

The following are suggested solutions to the problem questions on pages 317 and 318. They represent answers of an above average standard. The ILAC approach to problem-solving as set out in the 'How to Answer Questions' section of the preliminary pages of the *Criminal Law Guidebook Second Edition* has been used in devising these solutions.

### **SCENARIO 1**

The prosecution would argue that there is sufficient evidence to prove the elements of murder beyond reasonable doubt against Mahla. The actions of Mahla striking Rob repeatedly across the head with a solid wooden chair caused Rob's death from a brain haemorrhage and multiple head injuries. Further, it can clearly be inferred from the use of the particular object, the persistent nature of the blows and the blows being directed at Rob's head where a vital organ is located, that Mahla had either an intention to kill or to do grievous bodily harm<sup>1</sup>. Thus, from a defence viewpoint, extraneous defences must be considered to determine the availability of any lawful excuse<sup>2</sup>, or whether Mahla killed Rob in her own defence.

#### **Self defence**

Initially, it is prudent to consider the availability of self-defence, as it is a full defence and if the prosecution does not disprove the defence beyond reasonable doubt, then Mahla will be acquitted of murder<sup>3</sup>. The defence have an evidential burden to raise the possibility of self-defence. This evidence would come from Mahla that Rob, a very tall and solidly-built front-row forward in the school rugby team, verbally abused her, spat at her and then pushed his clenched fist firmly into her neck. There may be other students in the class who witnessed these aggressive acts by Rob and could testify to them.

Statutory tests for self-defence are applicable in all jurisdictions.<sup>4</sup> The prosecution must negative Mahla's belief that the conduct was necessary to defend herself in New South Wales and Victoria<sup>5</sup>, or that she genuinely believed the conduct was necessary and reasonable for a defensive purpose in South Australia<sup>6</sup>. In all situations this is a subjective test of Mahla's belief.<sup>7</sup> In analysing Mahla's belief as to the necessity for her to act in self-defence, it is apparent from the given facts that she heard Rob yelling out, 'Hey Miss – I need a piss!', and saw him mark on the classroom wall 'ENDERSON IS A FUCKIN' MAD BITCH'. This conduct does not raise any necessity for self-defence and Mahla seemed largely to ignore these actions, although she may have been insulted by the written comment, particularly considering her very

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<sup>1</sup> *Crimes Act 1900 (NSW)* s 18(1)(a); *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 661-662.

<sup>2</sup> *Crimes Act 1900 (NSW)* s 18(2)(a).

<sup>3</sup> *Crimes Act 1900 (NSW)* s 419; *Crimes Act 1958 (Vic)* s 322I(2); *Criminal Law Consolidation Act 1935 (SA)* s 15(5).

<sup>4</sup> *Crimes Act 1900 (NSW)* s 418; *Crimes Act 1958 (Vic)* s 322K; *Criminal Law Consolidation Act (SA)* s 15.

<sup>5</sup> *Crimes Act 1900 (NSW)* s 418(2)(a); *Crimes Act 1958 (Vic)* s 322K(2)(a).

<sup>6</sup> *Criminal Law Consolidation Act 1935 (SA)* s 15(1)(a).

<sup>7</sup> *R v Clothier* [2002] SASC 9.

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recent absence from work suffering from a mental illness. It was only when Rob physically approached Mahla, spat toward her and eventually clenched his fist and pushed it firmly into her neck after yelling at her, that Mahla reacted by pushing him away with the desk and hitting him with the chair. At this time, taking into account Rob's age, stature, physique, his repeated abuse and the final physical threat by use of a clenched fist, it is certainly arguable that Mahla believed that it was necessary for her to do what she did in self-defence.

In Victoria where self-defence is raised to a charge of murder there is a further requirement that Mahla must believe the conduct was necessary to defend herself 'from the infliction of death or really serious injury'.<sup>8</sup> In determining what her subjective belief was, this test takes into account all of Mahla's personal characteristics, including the fact that she was suffering from a mental illness, taking antidepressant medication and had only returned to work that day after an extended leave of absence. It is arguable Mahla at least believed from the physical aggression of Rob that it was necessary to defend herself from the infliction of really serious injury.

Overall, in each jurisdiction it will be difficult for the prosecution to disprove beyond reasonable doubt that Mahla genuinely believed in the necessity for defensive action in all the circumstances.

The second limb of the statutory tests<sup>9</sup> focus on the reasonableness or proportionality of Mahla's response, based on the threat that she perceived to exist in all the circumstances. The question is whether Mahla's response was objectively reasonable taking into account her subjective perception of the circumstances. The defence would argue that when account is taken of Mahla's subjective features, the reasonable person placed in the position of Mahla would have responded in the same way. With her prior knowledge of Rob from Australian history class the previous year, his imposing physique and intimidating behaviour, Mahla may well have perceived that Rob could physically overpower and seriously assault her. In accordance with Mahla's subjective perception of the circumstances, there is certainly an argument that her conduct was a reasonable response in those circumstances, and that the prosecution could not negative this second limb of the test beyond reasonable doubt.

