
Anger, Provocation, and the Intent for Murder: A Comment on *R. v. Parent*

Gary T. Trotter*

The Supreme Court's decision in *R. v. Parent* raises important questions about the effect of anger on the intent for murder. The Court's decision suggests that, outside the defence of provocation, anger alone is insufficient to vitiate the intent for murder.

The author is critical of the Court's approach to the impact of anger on murderous intent. He argues that the question of whether anger is capable of negating the intent for murder should be left to the jury to decide on the facts. In the author's opinion, the Court's reasoning is at odds with settled law relating to the intent for murder. He indicates that this tension may be related to its concern with the scope of the provocation defence, and its failure to distinguish between the two intents for murder in paragraph 229(a) of the *Criminal Code*. This is significant because the intent in subparagraph 229(a)(ii), which requires knowledge of likely death, may be more susceptible to anger than a simple intent to kill in subparagraph 229(a)(i).

La décision de la Cour suprême dans *R. c. Parent* soulève d'importantes questions quant à l'effet de la colère dans l'intention exigée en matière de meurtre. La décision de la Cour suggère que, hormis la défense de la provocation, la colère seule n'est pas suffisante pour vicier l'intention de commettre un meurtre.

L'auteur critique l'approche prise par la Cour à l'égard de l'impact de la colère sur l'intention meurtrière. Il soutient que la question quant à savoir si la colère peut nier l'intention de commettre un meurtre devrait être une décision fondée sur les faits et laissée au jury. L'auteur considère que le raisonnement de la Cour n'est pas en accord avec le droit déjà établi sur la question de l'intention de commettre un meurtre. Il souligne que la tension peut se rattacher à sa préoccupation pour l'étendue de la défense de provocation et à son incapacité de distinguer entre les deux intentions exigées en matière de meurtre dans le sous-paragraphe 229(a) du *Code criminel*. Cette distinction est importante car l'intention mentionnée au sous-paragraphe 229(a)(ii), qui exige la connaissance d'une mort possible, peut être plus sujette à la colère que la simple intention de tuer au sous-paragraphe 229(a)(i).

* LL.B., LL.M., M.Phil., Ph.D., Faculty of Law, Queen's University. I wish to thank my colleague Professor Don Stuart and Professor Kent Roach of the University of Toronto for their comments on an earlier draft of this article.

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Introduction

The Supreme Court of Canada's recent decision in *R. v. Parent*¹ is, on its surface, quite innocuous. While the Court granted leave to appeal in the case,² it appeared to be a simple case of error correction. The development of lofty principles seemed unlikely. In a relatively short judgment, the Court corrected an erroneous jury instruction on the intention for murder and its interaction with the defence of provocation in a case of spousal homicide. Concealed in this short judgment, however, are important questions about the relationship between anger and the intent required for murder. The Court prescribes a limited relationship between anger and murderous intent, while confirming the authority of its previous decision in *R. v. Thibert*,³ where a majority of a five-person Court ordered a retrial on the basis of a highly questionable claim of provocation in a spousal homicide case.⁴

Some of the *Parent* Court's statements about the effect of anger on the intention for murder in paragraph 229(a) of the *Criminal Code*⁵ are significant and may have important implications in the future. The Court held that an accused's anger, standing alone, is incapable of reducing murder to manslaughter. The scope of this holding is difficult to gauge. It is at odds with settled law relating to the intent for murder. The law has generally recognized that, in determining whether the intent for murder has been established, a jury is entitled to consider "all of the circumstances" disclosed by the evidence. *Parent* suggests that this may no longer be the case where anger, falling short of the formal defence of provocation in section 232 of the *Criminal Code*, is relied upon as negating the intent for murder. This signals a dramatic change in the law.

The Court's pronouncement on the issue of anger and intent is the primary focus of this case comment. It is argued that the broad and sweeping statements in *Parent* about anger and intent confound factual considerations about the potential operation of anger with questions of criminal policy. The net effect is a compromise of basic principles of criminal responsibility. Moreover, the Court fails to distinguish between the dual intents for murder in subparagraphs 229(a)(i) and (ii) of the *Criminal Code*. This is important because the intent in subparagraph 229(a)(ii), which requires knowledge of likely death, may be more susceptible to anger than a simple intent to kill in subparagraph 229(a)(i). Finally, while the application of the partial defence of

¹ [2001] 1 S.C.R. 761, 154 C.C.C. (3d) 1 [hereinafter *Parent* (S.C.C.)].

² *R. v. Parent* (2000), 143 C.C.C. (3d) vi.

³ [1996] 1 S.C.R. 37, 104 C.C.C. (3d) 1 [hereinafter *Thibert*].

⁴ A majority of the Alberta Court of Appeal had held that, while the trial judge had erred in his instructions to the jury, there was no air of reality to the defence. See *R. v. Thibert* (1994), 157 A.R. 316, 93 C.C.C. (3d) 193 (C.A.).

⁵ R.S.C. 1985, c. C-46.

provocation was not directly before the Court in *Parent*, it would be odd to discuss anger and homicide without also considering provocation. *Parent* should have been litigated as a provocation case. It is argued that the Court's decision in *Thibert* prevented this from happening and resulted in a distortion of *mens rea* principles.

I. The Facts in *Parent*⁶

Parent killed his estranged wife, to whom he had been married for twenty-four years. The couple owned a grocery store and had accumulated substantial assets. Due to long-standing marital discord, the victim commenced divorce proceedings and litigation ensued over the division of assets. Divorce proceedings were protracted because Parent refused to agree to an unequal division of assets.⁷ The victim continued to run the business during the proceedings, but the business declined and legal costs mounted to such a degree that the victim found it necessary to file for bankruptcy. On the day of the murder, shares held by Parent in the grocery business were on the verge of being sold at a sheriff's sale.⁸ The victim attended the sale of the shares, as did Parent. Parent came to the auction with a loaded handgun. The evidence disclosed that he habitually carried this weapon.⁹ Parent was concerned that his wife was planning to buy the shares through a third party. When he arrived at the auction, Parent saw the victim in attendance with her aunt and uncle, who were the only other persons present. The victim asked to speak privately with Parent, so they went to a nearby room. Parent then shot his wife six times.¹⁰

Parent testified that, when he and the victim went into the room, the victim said words to the effect that, "I told you that I would wipe you out completely."¹¹ Parent said that he "felt a hot flush rising" and then shot.¹² He said that he did not know what he was doing and did not intend to kill his wife. After shooting his wife, Parent left the premises and spent the afternoon in a strip club before turning himself in to the police.¹³

⁶ While the facts are derived largely from the Supreme Court's reasons, additional details are found in the reasons of the Quebec Court of Appeal in dismissing the appeal against the sentence. See *R. v. Parent* (1999), 142 C.C.C. (3d) 82, [1999] J.Q. No. 5127 (C.A.), online: QL (JQ) [hereinafter *Parent* (C.A.) cited to C.C.C.].

