The Law Commission

Partial Defences to Murder

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 15 October 2003, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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THE LAW COMMISSION

PARTIAL DEFENCES TO MURDER

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INTRODUCTION

Background and Terms of Reference

1.1 The Law Commission has long considered that the law of murder is overdue for review. In this consultation paper, however, we are not attempting a wholesale review of the law of murder. Our remit, in accordance with our terms of reference, is more limited.

1.2 In June 2003 the Home Secretary requested the Law Commission to consider and report on the following matters:

(1) the law and practice of the partial defences to murder provided for by sections 2 (diminished responsibility) and 3 (provocation) of the Homicide Act 1957.[1] In considering this, we are asked to have particular regard to the impact of the partial defences in the context of domestic violence.

(2) In the event that either or both of them are in need of reform:

(a) whether there should continue to be partial defences to murder in the circumstances provided for by them;

(b) if so, whether they should remain separate partial defences or should be subsumed within a single partial defence;

(c) if the former, how they may each be reformed;

(d) if the latter, how such a single defence may be formulated.

(3) Whether there should be a partial defence to murder in circumstances in which the defendant, though entitled to use force in self-defence, killed in circumstances in which the defence of self-defence is not available because the force used was excessive.

(4) If so, whether such a partial defence should be separately provided for and in what terms, or should be subsumed within a single partial defence such as is referred to in (2)(b) and (d) above.

1.3 We have not been requested to consider and report on section 4 of the 1957 Act (killing by survivor of a suicide pact), section 1 of the Infanticide Act 1938 or assisted suicide save as to the extent necessary to consider the law and practice of the defence of diminished responsibility. Such cases are rarely encountered.

1.4 Although this project is considerably narrower than a review of the whole law of murder, which would logically begin with consideration of the elements of murder before considering defences to murder, it is nevertheless an important project. It

[1] In this Part referred to as "the 1957 Act".

raises issues which have proved to be of great difficulty not only in this country but also in many others which have similar legal systems.

1.5 In our consultation papers we usually set out provisional proposals and invite comments on them. In this consultation paper we are taking a different approach. The Government has made known its intention to introduce legislation to address the issue of domestic violence possibly as early as Parliamentary session 2003-4. The purpose of this project is both to assist the Government in considering its proposals and to inform public debate. In the circumstances, we are keen to begin our public consultation process as soon as we can. The publication of this consultation paper marks an important step in that process.

1.6 We are pursuing other avenues of consultation and research in parallel with the publication of this consultation paper. We have invited the Forensic Faculty of the Royal College of Psychiatrists to submit a paper reflecting its views on: the merits of the current test of diminished responsibility; the inter-relationship between insanity, diminished responsibility and fitness to plead; whether there are particular problems in relation to defendants who have been or are the victims of abuse and whether there are perceived problems regarding the inter-relationship between diminished responsibility and provocation. We are also holding meetings with a range of psychiatrists with particular expertise in this area.

1.7 We have commissioned a public opinion research survey which is being carried out by Professor Barry Mitchell of Coventry University.[2] We hope to have the results in early 2004. In addition, Professor Ronald Mackay of De Montfort Law School, De Montfort University, Leicester is currently undertaking a research project on behalf of the Nuffield Foundation in relation to the defences of diminished responsibility and provocation.[3] It involves extracting data from a sample of cases over a five year period. The Nuffield Foundation and Professor Mackay have very generously agreed to make the results available to us.

1.8 We are conducting some research by way of a survey of the judges' reports which are prepared in all cases (duly anonymised) where there has been a conviction for murder.[4] This is being complemented by a survey which, at our request, is being undertaken by the Crown Prosecution Service. The survey comprises approximately 300 cases where provocation and/or diminished responsibility was raised.[5] We are grateful to the Home Office for making this material available and to the Crown Prosecution Service for undertaking the survey on our behalf.

1.9 After publication of this consultation paper, we are planning to participate in a number of meetings arranged under the auspices of professional, academic and other interested bodies. We are keen that such meetings should not be confined to London. We envisage that such meetings will be of particular benefit if they are held once there has been an opportunity to digest the content of this consultation paper.

[2] See Part II, paras 2.25 – 2.27. For details of previous research conducted by Professor Mitchell see Part II, paras 2.17 – 2.24.

