

# ANGER AND INTENT FOR MURDER: THE SUPREME COURT DECISION IN *R. v.* *PARENT* ©

BY JOANNE KLINEBERG\*

In *R. v. Parent*, the Supreme Court of Canada recently held that intense anger alone is not, of itself, a defence to murder, although anger does play a role in reducing murder to manslaughter in connection with the defence of provocation. The Court's brief decision ignores twenty years of contrary jurisprudence and fails to provide detailed reasons for its conclusion, resulting in uncertainty about the scope and application of the decision. In this article, the author explores the relationship between anger and intent for murder, and outlines some possible arguments the Court could have relied on that would have provided valuable guidance to lower courts in future cases.

Dans l'affaire de *Sa majesté la Reine c. Parent*, la Cour Suprême du Canada a récemment jugé que la colère extrême ne constitue pas, en elle-même, un argument à décharge dans une affaire de meurtre, même si la colère sert effectivement à réduire l'accusation de meurtre en accusation d'homicide involontaire lorsque la défense plaide la provocation. La décision laconique de la Cour méconnaît vingt années de jurisprudence à l'effet contraire, et manque à fournir les motifs détaillés de ses déductions, ce qui crée une incertitude au sujet du champ et d'application de cette décision. Dans cet article, l'auteur s'interroge sur la relation entre la colère et l'intention de tuer. Il met en relief certains arguments possibles sur lesquels la Cour aurait pu se rapporter, qui auraient pu sagement guider les cours d'instance inférieures dans les affaires futures.

I.	INTRODUCTION .....	38
II.	THE SUPREME COURT DECISION IN <i>R. v. PARENT</i> .....	40
III.	WEAKNESSES OF THE SUPREME COURT'S DECISION .....	42
	A. <i>Disregard of Relevant Jurisprudence on the Relationship Between Anger and Intent</i> .....	43
	B. <i>Absence of Detailed Reasons</i> .....	47
	1. A rule of evidence based on lack of scientific foundation .....	49
	2. A clarification of intent for murder .....	54
	3. A matter of social policy .....	64
IV.	IMPLICATIONS OF <i>R. v. PARENT</i> .....	67
	A. <i>The Rolled-Up Charge</i> .....	67
	B. <i>Reconciling Parent with other Supreme Court Jurisprudence on Factors Relevant to Intent for Murder</i> .....	70
	C. <i>Implications for Reform of the Partial Defence of Provocation</i> .....	71
	D. <i>Relevance of Evidence of Rage for Offences other than Murder</i> .....	72
V.	CONCLUSION .....	73

---

© 2002, J. Klineberg.

\* LL.B., B.C.L., LL.M., Counsel, Department of Justice, Ottawa. The views expressed herein are those of the author. The author wishes to thank Christine Boyle and Isabel Grant for their helpful comments and insights.

## I. INTRODUCTION

Our criminal law has long recognized that inflammatory conduct can cause a loss of self-control and thereby provoke a person to commit murder. The partial defence of provocation, codified in section 232 of the *Criminal Code*,<sup>1</sup> is available where provocative conduct sufficient to deprive an ordinary person of self-control in fact causes a loss of self-control that leads the accused to kill. When successful, the partial defence of provocation results in a conviction for manslaughter rather than murder.

It is clear from the wording of section 232 (i.e., “culpable homicide that would otherwise be murder”) that the partial defence operates to excuse, albeit only partially, responsibility for an intentional killing. The loss of self-control caused by provocation that satisfies section 232 does not negate the intent to kill; rather, the partial defence offers a concession to human frailty based on an understandable loss of self-control in extreme circumstances. Thus, the defence results in a conviction for the lesser offence of manslaughter, notwithstanding that the accused intentionally caused the death of the victim.

Because the partial defence only applies to a murder charge, evidence of anger is considered in the context of the defence only after intent for murder is found to be present. However, the precise contours and content of the partial defence of provocation do not necessarily resolve the question of how, or whether, the same evidence of provocation and rage can be used to determine whether intent for murder was present in the first place. It goes without saying that the Crown must prove intent for murder beyond a reasonable doubt; evidence capable of raising a reasonable doubt about intent should therefore generally be placed before the jury. If a state of anger were thought to be relevant to intent for murder, it would generally be admissible for that purpose absent some policy reason or rule of law excluding it. It also bears noting that if a state of anger can impact upon intent for murder, it could also logically affect intent for other crimes as well. The importance of this issue, therefore, potentially extends beyond the law of homicide to the criminal law more generally.

The connection between anger and intent for murder has been the subject of surprisingly little academic commentary in Canada.<sup>2</sup> Canadian courts, on the other hand, have waded into this question on various occasions. The Supreme Court of Canada has recently addressed the issue in its ruling in *R. v. Parent*.<sup>3</sup> The decision holds, in a surprisingly brief and seemingly straightforward manner, that anger may form part of the defence of provocation

---

<sup>1</sup> R.S.C. 1985, c. C-46 [Code].

<sup>2</sup> See *infra* notes 14 and 18.

<sup>3</sup> [2001] 1 S.C.R. 761 [Parent].

as set out in section 232 of the *Code*, but that it is not a stand-alone defence.

At first glance, *Parent* appears to settle the issue. However, a deeper examination of the judgment reveals that we are far from a state of legal certainty in a number of respects. In *Parent*, the Supreme Court decides the case without any reference to over twenty years of fairly consistent jurisprudence that established the opposite view, namely that a state of anger can be relevant to intent. The Court's silence in *Parent* suggests that, at least in the Court's view, the issue is uncontroversial. In fact, this issue is quite contentious and complicated by numerous social policy considerations. Further, the decision is remarkably devoid of any extended reasoning and analysis, and thereby raises more questions than it answers in respect of several related but distinct legal issues. For instance, by seemingly denying a link between anger and intent, the judgment creates uncertainty in respect of the continued existence and scope of the so-called rolled-up charge. Also, because the Court's ruling appears to be limited to the issue of anger as it impacts on intent for murder, it remains unclear whether the same state of anger may still legitimately affect intent for other crimes. The vagueness of the decision has additional and potentially significant ramifications in view of the possibility of the reform of the partial defence of provocation, which the Federal Government has been contemplating for several years.<sup>4</sup> Further, the brevity of the judgment, combined with the lack of detailed analysis, gives rise to the possibility that it will be inadvertently overlooked by trial counsel arguing similar cases in the future.

The live issue in *Parent* touches upon a variety of complex and important legal problems. These include the precise nature of the required *mens rea* for murder; the intersection of rules of evidence and the elements of criminal offences such as drawing inferences about state of mind; complex and controversial social policy matters, in particular those relating to domestic violence; and the relationship between law and science in respect of human behaviour and intentions. The outcome in *Parent* and the absence of detailed reasons have potential ramifications for each of these issues.

In Part II, I will briefly set out the Supreme Court's decision in *Parent*. In Part III, I will discuss the two principal weaknesses of the judgment, namely the Court's disregard for existing jurisprudence in respect of the very issue under discussion and the lack of reasoned analysis in support of the conclusion. In respect of the lack of reasons, I will suggest three potential avenues of analysis that might have been undertaken by the Court to support its conclusion, any one of which would have provided valuable assistance to trial counsel, the judiciary, and policy-makers. Finally, in Part IV, I will touch upon some additional questions raised by the uncertain foundation of the judgment.

---

<sup>4</sup> See *infra* note 106 and accompanying text.

## II. THE SUPREME COURT DECISION IN *R. v. PARENT*

In *Parent*, the accused and victim were engaged in a lengthy and bitter divorce that involved litigation over the division of assets. For many years, the accused felt that the victim had been trying to ruin him financially. In September 1996, the accused and the victim appeared at a courthouse to deal with the forced sale of some of the accused's property. The victim apparently intended to buy the property or have some members of her family buy it. Upon seeing each other, they went to speak privately in a room. The accused testified that the victim said to him, "I told you I was going to ruin you." The accused then fatally shot the victim six times using a gun he had taken with him in his pocket. After the shooting, the accused went to a strip club for a few hours and later turned himself in to police.

The accused was charged with first degree murder. He testified that he did not intend to kill his wife, but that upon hearing her say that she would ruin him, he felt a hot flush, went into a blind rage, and did not know what he was doing when he shot her. Defence counsel argued the defence of provocation under section 232 of the *Code*, and also argued that the accused should be convicted only of manslaughter on the ground that he did not have the specific intent to kill because his mental state was impaired by rage.

On the issue of intent to kill, the trial judge instructed the jury that "murder may be reduced to manslaughter where ... a person's state of mind is obscured or diminished by an outside force, by an incident like, for example, a *fit of anger*".<sup>5</sup> The trial judge went on to instruct the jury that to

reduce murder to manslaughter, you must come to the conclusion that the influence of the events that occurred was *strong enough, important enough, intense enough to cause the accused to not know or not want what he was doing by reason of his state of mind, that his faculties were too diminished to fully assess the situation, or that raise a reasonable doubt in his favour, in this respect*.<sup>6</sup>

The trial judge also instructed the jury on the defence of provocation. The accused was convicted of manslaughter and sentenced to sixteen years in prison.

The Crown appealed the verdict on the basis that the trial judge essentially created a defence of rage separate and apart from the partial defence of provocation. The accused appealed the sentence. The Quebec Court of Appeal dismissed the Crown appeal from conviction without reasons and, in a separate judgment, granted the accused's appeal as to sentence, reducing his

---

<sup>5</sup> See *e.g. Parent*, *supra* note 3 at 766 [translation; emphasis in original].

<sup>6</sup> *Ibid.* at 766-67 [emphasis in original].

sentence to six years after giving credit for two years of time served.<sup>7</sup>

The Crown appealed to the Supreme Court of Canada on the ground that the trial judge erred in his instructions to the jury on the issue of intent for murder. The Crown took the position that the trial judge's ruling essentially created a halfway house between provocation and non-insane automatism that was not justified or recognized in law. The Crown argued that the judge's instructions were wrong in that they left open the possibility that the jury could convict of manslaughter on the basis that a heightened state of anger, falling short of provocation under section 232, could negate criminal intent for murder.

In a very brief judgment,<sup>8</sup> Chief Justice McLachlin, writing on behalf of a unanimous Court, found that the trial judge erred in his instructions on rage and intent for murder, and ordered a new trial. The Supreme Court's reasons are essentially contained in three paragraphs of the decision. Because of the brevity of the reasons, they are reproduced here:

The Crown argues that [the trial judge's instruction] creates a halfway house defence of anger, between non-mental disorder automatism and provocation. I agree. 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.

The passage cited overstates the effect of anger. Anger can play a role in reducing murder to manslaughter in connection with the defence of provocation. Anger is not a stand-alone defence. It may form part of the defence of provocation when all the requirements of that defence are met: (1) a wrongful act or insult that would have caused an ordinary person to be deprived of his or her self-control; (2) which is sudden and unexpected; (3) which in fact caused the accused to act in anger; (4) before having recovered his or her normal control: *R. v. Thibert*, [1996] 1 S.C.R. 37. Again, anger conceivably could, in extreme circumstances, cause someone to enter a state of automatism in which that person does not know what he or she is doing, thus negating the voluntary component of the *actus reus*: *R. v. Stone*, [1999] 2 S.C.R. 290. However, the accused did not assert this defence. In any event, the defence if successful would result in acquittal, not reduction to manslaughter.