However, given the specific violent and unrelenting conduct of Mahla in killing Rob when compared to the threat she objectively faced from a clenched fist pushed firmly into her neck, it may be considered a disproportionate response. The question of excessive use of force in self-defence arises and certain factors need to be carefully analysed. Although the threat faced by Mahla may be considered to have been real and substantial, it is strongly arguable that after pushing Rob away with the desk her repeated striking of his head when he was in a vulnerable position after falling heavily to the classroom floor, was a disproportionate response to the threat she faced.

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<sup>8</sup> *Crimes Act 1958* (Vic) s 322K(3).

<sup>9</sup> *Crimes Act 1900* (NSW) s 418(2); *Crimes Act 1958* (Vic) s 322K(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 15(1)(b)..

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Arguably there was an opportunity for Mahla to retreat from the situation after pushing Rob to the ground.<sup>10</sup> Having responded sufficiently to Rob's physical threat, Mahla could then have sought assistance from others, such as another teacher in a nearby classroom. In those circumstances, Mahla's conduct may not be a reasonable response to the circumstances she perceived to exist<sup>11</sup>, or be reasonably proportionate to the threat she genuinely believed to exist<sup>12</sup> so that she would be liable to conviction for manslaughter rather than murder in New South Wales and South Australia.<sup>13</sup>

There are alternative arguments open on known facts, and the strongest argument is that although Mahla believed it was necessary for her to act in self-defence, the prosecution could prove beyond reasonable doubt that her response was not reasonably proportionate to the threat that she faced from Rob. Accordingly, Mahla would still be criminally responsible for the killing of Rob as 'murder' in Victoria but for the lesser charge of 'manslaughter' in New South Wales and South Australia.

### **Provocation**

#### ***New South Wales and South Australia***

Another defence available to Mahla if this incident occurred in New South Wales or South Australia, is provocation<sup>14</sup>, which can be raised in addition to self-defence. Provocation is a partial defence to murder at common law in South Australia<sup>15</sup> and 'extreme provocation' is available under the *Crimes Act 1900* (NSW) s 23(1), such that if the prosecution cannot disprove the defence, Mahla would be found guilty of manslaughter.

At the outset there must be some form of provocative conduct recognised by the law. The defence has the burden to adduce evidence of acts and/or words that could amount to provocation, which can be cumulative and will usually be proximate in time to the act causing death<sup>16</sup>, although the statutory provision in New South Wales extends this to conduct that 'did not occur immediately before the act causing death'<sup>17</sup>. In New South Wales the conduct of the deceased said to provoke the accused must itself amount to a serious

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<sup>10</sup> *Police v Lloyd* (1998) 72 SASR 271; *R v Clothier* [2002] SASC 9, [68].

<sup>11</sup> *Crimes Act 1900* (NSW) s 421.

<sup>12</sup> *Criminal Law Consolidation Act 1935* (SA) s 15(2); *Morgan v Coleman* (1981) 27 SASR 334, 336; *Police v Tee* [2005] SASC 402, [11].

<sup>13</sup> There is no partial defence to murder of 'excessive use of force in self-defence' in Victoria. The defence can only be used if the accused was responding to what she believed was a threat of death or serious injury to themselves – *Crimes Act 1958* (Vic) s 322K(3). Accordingly, the proportionate nature of the force used is a consideration in determining whether the accused's actions are reasonable in all the circumstances given the belief that her conduct was necessary to defend herself from death or really serious injury. If her conduct is judged unreasonable in those circumstances then self-defence will be negated by the prosecution.

<sup>14</sup> This defence has been abolished in Victoria – *Crimes Act 1958* (Vic) s 3B.

<sup>15</sup> *The Queen v R* (1981) 28 SASR 321.

<sup>16</sup> *Parker v The Queen* (1963) 111 CLR 610.

<sup>17</sup> *Crimes Act 1900* (NSW) s 23(4); *Chhay v R* (1994) 72 A Crim R 1.

