

# NO STRAIGHT ANSWER: HOMOPHOBIA AS BOTH AN AGGRAVATING AND MITIGATING FACTOR IN NEW ZEALAND HOMICIDE CASES

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*This article discusses recent New Zealand homicide cases in which male defendants have sought to rely on the partial defence of provocation to excuse the killing of a man who allegedly made them the subject of unwanted sexual advances. The author argues that at least in cases in which such claims are unsuccessful, reference should be made to section 9(1)(h) of the Sentencing Act 2002, which renders homophobia an aggravating feature in sentencing. To the extent that section 9(1)(h) is not relied on, while provocation is successfully pleaded in some cases, the author concludes that gay male citizens are not afforded equal protection under the criminal law.*

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I ... couldn't comprehend how [McNee's] behaviour could be a justifiable reason for such a revolting and violent killing – or a rationale for such a killing to be downclassified from murder to manslaughter. It evoked in me a sense that homosexuals living in New Zealand were still second-class citizens – "almost" humans, who would never get full human rights.<sup>1</sup>

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<sup>1</sup> Peter Wells "A Lonely Death" (18 September 2004) *The Listener* New Zealand.

## I INTRODUCTION

The "lonely death" of David McNee in Auckland on 20 July 2003, and the successful reliance on the defence of provocation by his killer, Phillip Edwards, placed the issue of homicidal responses to unwanted homosexual advances back in the public arena.<sup>2</sup> What seemingly made the McNee case<sup>3</sup> newsworthy, for many months, was the release of much information about the lifestyles of both the deceased and the accused – including tales of their respective drug taking, sexual practices and, in the case of Edwards, other criminal activity. Never far from a topical story, Winston Peters even made an appearance, alleging the questionable involvement of a judge's husband in the life of Edwards.<sup>4</sup>

Although I will return to the details of the McNee case later, as they remain significant for reasons other than prurient fascination, my current interest in the case arises primarily because it occurred after the introduction of section 9(1)(h) of the Sentencing Act 2002. This section allows the sentencing judge to take into account (as an aggravating feature) the fact that "the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as ... sexual orientation ... and the offender believed that the victim has that characteristic". At the same time, by claiming he lost the power of self-control as a result of McNee touching him sexually, Edwards was able to rely on the partial defence of provocation, which the jury accepted. The McNee case therefore sets up, as do others, the potential for a conflicting approach to the categorisation of an offender's homicidal reaction to an unwanted homosexual advance. Does such an advance operate to understandably cause the offender to lose the power of self-control and thereby mitigate the killing? Or does the offender's response to the advance (also) indicate hostility towards the victim on the basis of his sexual orientation (as well as his conduct) and is therefore (also) an aggravating feature to be taken account of in the sentencing process?

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- 2 It is not that violent attacks on gay men were absent from the media for any significant length of time. A number of killings of gay men, allegedly motivated by unwanted homosexual advances (or merely because the victims were gay), occurred before the introduction of the Sentencing Act 2002 and therefore fall outside the scope of this paper. However, the facts of the cases and the arguments made by the accused are similar, if not identical to the cases discussed in this article: see for example: *S v R* (27 July 1998) CA 118/98 (the accused telling the police that "he had been driven by disgust after having sex with [the deceased] Ronald Fuller"); "Accused targeted 'gay' pair court told" (31 July 2001) *Waikato Times* Hamilton 16 (Peter Kitchen was beaten to death in Napier); "Sex motive for murder explored" (14 July 2001) *Waikato Times* Hamilton 4 (Jason Johnson was beaten and run over when hitchhiking, and his body was dumped in Lake Whakamaru); "Killer said 'I've killed some queer'" (1 June 1997) *Sunday News* 5 (David Shore was stabbed by James Gardner after drinking with him at a gay bar - Gardner then stole from Shore's flat).
  - 3 Rather than referring to each case by the name of the accused, as is usual citation practice, I will refer to them by the name of the victim, thereby seeking to address in some way the invisibility of the men who have been killed because of their sexuality.
  - 4 "Evidence in McNee killing 'held back'" (8 September 2004) *New Zealand Herald* Auckland.

In the McNee case, section 9(1)(h) was not relied on by the prosecution, nor was it referred to by the sentencing judge,<sup>5</sup> whose imposed sentence of nine years was upheld by the Court of Appeal.<sup>6</sup> This omission has been criticised by community activists – the omission being interpreted as a lack of willingness by the criminal justice system to recognise the killing (or assault) of homosexuals as hate crimes and therefore worthy of higher penalties.<sup>7</sup> At the time of writing, I can still find no reference to any cases in which section 9(1)(h) has been relied on in the sentencing of someone who has offended out of hostility towards gays or lesbians.<sup>8</sup> The failure to use the penalty-enhancement provision of the Sentencing Act 2002 is certainly worthy of further examination, but the scope of my examination is more limited. Using the McNee case as one of the recent examples, I will examine whether there is in fact an undesirable tension between the availability of the defence of provocation in cases of unwanted homosexual advances and the existence of section 9(1)(h) of the Sentencing Act 2002. More specifically, was the sentencing judge in the McNee case right not to make reference to section 9(1)(h) as it was a case where provocation was successfully relied on? If so, will section 9(1)(h) ever be relevant to cases of homicidal responses to unwanted homosexual advances?

My answer in brief is that reliance should be placed on section 9(1)(h) *at least* when the claim of provocation is unsuccessful – however this is not currently happening in New Zealand. There is still a strong argument, of course, that provocation should never be considered by the jury when the claim is based on an unwanted homosexual advance. Although this position has not currently found favour internationally,<sup>9</sup> it is my conclusion that where the defence of provocation for murder is based on an unwanted homosexual advance, such a homicidal reaction must invariably arise out of the homophobia of the killer, and as such can not logically be treated as mitigation for a crime, especially in a jurisdiction where hatred on the grounds of sexual orientation has been recognised as an aggravating factor.

I reach this conclusion by firstly examining the theories of masculine violence, especially when that violence is directed at homosexual men, and how these theories have been specifically applied

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5 *R v Edwards* (16 September 2004) HC AK T2003-004-025591 Frater J.

6 *R v Edwards* [2005] 2 NZLR 709 (CA).

7 Chris Banks "A Month for Each Choking Minute" (13 October 2004) *Gay.NZ.com* <www.gaynz.com> (last accessed 23 June 2006).

8 It has, however, been used in a number of cases in which the offending has involved "racial overtones": see for example *R v Moon* (27 February 2003) CA 366/02 Doogue J for the Court, including the sentencing for murder of the killer of James Te Aute: *R v Dixon* (27 May 2005) HC AK CRI 2003-092-026923 Potter J.

9 Proposed by NSW Working Party *Homosexual Advance Defence: Final Report* <www.lawlink.nsw.gov.au> (last accessed 23 June 2006) (as an amendment of section 23 of the Crimes Act 1900 (NSW): Recommendation 1) but never actioned. It was also called for following McNee's death: see Alison Laurie "Homosexual Panic Defence Must Go" (18 August 2004) *New Zealand Herald* Auckland.

in relation to provocation and the so-called "homosexual advance defence". In Part II, I also briefly discuss the debate concerning reform of the defence of provocation, as it has relevance in this context.

In Part III, I draw on the work of Joshua Dressler, whose interpretation of the "ordinary man" standard in the defence of provocation precludes homophobia as a relevant characteristic. On this basis, only the "non-homophobe" should be entitled to rely on the defence of provocation in such cases – that is, the provocation must be sufficient to deprive an ordinary person, who by definition cannot be homophobic, of the power of self-control.

In Part IV, I link this claim to the work of Allyson Lunny to discuss some recent New Zealand cases,<sup>10</sup> including the McNee case. Lunny's thesis is that only particular kinds of killings in response to unwanted homosexual advances actually result in successful reliance on provocation – that is, where the victim portrays "hyper-masculinity", such that even a non-homophobe would lose the power of self-control when faced with his action. However, it is my view that the cases of McNee and Hart (in which provocation was successfully claimed) cannot even be explained by reference to the theories of Lunny and Dressler, and should therefore give us real concern about the value of homosexual lives and protection of their citizenship.

If provocation as mitigation is successfully (and appropriately) relied on, there may also be difficulties under the current (doctrinally pure) formulation of the defence to allow reference to section 9(1)(h) as an aggravating feature when sentencing for manslaughter. However, given my argument that the operation of the defence in such cases is itself heterosexist, there is no reason not also to classify such offences as hate crimes and increase the penalty accordingly by relying on section 9(1)(h) of the Sentencing Act 2002.