⁷ *Ibid.* at 86.

⁸ *Ibid.*

⁹ *Ibid.* at 87.

¹⁰ *Parent* (S.C.C.), *supra* note 1 at para. 1.

¹¹ *Ibid.* at para. 2.

¹² *Parent* (C.A.), *supra* note 6 at 87.

¹³ *Parent* (S.C.C.), *supra* note 1 at para. 2.

At trial, Parent relied upon the “defence” of lack of intent and on the formal defence of provocation set out in section 232 of the *Criminal Code*. The jury returned a verdict of manslaughter and Parent was sentenced to sixteen years of imprisonment. Since both of Parent’s defences, if successful, would have led to a verdict of manslaughter, there was no way of knowing how the jury reached its decision.¹⁴ Without written reasons, the Quebec Court of Appeal dismissed the Crown’s appeal from Parent’s acquittal on the charge of murder. In separate proceedings, however, the court allowed Parent’s appeal against sentence and reduced the sentence to six years of imprisonment.¹⁵

II. Parent in the Supreme Court of Canada

The Supreme Court of Canada was unanimous in allowing the Crown’s appeal against the acquittal of Parent on the charge of murder and in ordering a new trial. The Court’s decision focused on the trial judge’s instructions on the intent for murder, and not on those aspects of the charge relating to the application of section 232 of the *Criminal Code*. This illustrates an important assumption behind the Court’s decision—it accepted the position that the jury returned a verdict of manslaughter without having to rely on section 232 of the *Criminal Code*. In other words, the Court proceeded on the basis that the jury arrived at its verdict based on the trial judge’s instructions on intention and anger. Parent’s contention that the Court’s assumption was unwarranted was dismissed by the Court as “speculative”.¹⁶ It is not known how the jury reached its verdict or, indeed, whether it was even unanimous on how the manslaughter verdict was reached.¹⁷ However, it is highly unlikely that the jury concluded that the accused acted without the intent to kill when he shot his wife six times at point-blank range.

Central to the Court’s decision was the manner in which the trial judge instructed the jury on the intention for murder and the effect of anger on that intention. After reviewing a portion of the charge in which the trial judge instructed the jury that the an-

¹⁴ This is a case where an explanation by the jury might have been of assistance to the trial judge and both of the reviewing courts. Of course, the trial judge is not permitted to probe the jury as to how it reached its verdict. See *R. v. Solomon* (1984), 6 Cr. App. R. (S.) 120 at 126; *R. v. Tuckey* (1985), 9 O.A.C. 218, 46 C.R. (3d) 97; *R. v. Tempelaar*, [1995] 1 S.C.R. 760, 37 C.R. (4th) 91. This rule has been criticized by some commentators, see R.J. Delisle, “Annotation of *R. v. Lawrence*” (1987) 58 C.R. (3d) 71; P.A. Downes, “Findings of Fact for Sentencing in Jury Trials” (1995) 37 C.R. (4th) 93.

¹⁵ *Parent* (C.A.), *supra* note 6 at 95.

¹⁶ *Parent* (S.C.C.), *supra* note 1 at para. 17.

¹⁷ According to *R. v. Thatcher*, [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481, it would have been possible for some of the jurors to have reached the manslaughter verdict on the basis of a lack of intent for murder as set out in ss. 229(a)(i) and (ii) of the *Criminal Code*, while the rest could have reached the same result by applying s. 232 of the *Criminal Code*.

ger of the accused was capable of reducing murder to manslaughter, the Chief Justice said:

This passage suggests that anger, if sufficiently serious or intense, but not amounting to the defence of provocation, may reduce murder to manslaughter. It also suggests that anger, if sufficiently intense, may negate the criminal intention for murder. These connected propositions are not *legally* correct. *Intense anger alone is insufficient to reduce murder to manslaughter.*¹⁸

The Court further held that “[a]nger is not a stand-alone defence.”¹⁹ The Chief Justice suggested that, outside the defence of provocation, anger has no role to play in reducing murder to manslaughter. The Chief Justice did allow, however, that in extreme circumstances, anger may trigger a state of automatism, negating the voluntariness precondition for liability.²⁰

The Court reiterated the same point but in a slightly different way towards the end of its judgment:

So it seems clear that the trial judge misdirected the jury on the effect of anger in relation to manslaughter. His directions left it open to the jury to find the accused guilty of manslaughter, on the basis of the anger felt by the accused, even if ... the conditions required for the defence of provocation were not met.²¹

Chief Justice McLachlin concluded that the trial judge’s instructions as a whole were so deficient that a new trial was required in order to ensure that the result was not

¹⁸ *Parent* (S.C.C.), *supra* note 1 at para. 9 [emphasis added].

¹⁹ *Ibid.* at para. 10.

²⁰ *Ibid.* The Court made reference to *R. v. Stone*, [1999] 2 S.C.R. 290, 134 C.C.C. (3d) 353, in which the defence of psychological blow automatism was considered, but rejected on the facts of the case. See also *Rabey v. R.*, [1980] 2 S.C.R. 513, 54 C.C.C. (2d) 1; K.L. Campbell, “Psychological Blow Automatism: A Narrow Defence” (1980-81) 23 *Crim. L.Q.* 342.

²¹ *Parent* (S.C.C.), *ibid.* at para. 11. As discussed below, this passage reverses the order of how we would expect juries to reason in a provocation case. The jury would not consider the effect of anger on intent after having rejected the defence of provocation in s. 232 of the *Criminal Code*. Juries are routinely instructed that, because s. 232(1) begins with the phrase, “Culpable homicide that otherwise would be murder may be reduced to manslaughter ...”, the jury must be satisfied beyond a reasonable doubt that the intent for murder exists in the first place. See *R. v. Cameron* (1992), 7 O.R. (3d) 545, 71 C.C.C. (3d) 272 (C.A.) [hereinafter *Cameron*]. Thus, the jury should only address the effects of anger and s. 232 after it has already determined that the accused possessed one of the intents identified in s. 229(a)(i) or (ii) of the *Criminal Code*. This point was recognized by the Supreme Court later in the judgment, see *Parent* (S.C.C.), *ibid.* at para. 14.

reached on an erroneous basis. A new trial was ordered, but only on the charge of second-degree murder.²²

The *Parent* Court's comments on the intent for murder and its interaction with the anger of the accused are far-reaching. On one reading, McLachlin C.J.C.'s reasons suggest that the Court has chosen to place limits on what a jury may consider in relation to the intent for murder under subparagraphs 229(a)(i) and (ii) of the *Criminal Code*. While the Court's own jurisprudence has been uneven on this point, this more expansive interpretation of *Parent* introduces an unwelcome aspect to the law of murder as applied in Canada.