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 they concluded that the conditions required for the defence of provocation were not met. The directions raise the possibility that the jury's verdict of manslaughter may have been based on erroneous legal principles, unless they were corrected in the recharge to the jury.<sup>9</sup>

---

<sup>7</sup> *R. v. Parent* (1999), 142 C.C.C. (3d) 82 (Que. C.A.).

<sup>8</sup> The judgment is approximately eleven pages.

<sup>9</sup> *Parent*, *supra* note 3 at 767. The remainder of the judgment deals with the issue of whether the errors were cured by the recharge.

The Court makes clear that anger is, in and of itself, not a stand-alone defence. Anger plays a role in reducing murder to manslaughter in connection with the partial defence of provocation, all the elements of which must be met before a jury can consider a conviction for manslaughter. The Court appears to be stating that provocation and rage function to reduce murder to manslaughter only in the context of a plea of provocation under section 232 of the *Code*.

Because of the confused and erroneous instructions on the impact of anger on the intent for murder, the basis for the jury's verdict of manslaughter could not be known with certainty and the redirection by the judge did not cure the errors in the original charge. The Court therefore ordered a new trial. In so doing, the Court abstained from commenting on the potential applicability of the defence of provocation, as it could be an issue in the retrial.

### III. WEAKNESSES OF THE SUPREME COURT'S DECISION

Although many observers would likely agree that the Court reached the right result in this case,<sup>10</sup> there are significant difficulties with the judgment. First, the Court makes reference to very little jurisprudence in respect of the main issue, namely *mens rea* for murder and the nature of evidence capable of negating (or raising a reasonable doubt about) that intent. The Court refers only to two cases, *R. v. Stone* and *R. v. Thibert*, neither of which addresses the live issue in the case.<sup>11</sup> Second, the Court fails to provide a reasoned analysis in support of its conclusion. These failings make it difficult to fully comprehend the state of the law as a result of the decision, which poses significant difficulties for courts (both trial and appellate), trial counsel, and policy-makers.

#### A. *Disregard of Relevant Jurisprudence on the Relationship Between Anger and Intent*

Prior to the release of the Court's judgment in *Parent*, there existed a fairly consistent and growing body of jurisprudence that held the opposite view, namely that a state of anger or emotional disturbance caused by provocation

---

<sup>10</sup> In particular, equality-seeking women's groups and advocates have pointed to what they term the "common law defence of rage" as potentially more devastating to women's equality and safety than the partial defence of provocation. They have previously called for legislative action to prevent this use of evidence of anger. It can equally be assumed that those in favour of abolition of the partial defence of provocation on the grounds that it mitigates responsibility for sexist, homophobic, and racist beliefs and attitudes would equally support the restriction on the use of evidence of anger or rage to negate the intent for murder: see e.g. Andr e C t , Diana Majury & Elizabeth Sheehy, *Stop Excusing Violence: NAWL's Brief on the Defence of Provocation* (Ottawa: National Association of Women and the Law, 2000). See *infra* note 77 and accompanying text.

<sup>11</sup> *R. v. Stone*, [1999] 2 S.C.R. 290 [*Stone*]; *R. v. Thibert*, [1996] 1 S.C.R. 37 [*Thibert*].

could be sufficient to negate the specific intent to kill, and that this was a matter for the jury's determination. The Supreme Court ignored this line of authority in its judgment.

This body of law appears to have originated with the Ontario Court of Appeal decision in *R. v. Campbell*.<sup>12</sup> Campbell was charged with the attempted murder of his wife. According to the Crown, the accused induced his wife to go for a drive, took her to a secluded area, shot her five times, poured gasoline on her, and set her on fire. However, the attack was not fatal. The defence alleged that it was his wife who lured the accused away to the location, pointed a gun at him, and poured gasoline on him with the intent to kill him. According to the accused, while in shock and disoriented from the gasoline, the accused fired the gun aimlessly without intending to kill or injure his wife. The accused was found guilty of attempted murder and sentenced to twenty-five years in prison.

The accused appealed the conviction on the ground that the trial judge erred in failing to allow him to raise the defence of provocation in respect of the charge of attempted murder. The Court of Appeal declined to find this an error, holding that the language of section 232, namely "culpable homicide that would otherwise be murder may be reduced to manslaughter," is clear in limiting the defence of provocation to a charge of murder. The Court further noted that absence of provocation is not an essential element of the crime of murder, but rather the defence under section 232 is available where all the elements of the crime of murder have been committed. In discussing this issue, Justice Martin confirmed that: "the defence of provocation, where it applies, is based on the loss of self-control caused by the provocation, and not on its negating the intent requisite for murder. Provocation may, of course, inspire the intent required to constitute murder."<sup>13</sup>

---

<sup>12</sup> *R. v. Campbell* (1977), 17 O.R. (2d) 673 (C.A.) [*Campbell*]. Actually, the decision in *Campbell* was foreshadowed by the judgment of the Ontario Court of Appeal in *R. v. Rabey* (1977), 17 O.R. (2d) 1 (C.A.) [*Rabey*], aff'd [1980] 2 S.C.R. 513. Rabey was charged with assault causing bodily harm with intent to wound, a specific intent offence, for having attacked a female friend for whom he had strong emotions upon finding a letter she had written that contained derogatory comments toward the accused. Rabey asserted the defence of automatism, and the principal issue related to the distinction between insane and non-insane automatism. The Crown called a psychiatric expert, Dr. Rowsell, to rebut the defence's claim of dissociation. He testified that the accused was not in a state of dissociation but rather in a state of rage, and that he could probably form the specific intent to commit the crime, although Dr. Rowsell could not state with absolute certainty that he in fact had. In a throwaway line at the end of the judgment, Justice Martin for a unanimous court stated that Dr. Rowsell's opinion about the accused's state of rage was "relevant and admissible on the issue of the existence of the specific intent necessary in order to support a conviction for the offence charged" (at 486). Neither the majority nor the dissent in the Supreme Court referred to this aspect of Justice Martin's ruling. Interestingly, Justice Martin did not refer to this statement in his judgment in *Campbell*, released just six months later. However, the Ontario Court of Appeal in *R. v. Wade*, *infra* note 16 and accompanying text, relied on both *Campbell* and *Rabey* for the proposition that a state of rage can be relevant to intent for murder.

<sup>13</sup> *Campbell*, *ibid.* at 682-83.

Justice Martin then went on to make an “additional observation”:

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.<sup>14</sup>

The Court held that provocation could induce a state of rage or excitement that could cause persons to act without contemplating the consequences of their actions, and therefore not intend those consequences. Justice Martin’s comments deliberately distinguished the defence of provocation, which partially excuses an intentional killing and is only available on a charge of murder, from the issue of intent, which is an essential element whether the charge is murder, attempted murder, or another crime. In setting out this distinction, the Court emphasized the importance of addressing the prior question of the accused’s intent for murder before turning to any potential defences.

Numerous courts seized upon and adopted Justice Martin’s “additional observation.”<sup>15</sup> Some courts have expressly endorsed jury instructions that adopt, almost verbatim, Justice Martin’s comments in *Campbell*, and which draw the jury’s attention to the victim’s provocative conduct and the accused’s state of rage, and instruct the jury that it may take that evidence into account in determining intent.<sup>16</sup> Other courts have accepted the proposition that evidence of rage may be relevant to intent for murder without requiring that the jury be

---

<sup>14</sup> *Ibid.* at 683. Alan W. Mewett, “Murder and Intent: Self-defence and Provocation” (1984-85) 27 *Crim. L.Q.* 433 at 442, refers to Justice Martin’s additional observation as a “tantalizing statement.” Todd Archibald refers to it as “intriguing *obiter*” in T. Archibald, “The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-control” (1985-86) 28 *Crim. L.Q.* 454 at 454.

<sup>15</sup> It bears noting here that the author was unable to locate any cases, other than *Parent*, that have expressly rejected the *Campbell* proposition.

<sup>16</sup> *R. v. Bob* (1990), 40 O.A.C. 184 (Gen. Div.); *R. v. Wade* (1994), 18 O.R. (3d) 33 (Ont. C.A.) [*Wade*], rev’d [1995] 2 S.C.R. 737 (see discussion below); *R. v. Listes* (1994), 66 Q.A.C. 109 (C.A.) [*Listes*]; *R. v. Muir*, [1995] O.J. No. 670 (C.A.) (QL) [*Muir*]; *R. v. Klassen* (1997), 95 B.C.A.C. 136 (Y.C.A.) [*Klassen*], leave to appeal sentence to S.C.C. refused, [1997] S.C.C.A. No. 479 (QL); *R. v. Chedore* (1997), 187 N.B.R. (2d) 372 (C.A.); *R. v. Tomlinson* (1998), 175 Sask. R. 52 (Q.B.) [*Tomlinson*]; *R. v. Moise*, [1999] J.Q. No. 2079 (C.A.) (QL) [*Moise*]; *R. v. Gibson* (2001), 90 B.C.L.R. (3d) 247 (C.A.) [*Gibson*]. In certain of these cases, the appeal court found an error of law where the trial judge failed to give the *Campbell* charge; in others, the appellate court endorsed the charge given at trial.

specifically instructed as such.<sup>17</sup> Some commentators have made a note of the ruling, although in general terms, the amount of analysis devoted to this issue in Canadian criminal law commentary has been scant.<sup>18</sup>

Of the cases that do pick up the issue, *R. v. Wade* bears specific mention for two reasons. First, it gave the Ontario Court of Appeal another opportunity to consider this issue in detail and to provide expanded reasons in support of its decision in *Campbell*. It also marked the first opportunity the Supreme Court had to deal with this issue.

In *Wade*, the accused killed his wife by stabbing her and smashing her head against the sidewalk the night she told him she wanted a divorce. The defence forcefully argued non-insane automatism. Prior to the judge instructing the jury, defence counsel argued that manslaughter should also be put to the jury on the ground that the evidence (largely expert medical evidence) relating to automatism could also be used to raise a reasonable doubt about intent for murder. The trial judge refused to leave manslaughter with the jury. He sided with the Crown that the evidence was “all or nothing”; either the accused was an automaton or he was acting consciously and nothing in the evidence suggested that he did not intend to kill his wife. The jury convicted the accused of murder. The accused appealed to the Ontario Court of Appeal.

Justice Doherty, for the Court, held that the jury clearly rejected the evidence of automatism but granted the accused’s appeal (and ordered a new trial) on the ground that manslaughter should have been left as a possible verdict. The Court of Appeal noted that:

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.<sup>19</sup>

The Court drew heavily from *Campbell*, agreeing that anger, certainly anger at the level of rage, may affect the accused’s contemplation of the consequences of his or her actions, and his or her intention with respect to those consequences. In my view, that possible relationship exists whether or not the

---

<sup>17</sup> *R. v. Williams* (1995), 98 C.C.C. (3d) 176 (B.C.C.A.), leave to appeal to S.C.C. refused, (1995), 101 C.C.C. (3d) vi; *R. v. Stewart* (1995), 41 C.R. (4th) 102 (B.C.C.A.) [*Stewart*]; *R. v. Pawliuk* (2001), 151 C.C.C. (3d) 155 (B.C.C.A.) [*Pawliuk*].