My supplementary argument, which I will not develop fully in this article, is that the penalty enhancement provision does not operate to discourage violence against gay men in an effective way. Section 9(1)(h) may be read as applying only to hate crimes committed against gay men merely on the basis of their status. The section should therefore be taken into account when sentencing those who have committed random acts of violence motivated by their perception of their victim(s) as gay. It is not so clear that the section applies to offences committed due to the conduct of the victim.

In this way, section 9(1)(h) is not responsive to the discriminatory treatment of gay men (or lesbians) who conduct themselves in a seemingly provocative way: "[g]ays who engage in the same activities as straights [kissing in public, for example] are perceived to be flaunting their sexuality in an indecent way."<sup>11</sup> In order to avoid negative reaction, including homicidal violence, in the cases I

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10 Allyson Lunny "Provocation and 'Homosexual' Advance: Masculinized Subjects as Threat, Masculinized Subjects Under Threat" (2003) 12(3) *Social and Legal Studies* 311.

11 Kenji Yoshino "Covering" (2002) 111 *Yale LJ* 769, 843.

will discuss, gay men may feel forced to regulate their behaviour, to engage in "covering".<sup>12</sup> To the extent that the defence of provocation and section 9(1)(h) implicitly encourage covering, the criminal law therefore fails to be meaningfully protective of even private expressions of gay male sexuality.<sup>13</sup>

## II THEORISING MASCULINE VIOLENCE

The structure of hegemonic masculinity is defined ... by reference to its general (and successful) subjugation of women, to its heterosexual orientation, its contempt and hatred of homosexuality and its subjugation of masculinities deemed incompatible to its self-image.<sup>14</sup>

There is some debate about the role of the prevailing socio-legal environment in providing the catalyst for an increase in the violent attacks on gay men. Some argue that the more widespread tolerance of homosexuality there is, the less credit and esteem arises from conforming to "conventional, heterosexual gender roles".<sup>15</sup> In such a context, expressing homophobia is a mechanism for reasserting the greater value of heterosexuality and so "assuring oneself of one's own value, for acquiring status within the group, and for securing the status of that group ... by clearly marking out homosexuals as lower in rank."<sup>16</sup> By contrast, others claim "pandemic hate crime generally has only arisen in climates in which the ... government [has] also discriminated against the victims of hate crime and have scapegoated the victim class as a threat to the population deserving of injury."<sup>17</sup> One writer goes on to comment that "America's most recent national campaign of hostility toward gay people is the overtly defensive Defense of Marriage Act",<sup>18</sup> which notably has a current New Zealand equivalent in the form of the Marriage (Gender Clarification) Amendment Bill 2005.

Extensive discussion of the extent of current homophobic sentiment in New Zealand, and its role in contributing to anti-gay violence, is beyond the scope of this paper. What is of significance is the

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12 Yoshino describes "covering" as happening when "the underlying identity is neither altered or hidden, but is downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation." Yoshino, above n 11, 772.

13 I am grateful to Graeme Austin for explaining the relevance of the conduct/status tension to my project and introducing me to the very thoughtful writing of Kenji Yoshino.

14 Simon Hallsworth "Make My Day: Images of Masculinity and the Psycho-Dynamics of Mass Incarceration" in Ronnie Lippens (ed) *Imaginary Boundaries of Justice: Social and Legal Justice Across Disciplines* (Hart Publishing, Oxford, 2004) 144.

15 Dan Kahan "The Anatomy of Disgust in Criminal Law" (1998) 96 Mich L Rev 1621, 1636.

16 Kahan, above n 15, 1636.

17 James Allon Garland "The Low Road to Violence: Governmental Discrimination for Pandemic Hate Crime" (2001) 10 Law & Sex 1, 8.

18 Garland, above n 17, 88.

fact that men in New Zealand are regular victims of violent attacks, on the basis that they are, or are perceived to be, gay. The purpose of such violence is clear, as is its message to the gay community, even if such a rationale cannot be articulated by the perpetrators, beyond such statements as "we hate faggots".

As the opening quote to this Part encapsulates, most criminologists who engage with this issue suggest that "much [masculine] violence is a hostile response to gender disorder through which the perpetrator seeks to enact and reinforce gender boundaries and hierarchies, both between and within groups of men and women."<sup>19</sup> Gay bashing, therefore, has the dual role of constructing a masculine and heterosexual identity (through involvement with violence) while establishing homosexuals as "an opposed group of social outsiders."<sup>20</sup> In this way, violent crimes against homosexuals convey "a warning to all gay and lesbian people to stay in 'their place', the invisibility and self-hatred of the closet."<sup>21</sup> They are therefore paradigmatic hate crimes: they are directed at individuals because of the perpetrator's hostility towards them as members of a group of persons "who have an enduring common characteristic such as ... sexual orientation". Gay men are victims of violent assaults and murder, just because they are gay.

The effect of victimisation based merely on membership of a group, or possession of an immutable characteristic, is arguably to intimidate and instil fear in the entire group.<sup>22</sup> It has been claimed that "hate crimes are inherently more harmful to the social fabric of society than comparable crimes without bias motive."<sup>23</sup> In the United States, "anti-sexual orientation crimes" are on the rise, with 17% of all reported hate crimes committed against gays and lesbians, 70% of those

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19 Stephen Tomsen and Gail Mason "Engendering Homophobia: Violence, Sexuality and Gender Conformity" (2001) 37(3) *Journal of Sociology* 257, 259 (for a full report of Tomsen's research see *Hatred, Murder and Male Honour: Anti-homosexual Homicides in New South Wales 1980-2000* (Australian Institute of Criminology Research and Public Policy Series No 43, Canberra, 2002)). See also Antony Whitehead "Man to Man Violence: How Masculinity May Work as a Dynamic Risk Factor" (2005) 44(4) *How J Crim Just* 411, 417 ("The function of exclusive violence is to affirm the perpetrator's masculinity by negating the masculinity of the other man. Thus, through violence, he excludes the victim from the category 'man' as unworthy of belonging there."); Stephen Tomsen and Allen George "The Criminal Justice Response to Gay Killings: Research Findings" (1997-1998) 9(1) *CICJ* 56, 58 ("It appears that the very substantial number of gay men who are killed with criminal violence is the dual outcome of negative social constructions of marginal sexual identity and the rigid maintenance of conventional notions of manhood").

20 Tomsen and Mason, above n 19, 267.

21 Monique Noelle "The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group" (2002) 46(1) *ABS* 27, 28.

22 Charlotte Brown "Legislating Against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence" (2004) 35 *VUWLR* 591, 594.

23 Jack McDevitt and others "Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults" (2001) 45(4) *ABS* 697.

against gay men.<sup>24</sup> Whether or not the best response to such crime is to treat them more seriously, either as separate offences or, as in New Zealand, as part of a penalty enhancement provision,<sup>25</sup> there is certainly anecdotal evidence (and, increasingly, empirical research)<sup>26</sup> that such crimes do operate to silence and render invisible members of the gay and lesbian communities. This letter was published in the midst of the public debate about the hate crime addition to the Sentencing Act 2002.<sup>27</sup>

A schoolmate I've known for 44 years has only recently confided to me that he is gay: the homophobic hate-murder of Charles Aberhart in Hagley Park in 1964 has kept him in the closet from that day to this – as it was intended to do. Hate crimes have many victims other than the people physically hurt by them – whole communities. That is why they deserve special attention.

Section 9(1)(h) of the Sentencing Act 2002 has recently been categorised by the Court of Appeal as focussing on homophobic crimes, although the section refers simply to "hostility". As part of the discussion of "matters contributing to the seriousness of GBH offending", the Court in *R v Taueki* noted that "[w]here the attack is inspired by racism, *homophobia* or hostility to any other group, that may also constitute an additional aggravating feature."<sup>28</sup> The enactment of section 9(1)(h) is viewed by the Ministry of Justice as codifying "what had previously been noted as an aggravating factor in

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24 James Nolan, Yoshio Akiyama and Samuel Berhanu "The Hate Crimes Statistics Act of 1990: Developing a Method for Measuring the Occurrence of Hate Violence" (2002) 46(1) ABS 136, 148. The National Coalition of Anti-Violence Programs *Anti-Lesbian, Gay, Bisexual and Transgender Violence in 2004* (Report, New York, 2005) <<http://www.ncaavp.org>> (last accessed 23 June 2006) also noted an increase in the number of murders, intimidation and harassment of members of these groups.