Before considering the implications of this interpretation, a narrower view of the Court's judgment is considered, which focuses more closely on the language used in the trial judge's charge. McLachlin C.J.C. takes objection to the expression that anger is capable of *reducing* murder to manslaughter.²³ Quite plainly, once the Crown has established the intent for murder in subparagraphs 229(a)(i) or (ii) of the *Criminal Code*, outside of section 232, murder cannot be "reduced" to manslaughter solely on the basis of the accused's anger. Anger is not an independent external, excusing, or justificatory defence. If this narrower view is what McLachlin C.J.C. had in mind, it is unobjectionable.

The language used by the Chief Justice, however, supports the broader interpretation of her reasons, especially having regard to the following words:

This passage suggests that anger, if sufficiently serious or intense, but not amounting to the defence of provocation, may reduce murder to manslaughter. It also suggests that anger, if sufficiently intense, may negate the criminal intention for murder.²⁴

The last sentence makes it clear that the Court has held that anger is not available to the jury in determining whether the intent for murder in section 229 of the *Criminal Code* has been established in the first place. Thus, the narrower interpretation must be rejected and the implications of the broader interpretation examined.

²² It is not clear why a new trial on first-degree murder was not ordered. Given that the errors in the charge concerned the intent for murder, and given the obvious air of reality to the possibility that the killing was the result of planning and deliberation, a new trial on first-degree murder ought to have been granted. Subsequent to the Court's decision, the Attorney General for Quebec brought about a motion for reconsideration on this point, which was rejected by the Court without reasons.

²³ *Parent* (S.C.C.), *supra* note 1 at para. 9.

²⁴ *Ibid.* [emphasis added].

III. Anger and Intent in the Courts

The Supreme Court has been uneven in its treatment of the use that juries can make of evidence relating to so-called failed defences when considering the intent for murder. Given the potentially dramatic implications of *Parent*, the Court's previous decisions on this question deserve closer examination, as does the evolving jurisprudence from the appellate courts.

A. Uncertainty in the Supreme Court

In relatively recent times, the Supreme Court has delivered uneven judgments on the relationship between various failed defences, the intent for murder, and planning and deliberation. While these judgments are somewhat dated, and may have been overtaken by developments in the appellate courts, they deserve some consideration, as they are cited in appellate authorities from time to time.

In *R. v. Mitchell*,²⁵ the accused was charged with first-degree murder. The accused relied on the defences of intoxication and provocation. The trial judge instructed the jury properly on the effect of intoxication and provocation on the intent for murder, but failed to instruct the jury that this evidence was also relevant to whether the murder was planned and deliberate under paragraph 202A(2)(a) of the *Criminal Code* (now subsection 231(2)). Speaking for the Court, Spence J. applied two earlier decisions of the Court, *More v. R.*²⁶ and *McMartin v. R.*,²⁷ which held that mental illness short of insanity is still relevant to the issue of planning and deliberation:

I am of the opinion that the judgments in these two cases have as their ratio decidendi the principle that in determining whether the accused committed the crime of capital murder in that it was "planned and deliberate on the part of such person" the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind as affected by either real or even imagined insults and provoking actions of the victim and by the accused's consumption of alcohol. There is no doubt this is a finding of fact.²⁸

This approach to the residual effect of provocation or intoxication was not considered in relation to the intention to commit murder.

²⁵ [1964] S.C.R. 471, [1965] 1 C.C.C. 155 [hereinafter *Mitchell* cited to S.C.R.].

²⁶ [1963] S.C.R. 522, [1963] 3 C.C.C. 289 [hereinafter *More*].

²⁷ [1964] S.C.R. 484, [1965] 1 C.C.C. 142 [hereinafter *McMartin*].

²⁸ *Mitchell*, *supra* note 25 at 474-75. This approach has been followed by the Court in numerous cases, including: *R. v. Jacquard*, [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1; *R. v. Aalders*, [1993] 2 S.C.R. 482, 82 C.C.C. (3d) 215; *R. v. Wallen*, [1990] 1 S.C.R. 827, 54 C.C.C. (3d) 383.

In *Perrault v. R.*,²⁹ the accused was charged with the non-capital murder of his wife. The accused was tried by judge alone. The trial judge concluded that the defence of provocation set out in section 203 of the *Criminal Code* (now section 232) was not available because the words and actions of the victim relied upon by the accused as forming the basis for provocation did not meet the objective requirements of the partial defence. Moreover, the trial judge also held that the defence of intoxication was not made out. Nevertheless, the trial judge considered the effect of both “failed” defences and concluded that the Crown had failed to prove that the accused intended to kill the victim. Accordingly, the accused was convicted of manslaughter. The Alberta Court of Appeal allowed the Crown’s appeal and substituted a verdict of guilty for murder. The court held that it was an error for the trial judge to have considered the two defences in the manner that the trial judge did. A majority of the Supreme Court of Canada agreed. Fauteux C.J.C. said:

The trial Judge having found, particularly, that the words attributed to the victim and relied on by the accused were not of such a nature as to deprive an ordinary person of the power of self-control, that was the end of the matter so far as the defence of provocation was concerned; for, under s. 203 [of the *Criminal Code*], the words of provocation are to be assessed according to the effect they would have on a reasonable man and when this objective test is found not to have been met on the facts of the case, any further enquiry with respect to provocation becomes of no moment.³⁰

Similar comments were made about the effect of intoxication.

Perrault is the strongest precedent for the result reached in *Parent*. However, the *Perrault* Court did not refer to its previous decisions in *Mitchell*, *More*, or *McMartin*. Although those cases dealt with the effect of provocation and/or intoxication on planning and deliberation, and it is recognized that planning and deliberation are mental states that are less durable than the two intents for murder currently expressed in paragraph 229(a) of the *Criminal Code*, there is clearly conceptual similarity. If, as a matter of law, anger and/or provocation are capable of negating planning and deliberation, it should be at least possible that they have the same effect on the intent for murder. Anything beyond a purely formulaic account of liability must consider all factors in relation to whatever intent is required by the *Criminal Code*.

The issue arose again in *Mulligan v. R.*³¹ Mulligan was charged with non-capital murder for the killing of his wife. The accused had been drinking heavily in the days leading up to the time when he stabbed his wife to death. He said that he went “berserk” when the victim said that she thought she was pregnant and was going to abort

²⁹ (1970), [1971] S.C.R. 196, [1970] 5 C.C.C. 217 [hereinafter *Perrault* cited to S.C.R.].