[3] See Part II, paras 2.10.

[4] See Part II, paras 2.11 – 2.13.

[5] See Part II, paras 2.14 – 2.15.

1.10 The findings from the research projects and the contributions made at the meetings we plan to attend will be taken fully into account in the development of our final recommendations. They will supplement the responses we receive to this consultation paper.

1.11 The emphasis in this consultation paper is on tracing the history and background of the two existing partial defences, stating the current law with an analysis of its problems, and identifying possible options for reform together with their principal strengths and weaknesses.

The structure of this paper

1.12 In this Part we explain the background and nature of the project and we identify the main problem areas. In Part II we set out certain facts and figures about killings in England and Wales and describe the research which is being undertaken in connection with this project. In Part III we examine the history of the provocation defence and in Part IV we examine the current law and its problems. In Part V we summarise, for purposes of comparison, the law of provocation in a number of jurisdictions. In Part VI we examine the background to the introduction of the defence of diminished responsibility and in Part VII we examine the development of that defence since its introduction in 1957. In Part VIII we summarise, for purposes of comparison, the relevant law of diminished responsibility of a number of jurisdictions. In Part IX we examine the subject of excessive use of force in self-defence, which has at various times provided a partial defence to murder in certain jurisdictions but has never been a defence in England and Wales. In Part X we examine particular problems associated with abused women who kill. This Part unavoidably overlaps with others. In Part XI we identify previous recommendations, which have been made since 1957, for reforming both provocation and diminished responsibility. In Part XII we set out possible options for reform together with arguments for and against each option and invite responses. Part XIII contains a list of questions for consultees.

1.13 We have been greatly assisted by distinguished academics who have produced papers on the approach to these matters in a number of other jurisdictions. Their papers form appendices to this consultation paper.[6] We are particularly grateful for the speed with which they all produced their major contributions. In addition, we are greatly indebted to our consultant Professor David Ormerod of Leeds University who has read and commented on draft papers prepared by members of the Criminal Law Team and the comparative law papers which we received. Again we are particularly grateful for the speed with which he produced his observations.

OVERVIEW

Partial defences to murder

1.14 Murder differs from all lesser offences against the person in that the sentence is fixed by law. It used to be capital punishment.[7] It is now life imprisonment.

[6] Available on our website at www.lawcom.gov.uk, via the link to publications.

[7] Until the 1957 Act capital punishment was the sentence for all murders. The 1957 Act introduced separate categories of capital and non-capital murder. Capital punishment was abolished by the Murder (Abolition of Death Penalty) Act 1965.

Accordingly, mitigating circumstances cannot be taken into account in the formal sentence which is passed, although they are taken into account in determining the actual period of imprisonment which a person sentenced to life imprisonment should serve. (After release, such a person remains on licence and can be recalled to prison for breach of his or her licence conditions for the remainder of his or her natural life).

1.15 Because of the mandatory sentence, there are certain defences to murder which differ from defences to other offences against the person. There are three special defences which reduce murder to manslaughter:

(1) provocation;

(2) diminished responsibility; and

(3) killing pursuant to a suicide pact.

Infanticide is functionally similar, although it carries the special title of infanticide rather than manslaughter.

1.16 The major partial defences to murder are provocation and diminished responsibility. From time to time it has been argued that there should be other special defences to murder, for example the excessive use of force in self-defence. In addition, concern has been expressed that the current law is unsatisfactory in the way that it operates in relation to "mercy killings" and abused women who kill their partners. This project is not concerned with whether "mercy killing" should be a partial defence to murder.[8] Nor do we consider the related topic of whether euthanasia should be legalised. We do note, however, that at present "mercy killings" are often treated, seemingly somewhat inappropriately, as cases of diminished responsibility.[9]

1.17 This consultation paper does address whether the use of excessive force in self-defence should be a partial defence.[10] We also devote particular attention[11] to the topic of abused women who kill.