25 For criticism of the use of hate crime legislation in either form see Jo Morgan "US Hate Crime Legislation: A Legal Model to Avoid in Australia" (2002) 38(1) *Journal of Sociology* 25, 44-45: "If current guidelines for considering the seriousness of offences fail to capture the singular characteristics of these kind of cowardly attacks, then this is where, I would argue, the reform agenda lies – *not* in the enactment of specific hate crime legislation. The reform agenda should not be confined to the legal realm ... It should also include educative strategies to reduce prejudice, interrogate aggressive masculinity and address peer rituals that involve violence or stigmatizing shaming. ... The strategies are more consistent with an approach that problematizes the behaviours of the perpetrators involved in these kind of crimes, rather than the worthiness of otherwise of the victim." Also, in a similar vein, see Karen Franklin "Good Intentions: The Enforcement of Hate Crime Penalty-Enhancement Statutes" (2002) 46(1) ABS 154, 167: "It is not surprising that without explicit attention to issues of social power, hate crime laws will end up replicating the very power imbalances and inequalities they were designed to ameliorate. ... Penalty-enhancement statutes ... provide politicians with an easy way to demonstrate that they are doing something about a perceived social problem, while sidestepping the complex causes of prejudice and violence ..."

26 See for example Noelle, above n 21.

27 Young, to the Editor, *The Evening Post* (28 February 2002) letter.

28 *R v Taueki* [2005] 3 NZLR 372, para 31 (CA) O'Regan J for the Court (emphasis added).

cases with respect to the race or sex of victims."<sup>29</sup> Although I am unaware of any case in which the sex (or gender) of the victim has been viewed as an aggravating aspect of the offending, there has been at least one example of its application in relation to homophobic violence. This was just before the Sentencing Act 2002 came into effect, when as a result of "a senseless hate crime ... a brutal attack because he was a homosexual",<sup>30</sup> the offenders' motivation was viewed as an aggravating feature.

In that case, *R v Poki*,<sup>31</sup> the Court of Appeal upheld the sentence of 10 years imprisonment handed down to Andrew Poki for his attack on Auckland gay waiter Stephen Byrne. Nicholson J, the sentencing judge, was of the view that the attack was premeditated and was undertaken because Byrne was gay.<sup>32</sup> Poki and his associate led an intoxicated Byrne into a "classic dark, dingy alley" where they violently beat him, robbed him and left him for dead. Surgeons later removed part of his brain in order to save his life. At trial, Byrne was asked if he remembered trying to kiss Poki who had helped him up off the footpath in Vulcan Lane before leading him up the alley (he could not).<sup>33</sup> The Crown's case, seemingly accepted by the sentencing judge, was that the crime was motivated by "prejudice and sexual hatred ... an attack against the sexuality of the victim."<sup>34</sup>

If such a crime was committed because of hatred and homophobia, it arguably does not depend on the existence of an "exceptional bigotry" or "phobia denoting a serious mental condition".<sup>35</sup> As Tomsen and Mason observe, it is rather a result of "everyday constructions of gender identity and forms of masculinity generated within the dominant social order. ... [Research] suggests it is [therefore] no longer useful to think of homophobia as a disturbed minority condition."<sup>36</sup>

Section 9(1)(h) does however provide an aggravating feature when crimes are committed as a result of homophobia or hostility towards others on the basis of their sexual orientation (such homophobia and hostility arguably resulting from and supporting hegemonic masculinity). For

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29 Rajesh Chhana et al *The Sentencing Act 2002: Monitoring the First Year* (Ministry of Justice, Wellington, 2004) para 50.

30 From the sentencing remarks of Nicholson J, reported in "Men Jailed for 'Senseless' Hate Attack" (14 December 2000) *Stuff* <www.stuff.co.nz> (last accessed 23 June 2006).

31 *R v Poki* (24 May 2001) CA 14/01.

32 *R v Poki* above n 31, para 4 Heron J for the Court.

33 "Gay bashing was assault, not bid to murder, says jury" (13 November 2000) *New Zealand Herald* Auckland; "Victim can't remember trying to kiss accused" (7 November 2000) *Stuff* <www.stuff.co.nz> (last accessed 23 June 2006).

34 "Men jailed for 'senseless' hate attack" (14 December 2000) *Stuff* <www.stuff.co.nz> (last accessed 23 June 2006).

35 Tomsen and Mason, above n 19, 266.

36 Tomsen and Mason, above n 19, 270.



section 9(1)(h) to be relied on by sentencing judges, they must recognise when the offending does (or does not) arise as a result of the "dominant social order", which may, of course, prove problematic. It may well be that judges and juries are unable to recognise the homophobia within the "dominant social order" and therefore within the criminal justice system itself. This could explain its lack of use, particularly in the context of homicidal attacks following unwanted sexual advances. (It may also be, as argued in the introduction, that section 9(1)(h) is simply unresponsive to cases of violent reaction to gay (sexual) conduct, as opposed to violence provoked "merely" by gay identity.)

In the next Part, however, I explore the extent to which such homicidal responses should be categorised as homophobic,<sup>37</sup> and thereby captured by the intended scope of section 9(1)(h), as currently drafted.

### **III PROVOKED BY HOMOSEXUALITY?**

The broad evidence about the motives behind fatal attacks on homosexual men suggests that many offenders adhere to an obvious hatred and contempt of homosexuals and their violence is calculated to punish and restrict the public expression of a marginal sexual identity. ... Nevertheless, their violence is driven by a fear of the emasculation that is implied by homosexual objectification and fondling. A compelling need to defend their honour is shared with many other men in the general population who react with various degrees of aggression, anger and violence when they become objects of homosexual interest.<sup>38</sup>

Members of gay and lesbian communities, and their supporters, are very clear that the defence of provocation, in the guise of the "homosexual advance defence", is "simply used as an excuse for gay bashing."<sup>39</sup> That is, it is a violent response to a non-violent unwanted homosexual advance which stems simply from homophobia, in the current community understanding of the term.<sup>40</sup> Aggression and violence are seemingly viewed by perpetrators as the most appropriate response to a sexual advance by another male. However, as such notions "of honour and masculinist ideas of appropriate violence"<sup>41</sup> have broad community respect and influence in the courtroom, such

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37 I like the discussion of the meaning of the word put forward by Tomsen and George: "The term 'homophobia' was originally coined by psychological researchers to describe a disturbed condition of irrational fear and anxiety which occurs in reaction to the physical presence of homosexuals. Since then it has entered a more general use as meaning an everyday hostility and prejudice against homosexuals and even a broad opposition to gay and lesbian political claims for full citizenship." Stephen Tomsen and Allen George "More on 'Gay Killings'" (1997-1998) 9(3) CICJ 332, 333.

38 Tomsen and George, above n 37, 333.

39 Edward Dunbar "Defending the Indefensible: A Critique and Analysis of Psycholegal Defence Arguments of Hate Crime Perpetrators" (1999) 15(1) J Contemp Crim Just 64, 68.

40 See Tomsen and George, above n 37.

41 Tomsen and Mason, above n 19, 270.

advances are often pleaded as mitigating factors in offending of all kinds, presumably because such a response is viewed as understandable, even if it is homophobic.

In 1984 a group of young men attacked two men in two separate incidents in public toilets in Wellington. Giving the judgment for the Court of Appeal, Cooke J noted: "In cross-examination there were even suggestions of a homosexual advance by one of the complainants, but this was unsubstantiated. The party had become short of money and the motive for the assaults was apparently robbery."<sup>42</sup>

Ten years later, the Court of Appeal was considering a bail application in a robbery case. Eichelbaum CJ, for the Court, referred to an affidavit sworn by the appellant:<sup>43</sup>

He said he was defending himself against unwanted advances of a homosexual nature made by the complainant which shocked and scared him. Understandably the Judge was sceptical about the last assertion: the complainant was a 63-year old male while the appellant was a 35-year old ex-gang member.<sup>44</sup>

In 2004, Robert Hunt, a "quiet stamp collector" aged 55 was stabbed 42 times in his Ellerslie home by 18 year-old Dick Faisauvale, who held him by the throat during the stabbing. The defence case was that Hunt sexually attacked Faisauvale after inviting him home for a meal: he was "a young man under sexual attack who feared he was going to be raped."<sup>45</sup> Faisauvale and Hunt, however, had previously had a casual sexual relationship and Faisauvale also acknowledged during the trial that he had been paid to have sex with other men. The Crown also alleged that on the night of the killing Faisauvale told a friend that he was going "to smash a friend dead" and steal his television, DVD, stereo and Honda Integra car. He took a knife with him to the house. While Hunt was watching television, he attacked him with the knife, demanding property from him. Faisauvale then left the house, driving off in Hunt's Integra. Hunt died an hour later after trying unsuccessfully to dial 111.