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indictable offence,<sup>18</sup> which is any offence punishable by imprisonment for a period of five years or more.<sup>19</sup> Accordingly, the seriously insulting words used by Rob toward Mahla would not be sufficient to constitute extreme provocation. There is no specific evidence of previous conduct, although there is an inference that Rob had been a troublesome student in Mahla's Australian history class the previous year. The focus is rather on the immediate conduct of, and words used by, Rob toward Mahla. It is apparent that Rob deliberately set out to make it a difficult period for Mahla, who was replacing another teacher in an unfamiliar discipline, and it was Mahla's first day back teaching secondary students following a year's leave of absence during which she had endured severe personal crises. It cannot be assumed that Rob knew all this about Mahla, and it does not have to be established that Rob intended to be provocative. Rather it is whether the words and conduct could be provocative in all the circumstances at common law and amount to a serious indictable offence in New South Wales. The initial comment of Rob, 'Hey Miss – I need a piss!' amounts to disrespectful behaviour in a classroom, which is then followed by a direct insult written in permanent marker on the classroom wall, targeting a particular vulnerability of Mahla in a derogatory way.<sup>20</sup> Arguably, the provocative acts escalate with Rob striding out to the desk, spitting and yelling at the teacher in an insolent and highly disrespectful manner directly challenging her authority, and then culminate in an assault by Rob firmly pushing his clenched fist into Mahla's neck, which finally caused her to react. Taken in combination, it is strongly arguable that there is evidence of provocative conduct at common law, as well as insults, on the part of the deceased. In New South Wales, the defence would have to establish that the conduct amounted to an assault on a member of staff of a school while attending a school.<sup>21</sup> This can clearly be established on known facts as the conduct of Rob occurred in a classroom at a large secondary school.

The defence having established conduct that could constitute provocation, the first limb of the common law and statutory test then involves the prosecution proving beyond reasonable doubt that the accused did not actually lose self-control at the time of the killing. There must be evidence that in response to the provocative conduct, Mahla had actually lost self-control<sup>22</sup>. This is a subjective test concerned with the effect of the provocative conduct upon the accused<sup>23</sup>. The totality of the acts behind the killing must be considered, and it is strongly arguable that Mahla actually lost self-control in these circumstances. Her violent acts of repeatedly striking Rob over the head with a solid wooden chair as he lay on the floor, and then having to be restrained rather than stopping herself, provides evidence of an actual loss of self-control

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<sup>18</sup> *Crimes Act 1900* (NSW) s 23(2)(b)

<sup>19</sup> *Crimes Act 1900* (NSW) s 4.

<sup>20</sup> *R v Lees* [1999] NSWCCA 301.

<sup>21</sup> *Crimes Act 1900* (NSW) s 60E(1) – this offence carries a maximum penalty of 5 years imprisonment and so is a serious indictable offence. Alternatively, it may be possible to establish the serious indictable offence of 'Intimidation' under ss 7 and 13 *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

<sup>22</sup> *Crimes Act 1900* (NSW) s 23(2)(c); *The Queen v R* (1981) 28 SASR 321; *Green v The Queen* (1997) 191 CLR 334.

<sup>23</sup> *Stingel v The Queen* (1990) 171 CLR 312; *Masciantonio v The Queen* (1995) 183 CLR 58.

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from a seemingly otherwise non-violent person.<sup>24</sup> On the other hand, the prosecution could argue that Mahla was merely angry and frustrated by Rob's insults and conduct, such that her actions did not evidence a loss of self-control. Overall, the change in Mahla to exhibiting superhuman strength, her unrelenting use of the chair as a weapon, and having to be restrained by students to stop the attack on Rob, lead to the conclusion that she did lose self-control and it would be difficult for the prosecution to negative this aspect of the provocation test.

Next, the gravity of the provocation suffered by Mahla must be assessed for use in the second limb of the test. In South Australia, applying the common law, the ordinary person's perception of the nature of the deceased's conduct must be contextualised by reference to the personal characteristics, attributes or history of the accused, which serve to identify the implications in that conduct or affect the gravity of that conduct<sup>25</sup>. The ordinary person shares for that purpose the accused's age, sex, race, physical features, personal attributes, personal relationships and past history, so far as those characteristics relate to an objective assessment of the gravity of the particular conduct.<sup>26</sup>

On known facts, it is arguable that the provocation by Rob towards Mahla was of a high level of gravity. The relevant characteristics of Mahla for this assessment of the gravity of the provocation offered by Rob, are that she is a sober female secondary school teacher with a recent history of mental illness which necessitated her taking antidepressant medication. Also, Mahla had a past association with Rob, a physically strong and imposing person, as a 'troublesome' student in her class the previous year. Rob writing on the wall that Mahla is a 'FUCKIN' MAD BITCH' and following this up with loud verbal abuse that she is 'mad', before becoming physically aggressive toward her, are factors that heighten the degree of provocation given Mahla's history of mental illness and vulnerable personal circumstances.<sup>27</sup> The prosecution are likely to dispute an assessment of the provocation as being of a high degree of gravity, on the basis that the words and conduct of Rob were ordinary challenges that a teacher such as Mahla would have to develop strategies to cope with in teaching troublesome students in a secondary school.