1.18 Underlying the debate about partial defences to murder are two questions:

[8] The Criminal Law Revision Committee, Fourteenth Report, Offences against the Person (1980) Cmnd 7844, contrary to the view it had previously expressed in its *Working Paper on Offences against the Person* (1976), decided (para 115) against recommending that there should be a specific offence of "mercy killing". The Law Commission's Memorandum (1988-89) HL 20, which was submitted to the House of Lords Select Committee on Murder and Life Imprisonment, agreed with the Criminal Law Revision Committee but suggested (para 8.2) that there was a "strong case for treating some cases of mercy killing like cases of provocation and diminished responsibility, by a special defence".

[9] Professor R D Mackay, in an essay entitled "Diminished Responsibility and Mentally Disordered Killers" in A Ashworth and B Mitchell (eds) *Rethinking English Homicide Law* (2000) 55 at p 79 quotes Home Office figures as showing that between 1982 and 1991 there were twenty two homicides described as "mercy killings" of which one resulted in conviction for murder and the remainder in convictions for manslaughter. We hope during the course of this project to obtain more recent figures.

[10] See Part IX.

(1) Should "mitigated murder" be a separate offence (or group of offences) from murder or should mitigating factors simply be taken into account, as in other offences, in assessing the sentence?

(2) If mitigated murders are to be classed as separate offences from murder, should there be a unified form of mitigated murder which may take into account a variety of matters or should there be separate forms of mitigated murder?

Comparative studies

1.19 We have obtained papers from distinguished jurists on the relevant law and history of law reform proposals in Australia, Canada, India, Ireland, New Zealand, Scotland and South Africa. They form appendices to this paper. We also summarise salient parts of them in this consultation paper. We are deeply indebted to the authors.

Statutory background

1.20 Murder is a common law offence. In the nineteenth century codified versions of the offence were drafted in the Law Commissioners' Digest of 1839[12] and in the draft Criminal Code of 1879,[13] but these were not enacted in England and Wales. The 1957 Act amended the defence of provocation (section 3) and introduced the defence of diminished responsibility (section 2). The 1957 Act was preceded and influenced by the Royal Commission on Capital Punishment 1949 – 1953 Report.[14]

PROVOCATION

1.21 The law of provocation presents severe problems. It is a mark of these difficulties that the subject has been considered by the House of Lords or the Privy Council on four occasions between 1978 and 2000.[15] On recent occasions the court has been deeply divided. Similar difficulties and divisions have been experienced in other countries. In New Zealand, for example, judges variously described the New Zealand law of provocation as "all but impenetrable and incomprehensible" and as involving a definition that is "a blot on the criminal law".[16] In *Smith (Morgan)*[17] Lord Hoffmann said "it is impossible to read even a selection of the extensive

[11] See Part X.

[12] Fourth Report of Her Majesty's Commissioners on Criminal Law (1839) [168].

[13] Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences (1879) C 2345.

[14] (1953) Cmd 8932; in this Part referred to as the "Report of the Royal Commission".

[15] *Camplin* [1978] AC 705; *Morhall* [1996] AC 90; *Luc Thiet Thuan* [1997] AC 131; *Smith (Morgan)* [2001] 1 AC 146.

[16] The comments were made in response to the New Zealand Law Commission's Preliminary Paper: *Battered Defendants: Victims of Domestic Violence who Offend: New Zealand Law Commission Preliminary Paper 41* (2000).

[17] [2001] 1 AC 146.

modern literature on provocation without coming to the conclusion that the concept has serious logical and moral flaws".[18]

1.22 Few would dispute that statement, although Lord Hoffmann's opinion in the case (in which he was one of a three to two majority) is a source of great controversy and will be discussed in further detail below.[19] In this Part we identify and introduce the major problems which will be discussed in further detail below.

1.23 Study of the cases and textbooks suggests that there has never been a time when the doctrine was truly coherent, logical or consistent. In more recent times the fault lines have widened.

Historical foundations of provocation

1.24 Recognisable *theoretical* foundations of the doctrine of provocation can be traced back to the seventeenth century. Traditionally murder was held to require "malice aforethought" (in the sense of premeditation). The circumstance that a defendant killed the deceased under sudden provocation would negative this. However, if there was no reasonable relationship between the provocation and the response, malice would be implied. The requirement of malice aforethought and the doctrine of implied malice have long disappeared from the law. An intention to kill or to cause really serious bodily harm, even if formed on the spur of the moment, is sufficient mens rea for the offence of murder. But the notion that provocation negatived malice aforethought or mens rea continued to find expression in the cases.[20] The ambivalence in the courts' approach to the relationship between provocation and mens rea has meant that provocation has sometimes been seen as explaining and sometimes as negating mens rea.