In all these cases the allegation of a non-violent unwanted homosexual advance was unsuccessfully raised in an attempt to explain or excuse the offending, in a similar way to the accused (Andrew Poki) in the Bryne case suggesting that the victim attempted to kiss him. The extent to which homosexual advances are permitted to provide a motive for violent offending is also evidenced in the more recent trial of the killers of James "Janis" Bamborough in which, during a

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42 *R v Autagavaia* (12 September 1984) CA 197/84 Cooke J for the Court.

43 *R v Tonihi* (14 October 1994) CA 275/94 Eichelbaum CJ for the Court.

44 Such scepticism seemingly no longer applies – in all the New Zealand cases I will discuss, there was a similar significant age difference between the victim and the accused.

45 "Student Convicted of Murdering Stamp Collector" (2 October 2005) *New Zealand Herald* Auckland.

police interview, it was reportedly asked of one of the accused whether Janis had made any sexual advances towards him the night he was killed.<sup>46</sup>

Much as a woman's alleged sexual infidelity has been, and remains, a regular basis for reliance on the defence of provocation,<sup>47</sup> claims of unwanted homosexual advances have become the explanation for most of the killings of gay men. However, one of the recent exceptions is provided by the case of Janis Bamborough, in which both the accused famously ran a cut-throat defence, both blaming the other for killing Janis, although both admitted disposing of his body. In such a case clearly neither accused wanted to be thought to have any motive for killing Janis, even though both had been sometime members of the Fourth Reich, a group known to despise homosexuals and non-whites. Both accused allegedly claimed to colleagues they had "killed a faggot", but both denied having any "problem" with homosexuals.

McKenzie alleged that on the night Janis was killed, Wilding was offended by the fact that Janis hugged him (Janis was renowned for touching people and getting overly close when he had been drinking). Wilding claimed that McKenzie killed Janis because he had made an inappropriate comment about his sister. In my view, this was a case in which Janis, homosexual, and possibly intersexual,<sup>48</sup> was killed because of his sexuality. It was not, however, a case in which either accused wished to admit any homophobia as it would provide them with a motive, rather than an excuse.

Whether a non-violent unwanted homosexual advance should be considered sufficient to deprive a person with the power of self-control of the ordinary person, of the power of self-control, and thereby induce them to kill (to use the words of section 169 of the Crimes Act 1961), has been the subject of academic and public debate, especially in Australia and the United States. On one side of the debate are those who believe that the defence of provocation is worthy of preserving and can be either amended or supplemented by jury directions so that unmeritorious claims based on the supposedly overly-sexualised behaviour of women or gay men do not succeed.<sup>49</sup> There are others who consider that either the defence of provocation should be abolished,<sup>50</sup> or that the particular

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46 Transcript of Wilding and McKenzie trial, 149.

47 See for example: Elisabeth McDonald "Provocation, Sexuality and the Actions of 'Thoroughly Decent Men'" (1993) 9 *Women's Studies Journal* 126; Jenny Morgan "Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them" (1997) 21 *Melb U LR* 237.

48 "Men who drifted into murder" (11 June 2005) *The Press* Christchurch 21.

49 Joshua Dressler "When 'Heterosexual Men Kill 'Homosexual' Men: Reflections on Provocation Law, Sexual Advances and the 'Reasonable Man' Standard" (1995) 85 *J Crim L & Crim* 726.

50 Adrian Howe "More Folk Provoke Their Own Demise" (1997) 19 *Sydney LR* 336.

example of non-violent unwanted homosexual advances should not be sufficient to found the defence, as a matter of law.<sup>51</sup>

Part of the criticism of allowing non-violent unwanted (homo)sexual advances to found the defence (that is, accepting that an advance of this nature is sufficient to cause an understandable loss of self-control) is that such an allowance only benefits straight men:<sup>52</sup>

As victims, male heterosexuals are not burdened with the possibility that *their* non-violent unwanted sexual advance may partially excuse their killers because, first, women rarely kill at all even when provoked. Second, male heterosexuals do not make sexual advances upon males (who do kill and often upon provocation) of any sexual orientation. It is a situational impossibility. Thus ... male heterosexuals become an insulated class accruing all the benefits attached with no burdens because they are protected by the defense's very definition. ... [T]he provocation doctrine's purpose and effect is [therefore] to maintain male heterosexuality as the most privileged sex, gender, and sexuality. The doctrine is not just male-oriented or just heterosexist. ... The provocation defense is sexist and heterosexist. It is male heterosexist.<sup>53</sup>

The availability of the defence of provocation in cases of homosexual advances is therefore problematic because of its ability to excuse those who have subjected gay men to extreme violence in situations where there is no equivalent for straight men.<sup>54</sup> In this way, the operation of the defence reinforces the vulnerability of gay men as "dangerous outlaws".<sup>55</sup> When men who kill in response to homosexual advances are not convicted of murder, "courts and juries [further] reinforce the notion ... that gay men do not deserve the respect and protection of the criminal justice system."<sup>56</sup>

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51 NSW Working Party, above n 9; Robert Mison "Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation" (1992) 80 Cal L Rev 133. Other writers have proposed ways to limit the application of the defence – see for example: Victoria Nourse "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 106 Yale LJ 1331; Bradford Bigler "Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation" (2006) 53 UCLA L Rev 783.

52 Christina Pei-Lin Chen "Provocation's Privileged Desire: The Provocation Doctrine, 'Homosexual Panic', and the Non-Violent Unwanted Sexual Advance" (2000) 10 Cornell JL & Pub Pol 195, 224 (emphasis added).

53 Chen, above n 52, 228.

54 There are seemingly no cases in a number of jurisdictions of women successfully relying on the defence of provocation when they have been subject to (merely) an unwanted sexual advance. If the advance has become a physical sexual assault, however, there is some (limited) case law indicating women can access the defence. See for example the 1981 Canadian case of *Magliaro* cited in Lunny, above n 10, 313.

55 Ben Golder "The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform" (2004) 11(1) Mur UEJL 8, para 35.

56 Mison above n 51, 174.

The fact that heterosexual male bodies are treated as "bounded and impermeable"<sup>57</sup> as a result of the use of provocation claims in such cases, also leads some writers to allege that there is no real distinction between an advance and an assault, as there appears to be in cases involving women as the offended party.<sup>58</sup> By its very nature, a homosexual advance is accepted to be "an attack upon the sanctified and impenetrable male body. [Therefore] there is no such thing as a 'non-violent homosexual advance'".<sup>59</sup> Any advance, "however amorous or gentle, automatically represents an attack."<sup>60</sup>

To the extent that a partial excuse is potentially available to men who kill as a consequence of any unwanted homosexual advance, however minor, it is difficult to explain this as anything except the condoning of homophobia. The script is that there is something seriously provocative about such an advance when made by a gay man to a straight man, when in any other context the provocation would be minimal or non-existent.

Many agree that recognising a homosexual advance as sufficiently provocative "condone[s] hate motivated violence against homosexuals"<sup>61</sup> and that "homophobia is at the heart of the homosexual-advance defence".<sup>62</sup> However, those in favour of retaining the defence, even in these circumstances, believe that the defence does not validate homophobia, and even if that be so, juries can be instructed to disregard any such prejudices that might have motivated the defendant.

According to Joshua Dressler, for example, the standard of the ordinary man,<sup>63</sup> in the context of provocation law, must be assumed "to be devoid of ... extreme character flaws". The ordinary man may not possess "idiosyncratic moral values"; therefore the ordinary man is "not racist, anti-Semitic, or prejudiced against any class of persons. Thus, too, the Ordinary Man is not homophobic."<sup>64</sup> Therefore, Dressler argues, the jury should be instructed that:<sup>65</sup>

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57 Golder, above n 55, para 27, citing Ngairé Naffine "The Body Bag" in Ngairé Naffine and Rosemary Owens (eds) *Sexing the Subject of Law* (The Law Book Co, Sydney, 1997) 84.

58 Golder, above n 55, para 35.

59 Golder, above n 55, para 35.

60 Golder, above n 55, para 36.

61 Rebecca Bradfield "Provocation and Non-violent Homosexual Advances: Lessons from Australia" (2001) 65 J Crim L 76.

62 Scott D McCoy "The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict" (2001) 22 Cardozo L Rev 629, 657.

63 Post *R v Rongonui* [2000] 2 NZLR 385, para 231 (CA) Tipping J, it seems that the ordinary person test has been displaced by the ordinary man test, given the majority's view that the ordinary person should be invested with the relevant age and gender of the accused when undertaking the sufficiency inquiry.