<sup>18</sup> See e.g. Kent Roach, *Criminal Law*, 2d ed. (Toronto: Irwin Law, 2000) at 261; Isabel Grant, Dorothy Chunn & Christine Boyle, *The Law of Homicide*, looseleaf (Toronto: Carswell, 1994) at 4-56.3 (1999 – Rel. 1); A. Mewett & M. Manning, *Mewett & Manning on Criminal Law*, (Toronto: Butterworths, 1994) at 744; D. Stuart, *Canadian Criminal Law* (Toronto: Carswell, 2001) at 552. Mewett & Archibald, *supra* note 14, appear to be the only two articles published on this subject.

<sup>19</sup> *Wade*, *supra* note 16 at 51-52.

event triggering the rage was an act of provocation. It is the accused's emotional state which is relevant to intention. The cause of that emotional state is of evidentiary significance only.<sup>20</sup>

The accused appealed to the Supreme Court on other grounds. In a single paragraph, the Supreme Court (Chief Justice Lamer and Justice Sopinka dissenting) allowed the Crown's cross-appeal on the ground that, based on the totality of the evidence, the trial judge did not err by refusing to leave manslaughter with the jury. The Supreme Court reinstated the conviction for murder.

When the Supreme Court's decision in *Wade* was released, it was difficult to evaluate its significance. The Court provided no clue or explanation as to how the Court of Appeal went astray in its detailed discussion of the relevance of rage to intent for murder and the air of reality of a manslaughter verdict. Without a ruling on the merits, the Supreme Court's view on these issues could not be discerned with any degree of certainty. Some commentators might have interpreted the ruling as overturning the proposition established in *Campbell* as restated in *Wade*. However, the decision can also be taken as limited to the particular facts of the case.<sup>21</sup> In my opinion the latter is the more appropriate conclusion to draw. It is a leap to presume that the Supreme Court intended to overturn a rule of law or accepted practice in a one-paragraph decision expressly limited to the particular facts of the case before it. Surely the making or unmaking of law demands a clearer justification. Perhaps the only inference that can reasonably be drawn from the decision in *Wade* is that the Supreme Court was not prepared at that time to make any pronouncements about the law on this controversial issue.<sup>22</sup>

Whatever the Supreme Court's objective, appeal courts continued to endorse *Campbell* without referring to the decision in *Wade*<sup>23</sup> and, presumably, an even larger number of trial courts continued to give the *Campbell* charge to the jury. The question is therefore largely moot; whatever the intended result of the judgment in *Wade*, it has had no discernible practical impact on murder trials in Canada.

---

<sup>20</sup> *Ibid.* at 52.

<sup>21</sup> For example, Grant, Chunn & Boyle, *supra* note 18 at 4-56.3, n. 237 states that the "Supreme Court of Canada held that there was no basis for putting manslaughter to the jury although it did not comment on the issue of whether rage can negate the specific intent required for murder." In his discussion of this issue in his 2000 text, Roach, *supra* note 18, does not refer to the Supreme Court's decision in *Wade*.

<sup>22</sup> It is unlikely that the Court failed to consider the legal and social significance of the issues; this was a domestic killing, the nature of which was especially brutal. Wade was tried twice, and twice raised the defence that he was sleepwalking or in a state of automatism. These facts garnered a fair amount of press coverage, both during the trials and at the time of the Supreme Court hearing.

<sup>23</sup> See e.g. Pawliuk, *supra* note 17, and Gibson, *supra* note 16.

Six years later, the Supreme Court was confronted once again with this difficult issue in *Parent*. It is clear, this time around, that the Court meant to establish (or overturn) a rule of law. What is startling is that the Court disregarded entirely the existing jurisprudence, and thereby also failed to recognize the existence of a legal debate on this issue. The omission is all the more remarkable in light of the fact that the parties brought these cases to the Court's attention in their written submissions. For instance, the Attorney General of Quebec, for whom this line of authority was unfavourable, referred to numerous cases that accepted the possible link between rage and intent, including *Campbell* and *Wade*.<sup>24</sup>

B. *Absence of Detailed Reasons*

The decision in *Parent* does clearly contain more substance than the Supreme Court had to offer in *Wade*, but only slightly more. The underlying rationale for the Court's conclusion is neither compelling nor clear. The Court states simply that "intense anger alone" does not negate the criminal intent for murder and is insufficient to reduce murder to manslaughter. The Court also considers important the special role that anger plays in the partial defence of provocation, although it fails to explain why or how the existence of the partial excuse impacts upon the determination of intent. Indeed, the existence of the defence of provocation cannot, by itself, explain the Court's conclusion that anger does not negate intent because the defence arises only *after* intent has been proven.<sup>25</sup>

There are various reasons to be concerned about the absence of reasons in this judgment. The case potentially raises questions about the precise nature of the required *mens rea* for murder; the intersection of rules of evidence and the elements of criminal offences such as drawing inferences about state of mind; complex and controversial social policy matters, in particular those relating to domestic violence; and the relationship between law and science in respect of human behaviour and intentions. These complex issues warranted closer attention by the Supreme Court. It is surely desirable to have a principled and coherent doctrine of criminal law, and not merely a set of rules without explanation. It is unfortunate that the Court ignored this opportunity to develop and contribute to a coherent body of criminal law.

There may also be ramifications of a more practical nature that flow

---

<sup>24</sup> *Parent*, *supra* note 3 (Factum of the Appellant paras. 52-62). In its Factum at paras. 10, 14, the Intervenor, the Attorney General of Ontario, argued that the Supreme Court's judgment in *Wade* overturned this kind of practice and disallows the use of evidence of rage as a factor capable of negating intent.

<sup>25</sup> See *infra* note 88 and accompanying text.

from the brevity of this decision. Trial counsel and courts must make sense of this decision in future cases, and without the benefit of reasons this is a far more difficult task. Without reasons or analysis, it is difficult to extrapolate the holding to other cases that are similar but not identical. Also, the lack of reasoned analysis and reference to relevant jurisprudence gives some leeway to defence counsel to try to circumvent the result in a variety of ways. Counsel wishing to rely on *Campbell* may attempt to understate the importance of the judgment in *Parent*.<sup>26</sup> As a strategic matter, defence counsel might attempt to introduce the very evidence excluded by *Parent* by slightly re-characterizing it as evidence of an emotional state other than rage or anger, for example as depression, panic, or anxiety. The decision in *Parent* arguably fails to provide sufficient guidance to lower courts on how to rule on such a claim. Further, because the leading cases on this issue, such as *Campbell* and *Wade*, are not cited in *Parent*, noting up those cases, a basic practice taught to all first-year law students as a means of ascertaining whether a judgment is still authoritative law, will not uncover *Parent*.

Even for those commentators who believe that the Court reached the correct result, the absence of reasons creates the unfortunate possibility that the judgment will be ignored or overlooked, or that its importance will be minimized.<sup>27</sup> This state of affairs is unnecessary. There were in fact several different routes the Court could have taken to reach, and to support, its conclusion that rage cannot negate intention for murder. Any one of these courses would have provided at least a modicum of a rationale that would have assisted counsel, judges, and policy-makers who in the future will have to make sense of the decision in relation to similar issues. Below, I suggest a number of justifications the Court might have offered for its position.

1. A rule of evidence based on lack of scientific foundation

In the cases leading up to *Parent*, courts have tended to make what they consider to be common sense assumptions about the effect of anger on the human mind and behaviour. In particular, they have assumed that a state of rage can prevent a person from knowing or advertent to the obvious and unavoidable

---

<sup>26</sup> By failing to refer to *Campbell*, can it be said with certainty that the Court has repudiated it? Arguably, the Court's failure to identify arguments and cases in support of the opposite result leaves room, however small, for defence counsel to suggest that the Court in fact did not intend to overturn those authorities.

<sup>27</sup> There is already some evidence that the significance of the case is being overlooked or neglected: see the Ontario Court of Appeal decision in *Balchand*, *infra* note 100.

consequences of their actions.<sup>28</sup> Common sense is generally an acceptable method of drawing inferences. However, common sense cannot always be counted on to reveal the “truth.” Common sense can lead us astray for various reasons.<sup>29</sup>

Common sense assumptions about the impact of anger on the human mind may well be incorrect or unfounded from a scientific standpoint. Surely the psychological or physiological impacts of various emotions on the human mind are matters on which science can shed some light. If the scientific literature demonstrates that an extreme emotional state *does not* result in an impairment of faculties to such a degree that knowledge of the consequences of one’s actions (or other aspects of the intent for murder) may be lost, then the supposedly common sense suppositions that underlie *Campbell* and *Wade* are incorrect. Evidence of anger might not be relevant to the accused’s mental state, and consequently could be held inadmissible on that ground.<sup>30</sup>

There is a voluminous body of psychological and other scientific literature about emotion and its effects on the human mind and body. It is not feasible to canvass all of this literature here, but I will canvass some of the important and basic principles. It should first be noted that, for obvious reasons, the scientific literature does not squarely address the legal issue at hand and we must therefore make arguments about the relevance of this literature to the issue under discussion.<sup>31</sup>

---

<sup>28</sup> To be fair, in a small number of the cases the assumptions were based on expert evidence tendered at trial, but these were generally cases in which automatism was also argued and the expert evidence was principally adduced to establish that defence. See *e.g. Wade, supra* note 16.

<sup>29</sup> For instance, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, the Supreme Court of Canada held that domestic violence and battering relationships are subject to a number of different myths and stereotypes that prevent juries from accurately assessing the reasonableness of a battered woman’s claim of self-defence. For instance, the average juror might think that the abuse was not that bad because the woman remained in the house. The Court held that expert evidence was relevant and necessary to explain the perceptions and actions of a battered spouse in the face of such mistaken assumptions.

<sup>30</sup> An accused does not have a right to adduce irrelevant or misleading evidence to support illegitimate inferences. See *e.g. R. v. Darrach*, [2000] 2 S.C.R. 443 at 467-68; *R. v. Mills*, [1999] 3 S.C.R. 668 at 719. Also, in *R. v. Lifchus*, [1997] 3 S.C.R. 320 at 334 [*Lifchus*], the Court held that the jury should be instructed that a reasonable doubt must not be an imaginary or frivolous one.