³⁰ *Perrault*, *ibid.* at 202.

³¹ [1977] 1 S.C.R. 612, 28 C.C.C. (2d) 266 [hereinafter *Mulligan* cited to S.C.R.].

the fetus with a coat hanger. The accused relied on the evidence of a psychiatrist who said that the accused was in a dissociative state at the time and that alcohol played a minor role in his condition. The accused relied upon the defences of insanity, provocation, and intoxication. The trial judge put all of these defences to the jury. The accused complained that, in addition to detailing the evidence of the psychiatrist called on his behalf as it related to insanity, the trial judge should also have related the psychiatric evidence to the defence of intoxication. Both the Court of Appeal³² and the majority of the Supreme Court of Canada characterized the case as principally one of insanity and the evidence of the psychiatrist as focused on that issue. The majority held that the trial judge did not err in failing to relate the psychiatric evidence to the question of whether the specific intent for murder was compromised by the consumption of alcohol. The majority of the Court held that, because the jury obviously rejected the psychiatrist's evidence by virtue of having rejected the insanity defence, it was not necessary to relate the psychiatric evidence to the defence of intoxication.³³

In dissent, Spence J. held that the trial judge erred in failing to relate the psychiatric evidence to the defence of intoxication. Spence J. was concerned that, because of the trial judge's instructions, the jury might have arrived at its decision by reference to only a portion of the evidence adduced. Thus, its finding of guilt was doubtful and a new trial was required.³⁴ In a separate dissenting opinion, Dickson J. (as he then was) issued a strong statement about liability for murder that is relevant to the present discussion:

The predominant question is intent. A rigid categorization of defences, keeping medical evidence of insanity entirely separate from evidence of drunkenness is not only unrealistic but a departure from all that is embraced in the phrase '*mens rea*.' The concern is with the particular accused and with his capacity to form the intent to kill when as here, for example, the defence contends the accused was in a dissociative state of mind, drunk and provoked. It was necessary for the jury to weigh and assess each of these elements separately; it was imperative also, in my view, to relate the evidence of drunkenness to the evidence of the mental state of the accused. ... *If intent and capacity are to be anything more than catchwords, then all factors bearing upon capacity and intent, such as dissociative state, stress and drunkenness, must be considered jointly and severally as part of an overall picture and their respective influences, each upon the other, assessed.*³⁵

The holdings in these cases, *Perrault* and *Mulligan* in particular, were trapped in the debate about the proper test for the defence of intoxication and whether the

³² *R. v. Mulligan* (1974), 18 C.C.C. (2d) 270, 26 C.R.N.S. 179 (B.C. C.A.).

³³ *Mulligan*, *supra* note 31 at 626.

³⁴ *Ibid.* at 621, Spence J., with Laskin C.J.C. concurring.

³⁵ *Ibid.* at 627 [emphasis added].

Court's previous holding in *McAskill v. R.*³⁶—based on the rules established in *Director of Public Prosecutions v. Beard*³⁷ and the notion of capacity to consent—was appropriate. The Supreme Court's reluctance to adopt a direct-line approach to intent on the basis of provocation (either alone or in combination with intoxication) may have been because the defence of intoxication at the time was one step removed from an authentic examination of intent. As Professor Stuart observes, "Taken literally the second *Beard* rule may lead to the startling result that the Crown does not have to prove beyond reasonable doubt the essential element of intent, but merely that the accused had the capacity to form the intent."³⁸ Thus, in an atmosphere where evidence of intoxication engendered an approach to intent bordering on constructive liability, there was little room for an uncompromising approach to the effect on intent of so-called "failed" intoxication and provocation defences. As discussed in part III.C below, however, the Supreme Court's more recent decision on intoxication in *R. v. Robinson*³⁹ has cleared the way for a more authentic approach to intent.

B. Developments in the Provincial Appellate Courts

As the debate over the proper approach to intoxication played out in the Supreme Court of Canada, the Ontario Court of Appeal was developing its own approach to intent that was much more generous to the accused. This line of authority is generally attributed to the great Justice G.A. Martin in *R. v. Campbell*.⁴⁰ Campbell was convicted of attempting to murder his wife and was sentenced to twenty-five years of imprisonment. Campbell argued that the trial judge ought to have left the defence of provocation to the jury. The argument was based on the notion that, had Campbell actually killed his wife, he might have been convicted of manslaughter by virtue of provocation. Consequently, with respect to attempted murder, the accused lacked the requisite intent to kill for the same reasons. As Martin J.A. observed, Campbell's argument was based on the erroneous assumption that the definition of murder incorporated the notion of an unprovoked killing.⁴¹ Martin J.A. held that the defence of provocation is "based on a loss of self-control as a result of sudden provocation rather than on its negating the requisite intent" for murder.⁴² On the basis of the wording of sub-

³⁶ [1931] S.C.R. 330, 55 C.C.C. 81.

³⁷ [1920] A.C. 479, 14 Cr. App. R. 159 (H.L.).

³⁸ D. Stuart, *Canadian Criminal Law: A Treatise*, 4th ed. (Scarborough, Ont.: Carswell, 2001) at 426. See also A.D. Gold, "An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge" (1976-77) 19 Crim. L.Q. 34.

³⁹ [1996] 1 S.C.R. 683, 46 C.R. (4th) 1 [hereinafter *Robinson*].

⁴⁰ (1977), 17 O.R. (2d) 673, 1 C.R. (3d) 309 (C.A.) [hereinafter *Campbell* cited to O.R.].

⁴¹ *Ibid.* at 682.

⁴² *Ibid.*

section 215(1) of the *Criminal Code* (now subsection 232(1)),⁴³ the formal defence of provocation only becomes a live issue when all of the elements of the offence of murder have been established.⁴⁴

After rejecting the applicability of the defence of provocation to attempted murder, Martin J.A. made some important observations about the role of provocation and its relation to intent. He contemplated that the role of anger and provocative conduct on the part of the victim may sometimes operate under the radar of the formal provocation defence. In his characteristically incisive language, Martin J.A. declared that “[p]rovocation may, of course, inspire the intent required to constitute murder.”⁴⁵ For the purposes of the present discussion, it is worth reproducing in full Martin J.A.’s explanation of this thought:

There may, however, be cases where the conduct of the victim amounting to provocation produces in the accused a state of excitement, anger or disturbance, as a result of which he might not contemplate the consequences of his acts and might not, in fact, intend to bring about those consequences. The accused’s intent must usually be inferred from his conduct and the surrounding circumstances, and in some cases the provocation afforded by the victim, when considered in relation to the totality of the evidence, might create a reasonable doubt in the mind of the jury whether the accused had the requisite intent. Thus, in some cases, the provocative conduct of the victim might be a relevant item of evidence on the issue of intent whether the charge be murder or attempted murder. ... Provocation in that aspect, however, does not operate as a “defence”, but rather as a relevant item of evidence on the issue of intent.⁴⁶

These words from *Campbell* marked the beginning of a line of cases, centred in Ontario, referred to as the “rolled-up” or “cumulative effects” cases. The Ontario Court of Appeal has insisted that in murder cases, in appropriate circumstances, juries must be instructed to consider the cumulative effects of alcohol or drugs, provocation, and excessive force in self-defence as it might relate to the intention for murder.⁴⁷ In *R. v. Nealy*,⁴⁸ after reviewing a number of authorities that discussed this issue, Cory J.A. (as he then was) held that:

⁴³ Subsection 232(1) of the *Criminal Code* provides: “Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation” [emphasis added].

⁴⁴ See also *Cameron*, *supra* note 21.

⁴⁵ *Campbell*, *supra* note 40 at 683.

⁴⁶ *Ibid.* See also *R. v. Treccroce* (1980), 55 C.C.C. (2d) 202 at 211 (Ont. C.A.).

⁴⁷ See *R. v. Clow* (1985), 44 C.R. (3d) 228 at 231, [1985] O.J. No. 43 (C.A.), online: QL (OJ); *R. v. Desveaux* (1986), 13 O.A.C. 1 at 5-6, 51 C.R. (3d) 173 [hereinafter *Desveaux*]; *R. v. Bob* (1990), 40 O.A.C. 184 at 188-90, 78 C.R. (3d) 102. Most recently, the Ontario Court of Appeal mentioned this instruction in *R. v. Schell* (2000), 136 O.A.C. 163 at 173, 148 C.C.C. (3d) 219.

⁴⁸ (1986), 17 O.A.C. 164, 54 C.R. (3d) 158 [hereinafter *Nealy* cited to O.A.C.].

These authorities emphasize the importance of the issue of intent. Further, they indicate that all the circumstances surrounding the act of killing must be taken into account in determining whether or not the accused had the intent required for the commission of murder. It may well be that the evidence does not give rise to a reasonable doubt as to whether there was provocation or whether the accused lacked the ability to form that intent as a result of consuming alcohol or drugs. Nevertheless, the evidence adduced on these issues, viewed cumulatively, may be of great importance in determining the crucial issue of intent.⁴⁹

These cases typically involve situations where a number of factors arise in a case that are relevant to the issue of intent (such as alcohol, brain damage, and anger) or failed self-defence.⁵⁰ The Court of Appeal has ordered retrials when judges have failed to instruct juries along these lines. For a long time, however, the rolled-up charge was considered an Ontario-specific phenomenon. As Donald J.A. said for the British Columbia Court of Appeal in *R. v. Williams*, “Whether a rolled-up charge is obligatory in every case of multiple defences is an unsettled question.”⁵¹

Flowing from *Campbell*, and very relevant to *Parent*, is the decision of the Ontario Court of Appeal in *R. v. Wade*.⁵² Wade killed his wife and was convicted of second-degree murder. His main defence was automatism, “as a result of sleep terror, sleep somnambulism, and complicated by an obstructive sleep apnea disorder.”⁵³ One expert suggested that the accused’s behaviour was an exhibition of rage and fury, partly provoked by the victim’s conduct. Relying on *Campbell*, Doherty J.A. said:

Common experience tells us that rage may beget purposeful conduct. On the other hand, it may also cause a person to act without regard to or consideration of the consequences of his or her actions. *Rage may precipitate or negate the intention required for the crime of murder. Its effect in any given case is a question for the jury.*⁵⁴

⁴⁹ *Ibid.* at 170.

⁵⁰ See e.g. *R. v. Rathwell* (1998), 41 O.R. (3d) 764, 130 C.C.C. (3d) 302 (C.A.), in which allegedly provocative acts of the victim were directed at the accused, who suffered organic brain damage resulting in epilepsy and the development of a personality disorder. The accused consumed numerous prescription drugs and there was evidence of significant intoxication at the time of the killing. The court dismissed the accused’s appeal from his conviction for second-degree murder even though he could have more effectively distinguished the formal defence of provocation in s. 232 from the so-called rolled-up charge.

⁵¹ (1995), 98 C.C.C. (3d) 176 at 189, 58 B.C.A.C. 53, leave to appeal to S.C.C. refused (1995), 101 C.C.C. (3d) vi.

⁵² (1994), 18 O.R. (3d) 33, 89 C.C.C. (3d) 39 (C.A.) [hereinafter *Wade* cited to O.R.].

⁵³ *Ibid.* at 51 (in the words of one of the psychiatric witnesses).

⁵⁴ *Ibid.* at 51-52 [emphasis added].

Doherty J.A. found that there was some evidence that the victim's announcement that the marriage was at an end, while not amounting to provocation within the meaning of section 232, may have "produced in the appellant a state of anger reaching the level of rage."⁵⁵ Doherty J.A. alluded to a possible distinction between mere anger and anger reaching a level of rage that might affect an accused's contemplation of the consequences of his actions, and concluded:

In my view, that possible relationship exists whether or not the event triggering the rage was an act of provocation. It is the accused's emotional state which is relevant to his intention. The cause of that emotional state is of evidentiary significance only.⁵⁶

Because manslaughter was not left with the jury, a new trial was ordered for this issue to be considered.

The Supreme Court gave short shrift to this position. It overturned the Court of Appeal, holding that, on the totality of the evidence, the trial judge did not err in failing to leave the included offence of manslaughter to the jury.⁵⁷ In its one-paragraph judgment, the Court made no reference to the discussion of the relationship between anger, rage, and the intent for murder.

C. Recognition by the Supreme Court

Not long after *Wade*, the Supreme Court released its decision in *Robinson*, significantly altering the law of intoxication. For present purposes, it is unnecessary to retrace the contours of the debate in that case.⁵⁸ Suffice it to say that the Court has discouraged an approach to intoxication based on capacity, favouring a focus on intent in fact. Writing for eight members of the Court, Chief Justice Lamer stressed the importance of focusing the jury's attention on the state of mind of the accused. Analyzing the trial judge's charge in light of the Court's shift in focus, the Chief Justice made the following remarks about intent in general:

Thus, while the jury may have rejected each individual defence, they may have had a reasonable doubt about intent had they been instructed that they could

⁵⁵ *Ibid.* at 52.