64 Dressler, above n 49, 757.

65 Dressler, above n 49, 761.

[I]n determining whether an ordinary man in the defendant's situation might act from passion, rather than judgement, I instruct you that such a person would not act as the result of prejudice toward, or fear of, homosexuals or homosexuality.

This direction requires the jury to investigate the extent to which the accused was motivated by homophobia, an inquiry which may be difficult given the current acceptance of the view that protection of the boundaries of the heterosexual male body is innately justifiable, and does not arise out of fear or bigotry. Dressler's proposal, which is similar to the 1998 recommendation of the New South Wales Attorney General's Working Party,<sup>66</sup> fails to challenge the role that the law plays in the maintenance of the prejudice implicit in the defence in such cases, preferring instead "to locate the real problem in the extra-legal prejudices" jurors "have failed to divest themselves [of] before entering the jury room."<sup>67</sup>

If it is true that killing in response to a homosexual advance occurs as a result of homophobia, then, according to Dressler, such killings should not result in successful reliance on the defence. The advance must be sufficient to deprive an ordinary (non-homophobic) person of the power of self-control. If the advance is only sufficient to deprive a homophobe of the power of self-control, then it cannot be deemed sufficiently provocative as a matter of law.

It is true that not all claims of provocation that are founded on the existence of an unwanted homosexual advance are successful. If the "ordinary person" test is being appropriately applied when making the sufficiency or "evaluative" inquiry,<sup>68</sup> then only those cases in which the alleged conduct of the deceased is grave enough to provoke a non-homophobic male should be successful.

In some New Zealand cases, judges have been willing to comment on whether the alleged conduct is sufficiently provocative. In cases where the conduct is not viewed as sufficiently provocative as a question of law, the defence should not be left to the jury. It is therefore in the context of appellate cases that such comment, which is not always consistently undertaken,<sup>69</sup> is made.

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66 NSW Working Party, above n 9, Recommendation 2. A more recent proposal is currently being considered by California. Known as the Gwen Araujo Justice for Victims Act (named after a California teenager murdered in 2002 after the accused men allegedly "panicked" after discovering she was transgendered), the Act "would amend jury instructions to say that the use of societal bias to influence a criminal trial is inconsistent with California public policy, specifically hate-crime laws". "California 'Gay Panic' Bill One Step Closer to Reality" *Advocate.com* <[www.advocate.com](http://www.advocate.com)> (last accessed 23 June 2006). In my view, this proposal is susceptible to the same criticism expressed by Golder.

67 Golder, above n 55, para 42.

68 *R v Timoti* [2006] 1 NZLR 323, para 35 (NZSC) Tipping J for the Court.

69 In the context of the killing of an estranged wife, for example, the Court of Appeal has treated the victim's approach to child custody issues as not capable of being sufficiently provocative to allow the defence to go to the jury (see *R v JHL* (12 September 2005) CA 200/04, para 58 Glazebrook J for the Court: "We do not

The killer of Ronald Anderson claimed Anderson had "put his hand on [my] thigh and looked and smiled at [me]."<sup>70</sup> Campbell alleged that this led him to have a flashback to the abuse he suffered at the hands of a family friend V when he was 8 years old. He then hit Anderson, who bore a strong resemblance to V, with a poker, punched him and then struck him at least six times with an axe (one time after Campbell returned to the house after fitting a new battery in Anderson's car in order to leave the area). The Court of Appeal stated:<sup>71</sup>

Provocation could have been presented in two alternative ways, at least in theory. First, it could be advanced (as in fact it was) on the basis that there was a reasonable possibility that a homosexual advance triggered a flashback of the kind alleged. The alternative was that even in the absence of any flashback, the homosexual advance was sufficient provocation. There is no indication in the summing up however that the alternative was put forward. That is understandable. There are cases where a trial Judge has to take the responsibility of ruling that the ordinary person test cannot be satisfied on the evidence, see eg *R v Tai* [1976] 1 NZLR 102. Provocation is not lightly taken away from the jury, *but had there been no evidence at all of the flashback concept, the advance of which the appellant spoke would not have been a sufficient foundation for leaving provocation in the case.* It would not have been open to the jury to find that the hypothetical ordinary New Zealander, without any special characteristics, could have reacted in the same way.

The Court was therefore of the view that this kind of homosexual advance of itself, if it could be characterised as such, was not sufficient to deprive an ordinary person of the power of self-control. Without the "flashback", which was treated as stemming from a "characteristic", a homicidal response to such an advance would presumably have been a result of irrelevant "moral depravity" or homophobia.

Allyson Lunny's theory concerning the distinction between successful and unsuccessful reliance on the defence of provocation is based on the extent to which the advance is "a believable threat of symbolic feminization."<sup>72</sup> That is, where the threat is only homosexuality per se, the masculine subject is able to resist it (hence, some forms of homosexual advances are insufficient to provoke the ordinary man). Those reacting to homosexuality per se may therefore be treated as homophobic and the defence should not be available to partially excuse their actions. According to judicial understanding of "homosexual threat" structured on the logic of (hetero)normativity, when the threat

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consider that merely exercising her right to have custody and access issues determined by the courts can amount to provocative conduct on the part of Mrs B"). However, on the facts of *R v Blackmore* (18 May 2005) CA 29/05, para 9 Judgment of the Court, the victim's words relayed to the accused that "the issues about the custody of the children would have to 'go to court'" *were* viewed as sufficiently provocative to allow the jury to consider the defence, which they accepted.

70 *R v Campbell* [1997] 1 NZLR 16, 19 (CA) Eichelbaum CJ for the Court.

71 *R v Campbell*, above n 70, 23 Eichelbaum CJ for the Court (emphasis added).

72 Lunny, above n 10, 314.

is made by a "hypermasculine homosexual lacking in sexual self-control who is predatory and violent" this is "a direct threat to masculinity in so far as it is a figure that penetrates."<sup>73</sup> Such a threat is therefore arguably one that would be sufficient to deprive an ordinary man of the power of self-control: by definition, a man who is not homophobic.

In the next section I will analyse the recent New Zealand cases in order to determine whether the division between successful reliance and unsuccessful reliance on provocation is related to the existence of a threat from a "hypermasculine homosexual", and to what extent the division informs us about the role of homophobia in the application of the defence of provocation.

#### ***IV THE NEW ZEALAND CASES: STORIES OF HYPERMASCULINITY OR HOMOPHOBIA?***

(Hetero)normative masculinity has always been a central component to the ordinary person standard of the provocation defence. ... [However] it is not in (hetero)normative masculinity's best interest to treat every case of "homosexual" advance as a legitimate act of provocation. To do so would index the precarious and unstable ground of (hetero)normative masculinity as articulated by queer theory. Rather, (hetero)normative masculinity must show itself as resilient, as impenetrable, as defensible against violation.<sup>74</sup>

Rather than claiming that every homosexual advance is treated as a violation of the "bounded" masculine body, Lunny argues, based on her consideration of the Canadian provocation cases, that the (hetero)normative masculine body is expected to be resilient to mere "annoyances", such as that of Anderson's hand on Campbell's knee. A non-violent advance, she argues, by "a 'feminized' masculine subject (the 'homosexual')", surely, on the basis of the logic of (hetero)normativity, cannot represent a threat to "a sexually dominant subject (the 'heterosexual male')."<sup>75</sup> Reacting homicidally to such an advance "betrays an unstable masculinized identity",<sup>76</sup> one that is acting irrationally, one that is acting out of homophobia.

If consistent with this thesis, the New Zealand cases should reveal that provocation claims founded on "annoyances" are not successful – indicating as they do the possession of idiosyncratic moral values (homophobia). However, provocation claims founded on a threat by "a hypermasculine and dominant homosexual who lacks self-control and who is violent and predatory" may be successful because the threat is one that even a stable heterosexual masculine subject would, according to the logic of (hetero)normativity, understandably react to. This is not to say that the "successful" cases do not also expose the operation of the defence as homophobic. My purpose at

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73 Lunny, above n 10, 316.

74 Lunny, above n 10, 319.

75 Lunny, above n 10, 319.

76 Lunny, above n 10, 319.



this point is merely to consider the rationale (if any) for the difference in outcome in the recent New Zealand cases. The first two are examples of successful reliance on the defence of provocation.