<sup>31</sup> There is in fact a newly emerging body of scholarship on the relationship between law and the emotions. Legal scholars have recently begun to explore the role and function of emotion in various legal contexts. See Laura E. Little, “Negotiating the Tangle of Law and Emotions”, Book Review of *The Passions of Law*, Susan A. Bandes ed., (2001) 86 Cornell L. Rev. 974, for a synopsis of law and emotion scholarship. See also Susan A. Bandes ed., *The Passions of Law* (New York: New York University Press, 1999); Rachel Moran, “Law and Emotion, Love and Hate” (2001) 11 J. Contemp. Legal Issues 747; Eric A. Posner, “Law and the Emotions” (2001) 89 Geo. L.J. 1977. Some law and emotion scholarship pertains specifically to the relationship between the emotions and the criminal law. See *e.g.* Dan M. Kahan & Martha C. Nussbaum, “Two Conceptions of Emotion in Criminal Law” (1996) 96 Colum. L. Rev. 269. For a Canadian approach to these issues, see Alexander Reilly, “The Heart of the Matter: Emotion in Criminal Defences” (1997-98)

Emotions are very complex, and the psychological literature does not reveal any single definitive theory that explains what emotions are and how they affect us. One school of thought emphasizes emotion as a bio-physical phenomenon and focuses on the physiological changes that occur in the body, such as increasing heart rate and the release of chemicals in the body.<sup>32</sup> Other theories emphasize the intimate relationship between emotion and cognition. These theories see emotion as resulting from situation appraisal, which itself is the product of thought, reason, and judgement.<sup>33</sup> Such modern theories reject the historical view that reason and emotion are set in opposition to each other. In fact, “[m]ost currently popular theories of emotion will invoke cognitive processes at some level, but ... not all agree as to the role and place of these.”<sup>34</sup> There is also a discourse in the scientific literature that looks to the biological or evolutionary functions of the emotions for a better understanding and explanation of their manifestations.<sup>35</sup>

With respect to anger specifically, evolutionary theorists reject the historical perception of anger as a dysfunctional emotion, and instead emphasize its adaptive functions. It is common to find theories that view anger as playing a crucial role in allowing humans to cope with some of the challenges and dangers that have confronted humans throughout history. Anger fulfils this coping function in several ways. For example, anger creates a state of arousal that gives a person a sense of power that may facilitate the attainment of goals and also increases the energy or intensity with which a person may seek to act

---

29 Ottawa L. Rev. 117. Reilly provides a useful overview of psychological literature in respect of emotion and criminal law, and a more comprehensive review of the literature than I can accomplish here. Although this scholarship is enlightening with respect to the partial excuse of provocation, the current state of this scholarship is of limited usefulness on the question of the impact of a state of rage on the intent for murder.

<sup>32</sup> Kahan & Nussbaum, *ibid.*, refer to this kind of approach as the “mechanistic conception” of emotion.

<sup>33</sup> Legal discourse on law and emotion has also begun to recognize emotion as a form of cognition and to challenge the traditional dichotomy between reason and emotion: see *e.g.* Richard A. Posner, “Emotion versus Emotionalism in Law” in Bandes, *supra* note 31 at 310; Kahan & Nussbaum, *ibid.* at 273. Kahan & Nussbaum refer to cognitive approaches to emotion as embodying an “evaluative conception” which “holds that emotions express cognitive appraisals.” They advocate that the criminal law should strive to adopt the evaluative conception of emotion in its understanding of various doctrines and defences. Whereas the mechanistic conception camouflages moral issues, the evaluative approach is “brutally and uncompromisingly honest” and the “law is more likely to be just ... when decision makers are forced to take responsibility for their appraisals of wrongdoer’s emotions, and when the public is allowed to see for itself the appraisals that its decisionmakers have made” (at 274).

<sup>34</sup> Ron Tulloch, “Anger and Violence” in Windy Dryden and Robert Rentoul, eds., *Adult Clinical Problems: A Cognitive-Behaviour Approach* (New York: Routledge, 1991) at 88.

<sup>35</sup> Carroll E. Izard, *The Psychology of Emotions* (New York: Plenum Press, 1991) at 17.

in furtherance of these goals.<sup>36</sup> Anger in humans was thus “essential to the survival of the species”;<sup>37</sup> we “may indeed be an aggressive species ‘by nature.’”<sup>38</sup>

It is generally agreed that we cannot control our internal experience of emotion; the processes of emotion can be engaged automatically without our knowing or intending them.<sup>39</sup> However, it is believed, and this seems intuitively correct, that we *are* able, to a certain degree, to control the outward manifestation of our feelings. For example, we are able to keep a straight face in spite of a strong emotional reaction to a stimulus that invokes disgust or joy. It is thus crucial to distinguish between “having the emotion and acting in accordance with it.”<sup>40</sup> A person may experience a strong emotion in response to a situation, but judge it to be inappropriate for some reason to express the emotion in action.

In respect of anger specifically, then, we must distinguish the emotion or feeling of anger from anger-motivated action.<sup>41</sup> There seems to be common ground among psychologists that anger is not a necessary precondition of violence and may not cause violence. Experiencing the emotion of anger does not lead necessarily to action in anger. As one theorist puts it, there is “no evidence for any direct connection (in either the nervous system or at the behavioral level) between anger and aggressive behavior.”<sup>42</sup> Conversely, violence can occur without anger.<sup>43</sup> Where violence occurs without anger, it is considered to be *instrumental* aggression, namely violence in furtherance of a specific external objective. On the other hand, *emotional* aggression arises from

---

<sup>36</sup> Robert Plutchik, *The Psychology and Biology of Emotion* (New York: Harper Collins College, 1994) at 359.

<sup>37</sup> See e.g. Izard, *supra* note 35 at 243.

<sup>38</sup> James K. Averill, *Anger and Aggression: An Essay in Emotion* (New York: Springer Verlag, 1982) at 33.

<sup>39</sup> Antonio R. Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* (New York: Harcourt Brace & Co, 1999) at 49.

<sup>40</sup> Kahan & Nussbaum, *supra* note 31 at 288.

<sup>41</sup> The differentiation between the *feeling* of anger and *action* in anger is as important in legal discourse as it is in psychological literature. See e.g. Jeremy Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) at 77.

<sup>42</sup> Izard, *supra* note 35 at 247.

<sup>43</sup> Raymond W. Novaco, “Anger as a Risk Factor for Violence among the Mentally Disordered” in John Monahan & Henry J. Steadman, eds., *Violence and Mental Disorder: Developments in Risk Assessment* (Chicago: University of Chicago Press, 1994) at 22; Paul R. Robbins, *Anger, Aggression and Violence: An Interdisciplinary Approach* (North Carolina: McFarland, 2000) at 21; Tulloch, *supra* note 34 at 88-89.

an emotional outburst.<sup>44</sup> People who kill people they know, as opposed to strangers, are more likely to be acting under emotional aggression.<sup>45</sup>

But even in the case of emotional aggression, the aggressive response is distinct from and not compelled by the experience of strong feelings of anger. When anger is associated with violence, it is typically because there has been a failure of other strategies for resolving a perceived provocation.<sup>46</sup> Although anger may be innate from a biological perspective, “the greatest biological adaptation of humankind is the ability to transform and, to a limited extent, to transcend biological imperatives.”<sup>47</sup> Thus, some scientists think that aggression, even extreme aggression, can be controlled. According to the psychologist Leonard Berkowitz:

[T]he first automatic and involuntary reactions to negative stimuli can be modified quickly as the aroused persons think about their feelings, the instigating events, their conceptions of what emotions they might be experiencing, and the social rules regarding the emotions and actions that may be appropriate under the circumstances. The initial rudimentary anger experience may be intensified, enriched and differentiated, suppressed, or eliminated altogether by these cognitions ... [B]y giving attention to their feelings, unhappily aroused people may also exert self-control, restraining their negative affect-produced aggressive urges and perhaps also lessening the anger they perceive in themselves.<sup>48</sup>

For the clinician, then, aggression and violence are “seen as instances of failed or inappropriate problem solving, or poor coping responses, rather than a failure to check some innate, destructive drive.”<sup>49</sup> This view explains the existence of a vast industry aimed at controlling aggression and violence by developing anger therapy, treatment, and prevention techniques. Psychologists and clinicians regard such programs as effective measures to minimize violent tendencies and to prevent aggressive behaviour in individuals.<sup>50</sup>

---

<sup>44</sup> Leonard Berkowitz, *Aggression: Its Causes, Consequences and Control* (Boston: McGraw-Hill, 1993) at 300-01.

<sup>45</sup> *Ibid.* at 303.

<sup>46</sup> Robbins, *supra* note 43 at 20.

<sup>47</sup> Averill, *supra* note 38 at 33.

<sup>48</sup> Berkowitz, *supra* note 44 at 80.

<sup>49</sup> Tulloch, *supra* note 34 at 95.

<sup>50</sup> See Robbins, *supra* note 43, who writes at 145-46 that, the thresholds for feeling provoked and reacting are individual matters. Some people anger swiftly, others react in a more measured way. ... The question becomes how can we raise the thresholds of overly aggressive individuals for feeling angry, and more importantly, for becoming aggressive and violent? ... The good news is that many people have worked hard on these issues and have come up with useful ideas.

See also Plutchik, *supra* note 36 at 359-361; Berkowitz, *supra* note 44 at 336ff.

Our current state of scientific understanding may be such that we do not fully understand the effect of certain emotions, and anger in particular, on the mind, consciousness, choice and free will. However, there is certainly evidence in the literature that suggests that although anger as an emotion may be uncontrollable, we are capable of controlling our responses, and in particular the aggression response.

If this is the state of science, it is my view that the law is unwise to base decisions on the link between rage and intent on “common sense.” Common sense in this area may well be incorrect from a scientific perspective. The Court might have turned its mind to this issue and held that the common sense assumptions about the effect of anger on the human mind are mere speculation from a scientific perspective, and should not be permitted to raise a reasonable doubt about intent. Any doubt based on such assumptions would not be based on reason, but rather on conjecture, which is not a proper basis to support a finding of reasonable doubt.

## 2. A clarification of intent for murder

The central issue in *Parent* was not characterized by the Court as related to the *mens rea* for murder. However, the live issue in the case does in fact raise difficult and as yet unexamined questions about the precise nature of the *mens rea* for murder under section 229, in particular the notion of knowledge or foreseeability. Surely we cannot adequately address the proper relationship between intent for murder and a particular type of evidence without first clearly setting out the scope and content of intent for murder. The Supreme Court might have explored these issues in *Parent* and might have found a satisfying resolution. In so doing, the Court might also have provided valuable insight into and elucidation of the notion of intent and knowledge that would be applicable in the broader criminal law context. I will briefly explore this issue here.

Paragraphs 229(a)(i) and (ii) of the *Code* set out two forms of intent required for murder. To be convicted of murder, an accused must cause the death of a person, and either (i) mean to cause that death or (ii) mean to cause bodily harm that he or she knows is likely to cause death, and be reckless as to whether death ensues. Under paragraph 229(a)(i), the intent to cause death includes the paradigmatic case of an accused whose purpose or desire is to cause death. However, the notion of intention is not limited to desire. Intention also includes the undesired causing of a consequence (in this case death) where the accused knows that the consequence is certain or substantially certain to

follow as a consequence of the chosen course of action.<sup>51</sup> It is generally understood that a person intends, in a legally meaningful sense, to bring about a consequence if they act to achieve another end but they foresee that the prohibited consequence will occur. What is punished is not the desiring of the outcome, but the choice to act with full awareness that the consequence will be brought about.