⁵⁶ *Ibid.* Doherty J.A., *ibid.* at 52-54, also refers to dicta from Martin J.A. in *R. v. Rabey* (1977), 17 O.R. (2d) 1, 37 C.C.C. (2d) 461 (C.A.), aff'd [1980] 2 S.C.R. 513, 54 C.C.C. (2d) 1, on the issue of anger and intent that are similar to his earlier remarks on *Campbell*. *Wade* was applied in *R. v. Tomlinson* (1998), 175 Sask. R. 52 (Q.B.), in which the absence of expert evidence on the accused's mental state was an important consideration. See also *R. v. Stewart* (1995), 41 C.R. (4th) 102, 60 B.C.A.C. 245.

⁵⁷ *R. v. Wade*, [1995] 2 S.C.R. 737, 98 C.C.C. (3d) 97.

⁵⁸ See generally Stuart, *supra* note 38 at 416-49.

still consider the evidence of intoxication, provocation and self-defence cumulatively on that issue. This is commonly known as the “rolled-up” charge.⁵⁹

The Court referred to a number of the Ontario cases discussed above.⁶⁰ Thus, the Supreme Court has now approved of this type of instruction to juries, putting an end to the suggestion that this type of instruction is only applicable in Ontario. However, the questions linger about what this type of instruction means and, now, the impact of *Parent* on this ruling.

The “rolled-up” charge or cumulative effects cases involve two related issues: what is relevant to intent and what are the obligations of trial judges in instructing the jury on the relevant evidence. The second question, about the obligations of trial judges, is the easier of the two and flows rather naturally from the first. If a circumstantial factor is relevant to the issue of intent, then the trial judge is obliged to ensure that the jury is made aware of the ability of that factor to impact intent. Of course, the “rolled-up” charge cases typically deal with a group or cluster of factors that may or may not relate to another “positive” defence relied upon by the accused. Thus, it is the judge’s job to make sure that the jury takes all of the circumstances into account on the issue of intent, and to draw the jury’s attention to circumstances that might not naturally appear relevant, especially in the event of a determination that one or more of the “positive” defences raised by the accused does not raise a reasonable doubt.

Robinson and the “rolled-up” charge cases assume that a cluster of factors, such as intoxication, provocation, and self-defence, may affect the intent for murder. For the purposes of considering the holding in *Parent*, the question is whether any *one* of these factors might have that effect. Logically and empirically, if a combination of three factors might impact intent, it follows that any *pair* of factors could also have the same effect, as could any *single* factor. There should be no difference from the vantage point of criminal law policy. Yet *Parent* holds that anger alone is not capable of negating the intent for murder. No explanation for this proposition was given by the Court in *Parent*, and no attempt was made to locate its holding in the context of the long line of cases discussed in this section.

IV. Anger and Intent: Charting the Implications

A. *Inspiring Intent or Vitiating Intent: The Reality of Anger*

As a matter of fact, is anger truly capable of negating the intention for murder? After referring to the propositions found in the trial judge’s instructions that anger

⁵⁹ *Robinson*, *supra* note 39 at para. 59.

⁶⁰ In particular, the Court cited *Clow*, *supra* note 47, *Desveaux*, *supra* note 47, and *Nealy*, *supra* note 48.

may reduce murder to manslaughter or negate the intent for murder, the Chief Justice held, "These connected propositions are not *legally* correct. Intense anger alone is insufficient to reduce murder to manslaughter."⁶¹ If these propositions are not legally correct, it must be because they are either empirically unsound or contrary to other policy considerations. If the Court's conclusion rests on policy considerations, its holding flies in the face of its own principled approach to murder and intention.

Whether anger is capable of negating the intent for murder may be a question that is susceptible to expert opinion. Therefore, if the Court's holding rests on the notion that intent cannot be negated by anger, however intense, there ought to have been a proper empirical foundation to support that conclusion, especially since the courts, including the Supreme Court in *Robinson*, have long since worked on the assumption that intent is capable of vitiation in this manner.⁶² The Court should resist the temptation to make epic statements about matters that are at their core empirical.

Recently, the Court's decision in *R. v. Daviault*,⁶³ and its assumptions about alcohol and automatism, was thrown into question by scientific evidence presented to Parliament in the aftermath of the decision.⁶⁴ Doherty J.A.'s reference in *Wade* to "common experience" telling us that rage may negate intent seems plausible. The history of the Canadian common law supports the notion that extreme levels of anger alone may be capable of negating the intent for murder in paragraph 229(a) of the *Criminal Code*, but probably not very often. There should be a good evidentiary basis produced before we turn our backs on this proposition.⁶⁵

⁶¹ *Parent* (S.C.C.), *supra* note 1 at para. 9 [emphasis added].

⁶² Writers have debated the effects of emotions on cognition and have underscored the socio-philosophical nature of the inquiry. See the excellent comprehensive piece by A. Reilly, "The Heart of the Matter: Emotion in Criminal Defences" (1997-98) 29 *Ottawa L. Rev.* 117. See also D.M. Kahan & M.C. Nussbaum, "Two Conceptions of Emotion in Criminal Law" (1996) 96 *Colum. L. Rev.* 269; P. Brett, "The Physiology of Provocation" [1970] *Crim. L.R.* 634.

⁶³ [1994] 3 S.C.R. 63, 33 C.R. (4th) 165.

⁶⁴ See Stuart, *supra* note 38 at 440-42; K. Smith, "Section 33.1: Denial of the *Daviault* Defence Should Be Held Constitutional" (2000) 28 C.R. (5th) 350; and see especially J.S. Wilkinson, "The Possibility of Alcoholic Automatism: Some Empirical Evidence" (1997) 2 *Can. Crim. L. Rev.* 217.

⁶⁵ In *Wade*, *supra* note 52, Doherty J.A. placed significant reliance on expert evidence, which laid the foundation for his conclusions on intent. The court's judgment stops short of finding that expert evidence is required before manslaughter may be left open to the jury. Without expert evidence, an air of reality might be difficult to fathom from the rest of the evidence. However, that is a matter of proof and it does not undermine Doherty J.A.'s conclusion that anger is at least capable of negating intent.

B. The Dual Intent for Murder: Distinguishing between Subparagraphs 229(a)(i) and (ii)

In its discussion of murder, the *Parent* Court speaks in broad terms about the requisite intent, drawing no distinction between the different intents in subparagraphs 229(a)(i) (means to cause death) and 229(a)(ii) (means to cause bodily harm knowing that death is likely to result and being reckless whether death ensues). In recent years the Court has suggested that there is little difference between the two states of mind expressed in those two provisions. Cory J. held in *R. v. Nygaard* that subparagraph 229(a)(ii) involves the infliction of such serious or grave harm that the accused knew it was likely to result in death.⁶⁶ Recklessness, the Court held, “is almost an afterthought.”⁶⁷ Still, it is undeniable that subparagraph 229(a)(ii) relaxes the liability standard for murder by permitting a conviction for something beyond an actual intention to kill. It transforms a non-murderous intent into a murderous one if it can be said that the accused knew the bodily harm inflicted would likely (not merely possibly) result in death.⁶⁸ This distinction may be significant in terms of the operation of anger.