**A *Manslaughter Verdicts for the Killers of David McNee and Colin Hart***

David McNee, aged 55, was "a man who enjoyed a high public profile."<sup>77</sup> He appeared on television programmes and was a designer of some note. To his friends and family he was kind, generous, outgoing and loyal. He was "openly gay". The sentencing judge noted that in the weeks prior to his death, McNee engaged in numerous and varied sexual liaisons and was taking increasing risks.

The facts leading up to his death, as reported in the sentencing decision,<sup>78</sup> (and, it must be remembered, based almost entirely on the evidence given by Edwards) may be summarised as follows: On the evening of 20 July 2003, Edwards, aged 24 when sentenced, was with two friends in Karangahape Road in Auckland when he noticed a black Audi TT convertible driving slowly by. Edwards knew that the driver, McNee, was looking for someone to pick up, and as Edwards had no money (he had been released from prison 10 days earlier), he jumped into the car when it stopped at the traffic lights. In the car, Edwards agreed to masturbate in front of McNee for \$120. McNee said his home was nearby and as Edwards needed a shower, they went there. After he showered, Edwards went into the main bedroom and performed what he referred to as "puppetry of the penis". According to Edwards, McNee's demeanour changed after he took amyl nitrite and started questioning Edwards about his previous homosexual experience. Edwards allegedly said he was not into that type of activity and was not gay. Despite this, Edwards did get on all fours, as asked to by McNee. McNee then allegedly started making animal noises, kissed Edwards' leg, rubbed his hands on his buttocks and inserted his finger into his anus.

At this point, Edwards got to his feet, asked if McNee thought he (Edwards) was a female, and started hitting him about the head. Edwards reported being "very angry" and said (at trial) that after the first couple of blows, everything became a blur. In his interview with the police, Edwards actually admitting striking McNee between 30 and 40 times, which was consistent with the state of his hands and the injuries sustained by McNee.

When he stopped beating McNee, he was on the floor and there was blood everywhere. McNee was not moving (although the pathologist was of the view that McNee would have lived for at least another 15 minutes). Edwards put a rug over McNee so he "would not have to look at him." He then showered and looked for the keys to his car. Edwards also took alcohol, clothes and McNee's wallet. He then drove to meet up with friends who helped Edwards unload the car and dispose of his bloodied clothes. Over the next eight days Edwards and his friends drank the alcohol, wore McNee's

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<sup>77</sup> *R v Edwards*, above n 5, para 25 Frater J.

<sup>78</sup> *R v Edwards*, above n 5, paras 4-15 Frater J.

clothes and drove around in his car. When Edwards was arrested he first denied knowing McNee, gave an implausible explanation as to how he came to have the car, and only admitted killing McNee when the interviewing officer told Edwards that his fingerprints had been found at McNee's house. Edwards then said that McNee had thought he was gay, which he was not, so he killed him.

The sentencing judge accepted that "some type of homosexual advance was made towards [Edwards] by [McNee]", although she was "less sure of whether it was to the extent claimed by Edwards."<sup>79</sup> The Judge stated that the existence of the advance diminished the significance of the Crown's submissions with regard to the claimed aggravating feature of an alleged "home invasion" and the vulnerability of the naked, older man. However, she accepted that the degree of violence used was an aggravating feature. It was apparent "from the injuries suffered by McNee and the blood spatter evidence, that the violence was extreme and sustained."<sup>80</sup> Frater J also accepted that although lack of murderous intent or provocation could have formed the basis for the jury's manslaughter verdict, "provocation is the more likely reason for the verdict."<sup>81</sup>

In accepting provocation, the jury must have been satisfied that there was enough evidence to support the defence's claim that the provocative acts alleged at trial by Edwards (fondling and digital penetration) would have been sufficient to deprive an ordinary man of the power of self-control, such that they would kill.

The alleged anal penetration is seemingly the action that turns this into the killing of "a hypermasculine homosexual [who] poses a direct threat to masculinity in so far as it is a figure that penetrates."<sup>82</sup> In such cases, the killer can arguably be viewed as being preoccupied with "issues of male honour, bodily integrity and hostility to sexual objectification."<sup>83</sup> "Success" for Edwards followed his claim of the "threat of symbolic feminization"<sup>84</sup> – note what he said to McNee before he brutally beat him: "do you think I am a female?" In the words of Peter Wells: "The male anus, in the patriarchy, is sacred. To have it breached is to be dishonoured."<sup>85</sup> The heterosexual male body is bounded and impermeable.

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<sup>79</sup> *R v Edwards*, above n 5, para 48 Frater J.

<sup>80</sup> *R v Edwards*, above n 5, para 49 Frater J.

<sup>81</sup> *R v Edwards*, above n 5, para 39, point 5 Frater J.

<sup>82</sup> Lunny, above n 10, 316.

<sup>83</sup> Tomsen and Mason, above n 19, 266.

<sup>84</sup> Lunny, above n 10, 314.

<sup>85</sup> Wells, above n 1.

If provocation can be successfully relied on in such cases, then presumably this "ordinary man" who killed did not do so out of homophobia but out of understandable and partially excusable homicidal rage.

According to Lunny's thesis, McNee should therefore fit into the category of "dominant homosexuals who lack self-control and who are violent and predatory". However, there was no evidence that McNee was violent or predatory – and any dominance by McNee in the circumstances arose from a difference in social circumstances, rather than physical domination. Given Edwards' claim that he was digitally penetrated (a claim not necessarily accepted by the sentencing judge),<sup>86</sup> it may have been this unwanted act that was sufficiently provocative. This is somewhat difficult to accept in the context of the activities reported by Edwards – it was not a case of an unexpected or unwanted sexual encounter. Edwards may not have wanted to be penetrated, but why would a verbal objection not have been enough? Given the situation Edwards had agreed to be in, it is hard to believe that this act of penetration (if indeed it occurred) could have been sufficient to deprive a non-homophobic man of the power of self-control, such that he would kill. Further, Edwards' first explanation of the killing (after his earlier denials) was that it occurred because McNee thought he was gay.<sup>87</sup> He therefore claimed it was his reaction to being thought of as gay that made him react in the way that he did. Rather than being a reaction to an unwanted homosexual advance, it was a reaction to being considered gay – in other words a "homosexual panic" arising out of Edwards' homophobia.<sup>88</sup>

If the killing did stem from the accused's homophobic reaction, and therefore Edwards did not "exhibit as much self-restraint as we have a right to demand of someone in [his] situation",<sup>89</sup> provocation should not have been accepted by the jury, according to Dressler's analysis of the appropriate operation of the defence. Even if provocation was inappropriately accepted by the jury, the fact that the killing occurred because of Edwards' homophobic response means that section 9(1)(h) of the Sentencing Act 2002 should have been considered. However, in both the McNee case and the second "successful" case in 2004, section 9(1)(h) was not referred to by the sentencing judge.

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<sup>86</sup> *R v Edwards*, above n 5, para 48 Frater J.

<sup>87</sup> *R v Edwards*, above n 5, para 15 Frater J.

<sup>88</sup> Mison, above n 51, 155: "Individual hostility and insensitivity towards gay men [is] 'intimately tied to widely held notions about the nature of masculinity and what males are not permitted in the way of behavior and feelings.' As a result, heterosexuals often experience fear and anxiety toward gay men and homosexuality. One psychoanalytical interpretation relates this anxiety to the fear men in our society have about the feminine side of themselves."

<sup>89</sup> John Gardner "The Gist of Excuses" (1998) 1 *Buffalo Crim L Rev* 575, 579.

Barry Hart, aged 56, was killed by his nephew by marriage, Amsheen Ali, aged 16 at the time of the killing, over Labour Weekend in 2003 during a barbecue at Hart's house.<sup>90</sup> Ali and a friend (Nadan) had tried to persuade Hart to lend them a car so they could go night-clubbing. Their repeated requests were refused which upset them. The sentencing judge referred to it as "a humiliating experience" for Ali. They also smoked cannabis with Hart and drank a little alcohol. Ali also picked up a knife from the kitchen at one point, was playing with it and subsequently put it in the couch while he watched television.

At the time of the killing, only Nadan and Ali were left at the house, and Nadan was outside smoking. Ali's evidence was that Hart made what he took to be a homosexual advance towards him – hugging him, rubbing his hands on Ali's body and attempting to kiss him once on the neck. At trial, but not at any time previously, Ali alleged that he was scared that Hart would rape him. Ali allegedly pushed Hart away on a number of occasions, before he grabbed the knife and stabbed Hart at least five times, once in the back, once in the chest and once in the neck. Ali called out for Nadan who then became involved in the "scuffle". The pathologist reported that two of the wounds would have caused rapid unconsciousness and death.