Finally, if the deceased's provocative words and conduct have been assessed as being of a high degree of gravity, then at common law it must be tested against the ordinary person's powers of self-control. For this purpose, the ordinary person is unaffected by the personal characteristics of the particular accused, except his or her age if the accused is of immature age.<sup>28</sup> In this case, Mahla's precise age is unknown. From the length of her marriage and recent pregnancy it may be inferred that she is a mature adult, aged somewhere in her late twenties to mid thirties. This characteristic will then be

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<sup>24</sup> *Chaay v R* (1994) 72 A Crim R 1, 14.

<sup>25</sup> *Masciantonio v The Queen* (1995) 183 CLR 58; *Green v The Queen* (1997) 191 CLR 334.

<sup>26</sup> *R v Starr* (unreported, SC (NSW), 12 October 1994, Hunt CJ at CL).

<sup>27</sup> *Stingel v The Queen* (1990) 171 CLR 312, 326 and 332; *Green v The Queen* (1997) 191 CLR 334, 356 and 368.

<sup>28</sup> *Stingel v The Queen* (1990) 171 CLR 312.

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legally irrelevant to her powers of self-control when measured against the ordinary person.

The overarching question is whether provocation of that high degree of gravity, could cause an ordinary person with ordinary powers of self-control to lose self-control and act in a manner which would encompass the accused's actions. The proportionality of the response may be a matter properly taken into account by the fact finder, in making their factual assessment of the ordinary person's reaction to the provocation in a particular case<sup>29</sup>. Applying this test to Mahla's reaction to Rob's highly provocative conduct, it is certainly arguable that an ordinary person could act in such a way in all the circumstances, and it may be difficult, but not impossible, for the prosecution to negative a defence of provocation in this case at common law. A 'manslaughter' verdict would be the likely outcome.

The prosecution may argue that it was an extreme reaction by Mahla in circumstances that were provocative, but not to an equally extreme degree<sup>30</sup>, so that an ordinary person could not have acted in this way, despite the high degree of provocation from Rob. This argument may be determinative in New South Wales where there is a purely objective inquiry that asks whether the 'conduct of the deceased could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased'.<sup>31</sup> This means that, apart from the age of the accused, their personal characteristics are not relevant to this limb of the provocation defence and arguably it would be easier for the prosecution to negative this limb of the statutory defence of extreme provocation in all the circumstances so that a conviction for 'murder' would be more likely in New South Wales.

### **Mental illness or mental impairment**

The third defence to be considered is mental illness or mental impairment, which is a full defence, but if successful, does not entitle Mahla to an acquittal. Depending on the jurisdiction, if Mahla is found 'not guilty on the grounds of mental illness' she may be released conditionally or detained in a mental health or correctional facility for treatment.<sup>32</sup> The defence would have to consider the strategic implications of raising this defence but it is clearly available on the given facts and it would be prudent to have Mahla psychiatrically examined for this defence. It would be essential to have expert psychiatric evidence at trial in relation to the availability of this defence.

To establish the defence of mental illness at common law applicable in New South Wales<sup>33</sup>, the legal burden of proof is on the accused to prove on the

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<sup>29</sup> *R v Quartly* (1986) 11 NSWLR 332.

<sup>30</sup> *R v Leonboyer* (1999) 109 A Crim R 168.

<sup>31</sup> *Crimes Act 1900* (NSW) s 23(2)(d).

<sup>32</sup> *Criminal Law Consolidation Act 1935* (SA) ss 269O-269ZB; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 23 and Part 5; *Mental Health (Forensic Provisions) Act 1990* (NSW) Part 5.

<sup>33</sup> *M'Naghten's Case* (1843) 8 ER 718; *Porter v The Queen* (1933) 55 CLR 182.

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balance of probabilities, that at the time of the offence she was (1) suffering from a disease of the mind; (2) that this disease gave rise to a defect of reason; and (3) that as a result, either (a) the accused did not know the nature and quality of her act, or (b) if the accused did know this, she did not know that the act was wrong.

There is evidence that Mahla suffered severe bouts of depression after her child's sudden death and the breakdown of her marriage. This culminated in her admission to a psychiatric hospital and a diagnosis of bipolar disorder. She was then prescribed certain antidepressant medication and had been taking it as prescribed. Bipolar disorder is a mental illness and amounts to a disease of the mind at common law.<sup>34</sup> This must cause a 'defect of reason', namely that the powers of reasoning of the accused at the relevant time must have been impaired, and she was without capacity to appreciate what she was doing or whether it was wrong. At the time of the acts causing death, Mahla suddenly sprang out of her chair and then with 'superhuman strength' pushed the desk against Rob, causing him to fall to the ground, before repeatedly, and apparently forcefully, striking him over the head with a chair as he lay on the floor. This may be evidence of a defect of reason without Mahla knowing the acts were wrong, as she had to be restrained by other students in the class to stop the assault. On the other hand, it may be evidence of a loss of self-control as there is evidence that Mahla ignored the initial actions of Rob until they escalated to such a point that she could no longer take it. It is a reasonable inference from this initial restraint that Mahla was aware of what was happening and that she knew what she was doing was wrong, but she simply could not control herself in the end. The defence is difficult to establish and although available it is not strongly arguable on the given facts.