In *Wade*, Doherty J.A.’s analysis is trained more on the advertence of consequences, rather than on a pure intent to kill. It was assumed in *Wade* that anger may be more relevant to the intent expressed in subparagraph 229(a)(ii). It is unlikely that intense anger will have much of a role to play in cases involving the deliberate infliction of homicidal harm. This type of case fits more easily within subparagraph 229(a)(i). Cases like *Parent*, where the accused shoots the victim at point-blank range, seem unlikely scenarios for a plausible argument that, because of anger or rage, the accused did not intend to bring about death. However, it is easier to accept the possibility of advertence to consequences, at issue in subparagraph 229(a)(ii), being compromised by intense anger. Lashing out and killing someone with fists, boots, or an object, all in a fit of anger, and not advertent to the likelihood of death because of intense anger, seems more plausible. As Lamer C.J.C. says in his dissent in *Cooper*, a person who grabs another person by the neck may, at the outset, have no intention to

⁶⁶ [1989] 2 S.C.R. 1074 at 1087-88, 72 C.R. (3d) 257 [hereinafter *Nygaard* cited to S.C.R.].

⁶⁷ *Ibid.* at 1088. See also *R. v. Cooper*, [1993] 1 S.C.R. 146 at 154-55, 18 C.R. (4th) 1 [hereinafter *Cooper* cited to S.C.R.]. *Nygaard* is somewhat beguiling. At the level of s. 229(a)(ii), the judgment appears to be cautious: it sketches a very narrow role for s. 229(a)(ii), making it appear like s. 229(a)(i). Of course, this was done with the purpose of bringing s. 229(a)(ii) within the fold of first-degree murder in s. 231(2). Thus while *Nygaard* narrowed s. 229(a)(ii), it expanded s. 231(2).

⁶⁸ *Cooper*, *ibid.* at 155. This difference is also emphasized by Martin J.A. in *R. v. Simpson* (1981), 58 C.C.C. (2d) 122 at 144-45, 20 C.R. (3d) 36 (Ont. C.A.). See also the discussion of s. 229(a)(ii) in *R. v. Murray* (1994), 20 O.R. (3d) 156 at 164-69, 93 C.C.C. (3d) 70 (C.A.), in which the charge to the jury was criticized for failing to emphasize that the provision requires that the accused know that what he or she is doing is likely to result in death.

cause death and no knowledge that the action is likely to cause death.⁶⁹ This failure to advert to the likely consequences could well be inspired by myriad factors, individually or collectively, including anger or intoxication.

Parent shares a shortcoming with the rolled-up charge jurisprudence—no attempt is made to distinguish the two intents for murder in paragraph 229(a) of the *Criminal Code*. When clearly deliberate conduct is at issue, like *Parent*'s actions in shooting his wife at point-blank range, subparagraph 229(a)(i) (which requires that the accused must "mean to cause death") is the most likely route to liability. In this type of scenario, an accused person is unlikely to benefit from the rolled-up charge, because the apparent intent of the accused will not be compromised by the residual effects of anger, drunkenness, or failed self-defence. Insofar as cases litigated under subparagraph 229(a)(i) are concerned, the holding in *Parent* is reasonable. This is not necessarily the case with conduct that is assaultive, but not so obviously death-causing and not accompanied by an actual intent to kill. These cases fall to be determined under subparagraph 229(a)(ii), which requires that the accused intend to cause bodily harm, know that his or her conduct will likely result in death, and be reckless as to whether or not death ensues. The comments in *Nygaard* about recklessness being an "after-thought" in subparagraph 229(a)(ii) notwithstanding, there are three separate fault elements that might be affected by anger. In this type of scenario, the foresight of consequences required by subparagraph 229(a)(ii) (namely, knowledge or likelihood of death) is the most likely to be affected by the rolled-up charge. Thus, the holding in *Parent* about the effect of anger and intent is overstated.

At first blush, there is something contradictory in the notion, expressed by Martin J.A. in *Campbell* and progeny, that the anger caused by provocation may "inspire" the intent for murder, but that it might also negate that intent. This irony disappears when the distinction between the different intents in subparagraphs 229(a)(i) and (ii) is placed more clearly in focus. The words of Martin J.A. in *Campbell* should be adjusted and fused with a more sensitive differentiation between subparagraphs 229(a)(i) and (ii). Thus, while provoked anger or rage may inspire the outburst or attack on the victim, it may also be capable of undermining the accused's advertence to the likelihood that death will result from the attack.⁷⁰

⁶⁹ *Cooper, ibid.* at 150-51.

⁷⁰ This defence works in the case of murder because of s. 229(a)(ii). Ironically, it is now an untenable gloss on *Campbell, supra* note 40, a case of attempted murder, that the law has developed in such a way that an intention to kill is now required. See *R. v. Ancio*, [1984] 1 S.C.R. 225, 10 C.C.C. (3d) 385.

C. Keeping Provocation in the Box

It is unlikely that the *Parent* Court's decision is based on some unarticulated policy decision that suggests that fundamental principles of intent ought to be compromised. The Court articulated none. However, that anger might have a role to play outside of the parameters of the formal provocation defence in section 232 of the *Criminal Code* does have undesirable implications from a policy perspective. The controversial defence of provocation has important limitations built into its present statutory expression in section 232, particularly the requirement that the provoking act or insult be capable of causing an "ordinary person" to lose the power of self-control. Recognizing the potential of free-standing anger or rage to impact on intent does undo some of these important limitations. From one perspective, if anger alone is capable of compromising the intent for murder, thereby resulting in a conviction for manslaughter, it might be said that the jury need not bother with the objective component in section 232, or any of the other requirements built into the section. However, recognizing the dual role that anger might play, under section 229 and then again under section 232, is justified for two reasons.