Paragraph 229(a)(ii) requires a subjective intent to cause bodily harm and subjective knowledge that death is likely to result.<sup>52</sup> This formulation represents a “slight relaxation” of the strict requirement for subjective intention to cause death.<sup>53</sup> Presumably, “intent to cause bodily harm” under this paragraph could also be satisfied by knowledge that bodily harm would certainly (or almost certainly) result, even if the bodily harm was not desired.<sup>54</sup>

In *Campbell*, Justice Martin held that a state of rage can potentially negate a person’s contemplation of the consequences of their actions and that a failure to contemplate consequences could give rise to a doubt about intention.<sup>55</sup> Other language used in this line of cases includes the includes “intend to bring about [the] consequences”<sup>56</sup> and the negative formulation “without regard to or consideration of the consequences.”<sup>57</sup> This type of reasoning and language, which suggest an internal conversation in which the accused announce to themselves their intentions, seems to underlie the cases that follow *Campbell*. Indeed, in *Parent*, the trial judge instructed the jury that in order to find intent, they had to find that the accused acted with “full appreciation of the consequences” of his actions (“en pleine connaissance de cause”).<sup>58</sup>

---

<sup>51</sup> *R. v. Buzzanga* (1979), 25 O.R. (2d) 705 (C.A.), approved by the Supreme Court in *R. v. Chartrand*, [1994] 2 S.C.R. 864. See also Grant, Chunn, & Boyle, *supra* note 18 at 4-41; Mewett & Manning, *supra* note 18 at 717; Stuart, *supra* note 18 at 214, 218ff.

<sup>52</sup> The requirement that the accused also be reckless as to whether or not death ensues can be considered an “afterthought,” since any accused who caused bodily harm while subjectively knowing that death is likely to result must logically also have had a deliberate disregard for the fatal consequences: *R. v. Nygaard*, [1989] 2 S.C.R. 1074 [*Nygaard*]; *R. v. Cooper*, [1993] 1 S.C.R. 146 [*Cooper*].

<sup>53</sup> *Cooper*, *ibid.* at 155.

<sup>54</sup> Grant, Chunn, & Boyle, *supra* note 18 at 4-43 (1995 - Rel. 1).

<sup>55</sup> See *Campbell*, *supra* note 12 at 682-83.

<sup>56</sup> *Ibid.* at 683.

<sup>57</sup> *Wade*, *supra* note 16 at 51.

<sup>58</sup> *Parent*, *supra* note 3, [Factum of the Appellant at para. 25]. The Appellant argued before the Supreme Court that this formulation went beyond what was required for intent for murder, submitting at paras. 42-43 (translation):

In our submission, the concept of intent to cause death and the concept of acting ‘with full appreciation of consequences’ are separate concepts, the latter being much broader than the

The Supreme Court might have examined whether this linking of *contemplation* of consequences with intention was an overstatement of the requisite *mens rea* for murder, or at least potentially misleading with respect to second-degree murder.<sup>59</sup> Contemplation<sup>60</sup> suggests an active and thorough process of mental deliberation, and implies that a specific kind of “mental conversation” took place in the mind of the accused at the time of action.<sup>61</sup> This suggests that impulsive action is excluded; one cannot logically contemplate the consequences of one’s actions if one acts in an unplanned and spontaneous manner. Intention in the sense of desire or purpose suggests a degree of active mental deliberation and reflection at some point *prior* to action (even if just moments prior). However, it is not clear that “knowing” the (near) certain consequences of one’s actions necessarily requires the same degree of active mental process.<sup>62</sup> “Knowing” is not necessarily absent in the context of spontaneous, impulsive action. One may act on the spur of the moment, without any planning or forethought, and still *know* at the time of acting, in a meaningful way, that certain consequences are highly likely to occur or that certain circumstances exist. I do not mean to suggest that something less than subjective knowledge is sufficient to satisfy the *mens rea* requirement for murder. Indeed, the Supreme Court made clear in *Martineau* that the constitutionally required *mens rea* for murder is subjective foresight of death.<sup>63</sup>

---

former.[...] Obviously, anger may affect a person’s judgment, may prompt a person to engage in conduct that he or she would never have engaged in otherwise. Impulsive action is necessarily thoughtless, but it is still consistent with the *mens rea* required by section 229 of the *Criminal Code*. It is the anger itself that motivates the action in that situation.”

<sup>59</sup> Throughout this section, I will focus mostly on “knowledge” as the requisite mental state. I do not deal directly with intention. The type of claim under analysis will generally involve a denial of a *desire* to bring about the consequence of death. But even in the absence of desire, knowledge of the virtual certainty of the consequence will satisfy the mental state for murder under s. 229(a)(i). Further, under s. 229(a)(ii), knowledge will also be a crucial mental state (either knowledge that an action will almost certainly cause bodily harm in the absence of an intent to cause it, or knowledge of the likelihood of death).

<sup>60</sup> See e.g. *The Canadian Oxford Dictionary* 1<sup>st</sup> ed. (re-issue), s.v. “contemplate: 1. Look at or consider in a calm, reflective manner. ... 3. intend; have as one’s purpose ... .”

<sup>61</sup> Bruce Ledewitz, “Mr. Carroll’s Mental State or What is Meant by Intent” (2001) 38 Am. Crim. L. Rev. 71 at 73. Ledewitz states at 73 that,

there is something deeply wrong with the way criminal law views human conduct. When we try to imagine which of two mental states—intent to kill or not—was present ... we are, as it were, imagining which of two internal conversations took place; in fact no such conversation might have taken place at all, or both might have taken place, or a jumble of feelings, some expressed, some never expressed, might have moved the defendant.

<sup>62</sup> See e.g. *The Canadian Oxford Dictionary* 1<sup>st</sup> ed. (re-issue), s.v. “knowledge: 1 a. awareness or familiarity gained by experience (of a person, fact, or thing) (have no knowledge of that). b. a person’s range of information.”

<sup>63</sup> *R. v. Martineau*, [1990] 2 S.C.R. 633 [*Martineau*].

But *Martineau* is not a complete answer here; specifically, it does not elucidate the precise *nature* of knowledge (or foresight of consequences) that is required.

There are a variety of ways in which we use the concepts of “know” and “knowledge” in the real world. For example, we say that we know a person or place, that we know how to do something, or that we know that such and such is the case. This latter object of knowledge can apply both to circumstances and to future events, and this is the type of knowledge relevant to the criminal law. In respect of this latter category, there are other distinctions that can be made. Certain pieces of information seem to be of such a nature that once they are known, they are not susceptible to being forgotten. Such information might include knowledge that if you put your hand in fire it will burn, or that water flows from a higher elevation to a lower one. Our intuition tells us that people “know” this kind of information all the time, regardless of whether they actively deliberate about it at any given time. We still know that fire burns, even though we might contemplate that fact on very rare occasions. *If* we were asked what we knew about fire and contact with human flesh, we would give the correct answer. In this sense, “knowing” is not synonymous with contemplating a particular thing or having a thought in one’s active consciousness. It refers rather to the possession of knowledge that has previously been acquired and stored somewhere in the mind, whether or not it is accessed. Other kinds of information can be of a more transient nature in the human mind. For instance, knowledge of directions to a particular location, or knowledge of a poem. The subject matter of this kind of knowledge might be possessed only briefly and might easily be lost or forgotten.

It may be helpful here to distinguish between *actual* and *latent* knowledge (alternatively *active* and *passive*).<sup>64</sup> Latent or passive knowledge can be said to refer to that information that a person possesses, but which is not actively guiding a person’s conduct at a given time. For instance, a person driving a car has all kinds of latent knowledge about rules of the road, where the controls are in the car, and so on. That knowledge may become *actual*, for instance, where the driver calls that knowledge to the driver’s conscious mind in order to navigate through a dangerous situation.<sup>65</sup>

---

<sup>64</sup> These notions of “latent” and “actual” are derived from R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990) at 159ff. Duff’s objective, which is somewhat more ambitious than mine, is to challenge as too narrow the orthodox subjectivist position that subjectivism requires actual awareness of risk of consequences. For Duff, orthodox subjectivism is an overly dualistic approach that sets up a rigid and artificial divide between *mens rea* and *actus reus*, and forces us to engage in an examination of all of the thoughts that pass through the mind of the agent over the course of a transaction. In Duff’s view, the “occurrence of some thought” in the mind of the agent is neither a necessary nor a sufficient condition of that agent realizing that he or she is creating a particular risk. Rather, an agent’s knowledge of what they are doing is shown in their “actions and reactions.”

<sup>65</sup> *Ibid.*

Whether information is capable of being stored permanently even though not accessed or whether it is capable of being forgotten (giving rise to a legitimate question about whether or not the person “knows” it), seems to depend in part on the nature and quality of the information in question. Some information is certain, pervasive, undisputed, and in a sense absolute. For instance, absent a mental defect of some kind, one does not forget that if you put your hand in fire, it will burn. In respect of this type of knowledge, claims such as “I forgot,” “I wasn’t thinking about it at the time,” or “the thought never occurred to me” are meaningless in an important sense. We accept that a person might not be thinking about such things, but intuitively we still consider that person to “know” that such and such is the case. In this sense, I suggest that latent or passive knowledge is still knowledge.

We must now return to the question of knowledge in the criminal law. Can latent knowledge constitute knowledge as an element of a crime? There are a variety of criminal offences that require knowledge of a circumstance or knowledge of the likelihood of a consequence. Crimes that have a knowledge requirement include knowingly selling obscene written matter;<sup>66</sup> incest, which requires knowledge of a blood relationship;<sup>67</sup> fraud, which requires knowledge of the risk of deprivation;<sup>68</sup> and driving while suspended, which requires knowledge of suspension. If the element of knowledge requires active contemplation, thinking about, or conscious awareness of the relevant consequences or circumstance at the time of the commission of the act that constitutes the offence, each of these offences would be vulnerable to the claim “but I wasn’t thinking about that fact at the time.” This does not seem to be the case. The idea of latent or passive knowledge seems to make intuitive sense in respect of these offences. We do not often hear the following claims of exculpation: “I was not contemplating the fact that my licence was suspended *while* I was driving” or “at the time I sold that pornographic magazine, I was not thinking about the kinds of pictures it contained.” Surely the Crown does not need to prove that at the time an accused committed incest, he or she was thinking about the blood relationship. Likewise, the Crown is not put to the task of proving that at the very moment the act that constitutes fraud was completed, the accused was actively thinking about the risk of deprivation. The law seems to presume that once knowledge of certain facts or circumstances is acquired, it is ever present.

Turning then to consider the offence of murder, it may be helpful to recall the nature of a claim of rage in a murder case. The plea is not “I knew

---

<sup>66</sup> *Code*, *supra* note 1 at s. 163(2)(a).

<sup>67</sup> *Ibid.* at s. 155(1).

<sup>68</sup> *Ibid.* at s. 380.

what I was doing but I couldn't stop myself" or "I was not aware of what I was doing." In the former case, the proper defence to leave with the jury would be provocation under section 232; in the latter case, automatism. Rather, the accused's plea must be "I knew what my body was doing, but I did not mean to cause death or to injure and I did not know that what I was doing would almost certainly cause death or injury. I just wasn't thinking about the consequences at all." Stated in legal terms, the claim is roughly the following: an accused voluntarily and intentionally applies force to another person (or commits another underlying criminal act that carries an objectively foreseeable risk of harm) yet is not at the relevant moment aware of either (a) the certain result of death or (b) the certain result of bodily injury and likely risk of death.