Similar reasoning applies in relation to the statutory defence of mental impairment in Victoria<sup>35</sup>, which is essentially the same as the common law test for mental illness. In South Australia, the defence of mental incompetence<sup>36</sup> has some similar elements to the common law defence, but also extends to a mental impairment that results in the accused being unable to control their conduct. The case law in South Australia demonstrates that this element is more likely to be found when an accused is suffering from a serious impairment that damages their cognitive function<sup>37</sup>, which may be arguable in Mahla's case. Again, however, the objective facts of her return to work and her prior restraint in dealing with Rob's insolence, demonstrate that her cognitive awareness was not seriously impaired, but she was reacting to specific provocative conduct when she lost self-control.

### **Substantial impairment by abnormality of mind**

#### ***New South Wales***

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<sup>34</sup> *R v Weeks* (1993) 66 A Crim R 466.

<sup>35</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.

<sup>36</sup> *Criminal Law Consolidation Act 1935* (SA) s 269C.

<sup>37</sup> *R v Berlingo* [2003] SASC 109.

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Finally, the defence of ‘substantial impairment by abnormality of mind’, which is a partial defence to murder only available in New South Wales<sup>38</sup>, must be considered. If a mental illness defence is raised and ‘substantial impairment’ is also reasonably open on the evidence, a trial judge is obliged to give directions on this defence.<sup>39</sup> It is certainly open to Mahla to raise this defence, and the onus is upon her to prove that at the time of the act causing death her capacity to understand events, or to judge whether her actions were right or wrong, or to control herself, was ‘substantially impaired by an abnormality of mind arising from an underlying condition’<sup>40</sup> and ‘the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.’<sup>41</sup> An underlying condition means a pre-existing mental or physiological condition, other than a condition of a transitory kind.<sup>42</sup> Evidence of severe depression, resulting in a diagnosis of bipolar disorder, would amount to an ‘underlying condition’.

Abnormality of mind<sup>43</sup> encompasses a broader range of mental conditions than a disease of the mind under the *M’Naghten* rules. The severe personal traumas suffered by Mahla in the preceding twelve months, including the death of her only child and her marriage breakdown, combined with returning to work in a ‘troublesome’ teaching environment after a lengthy leave of absence, may provide evidence that Mahla’s capacity to control herself was impaired by an abnormality of mind arising from an underlying condition.<sup>44</sup> Beyond this there is clearly an argument that on the balance of probabilities<sup>45</sup>, this abnormality substantially impaired Mahla’s mental responsibility for the conduct resulting in Rob’s death. Her sudden springing up from her chair with what appeared to be ‘superhuman strength’, her repeated striking of the deceased, and then having to be restrained by other students, adds weight to an argument of a substantial impairment of capacity to control herself.

Finally, the emphasis is on the role of the jury in forming an opinion that the impairment was so substantial as to warrant liability being reduced from murder to manslaughter. To be substantial, the impairment may be less than total but must be more than trivial or minimal.<sup>46</sup> Overall, it is a value judgment on moral culpability. The cumulative effect of all the circumstances is such that the defence counsel for Mahla may well be successful in persuading the jury that her impairment was substantial, thus resulting in a verdict of ‘manslaughter’.

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<sup>38</sup> *Crimes Act 1900* (NSW) s 23A.

<sup>39</sup> *R v Cheatham* [2000] NSWCCA 282.

<sup>40</sup> *Crimes Act 1900* (NSW) s 23A(1)(a).

<sup>41</sup> *Crimes Act 1900* (NSW) s 23A(1)(b).

<sup>42</sup> *Crimes Act 1900* (NSW) s 23A(8).

<sup>43</sup> *R v Byrne* [1960] 2 QB 396; *R v Dawes* [2004] NSWCCA 363.

<sup>44</sup> There will be some reliance on expert psychiatric evidence in this regard but it will not extend to an opinion as to whether the impairment was substantial – *Crimes Act 1900* (NSW) s 23A(2).

<sup>45</sup> *Crimes Act 1900* (NSW) s 23A(4).

<sup>46</sup> *R v Trotter* (1993) 35 NSWLR 428.