First, it must be recognized that anger plays a different role in its impact on the intent for murder than it does in section 232. The partial excuse of provocation comes into play only after the Crown has proved an intentional killing has taken place. The statutory defence acts as a concession to human frailty by recognizing that some intentional killings will be treated less seriously than others, sudden anger or rage being the extenuating circumstance. Thus, section 232 operates outside the contours of the *mens rea* for murder.⁷¹ Parliament has chosen to privilege the emotion of anger in determining whether an accused who intentionally kills should be convicted of murder or manslaughter. That this is a matter of pure policy is confirmed by the fact that the present statutory expression ensures that this decision is made outside of the strict requirements of fault.⁷² More telling on this front is the failure of Parliament similarly to privilege other, arguably more laudable emotional states, such as compassion or pity.⁷³

Second, having established that the anger or rage recognized in section 232 is not concerned with intent, it must be determined whether there is any other place where anger might play a role. An authentic inquiry into the intent for murder in subparagraphs 229(a)(i) and (ii) reveals a preoccupation with subjective states of mind (*i.e.*,

⁷¹ See *Cameron*, *supra* note 21.

⁷² The defence was developed long before the modern approach to subjective intent in the context of murder in Anglo-Canadian law. See A.J. Ashworth, "The Doctrine of Provocation" (1976) 35 *Cambridge L.J.* 292; J. Horder, *Provocation and Responsibility* (New York: Oxford University Press, 1992).

⁷³ For instance, mercy killing is not recognized as a type of homicide similarly deserving of mitigation. See I. Grant, D. Chunn & C. Boyle, *The Law of Homicide* (Scarborough, Ont.: Carswell, 1994) c. 6.2.

actual intent or knowledge of a likely risk). As a matter of principle, nothing is excluded from a jury's consideration in determining whether either intent is established. Again, whether a particular factor is capable of affecting the integrity of either of the intents expressed in paragraph 229(a) is an empirical question. This distinction is blurred in *Parent*.

D. Parent's Impact on the Provocation Defence

One gets the sense that the Court's emphasis in *Parent* is misplaced. The case seems like it got off in the wrong direction from the outset. It is difficult to accept that twelve jurors, in the absence of any expert evidence, could have entertained a reasonable doubt that, when *Parent* shot the victim six times, he intended to kill her, notwithstanding how angry he was. In other words, *Parent* was more authentically a case about the operation of the partial defence of provocation in section 232 of the *Criminal Code* than about intent. Instead of meddling with fundamental principles of criminal liability, it would have been preferable had the Court addressed section 232 directly, if not in *Parent*, then in another case.

The defence of provocation has lived a rather ignominious existence in Canada in recent years. A pervasive view is that the courts have contributed to this reputation through the application of section 232 of the *Criminal Code*. The Supreme Court of Canada must share in the responsibility for this criticism. The Court's recent, and now leading, decision in *Thibert*⁷⁴ endorsed the defence of provocation in a troubling scenario, not far removed from the facts in *Parent*. There, by a fragile 3:2 majority, the Court fashioned an approach to the "ordinary person" component of section 232 that has arguably denuded it of authentic objectivity. Cory J. for the majority said that, while the breakup of a marriage can never warrant the taking of a life, "[r]eality and the past experience of the ages recognize that this sort of situation may lead to acts of provocation."⁷⁵ The decision has been roundly criticized.⁷⁶ More specifically, the *Thibert* decision was important in the Federal Government's decision to circulate a dis-

⁷⁴ *Supra* note 3.

⁷⁵ *Ibid.* at para. 22.

⁷⁶ See E.M. Hyland, "R. v. *Thibert*: Are There Any Ordinary People Left?" (1996-97) 28 Ottawa L. Rev. 145; R. Sahni, "Crossing the Line: R. v. *Thibert* and the Defence of Provocation" (1997) 55 U.T. Fac. L. Rev. 143; W. Gorman, "Provocation: The Jealous Husband Defence" (1999) 42 Crim. L.Q. 478. Some of the criticisms levelled in these pieces are compelling. However, my point is not that there should be no concession to subjective factors in the application of the ordinary person test. Instead, it is my contention that the majority judgment in *Thibert* is an unacceptable application of the modified objective test and has sent the wrong message about the proper breadth of s. 232.

cussion paper focused on reforming certain defences, especially the defence of provocation.⁷⁷

There is no explicit suggestion in *Parent* that the Court has backed away from *Thibert*. However, the Court's uncompromising approach to anger and intent is at odds with the generous spirit of *Thibert*. There was little likelihood that the *Parent* jury reached its verdict based on anger vitiating intent. The manslaughter verdict was likely the product of section 232 of the *Criminal Code*, which is now unduly wide and more easily asserted in the context of domestic violence after *Thibert*. The trial judge in *Parent* had no realistic choice but to hold that, in the wake of *Thibert*, there was an air of reality to the defence on the facts of the case. After *Thibert*, it will only be the rarest of cases that will fail to demonstrate an air of reality to the defence. For the same reasons, the Crown in *Parent* was powerless to mount a credible appeal from the decision to leave provocation with the jury.

The full Court should reconsider its ruling in *Thibert* when the occasion next arises. Given the low standard for putting the defence to the jury authorized in *Thibert*, however, it will be difficult and some time before another provocation case reaches the Supreme Court. After *Thibert*, it is virtually impossible for the prosecution to appeal a decision to leave the defence with the jury. It will take a defence appeal in a case where the trial judge essentially ignores *Thibert* and prevents a spurious case of provocation from going to the jury. It will take an equally bold appellate court to affirm this approach. Only then will it be possible to bring the matter back to the Supreme Court for reconsideration.

The irony of *Parent* and the need for this comment is that it is likely that the Supreme Court was attempting to correct an injustice by sending the case back for a retrial. On the facts, anything but a conviction for murder seems unreasonable. As discussed, the effect of anger on intent provided the only basis for a retrial. However, the cost of doing justice on the facts of this case was a dilution of *mens rea* principles.

Conclusion

The Supreme Court's judgment in *Parent* raises a number of serious issues about criminal liability in murder cases. Where the evidence suggests intense anger or rage on the part of the accused, possibly in the context of the formal defence of provocation, it is now unclear how juries are supposed to regard that evidence. According to *Parent*, the trial judge would be wrong to instruct the jury that anger might vitiate intent. Presumably, this means that defence counsel will be unable to refer to this evi-

⁷⁷ Canada, Department of Justice, *Reforming the Criminal Code Defences: Provocation, Self-Defence and Defence of Property* (June 1998), online: Department of Justice Canada <<http://canada.justice.gc.ca/en/cons/rccd/>> (date accessed: 14 May 2002).

dence in their addresses to the jury, outside of the formal defence in section 232. Are trial judges to remain silent on this body of evidence and its application outside section 232, or does *Parent* require that they go one step further and instruct the jury that they must not consider evidence of anger in this manner? While this seems unlikely and wrong in principle, it is a legitimate question after the Court's brief but sweeping decision in *Parent*. The Court needs to revisit this issue to clarify the potentially broad implications of its short judgment.
