered this question in the negative, but the Ontario Court of Appeal allowed the accused's appeal and ordered a new trial on the basis that the victim's conduct was relevant to the overall inquiry into whether the accused had the requisite *mens rea* for murder. In other words, provoking conduct that falls short of the requirements of s. 232 may nonetheless be sufficient to negate the accused's *mens rea* for murder. The Court held that when evidence of provocation is used to negate the *mens rea* for murder, the limits imposed by the statutory definition of provocation, such as the "ordinary person" requirement, do not apply. This result was upheld by the SCC without reasons.[106]

The decision in *Bouchard* is problematic for several reasons. First, allowing provocation to go to the jury in this case, necessarily embraces

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103. *Ibid*. The accused was initially convicted of second degree murder, but this conviction was set aside due to improper jury instructions (2013 BCCA 37). At his second trial, the accused was convicted of second degree murder (2014 BCSC 1215, [2014] BCJ No 1398 (QL)). This decision was overruled on appeal, 2017 BCCA 230.

104. *Ibid*. See also *KRB, supra* note 98.

105. *Bouchard* ONCA, *supra* note 95.

106. *Bouchard* SCC, *supra* note 95. Bouchard was convicted of murder at the second trial: *R v Bouchard*, 2016 ONSC 4484.

homophobic assumptions about responses to non-violent same-sex advances by affirming the reasoning that it is ordinary to respond to a non-violent same-sex advance, such as a "wet kiss," with lethal violence.[107] Second, *Bouchard* opens a back door into a manslaughter verdict even where an ordinary person would not have lost self-control (albeit through the doctrinal route of negating the *mens rea* for murder). This is particularly problematic because there will be no safeguard of an objective test to ensure that unreasonable responses based on toxic masculinity or homophobia will not serve as mitigating factors.[108]

The Canadian Judicial Council's model jury charge on provocation includes a mention in a footnote that the characteristic of homophobia should not be attributed to the ordinary person.[109] However, juries are to be instructed that the accused's gender and sexual orientation should be taken into account to the extent they are relevant. Yet to do so in these cases can be problematic. In *Rothgordt*, where the defence theory was that the accused was sexually curious or confused, jury speculation about his sexual orientation (which was not at all clear) does not assist in understanding the nature of the alleged insult unless the ordinary person can be homophobic. Unspoken in these cases is the idea that, if the accused had been gay himself, provocation might not be available. The decision at the second trial in *Rothgordt* provides a rare example of a court taking these concerns seriously. Justice Arnold-Bailey stated, "Moreover, in this day and age I do not consider it likely that 'homosexual panic' will often, if ever, provide a valid basis upon which to find provocation."[110]

Remember that the example given by Dickson CJ in *Hill* of when personal characteristics might be relevant was that of a racialized accused being subjected to a racist insult. The analogy for sexual orientation would be a gay man or woman losing self-control as a result of a homophobic insult. The facts in *R. v. Reid*[111] come close to the kind of insult envisioned

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107. The alleged conduct by victims in other homosexual panic cases (e.g., *Peterson*, *Rasberry*) cannot be considered "non-violent" and we do not mean to suggest that sexual assaults—whether experienced by men or women—are not violent acts. As discussed further below, the relevant defence in such cases should be self-defence and any limitations within that defence should be addressed directly rather than through provocation.

108. If a killing is reduced from murder to manslaughter based on a lack of *mens rea*, the defence of provocation should not arise given that it only applies to killings that are otherwise murder. The first question should be the *mens rea* question and only if the intent to kill is found should provocation be considered.

109. Canadian Judicial Council, "Provocation—In force July 16, 2015," online: Canadian Judicial Council <http://www.cjc-ccm.gc.ca/english/lawyers_en.asp?selMenu=lawyers_provocation_en.asp>.

110. *Rothgordt*, *supra* note 99.

111. 2015 BCSC 835 [*Reid*].

in *Hill*. The facts suggest that the accused was born intersex,[112] raised as a boy, and as an adult had surgery to transition to be a woman. The accused engaged in what was found to be a consensual sexual encounter with a man who, on discovering she was transgender, started berating her viciously, calling her a faggot and other epithets. The victim also allegedly assaulted her, to which she responded with deadly force, hitting him several times with a baseball bat and causing his death. The defence of self-defence failed in this case because it was found that the force used by the accused was excessive. Silverman J. recognized that one's "gender and sexual identity" is relevant to the provocation inquiry. In particular, he accepted the Crown's concession that the victim's words and actions "could be taken as a dehumanizing attack on Ms. Reid's sense of identity and self-worth, as gender is a legitimate core aspect of self-identity and self-worth."[113] The accused was convicted of manslaughter on the basis of provocation. In our view, any principled basis to mitigate Reid's sentence in this case should be rooted in an understanding that she was defending herself against a man who, it seems, flew into a transphobic rage at the realization she was transgender. It is only necessary to shoehorn our desire to mitigate the sentence here into the ill-fitting defence of provocation because the mandatory minimum sentences for murder preclude consideration of the circumstances of the accused.