## **SCENARIO 2**

If these events occurred in New South Wales then the partial defence of extreme provocation<sup>47</sup> may be available to Roxanne in relation to the charge of murder. The defence has three elements and when there is any evidence that the act causing death was in response to extreme provocation then the prosecution has the onus to prove beyond reasonable doubt that it was not the case.<sup>48</sup> If the prosecution cannot negative the defence then Roxanne will be acquitted of murder and found guilty of manslaughter.<sup>49</sup>

The first issue is whether there is any provocative conduct from the deceased, Ivan towards or affecting Roxanne that amounts to a serious indictable offence,<sup>50</sup> which is any offence punishable by imprisonment for a period of five years or more.<sup>51</sup> There are a number of potentially relevant serious indictable offences committed by Ivan upon or affecting Roxanne. One is intimidation with intent to cause fear of physical or mental harm.<sup>52</sup> The threat by Ivan to Roxanne, 'When I find her I'm going to teach both of you a lesson' on 11 May 2015 is conduct falling within the definition of 'intimidation'<sup>53</sup> as it would cause a reasonable apprehension of injury to a person with whom Ivan has a domestic relationship, namely Roxanne. Further, there is evidence of two aggravated assaults involving broken bones to Roxanne in 2001 and 2009, which both would amount to assaults occasioning actual bodily harm<sup>54</sup> as they are injuries 'calculated to interfere with the health or comfort of the victim ... (and) are more than merely transient or trifling'.<sup>55</sup> Also, there are the sexual assaults reported to Roxanne by Jemima.<sup>56</sup> The defence would focus on the intimidation and aggravated assaults as evidence of provoking conduct by Ivan; they directly involve Ivan's conduct towards Roxanne. The phrase 'towards or affecting' has been interpreted as excluding 'hearsay provocation' or provocation on the basis of events recounted to the accused by another person,<sup>57</sup> so that the sexual assaults reported by Jemima to Roxanne are not likely to be regarded as relevant provoking conduct. It is not clear whether these assaults continued after 21 September 2014 although Ivan's insistence that Jemima not leave the house and that they would 'all live together as one happy family'<sup>58</sup> allows for the inference that they did continue until Jemima

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<sup>47</sup> *Crimes Act 1900* (NSW) s 23. The partial defence of 'extreme provocation' applies on these facts as the relevant killing occurred after 13 June 2014. The defence of 'provocation' has been abolished in Victoria – see *Crimes Act 1958* (Vic) s 3B.

<sup>48</sup> *Crimes Act 1900* (NSW) s 23(7).

<sup>49</sup> *Crimes Act 1900* (NSW) s 23(1).

<sup>50</sup> *Crimes Act 1900* (NSW) s 23(2)(a) and (b). Conduct under s 23(3)(a) or (b) is excluded from 'extreme provocation' but does not apply to the given facts.

<sup>51</sup> *Crimes Act 1900* (NSW) s 4.

<sup>52</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.

<sup>53</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.

<sup>54</sup> *Crimes Act 1900* (NSW) s 59.

<sup>55</sup> *R v Donovan* [1934] 2 KB 498, 509.

<sup>56</sup> On the basis of the limited information available, these would likely amount to offences of 'sexual intercourse without consent' under *Crimes Act 1900* (NSW) s 611 or other aggravated sexual or indecent assault offences, all of which would fall within the definition of 'serious indictable offence'.

<sup>57</sup> *Davis* (1998) 100 A Crim R 573.

<sup>58</sup> See *The Queen v R* (1981) 28 SASR 321.

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escaped the house on 11 May 2015. Roxanne may have become more directly affected by the assaults on Jemima if they continued with her knowledge over that eight-month period. Overall, it is strongly arguable that there is sufficient evidence of provoking conduct by Ivan and as it does not have to occur immediately before the act causing death<sup>59</sup> the historical assaults on Roxanne in 2001 and 2009 are included, which would make it difficult for the prosecution to negative this element of the defence beyond reasonable doubt.