Certain acts give rise to an obvious and substantial risk of death. These acts might include shooting a person in the upper part of the body at close range or plunging a knife into a person's chest. Does our law of murder entertain the possibility that an accused might voluntarily, absent a mental disorder or intoxication, commit one of these acts (or any other act certain to cause death of serious bodily harm) and simultaneously fail to know that death is likely to result?<sup>69</sup> The state of mind asserted is analogous to that of a child who smashes a playmate with a hammer or other heavy object and is simultaneously oblivious to the fact that injury might result. It is essentially an infantile level of consciousness or awareness that does not accord with our understanding of the adult mind.

Alternatively, the claim is that the accused acted spontaneously and impulsively, and that such action precludes knowledge of the consequences. Humans engage in spontaneous, unthinking action every day. Much of what we do, in fact, is done without thinking; for example, walking, eating, and even more complex actions such as brushing one's teeth or driving. We would react very skeptically to the claim that a person did not know that they were driving when they were, or that they did not appreciate that by driving they would move from one place to another. Yet these facts and circumstances might not be in the person's conscious mind at all. We do not normally accept denials of responsibility for many spontaneous, unthinking actions on the ground that a person failed to consciously and purposely call into their mind the range of likely consequences or circumstances.

In response to the claim "I just did it without thinking," the distinction

---

<sup>69</sup> It might be argued that murder should be singled out because the stakes are so much higher than for other offences resulting from the mandatory life sentence. But this does not explain why the knowledge component for murder should be different from the knowledge requirement in other offences such as incest, obscenity, or fraud. Knowledge is a quintessentially subjective state of mind. There is nothing in the literature or jurisprudence to suggest that the scope or content of a paradigm mental state should vary depending on the crime.

between first and second-degree murder is also important. Murder is first degree if it was “planned and deliberate.”<sup>70</sup> It is well established that the conditions of planning and deliberation do not create a separate offence, but rather elevate the seriousness of the murder for sentencing purposes, on the principle that a killing that is planned in advance is more morally blameworthy than one that is not. Both planning and deliberation must be proved for a murder to be first degree. In *Nygaard*, the Supreme Court elucidated the twin notions by stating “[i]t has been held that ‘planned’ means that the scheme was conceived and carefully thought out before it was carried out and ‘deliberate’ means considered, not impulsive.”<sup>71</sup> If the ‘deliberate’ component of first degree murder requires something more than what occurs in an impulsive killing, then second degree murder could logically, and legally, be made out in respect of an impulsive killing. Thus the claims under analysis may be subject to challenge both on the basis of intuitive reason and of legal analysis.

It may be tempting to counter the claims by stating that the jury would disbelieve any assertion of “lack of contemplation” or “lack of knowledge” in respect of a consequence that was virtually certain or a circumstance that could not be forgotten, and would find (or infer) knowledge *in fact*. I think we should resist this argument for two distinct but closely related reasons. First, to find the existence of knowledge by inference from the act is essentially to limit the notion of knowledge to actual knowledge in the sense of active contemplation. This leads to the second objection, which is that limiting knowledge to actual knowledge invites, or at minimum permits, any claim seeking to rebut the inference, such as “the thought never crossed my mind.”

It is not inconceivable that a person could engage in conduct for which death is the obvious and unavoidable consequence, and yet be thinking about something other than death during the entire time those acts are committed. Not only impulsive action but also highly purposeful action might be carried out in the absence of an “internal conversation.” Imagine an individual so opposed to abortion that he or she has decided, in conjunction with others, to destroy an abortion clinic. Early one morning, as clinic staff are arriving at the clinic, he or she plants a bomb, which another person will remotely detonate. During this time, she or he is thinking about the lives of the fetuses that will be spared that day and for many days afterward because the clinic will not be operational for some time; she or he has not at any time thought consciously about the lives of the staff that will be lost. Suppose, even, that she or he is deliberately closing her mind to thoughts about the nature of her actions.

If knowledge in the sense of “active contemplation of consequences”

---

<sup>70</sup> Code, *supra* note 1 at s. 231(2).

<sup>71</sup> *Nygaard*, *supra* note 52 at 1084.

is required, then this clinic bomber could potentially escape liability for murder.<sup>72</sup> However, if latent or passive knowledge is equivalent to subjective knowledge, then we can resist the claims (other than those based on some incapacity or other established defence) that a relevant circumstance or consequence was not in the mind of the accused at the relevant time. Further, we can avoid the difficult task of drawing inferences about the active mental deliberations and conversations in the mind of the accused at the exact moment of the prohibited acts.

We can instead inquire into whether the accused possessed the required knowledge in a more general sense. We can pose the question: *if the accused had been asked*, would he or she have known the relevant circumstance or foreseen the relevant consequence. We can also learn something about an accused's knowledge of what they are doing by observing their reactions, or more specifically, their lack of surprise at what actually happens.<sup>73</sup>

One significant objection to this conception of knowledge is that it violates the contemporaneity or simultaneous principle. The simultaneous principle holds generally that the *mens rea* of an offence must coincide temporally with the *actus reus*.<sup>74</sup> In other words, for the crime to be made out, the guilty mind must accompany the guilty act. It would not be sufficient, for instance, to convict of murder a person who accidentally caused the death of another person but who had at some previous point in time desired their death.

There are, however, necessary relaxations of this principle from time to time. For instance, the principle can be satisfied if the required state of mind overlaps with the prohibited act *at some point in time*. The two need not co-exist for the entire duration of the transaction. In *R. v. Cooper*, the Supreme Court adopted just such a relaxed version of the principle in respect of murder and held that it was not necessary for the required intent to continue throughout the commission of the entire wrongful act. It is sufficient if the act and guilty state of mind coincide at some point.<sup>75</sup> The Court wrote:

The determination of whether the guilty mind or *mens rea* coincides with the wrongful act will depend to a large extent upon the nature of the act. For example, if the accused shot the victim in the head or stabbed the victim in the chest with death ensuing a few minutes after the shooting or stabbing, then it would be relatively easy to infer that the requisite intent or *mens rea* coincided with the wrongful act (*actus reus*) of shooting or stabbing. As well, a series of acts may form part of the same transaction. For example the repeated blows of the baseball bat continuing over several

---

<sup>72</sup> Perhaps ironically, as this kind of example suggests, an accused might claim "no intent" for murder under circumstances where there is evidence of planning and deliberation.

<sup>73</sup> Duff, *supra* note 64 at 160.

<sup>74</sup> Stuart, *supra* note 18 at 359ff; Roach, *supra* note 18 at 83; Mewett & Manning, *supra* note 18 at 157.

<sup>75</sup> *Cooper*, *supra* note 52.

minutes are all part of the same transaction. In those circumstances if the requisite intent coincides at any time with the sequence of blows then that could be sufficient to found a conviction.<sup>76</sup>

In *Cooper*, the Court goes some way toward clarifying the nature of intent for murder and the requirement of a temporal correspondence between intent and conduct. However, it can be argued that *Cooper*, like *Martineau*, fails to elucidate the *precise nature of knowledge* that must occur in the accused's mind at some point during the *actus reus*. In other words, *Cooper* does not necessarily rule out the possibility of latent or passive knowledge as I have suggested above. The Court is right to emphasize that knowledge will depend "to a large extent upon the nature of the act."<sup>77</sup> However, this is *not only* because we can infer knowledge of the consequences at the requisite time because of the nature of the act, but *also* because such consequences are "known" to the accused in a more general sense, although not necessarily at the forefront of his or her mind at the time.

I recognize that this approach does not assist in resolving the difficult question of intent in respect of conduct that *does not* necessarily entail a virtual certainty of causing death or causing grievous bodily harm likely to cause death, such as an extended fist fight. I am not troubled by this limitation. These are the sorts of cases in which the line between possibilities and probabilities of death, and consequently between murder and manslaughter, is difficult to draw under normal circumstances. In other words, intent and knowledge are difficult issues in such cases *regardless* of any claim of lack of knowledge or any claim of rage or impaired mental deliberation. The notion of latent knowledge, then, is meant to be a helpful tool for resolving claims of "no knowledge" where the consequences were virtually certain, such as in the *Parent* case.

I take encouragement for this approach from the law's development of the notion of wilful blindness, which permits a slight expansion of subjective knowledge. Wilful blindness arises where a person has a subjective suspicion about a particular state of affairs and deliberately refrains from inquiring further in order to be able to shield him or herself from the knowledge that they suspect.<sup>78</sup> The deliberate ignorance of the truth is equated with knowledge for

---

<sup>76</sup> *Ibid.* at 157-58.

<sup>77</sup> *Ibid.* at 157

<sup>78</sup> *R. v. Sansregret*, [1985] 1 S.C.R. 570 [*Sansregret*]; *R. v. Jorgensen*, [1995] 4 S.C.R. 55; *R. v. Hinchey*, [1996] 3 S.C.R. 1128. The Supreme Court's decision in *Sansregret* has been roundly criticized on the ground that the facts of the case could not support a finding of wilful blindness, because the trial judge found as a fact that the accused did not subjectively suspect that the complainant did not consent. Notwithstanding criticism surrounding the application of the principle of wilful blindness by the Supreme Court in *Sansregret*, the principle itself as enunciated by the Court in *Sansregret* has become a recognized aspect of Canadian criminal law. In subsequent cases, courts of appeal have been clear that wilful blindness requires subjective suspicion.

the purposes of determining guilt.

The principle of wilful blindness remedies one possible situation in which a strict knowledge requirement may fail to further the ends of justice. I suggest that the *Parent*-type situation may also require an interpretation of the knowledge requirement that permits latent or passive knowledge. Such an understanding of the notion of knowledge would better accord with our intuitive sense of what it means to foresee or comprehend the consequences of our actions. At a minimum, there should be a parallel expansion to account for those accused who, in order to be able to plead lack of knowledge at the relevant time, *deliberately* and *purposefully* empty their minds of all thoughts or else fill their minds with thoughts other than those relevant to the crime.

In *Parent*, it is certainly arguable that the Court should have embarked upon a discussion of intent for murder and what exactly is required. Had it done so, the Court might have found that the trial judge erred by instructing the jury that murder (second degree) requires proof of active contemplation of the consequences at the time the acts constituting the offence take place. Rather, the jury would have been entitled to convict if it found that the accused knew, in a general (latent) sense, that death (or grievous bodily harm likely to cause death) was virtually certain to occur from the chosen course of conduct, even if the accused was not actively thinking those very thoughts at the relevant time.

Alternatively, the Court might have addressed this issue in terms of the “air of reality” of a claim of no intent or in terms of reasonable doubt. There must be an “air of reality” before any defence, denial of intent, or included offence be left with the jury.<sup>79</sup> Thus “[s]peculative defences that are unfounded should not be presented to the jury. To do so would be confusing and wrong, and would unnecessarily lengthen jury trials.”<sup>80</sup> Similarly, it is well established that although the accused must receive the benefit of doubt, any doubt in favour of the accused must be a reasonable one. The jury should be instructed that “a reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence [... .] and that a reasonable doubt cannot be based on sympathy or prejudice. Further they should be told that a reasonable doubt must not be imaginary or frivolous.”<sup>81</sup>

In *R. v. Aalders*, for instance, the Supreme Court applied these principles and held that a verdict of manslaughter should not have been left with the jury in the case of an accused who shot someone eight times.<sup>82</sup> The accused testified that he did not mean to kill the victim, but that he only meant to shoot

---

<sup>79</sup> See e.g. *R. v. Pappajohn*, [1980] 2 S.C.R. 120.