Ali and Nadan then left Hart's house, locking it and taking with them his car keys, wallet, credit cards (which they had taken from his pockets) and some cannabis. Ali subsequently returned to collect the knife. They then drove off, collected two other friends and drove around Auckland for a number of hours. Ali told the friends about the killing but then said he was just joking. As part of that confession, Ali made no mention of any homosexual advance.

Nadan and Ali then left Hart's car in central Auckland, after wiping it down to remove fingerprints and taking out the CD stacker and car stereo to make it look as though the car had been broken into by others. They then disposed of Hart's wallet, credit cards and other possessions. Ali was arrested the next afternoon at a soccer match. He admitted killing Hart but said he did not mean to.

In considering which defences should be left to the jury, Williams J held that self-defence could be considered, but only to the extent and for the time that Ali actually feared "homosexual rape"; that is, the defence was not available after Nadan returned from outside. Williams J also noted that Hart weighed 61 kg and was only 166cm tall, was not armed with a weapon at any stage and did not utter "anything that could be construed as a threat". There was also evidence from which the jury might have concluded.<sup>91</sup>

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90 *R v Ali* (19 August 2004) HC AK CRI 2003-292-1224, para 3 Williams J (sentence).

91 *R v Ali & Nadan* (21 July 2004) HC AK CRI-2003-292-1224, para 20 Williams J (available defences and convictions).

[F]irst, that Mr Hart has a habit of befriending Fijian-Indian boys and giving them alcohol and cannabis, secondly, that he might have inappropriately touched visitors to his home and, thirdly, that according to his estranged wife, Mr Hart had indulged in such conduct in the past and she had found him naked in bed with a young boy some years before.

However, there was no evidence that Hart had ever touched Ali before and he had scant knowledge of Hart's suggested sexual proclivities.

With regard to the defence of provocation, the defence acknowledged that there were no verbal threats by Hart and the evidence of homosexual threat was slight. Their argument was that the required evidence of loss of self-control could be satisfied by Ali's "imperfect recall of the sequence of events."<sup>92</sup>

In declining to accept that Ali had any special characteristics that could be taken into account when evaluating the severity of the provocation (the defence arguing that his Muslim faith was a relevant characteristic, a faith that "regards same sex relationships as abhorrent"), Williams J nevertheless held that:<sup>93</sup>

[Q]uite irrespective of considerations of age and religious tenets, it must be open to the jury to conclude that a potential homosexual assault, even of the type to which the evidence referred, might be met with feelings of revulsion which could lead to a loss of self-control, that is to say, what was done in this case might arguably have been sufficient to deprive Mr Ali of the power of self-control, that power being assessed by reference to the self-control of an ordinary person.

Presumably, just the hugs and an attempted kiss on the neck would not have been sufficient provocation, on the basis of the judgment in *R v Campbell*. It must have been the fear of being raped (notably a late addition to Ali's story and one not even relied on by the defence) that could have operated to provoke the "ordinary man". However, the Judge seemed to indicate that any "potential homosexual assault" might be sufficient and that "revulsion" *might* lead to a loss of self-control. Revulsion is not, however, the relevant emotional basis of the defence, which has traditionally been viewed as excusing anger, not fear or disgust.<sup>94</sup> Revulsion is more closely related to hatred than anger.

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92 *R v Ali & Nadan*, above n 91, para 34 Williams J.

93 *R v Ali & Nadan*, above n 91, para 38 Williams J.

94 "One needs to argue that, even if one had inadequate reasons to kill, one had adequate reasons to get *angry* to the point at which one killed": John Gardner "The Mark of Responsibility" (2003) 23(2) *Oxford J Legal Stud* 157, 160. See generally Jeremy Horder *Excusing Crime* (Oxford University Press, Oxford, 2004), who does discuss the argument in favour of accepting that "fear may temper anger" and that the requirement for rage (alone) has given rise to the criticism that the defence is discriminatory in favour of men (Horder, 96).

Furthermore, even though there was "scant" evidence of a loss of self-control (Ali never asserted that he lost self-control and was sufficiently composed to lock the house and then return to it to get the knife), Williams J accepted the argument that his "hazy recall of precisely what happened", including not knowing "the number and severity of the wounds he inflicted on Mr Hart", could lead the jury to conclude that there was sufficient evidence to bring Ali within section 169 of the Crimes Act 1961.<sup>95</sup> He therefore ruled that provocation could be left to the jury.

Would an ordinary (non-homophobic) man have been provoked to kill in such a situation? There was no evidence at all that Hart was a "dominant homosexual lacking in self-control, violent and predatory". The defence accepted that no threats were made by Hart, and did not appear to rely on Ali's (late) claim that he feared being raped. A homicidal reaction to being hugged and kissed on the neck by another man cannot be explicable by anything except homophobia. Ali even acknowledged that he had "antipathy to homosexual activity",<sup>96</sup> which Williams J rightly declined to accept as a characteristic. Despite the defence case relying heavily on Ali's view of homosexuals as "abhorrent", thereby arguing that Ali was not an "ordinary man" with regard to issues of sexuality, provocation was accepted by the jury.

Ali was sentenced to three years imprisonment. Despite claiming his "antipathy to homosexual activity", consistent with his Muslim faith, section 9(1)(h) was not referred to in the sentencing judgment. As with the McNee case, the failure to recognise these killings as hate crimes may arise out of the jury acceptance of the provocation by the victim. If any "ordinary man" would have been provoked, then presumably the homicidal response cannot by definition be classified as homophobic, hence section 9(1)(h) is irrelevant. However, in my view, these killings did occur as a result of homophobia, if the accused's claims are to be believed (if their stories of homosexual advances are not believed, the cases are more consistent with aggravated robberies than crimes of passion). Therefore section 9(1)(h) needed to be considered in the sentencing process.

By way of further comparison, I will now discuss cases in which a homosexual advance has been claimed as the motive for the killing, yet the defence of provocation has *not* been successfully made out. In such cases, if the killing has followed a homosexual advance that is not deemed sufficiently provocative to deprive an ordinary man of the power of self-control, the killing has presumably occurred because of the accused's homophobia. In such cases, section 9(1)(h) should therefore unarguably be of relevance to the sentencing process.

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95 *R v Ali & Nadan*, above n 91, para 44 Williams J.

96 *R v Ali & Nadan*, above n 91, para 43 Williams J.

**B Murder Verdicts for the Killers of John Sorrenson and Robert Green**

Jason Fergusson, 20, was picked up by John Sorrenson, 57, in June 2002, while he was hitchhiking.<sup>97</sup> Evidently Sorrenson, a gay man, would often pick up hitchhikers, mostly younger males, and invite them to stay with him. Fergusson went back to Sorrenson's Mamaku house, where he stayed the weekend. During this time Sorrenson told him he was gay and had feelings for him. Fergusson then asked to use the shower and when he was getting out of the shower, Sorrenson allegedly came in uninvited and fondled his genitals. Fergusson pushed him away and then hit him three times. Sorrenson ran out of the bathroom, pursued by Fergusson who smashed a vase and plate over his head, threw other ornaments at him and hit him on the head several times with a steel poker. When Sorrenson got to his feet, Fergusson, allegedly in fear of being indecently touched again, grabbed a knife and stabbed Sorrenson in the back three times. He then buried him in a shallow grave in a nearby forest. He also stole items from the house. He was arrested a few days later.

Fergusson told police that he had previously been indecently assaulted by a man who was never convicted (he had complained to the police in Tokoroa about this incident in August 2000). The defence case was that "the horror of unwanted homosexual advances festered away in his mind, becoming part of his psyche."<sup>98</sup> The previous attack had therefore made him particularly sensitive to Sorrenson's approach. The defence also argued that even "the average New Zealander would have acted the same way if provoked to the same extent."<sup>99</sup>

At the trial, the defence were permitted to call a witness who gave evidence that Sorrenson had made advances to him in 1983, when he was 12 years old, including performing oral sex on him. Rodney Hansen J stated that "evidence of a propensity on the part of the deceased to make unwanted homosexual advances is therefore potentially of significant value."<sup>100</sup> He continued:<sup>101</sup>

It seems to me that the value of the evidence, if it were to be accepted by the jury, is to disclose a predilection on the part of the deceased to predatory, opportunistic and unprincipled conduct in pursuit of sexual gratification. I think it also shows a propensity to exploit the weak and vulnerable, an issue which may be open to the jury to consider. There is evidence that the accused is an epileptic, that he suffers from some mild degree of intellectual impairment and that the deceased believed him to be undergoing some form of psychiatric treatment.