The second element requires the prosecution to disprove that Roxanne killed Ivan during a period where she was experiencing a loss of self-control caused by his provoking conduct.<sup>60</sup> A loss of self-control is assessed subjectively and involves 'more ... than anger, or loss of temper, or building resentment. There must be a loss of self-control which includes a state in which the blood is boiling or a state of fear or terror, in either case, to the point where reason has been temporarily suspended.'<sup>61</sup> All of Roxanne's subjective characteristics, including her age, gender, temperament, state of health and physical and mental characteristics are potentially relevant to this enquiry<sup>62</sup> and a contextual approach is taken in assessing whether the conduct of the deceased caused the accused to lose self-control.<sup>63</sup> The prosecution would argue that Roxanne's action in waiting for Ivan to come home and then producing a semi-automatic weapon with which she repeatedly shot him is inconsistent with a loss of self-control. On the other hand, Roxanne's defence counsel could point to a range of factors in attempting to show that there was a reasonable possibility that the killing occurred while she had lost self-control. The apparent indiscriminate nature of the shooting with the firing of more than 40 shots in the lounge room, 11 of which hit Ivan, together with Roxanne's account that she 'couldn't stop shooting 'cos she had to make sure that he was dead', are evidence suggesting that Roxanne lost self-control and committed the killing during that period of loss of self control. The defence would argue that these features of the killing reveal a state of fear or terror where her capacity to reason had been interrupted. Further, the defence may seek to use evidence of 'battered woman syndrome' to support an argument that in the context of Ivan's threat a day earlier to cause harm to both Roxanne and Jemima this caused Roxanne to lose self-control. This evidence is relevant to Roxanne's personal characteristics given the context of domestic disputes between Roxanne and Ivan over a period of approximately 15 years and may help to explain her waiting for him and accessing a semi-automatic weapon as a response to ongoing provoking conduct. Overall, although the aggravated assaults are historical there seems to be an enduring environment of domestic violence well known to local police, which culminated in Roxanne's well-grounded fear of another attack following the serious threat by Ivan on 11 May 2015. In all the circumstances, it would be unlikely for the prosecution to negative this element of the defence beyond reasonable doubt.

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<sup>59</sup> *Crimes Act 1900* (NSW) s 23(4).

<sup>60</sup> *Crimes Act 1900* (NSW) s 23(2)(c).

<sup>61</sup> *Peisley* (1990) 54 A Crim R 42.

<sup>62</sup> *Parker v The Queen* (1963) 111 CLR 610; *Chhay v R* (1994) 72 A Crim R 1.

<sup>63</sup> *The Queen v R* (1981) 28 SASR 321; *R v Hill* (1981) 3 A Crim R 397; *Masciantonio v The Queen* (1985) 183 CLR 58; *Pollock v The Queen* (2010) 242 CLR 233.

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The third element requires the prosecution to disprove that the conduct of Ivan could have provoked an ordinary person to lose self-control to the extent of intending to kill Ivan.<sup>64</sup> The ordinary person is a person of the age and maturity of the accused<sup>65</sup> and it only has to be possible that Ivan's conduct could have provoked such a person to lose self-control and form the relevant intention.<sup>66</sup> Perhaps the sex of the accused is also attributed to the ordinary person, although there is no direct Australian authority in this regard.<sup>67</sup> The prosecution would argue that Ivan's conduct could not have provoked an ordinary person in this way as his threats of harm to Roxanne and her daughter were not of a kind that could possibly have caused an ordinary person to react by losing self-control to the extent of forming the intent to kill. A counter argument by the defence would be that a threat to seriously harm a person or their child by teaching them 'a lesson', which in the known domestic context may involve a sexual assault on the child, might realistically cause an ordinary person to lose self-control and form the intent to kill Ivan. The defence may pursue an argument that the ordinary person should be attributed with the sex of the accused and this would certainly make it more difficult for the prosecution to disprove this element.

Overall, it is certainly arguable that the prosecution could not disprove any of the elements of the extreme provocation defence beyond reasonable doubt in all the circumstances of this case. There is a strong chance that Roxanne would be acquitted of the murder of Ivan and convicted of the lesser alternative offence of manslaughter.

If these events occurred in South Australia, Roxanne could raise the common law defence of provocation, which has similar elements to the legislative defence of extreme provocation analysed above.<sup>68</sup> A wide range of conduct from the victim can, in certain circumstances, amount to provocation at common law and careful consideration is given to the relationship and context in which the conduct takes place. The context of sustained domestic violence over many years and numerous sexual assaults upon Jemima by Ivan culminating in the final provocative incident of the threat to 'teach both of you a lesson' on 11 May 2015 is strong evidence of provoking conduct by Ivan.<sup>69</sup> Then as a result of this conduct there must be evidence of an actual loss of self-control by the accused and the killing must take place while the accused was not in control. At common law this is a purely subjective test so that all of Roxanne's personal characteristics and relevant circumstances, including her domestic history with Ivan where she has been brought to breaking point<sup>70</sup> are part of the assessment. Roxanne's indiscriminate and repeated shooting of Ivan arguably amounts to evidence of actual loss of self-control even though it

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<sup>64</sup> *Crimes Act 1900* (NSW) s 23(2)(d).

<sup>65</sup> *Stingel v The Queen* (1990) 171 CLR 312.

<sup>66</sup> *Heron v The Queen* (2003) 197 ALR 81; *Filippou v The Queen* (2015) 256 CLR 47.

<sup>67</sup> *DPP v Camplin* [1978] AC 705; *Attorney-General for Jersey v Holley* [2005] 2 AC 580.