<sup>80</sup> *R. v. Osolin*, [1993] 4 S.C.R. 595 at 683. See also *supra* note 30.

<sup>81</sup> *Lifchus*, *supra* note 30 at 333-34.

<sup>82</sup> *R. v. Aalders*, [1993] 2 S.C.R. 482 [*Aalders*].

him in the legs. In fact, only one of the eight shots hit the victim in the legs, the remainder struck the victim in the torso and neck. A majority of the Supreme Court held that there was no air of reality to the accused's claim that he did not intend to kill or cause bodily harm he knew was likely to cause death; there was no air of reality to a manslaughter verdict.<sup>83</sup>

In my view, the Court in *Parent* might have held, in accordance with these principles and previous authority such as *Aalders*, that there is no air of reality to a defence of "I wasn't thinking" where the accused kills in circumstances that give rise to certainty about the consequence of death or grievous bodily harm likely to cause death. Any such claim does not create a *reasonable* doubt, but rather an unreasonable, imaginary, and speculative one that the jury should not be permitted to consider.

### 3. A matter of social policy

Even if the Court had not been prepared to hold that the alleged state of mind is absurd or unfounded from a scientific perspective or that intent to kill does not require active and conscious contemplation of obvious consequences but rather can arise spontaneously, the Court might still have relied on larger social policy objectives to deny the use of evidence of provocation-induced rage to negate intent for murder.

Social policy considerations play an essential role in justifying violations of constitutionally protected rights and freedoms. Policy considerations have also been regularly invoked in shaping our substantive criminal law by Parliament, and also by the judiciary. For instance, in *R. v. Jobidon*,<sup>84</sup> the Supreme Court discussed the common law's "policy-based limitations" in respect of consent (in particular consent to assault). Notwithstanding that all criminal offences are now defined in the *Code*, the common law still "illuminates these definitions" and "gives content to the various principles of criminal responsibility those definitions draw from."<sup>85</sup> The Court clarifies that "[p]olicy-based limits are almost always the product of a balancing of individual autonomy (the freedom to choose to have force intentionally applied to oneself) and some larger societal interest."<sup>86</sup>

There are very strong arguments that policy considerations could be

---

<sup>83</sup> *Ibid* at 505-06.

<sup>84</sup> *R. v. Jobidon*, [1991] 2 S.C.R. 714 [*Jobidon*].

<sup>85</sup> *Ibid.* at 736.

<sup>86</sup> *Ibid.* at 744.

invoked to limit the use of evidence of rage on the issue of intent for murder.<sup>87</sup> In *Wade*, Justice Doherty states that the jury's task is to determine intent with due regard for the emotional state claimed by the accused, and that the *cause* of that emotional state is of evidentiary significance only. But it is not at all clear that the *significance* of the cause of such an emotional state should be limited to its evidentiary value. The nature of the cause of a murderous rampage may in fact matter a great deal on a number of levels.

The cause of an emotional state in rage cases is typically an act of provocation by the victim that only very rarely includes violence or threats of violence against the accused. Provocative acts relied upon for having caused a blind rage include termination of relationship, a non-violent homosexual sexual advance, insults about the accused's girlfriend, and a robbery victim's refusal to assist the robber in locating money.

The partial defence of provocation includes a number of components that seek to ensure, for policy reasons, that only certain kinds of provocation are permitted to mitigate responsibility. The reasonable person test, for instance, is designed to prevent those who are exceptionally excitable or pugnacious from relying on their minimal degree of self-control for exculpation. Why should a claim of lack of intent not have a similar qualification? In the absence of any policy-based considerations, the factors that can be relied upon by an accused are purely subjective; no matter how unreasonable an accused's emotional reaction and response, it might be the proper subject of a jury charge on manslaughter, since the credibility of the claim is a matter for the jury (subject to the judge's determination of an air of reality).

The gendered nature of homicide and violence leads to many policy concerns about a purely subjective approach to rage.<sup>88</sup> The partial defence of provocation has been criticized as an outdated defence that excuses male violence against women in situations where women are most in need of protection, such as at the termination of a relationship.<sup>89</sup> The defence is also invoked to excuse other forms of socially unacceptable violence such as homophobic and racist violence. The defence advantages men by favouring the notion (now thought by many commentators to be a myth) of the stereotypical

---

<sup>87</sup> Given the Supreme Court's decision in *Martineau*, *supra* note 63, a ruling that evidence related to intent should be excluded on public policy grounds would likely raise concerns about an infringement of sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. However, such a violation, like any other, is subject to being found a reasonable limit under s. 1 of the *Charter*.

<sup>88</sup> Grant, Chunn & Boyle, *supra* note 18 at 1-12ff.

<sup>89</sup> See e.g. Tim Quigley, "Battered Women and the Defence of Provocation" (1991) 55 Sask. L. Rev. 223; Wayne Gorman, "Provocation: The Jealous Husband Defence" (1999), 42 Crim. L.Q. 478; Edward M. Hyland, "*R. v. Thibert*: Are there any Ordinary People Left?" (1996-97) 28 Ottawa L. Rev. 145.

loss of self-control, while denying its availability for other kinds of violence in response to other types of situations, such as the battered woman who kills her abuser out of desperation. The defence also inappropriately lays part of the blame for the killing on the victim, who “caused” the accused to lose control.

It is certainly arguable that the same flaws that pervade the law of provocation are active in terms of the relationship between provocation and intent. It bears noting that about half of the cases in the *Campbell* line of authority involved domestic killings.<sup>90</sup> Two additional cases were cases of an unwanted homosexual advance, another type of case for which the partial defence of provocation is frequently criticized.<sup>91</sup>

Some equality advocates consider the proposition that an angry accused does not commit murder to be more dangerous than a partial excuse for an intentional killing.<sup>92</sup> Labeling an angry killing manslaughter trivializes femicide, reducing it to the same status as negligent homicide. There is also an argument to be made that the lack of intent claim is relied on by accuseds unable to satisfy the conditions of the defence of provocation. The lack of intent claim allows these accuseds to circumvent the very rules designed to properly evaluate their claims, factoring in larger policy objectives.

More generally, the public might well be incredulous that a criminal justice system could permit a person who became extremely angry to be relieved of responsibility for an intentional killing. In fact, the more angry a person gets, the more their chances increase of reaching a mental state of impaired deliberation about the consequences of their actions. Other policy considerations include the fact that such claims cannot easily be verified and are easily feigned.<sup>93</sup>

In my view, then, it would not have been unreasonable for the Court to assert, as a normative statement, that murder committed while in a state of rage should not be reduced to manslaughter. In other words, it is not socially acceptable to allow people to get away with murder simply because they were

---

<sup>90</sup> See *Muir, Wade, Listes, Klassen, and Moise, supra* note 16.

<sup>91</sup> *Tomlinson, supra* note 16, and *Stewart, supra* note 17. The defence of provocation is also criticized on the ground that it permits an excuse based on racially motivated anger. Although there does not appear to be any case involving a claimed of no intent on account of a racist response to provocation, it is not difficult to imagine such an occurrence.

<sup>92</sup> See *Côté, Majury & Sheehey, supra* note 10 at 4.1.3.

<sup>93</sup> In *Stone, supra* note 11 at 377-79 a majority of the Supreme Court expressly relied on policy considerations such as the difficulty of verification and the ease of feigning claims as reasons for elevating the burden of proof on an accused wishing to claim automatism to proof on a balance of probabilities. It is surprising that the Court did not refer to similar concerns in respect of a claim of “no intent” based on a state of rage.

very angry.<sup>94</sup> The Court was surely cognizant of many of these considerations. A clear statement of the social policy rationale for this ruling—for one is left with a vague impression that such considerations must have animated the decision on some level—would have been beneficial and elucidating.

#### IV. IMPLICATIONS OF *R. v. PARENT*

##### A. *The Rolled-Up Charge*

The lack of clear reasons for the decision has other potential ramifications. For example, it calls into question the continued existence of the so-called rolled-up charge. The necessity for this type of charge arises in cases where there is some evidence on multiple defences, typically self-defence, provocation, and intoxication. Although the evidence may not be sufficient for any of the particular defences to succeed, the evidence of all the relevant circumstances could *cumulatively* impact upon the accused's state of mind so as to raise a reasonable doubt about his or her actual intent.<sup>95</sup> In certain circumstances, it is an error to fail to instruct the jury to consider the cumulative effect of the circumstances on the accused's intent.<sup>96</sup>

The Supreme Court expressly endorsed jury instructions on the rolled-

---

<sup>94</sup> This normative position would of course be subject to the possibility of claiming anger-induced automatism, and also the partial defence of provocation. However, the partial defence contains a number of distinct elements, including an objective test that requires the provocation to be sufficient to cause an ordinary person to lose control. Automatism itself has been subject to a fairly stringent test since the judgment in *Stone*, *ibid.*

<sup>95</sup> Stuart, *supra* note 18 at 552, finds that the rolled up charge is akin to a "murder with extenuating circumstances category for manslaughter." Stuart recommends a legislative category to this effect and, in a telling passage, he writes that "[i]n the meantime courts will have to use this pragmatic device of no intent even when it was clear to all that intentional conduct was involved" [emphasis added].

<sup>96</sup> The genesis of the rolled-up charge appears to be the Ontario Court of Appeal case of *R. v. Clow* (1985), 44 C.R. (3d) 228 (Ont. C.A.), which turned at trial on the issue of whether the accused had the specific intent to kill. The jury was instructed on a number of possible defences (consumption of alcohol and drugs, provocation, and excessive force in self-defence), but returned a verdict of guilty of second degree murder. The Ontario Court of Appeal held that the trial judge had "compartmentalized" his instructions on the particular defences, and it constituted an error in law for a failure to instruct the jury as to the *cumulative effect* of the various defences on the accused's intent. Interestingly, the Court cited *Campbell* for the proposition that a state of anger could be relevant to the issue of intent. The rolled up charge has been endorsed in numerous cases: *R. v. Desveaux* (1986), 26 C.C.C. (3d) 88 (Ont. C.A.); *R. v. Nealy* (1986), 30 C.C.C. (3d) 460 (Ont. C.A.); *R. v. Settee* (1990), 83 Sask. R. 132 (C.A.), leave to appeal to S.C.C. refused, (1991), 93 Sask. R. 158n; *R. v. Freisen* (1995), 101 C.C.C. (3d) 167 (Alta C.A.); *R. v. Summerbell*, [1996] O.J. No. 795 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 214 [*Summerbell*]; *R. v. Rathwell* (1998), 130 C.C.C. (3d) 302 (Ont. C.A.), leave to appeal to S.C.C. refused, (1998), 240 N.R. 198n [*Rathwell*]; *R. v. Leming*, [2000] O.J. No. 3540 (C.A.) QL.

up charge in *R. v. Robinson*.<sup>97</sup> In *Robinson*, there was evidence of intoxication, and some evidence of provocation and self-defence. The Supreme Court said that “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 still consider the evidence of intoxication, provocation and self-defence cumulatively on that issue.”<sup>98</sup> The Supreme Court commented favourably on a rolled-up charge that included reference to evidence of provocation held not to be sufficient under section 232, and has twice since refused leave to appeal in cases that relied on the rolled-up charge.<sup>99</sup>

The Court held in *Parent* that evidence of anger and provocation does not negate the intent to kill. Anger falling short of provocation cannot reduce murder to manslaughter; anger must fit within the defence of provocation under section 232 in order to be considered by the jury. If anger *on its own* cannot reduce murder to manslaughter, it is difficult to see how anger, in combination with other factors, could have the same effect. Consequently, it is unclear if the rolled-up charge, at least to the extent that it includes reference to provocation, and anger, survives the decision in *Parent*. There is already some indication that lower courts are differing in their view as to appropriate application of *Parent* to jury instructions on intent.<sup>100</sup>

---

<sup>97</sup> *R. v. Robinson*, [1996] 1 S.C.R. 683 [*Robinson*].