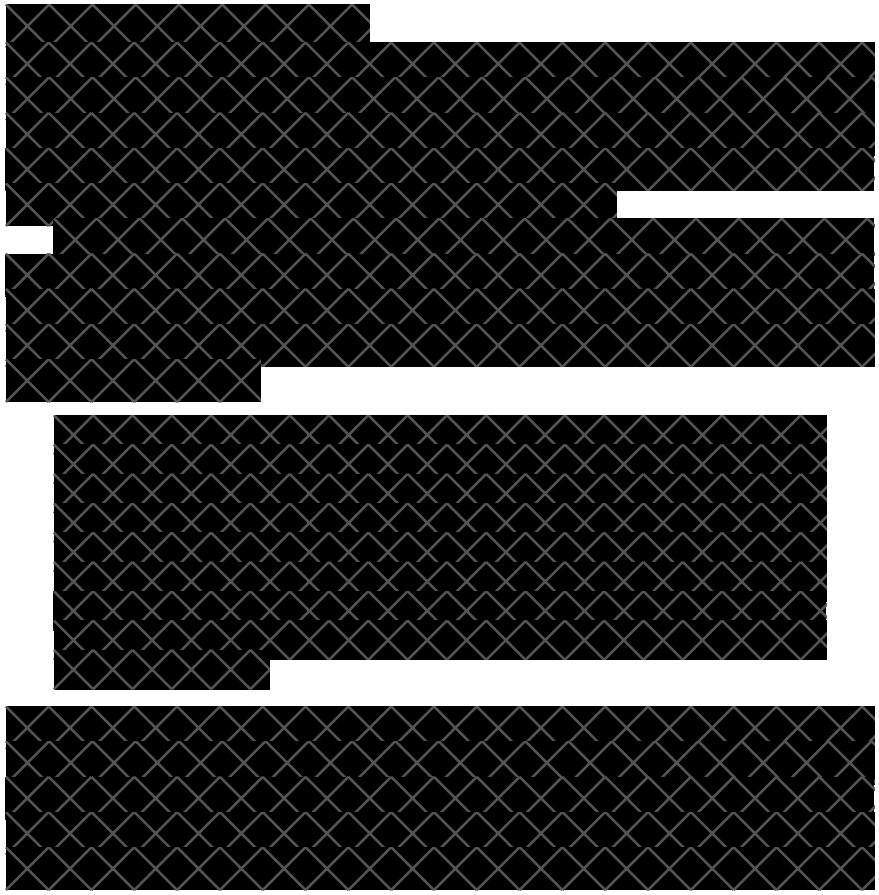
Self-defence should, of course, be open to both men and women who are defending themselves against sexual or other assaults but that defence requires that the defensive response be reasonable in the circumstances.[114] We are not saying that an accused responding violently to a sexual assault should never form the basis for mitigation of a murder sentence, but rather that the presumed sexual orientation of the victim should not render a sexual assault a provocative act based on some discriminatory construction of masculinity. While women are overwhelmingly more likely to be victims

112. The decision uses the word "hermaphrodite" which is considered a stigmatizing term. See Intersex Society of North America, "On the Word 'Hermaphrodite,'" online: <http://www.isna.org/node/16>.

113. *Reid*, *supra* note 111 at para 100.

114. It is interesting to note that when the defence of provocation was abolished in the Australian state of Victoria, a new offence of "defensive homicide" was introduced. Ramsey, *supra* note 17. Some have argued that the notion of a mitigated form of "defensive homicide" in fact brings in through the back door values that were rejected in the provocation context: see, e.g., Tyson, "Victoria's New Homicide Laws," *supra* note 55 at 212-214; Hunter & Tyson, "The Implementation of Feminist Law Reforms," *supra* note 17.

of sexual assault, we do not see women responding to unwanted sexual advances (whether heterosexual or same-sex) with lethal violence.[115]



115. The only case that we are aware of where a woman killed in response to sexual violence is *R v Magliaro*, [1981] NSJ No 115 where the accused pleaded guilty to manslaughter after killing a man who, after apparently consensual sex, forced her to perform fellatio. The accused had been sexually assaulted as a teena er and had a history of mental health issues.