<sup>68</sup> *The Queen v R* (1981) 28 SASR 321.

<sup>69</sup> *The Queen v R* (1981) 28 SASR 321; *Chhay v R* (1994) 72 A Crim R 1; *Osland v The Queen* (1998) 197 CLR 316.

<sup>70</sup> *Parker v The Queen* (1963) 111 CLR 610, 663.

was preceded by approximately one day where she was under threat of harm from Ivan and had time to plan his killing. The context of enduring domestic violence and sexual assaults on her young daughter significantly bear on the determination of whether Roxanne had lost self-control and killed Ivan during that time, rather than through executing a motive of revenge.<sup>71</sup>

Finally, at common law the prosecution is required to disprove that the conduct of the victim could have provoked an ordinary person in the position of the accused to form an intention to kill or act as the accused did. This is an objective test involving two steps; the first being an assessment of the gravity of the provocation that the accused faced in the circumstances. This assessment is not purely objective and attributes the hypothetical ordinary person with the characteristics of the accused that are relevant to the seriousness of the provocative conduct in order to properly contextualise that conduct.<sup>72</sup> In relation to Roxanne, she was in a submissive domestic relationship with Ivan in which he had a history of violent behaviour particularly when intoxicated, including breaking her arm and hand at different times and continually sexually assaulting her young daughter who had lived with them for seven years. In such circumstances, the gravity of the provoking conduct would be assessed as very high to extreme. The second step of the test is purely objective in assessing whether an ordinary person facing that degree of provocation could have lost self-control and killed the victim. The personal characteristics of the accused are not considered in this part of the test,<sup>73</sup> however it is strongly arguable that the extremely grave nature of the provocation faced by Roxanne could have caused the ordinary person to act as she did and kill Ivan. Overall, the prosecution is unlikely to be able to negative the provocation defence at common law so Roxanne would be convicted of manslaughter rather than murder.

The other defence that is potentially relevant in these circumstances is self-defence.<sup>74</sup> The history of the relationship between Roxanne and Ivan is very relevant to Roxanne's belief as to the necessity to act to defend herself or another, her daughter Jemima, and to Roxanne's perception of the relevant circumstances.<sup>75</sup> An important consideration in relation to this defence will be the use of 'battered woman syndrome' and expert evidence in this regard, particularly in relation to the reasonableness or proportionality of the response by Roxanne to the circumstances as she perceived them or genuinely believed to exist.<sup>76</sup> It may be that the repeated firing of a semi-automatic weapon to make sure that Ivan was dead is not a reasonable response or

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<sup>71</sup> *Pollock v The Queen* (2010) 242 CLR 233, 250.

<sup>72</sup> *Stingel v The Queen* (1990) 171 CLR 312, 324-326; *Masciantonio v The Queen* (1995) 183 CLR 58, 67; *Green v The Queen* (1997) 191 CLR 334.

<sup>73</sup> *Masciantonio v The Queen* (1995) 183 CLR 58, 72-74; *R v Machin (No 2)* (1997) 69 SASR 403, 406.

<sup>74</sup> See above notes 3 to 13 in relation to the legal tests and primary features of the full defence of self-defence and the partial defence of excessive use of force in self-defence in all common law jurisdictions.

<sup>75</sup> *Crimes Act 1900* (NSW) s 418(2)(a); *Crimes Act 1958* (Vic) ss 322K(2)(a), 322M; *Criminal Law Consolidation Act 1935* (SA) s 15(1) & (3)(a).

<sup>76</sup> *Crimes Act 1900* (NSW) s 418(2); *Crimes Act 1958* (Vic) ss 322K(2)(b), 322M; *Criminal Law Consolidation Act 1935* (SA) s 15(1)(b).

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proportionate to the threat believed to exist so that it involves an excessive use of force in self-defence and Roxanne will instead be convicted of manslaughter in New South Wales and South Australia.<sup>77</sup> In Victoria, as the killing of Ivan occurred in a context of family violence<sup>78</sup> then if Roxanne believes that her conduct is necessary to defend herself or Jemima from the infliction of death or really serious injury the shooting may still be a reasonable response even if the force used is in excess of the force involved in the harm or the threatened harm<sup>79</sup> thus still entitling Roxanne to an acquittal. This defence is strongly arguable in all the circumstances of the case.

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<sup>77</sup> *Crimes Act 1900* (NSW) s 421; *Crimes Act 1958* (Vic); *Criminal Law Consolidation Act 1935* (SA) s 15(2).

<sup>78</sup> *Crimes Act 1958* (Vic) s 322J.

<sup>79</sup> *Crimes Act 1958* (Vic) ss 322K(3), 322M(1)(b).