<sup>98</sup> *Ibid.* at 716.

<sup>99</sup> *Summerbell and Rathwell*, *supra* note 96.

<sup>100</sup> In *R. v. Williams*, [2001] B.C.J. No. 2273 QL, the British Columbia Court of Appeal appears to have been the first to recognize this particular impact of *Parent*. The Court held at para. 33 that:

I do not need to deal with the argument of the Crown that the absence of a complete rolled-up plea was inconsequential here, because ... logically, provocation could not form part of the instruction because the defence only comes into play after the jury finds the intent to commit murder: see in regard to the latter submission *R. v. Parent*...

The Court appears to be taking provocation out of the rolled-up charge, but in the absence of a fuller explanation, it cannot be known with certainty. However, in the recent decision in *R. v. Balchand*, [2001] O.J. No. 4775 (C.A.) QL [*Balchand*], heard and decided after *Parent*, the Ontario Court of Appeal does not appear to be concerned about jury instructions that link anger to intent for murder. Balchand was convicted of second degree murder for killing the wife of her lover. She confronted the victim and a struggle ensued in which the victim was killed by strangulation. The accused claimed self-defence. The trial judge did not leave manslaughter with the jury. However, in instructing the jury on intent, the trial judge stated:

Looking at the issue of intent another way, you may find when considering the evidence as a whole that at the time of the choking the accused was filled with all sorts of emotions ranging from fear to anger to excitement and then as a result she may have acted instinctively without consideration of the consequences of her action.

The Court of Appeal held that the trial judge obviously considered intent a live issue and that consequently, it was an error to fail to instruct the jury on manslaughter as a possible verdict. The Court does

Chief Justice McLachlin does write in *Parent* that “[i]ntense anger alone is insufficient to reduce murder to manslaughter.”<sup>101</sup> Some might argue that this statement allows for the possibility that intense anger coupled with other circumstances might be capable of reducing murder to manslaughter on the basis of lack of intent. I do not consider this to be a persuasive interpretation. For one thing, the existence of such a state of mind is a matter of pure speculation. The Court seems in its decision to be rejecting the “common sense” assumption that anger can prevent people from knowing the consequences of their actions. It would be odd for the Court to reject this assumption, while permitting a similar and related assumption to persist. It is preferable to interpret Chief Justice McLachlin’s statement to mean that intense anger, when *coupled with the other requirements for the defence of provocation*, could reduce murder to manslaughter under section 232.

B. *Reconciling Parent with other Supreme Court Jurisprudence on Factors Relevant to Intent for Murder*

While certain factors may be relevant to intent in combination with others (as in the rolled-up charge), it is also clear that the same factors may be relevant *on their own* to the issue of intent. For instance, in *Robinson* the Supreme Court held that evidence of intoxication should be considered with all other relevant evidence on the question of whether the accused had the requisite mental state for murder.<sup>102</sup> The Court held that the common law rule that prevented the jury from considering evidence of intoxication unless the intoxication was sufficient to deprive the accused of the *capacity* to form intent violated the *Charter*, because the accused might be convicted despite a reasonable doubt about his or her actual intent. It was essential that the jury be able to consider all relevant evidence capable of raising a reasonable doubt about specific intent for murder.

In *R. v. Jacquard*, the Supreme Court held that evidence of insanity, short of that capable of sustaining a defence under section 16 of the *Code*, may still be taken into account by the trier of fact in determining whether the accused

---

not refer to *Parent*, and appears unconcerned with the portion of the trial judge’s ruling that links anger with intent for murder.

<sup>101</sup> *Parent*, *supra* note 3 at 767 [emphasis added].

<sup>102</sup> *Robinson*, *supra* note 97.

had the required intent for murder.<sup>103</sup> The same principle applies in respect of evidence of self-defence short of that required to establish a defence under sections 34, 35, or 37. In *R. v. Faid*, the Supreme Court of Canada conclusively rejected a partial defence of excessive force in self-defence, which would reduce murder to manslaughter.<sup>104</sup> However, the Court held that the same evidence might nonetheless be relevant to the question of whether or not the accused had the intent to kill or cause grievous bodily harm. Justice Dickson for the Court noted that:

there is no special rule to the effect that death caused by the use of excessive force in self-defence can only be manslaughter, though the facts on which the defence of self-defence was unsuccessfully sought to be based may in some cases go to show that the defendant acted under provocation or that, although acting unlawfully, *he lacked the intent to kill or cause grievous bodily harm*. In such cases a verdict of manslaughter would be proper.<sup>105</sup>

*Robinson, Faid, and Jacquard* establish that evidence of certain circumstances and mental states, though falling short of establishing some recognized legal defence, might nonetheless be relevant in determining the prior and central question of whether the accused had the required intent to commit the crime charged. The Court emphasizes the importance of separating the issue of wrongdoing (i.e. commission of the crime) from that of attributing responsibility (i.e. whether the crime is excused or justified), and the necessity of dealing with the elements of the crime first. Surely, if the accused did not have the mental state required for murder, she or he need not invoke defences that seek to excuse liability for murder. In addition, in considering this fundamental issue of intent, the trier of fact should make use of all relevant, admissible evidence bearing on that issue. This evidence, according to the Court, might include the very same circumstances that might independently afford an excuse or justification.

Yet the Supreme Court's decision in *Parent* runs counter to this approach, at least in respect of anger, by failing to place the same emphasis on the prior question of intent. At the same time, the Court fails to provide any indication of why it deviated from this seemingly well-established course. To be sure, anger might affect the human mind very differently than does fear, mental disorder, or intoxication. And surely the public policy considerations will vary depending on the factor being considered. Nonetheless, the previous

---

<sup>103</sup> *R. v. Jacquard*, [1997] 1 S.C.R. 314 [*Jacquard*]. However, the Court held that it may not be necessary for the trial judge to expressly link evidence of mental disorder to the issue of intent in instructing the jury.

<sup>104</sup> *R. v. Faid*, [1983] 1 S.C.R. 265 [*Faid*].

<sup>105</sup> *Ibid.* at 270 [emphasis added].

cases emphasize the importance of permitting any evidence relevant to the issue of intent, whereas *Parent* omits any discussion of the importance of the prior question of intent and of giving the jury access to any relevant evidence on that issue. Given the lack of such discussion, and the lack of other explanation for the Court's ruling in *Parent*, it is difficult to appreciate whether or not this ruling has an impact on the consideration of other factors on intent, and if so, what that impact is. At a minimum, it is unclear why anger is treated differently from other emotions.

C. *Implications for Reform of the Partial Defence of Provocation*

The Department of Justice has been reviewing the defence of provocation with a view to reform for several years.<sup>106</sup> The basis for the Department's consultation and review is, among other things, the sustained criticism that the defence condones sexist and homophobic violence.

To the extent that it is possible to discern a rationale for the Court's conclusion in *Parent*, it appears to be motivated by the existence and function of the partial defence of provocation. The Court's refusal to give importance to anger in respect of intent seems to be linked to the fact that anger has a distinct role to play in the partial defence of provocation. The partial defence is apparently used in this way as justification for the exclusion of evidence of anger to the issue of intent. According to the Court, then, the defence of provocation is the designated outlet for evidence of anger.

The Supreme Court's reasoning in *Parent* may have serious implications for reform of the partial defence of provocation. Should the common law with respect to anger and intent be dependent on the existence or contours of the defence of provocation? Any such linkage gives rise to the concern that if the defence of provocation were severely limited or abolished, the relationship between anger and intent might be subject to revision. The impact of *Parent* on the reform of the defence of provocation is uncertain.

D. *Relevance of Evidence of Rage for Offences other than Murder*

The issue in *Parent* was whether a state of anger could negate intent for murder. As mentioned above, the Court placed emphasis on the scope and function of the partial defence of provocation in answering that question in the negative. This suggestion, coupled with the lack of clear reasons, raises the question of whether evidence of rage can still be introduced in respect of intent

---

<sup>106</sup> Department of Justice, *Reforming Criminal Code Defences: Provocation, Self-defence and Defence of Property* (A Consultation Paper) (Ottawa: Department of Justice, 1998).

for offences other than murder.

Since the partial defence of provocation is applicable only on a charge of murder, this mechanism for introducing evidence of rage is not available where the charge is another offence. Thus, to the extent that the defence of provocation justifies the exclusion of rage on the issue of intent, it does so only with respect to murder. It is interesting to recall that in *Campbell*, the case that gave rise to the notion that anger could negate intent, the charge was not murder but attempted murder. As such, the partial defence of provocation was not available. The Ontario Court of Appeal was likely more inclined to consider rage on the issue of intent precisely because the partial defence of provocation was unavailable.

This distinction is important. To the extent that rage might be thought to be relevant to an accused's knowledge of a circumstance or foreseeability of a consequence, it may be relevant to such states of mind generally, and not exclusively with respect to the offence of murder. For example, could a state of rage render a person incapable of knowing that the person he or she was assaulting was a police officer?

The decision in *Parent* emphasizes the role of the partial excuse of provocation, which is applicable only on a murder charge. The Court simultaneously fails to articulate whether rage is relevant or not in respect of state of mind more generally and, if not, why not. It therefore remains an open question whether a so-called defence of anger is still available for offences other than murder.

## V. CONCLUSION

Depending on one's point of view, the Supreme Court's decision in *Parent* may have come to the right conclusion, but little else about the judgment is satisfactory. It ignores both the controversial nature of the issue and the existence of a significant body of contrary jurisprudence. Further, the Court sets down a rule without providing an explanation or justification for it. Is it a rule of evidence (e.g., evidence of anger is irrelevant and therefore inadmissible in respect of intent)? Is it a rule of substantive criminal law (e.g., the intent for murder can be satisfied by latent knowledge of consequences and does not require active contemplation of consequences)? Or is the Court espousing a normative position (e.g., short of automatism and the confines of the partial defence of provocation, it is socially unacceptable to permit anger to mitigate responsibility for murder)? The Court's failure to provide reasons is not justified; several avenues of analysis were open to the Court and could have been explored. This failure is also unfortunate; it creates a risk that the judgment's importance will be minimized, ignored, or limited in various ways.

There are also unknown implications in respect of the rolled-up charge, the relevance of other factors to intent, reform of the partial defence of provocation, and whether a common law rage defence continues to exist for offences other than murder. It is hoped that when the Supreme Court and other courts return to these questions, they will provide more satisfying and compelling answers.