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97 *R v Fergusson* (5 December 2002) HC ROT T02/2759, para 2 Rodney Hansen J.

98 "Matamata man found guilty of murder" (7 December 2002) *Stuff* <[www.stuff.co.nz](http://www.stuff.co.nz)> (last accessed 23 June 2006).

99 "Matamata man found guilty of murder", above n 98.

100 *R v Fergusson*, above n 97, para 12 Rodney Hansen J.

101 *R v Fergusson*, above n 97, para 14 Rodney Hansen J.

Fergusson's defence of provocation, based on Sorrenson's actions, was not, however, accepted by the jury who returned with a guilty verdict after deliberating for three hours. The sentencing judge referred to the new Sentencing Act 2002 in imposing life imprisonment, but no mention was made of section 9(1)(h), despite the defence's claim that Fergusson had a "phobia of homosexuals" which amounted to a "characteristic" for the purposes of section 169 of the Crimes Act 1961.

Craig Ross, 31, had worked on Robert Green's Kaikohe farm off and on since he was 16. He had been living in a farm cottage and working for Green, 53, for 3 and a half years when he killed him on the night of 12 August 2004. That night Ross took a gun, which he had modified by cutting down its barrel, and went to Green's house at about 6 pm. His mother rang him while he was at Green's house at 6.30pm. Shortly after that call, and while Green was eating his evening meal in front of the television, Ross came up behind him and shot him in the back of the head with the sawn-off shotgun. He then took Green's wallet, the shotgun and Green's car and drove into Kaikohe where he took \$700 out of Green's bank account and purchased various items from a supermarket.<sup>102</sup>

As previously arranged, he then went to the home of his wife, at about 8 pm, from whom he was separated. She lived with their two children. He told her he had done something stupid, something illegal. He asked if they could have one last night together. When she refused, he assaulted her, tied her up and gagged her. He drove her to various places where he raped her, including a tent in a forestry block where he called the police from two days later and pleaded guilty to abduction and sexual violation.

On trial for the murder of Green, Ross's defence was provocation, on the basis that Green had put Ross under pressure over a period of time to have a homosexual relationship with him. This pressure had intensified after he and his wife separated in March 2004. It had culminated, according to Ross, in a "provocative homosexual action",<sup>103</sup> namely Green getting into Ross's bed in the late afternoon of 12 August, naked from the waist down and sexually assaulting him.<sup>104</sup> One of Green's other workers gave evidence that it was common knowledge that Green was gay and that Ross had told her that Green used to try and force himself on him.<sup>105</sup>

Ross's provocation claim was not accepted and he was found guilty of murder. Although Ross was sentenced to life imprisonment with a minimum non-parole period of 17 years, no mention was made in the sentencing notes of his alleged motive, nor the claimed provocation. Nicholson J found that three features of the killing meant that section 103 of the Sentencing Act 2002 was satisfied.

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102 *R v Ross* (7 October 2005) HC WHA T No S041587, para 12 Nicholson J.

103 *R v CNR* (19 May 2005) CA 137/05, para 11 Doogue J for the Court.

104 "Farmworker guilty of murder" (31 August 2005) *New Zealand Herald* Auckland.

105 "Homosexual panic in Kaikohe?" (22 December 2004) *Gay.NZ.com* <[www.gaynz.com](http://www.gaynz.com)> (last accessed 23 June 2006).



The Judge concluded that there was: calculated and lengthy planning (due to Ross's modification to the shot-gun and his leaving Green's house after his arrival to retrieve it); unlawful entry into a dwelling house (given that he entered with intent to kill); and, that the murder was committed with a "high degree of brutality and callousness"<sup>106</sup> (given that Ross shot Green from behind, in the head, in his own home). No reference was made to section 9(1)(h) of the Sentencing Act 2002.

In my view, both these "unsuccessful" provocation cases are also examples of situations in which the offender was motivated by homophobia. Given that the defence of provocation was not satisfied, the conclusion must be that an "ordinary man" would not have lost the power of self-control and killed in such circumstances. If the offender did, it was because of hatred or disgust of the victim and his sexuality. Such hatred must fall within the ambit of section 9(1)(h), especially given the *R v Taueki* interpretation of its intended scope – that is, to punish homophobia that results in criminal conduct.<sup>107</sup>

The jury's rejection of the defence in these cases could, of course, have been due to a lack of evidence of loss of self-control, rather than a decision that the alleged provocation was insufficient. If that is so, then the accused's alleged motive for the killing can also be viewed as homophobic. In other words, unsuccessful reliance on the defence of provocation either because the alleged provocation is insufficient or because there was no loss of self-control indicates homophobia on the part of the accused, homophobia that should be considered an aggravating feature in the sentencing process. The absence of judicial consideration of section 9(1)(h) in such cases indicates a lack of ability or willingness to recognise the vulnerability of gay men – vulnerability intended to be acknowledged by the Sentencing Act 2002.

## V CONCLUSION

There is clearly a tension between the operation of the defence of provocation and the existence of section 9(1)(h) of the Sentencing Act 2002. If a killing based on an unwanted homosexual advance is the result of homophobia, then the defence of provocation should not be available, and section 9(1)(h) should be relied on during the sentencing process. However, in New Zealand cases subject to the Sentencing Act 2002 where provocation has been unsuccessful, no reference has even been made to section 9(1)(h). In my view, reliance should be placed on section 9(1)(h) *at least* when a claim of provocation is unsuccessful. Failure to use section 9(1)(h) in such cases must give rise to

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<sup>106</sup> *R v Ross*, above n 102, para 54 Nicholson J.

<sup>107</sup> This argument is possible given the Court of Appeal's categorisation of the focus of the Sentencing Act 2002 provision in *R v Taureki*. The section itself, however, could be more narrowly focussed – only capturing "random" or chance acts of violence (as in the *R v Poki* case) based on a perception of the victim's sexual orientation, rather than acts of homicide following a period of social interaction. Although I consider this more narrow interpretation to be contrary to the purpose of section 9(1)(h), and would give rise to fine distinctions as to how much prior knowledge of the victim the accused had before acting out of hostility, I am grateful to Dean Knight for pointing out this contrary view, which needs to be acknowledged.

questions about the efficacy of such a provision. As I outlined in the introduction, the penalty enhancement provision may actually be ineffective because of a seeming limited application to offences motivated by status rather than conduct. However, if the section is interpreted as covering all cases of homophobic reaction, then there should be real concern about how seldom it is being relied on in the sentencing process.

It is also my view that provocation should never be considered by the jury when the claim is merely based on an unwanted homosexual advance. Applying Dressler's view that the "ordinary man" is not homophobic, provocation founded on a homosexual advance which is not sufficient to deprive an ordinary person of the power of self-control must invariably arise out of the homophobia of the killer, and as such can not logically be treated as mitigation for a crime in a jurisdiction where hatred on the grounds of sexual orientation has been recognised as an aggravating factor. It may be, to draw on Lunny's analysis, that an ordinary man's reaction to "hyper-masculinity" is not a result of homophobia, and therefore may found a defence of provocation. It is my opinion, however, that this analysis cannot explain the result in either the McNee or Hart cases, which should lead to fuller consideration of the discriminatory impact of this partial defence on homosexual men.

If provocation can ever be appropriately relied on for the killing of homosexual men because of their sexuality, there may also be difficulties under the current formulation of the defence to allow reference to section 9(1)(h) as an aggravating feature when sentencing for manslaughter. However, given my argument that the current operation of the defence will almost invariably be heterosexist in such circumstances, there is also no reason not to classify such offences as hate crimes and increase the penalty accordingly by relying on section 9(1)(h) of the Sentencing Act 2002. Such an approach is consistent with the abolition of the defence of provocation and its use as only a relevant factor in sentencing, as proposed by the Law Commission in 2001.<sup>108</sup>

If reliance on the claim of an unwanted homosexual advance is likely to be considered an aggravating rather than (just) a mitigating factor of the offending, men accused of violent assaults or killing of gay men are less likely to offer evidence of such an advance in their defence. A decrease in reliance on such claims is also consistent with the appropriate legal status of gay men as citizens worthy of equal protection under the criminal law.

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<sup>108</sup> New Zealand Law Commission *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R 73, Wellington, 2001) para 120. This recommendation is currently being reconsidered by the Law Commission, whose Terms of Reference include considering whether the repeal of partial defences would unduly disadvantage some persons, and whether there is a risk of unduly harsh sentences under section 102 of the Sentencing Act 2002 if partial defences are repealed: New Zealand Law Commission *Terms of Reference: Criminal Defences (Insanity & Partial Defences)* (Wellington, 2004).