1.25 Professor Horder has explained the *moral* underpinning of the cases in the seventeenth and early eighteenth century.[21] It was considered *virtuous* for a man of honour to respond with *controlled* violence to certain forms of offensive behaviour. If he overreacted to some degree, but not to a disproportionate extent, such overreaction was natural human frailty. If death resulted from this overreaction, it should be regarded as manslaughter rather than a hanging offence. Limits were implied by the notion itself, such that not every trifling insult would turn a retaliatory killing into a provoked killing. These limits related to the nature of the conduct of the person causing the provocation and the nature of the defendant's response.

1.26 Essentially, there were three requirements:

(1) there had to have been provocative conduct by the deceased;

(2) this had to have caused the defendant to respond in anger; and

[18] *Ibid*, at p 159.

[19] Paras 1.40 – 1.44 and Part IV paras 4.72 – 4.93.

[20] *Welsh* (1869) 11 Cox CC 336, 338; *Holmes v DPP* [1946] AC 588, 598.

[21] J Horder, *Provocation and Responsibility* (1992). See in particular ch 2.

(3) there had to have been a reasonable relationship between the provocation and the response.

1.27 As to the first requirement, in *Mawgridge*[22] Lord Holt classified the types of conduct which might amount to provocation. In the nineteenth century the concept became generalised, but the conduct had to be inherently offensive. The Law Commissioners' Digest of 1839 stated that the provocative conduct must be "a wrongful act or insult".[23] If the moral notion was that, while the defendant had gone too far, the victim was partly responsible by his conduct for causing the defendant's reaction, it would turn the notion on its head to apply it in circumstances where the victim had a right to behave as he did.[24]

1.28 The third requirement, that there had to be a reasonable relationship between the provocation and the defendant's mode of showing resentment, was stated by Viscount Simon LC in *Mancini v DPP*,[25] but the concept is much older and can be seen in Lord Holt's judgment in *Mawgridge*.[26]

1.29 In *Welsh*[27] Keeting J introduced the concept of the reasonable man when he referred to provocation as "something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act".[28]

1.30 By 1957 there were signs of a tendency to run together the first and the third requirements, namely that there had been provocation and that there was a reasonable relationship between the provocation and the defendant's response. The elision is illustrated in the Report of the Royal Commission:[29]

> Two fundamental conditions must be fulfilled in order that provocation may reduce to manslaughter a homicide which would otherwise be murder. First, the provocation *must be gross* and *must be such as might cause a reasonable man to lose his self-control and use violence with fatal results*. Secondly, the accused must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime whilst still so deprived.[30]

The first condition combines the first and the third requirements referred to above.[31]

[22] (1707) Kel J 119, 135-137; 84 ER 1107, 1114-5.

[23] Fourth Report of Her Majesty's Commissioners on Criminal Law (1839) [168].

[24] See also s 176 of the draft Criminal Code of 1879: "no-one shall be deemed to give provocation to another by doing that which he had a legal right to do".

[25] [1942] AC 1, 9.

[26] (1707) Kel J 119; 84 ER 1107.

[27] (1869) 11 Cox CC 336.

[28] *Ibid*, at p 339.

[29] (1953) Cmd 8932.

[30] *Ibid*, at para 126. (emphasis added)

[31] Para 1.26.

1.31 As to the second requirement, for the defendant to be able to avail himself of a defence of provocation his response had to have been in hot temper. Provocation was not available as a defence to a person who used the occasion of an insult to kill another in cold blood or who nursed his anger before retaliating.

1.32 Hot temper became equated with a lack of capacity to exercise self-control in the formulation that the defendant must have acted "under a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind".[32] Although this vivid expression became a classical statement of law, it is somewhat ambiguous and apt to confuse. First, it seems to be inconsistent with a rule requiring a reasonable relationship between the victim's provocation and the defendant's response. This is because it would be illogical to require a measured response from a person in a frenzy. Second, the test hints at requiring a lack of mens rea. But provocation is not limited to cases in which the defendant has gone berserk. It applies where a killing is controlled in the sense of the defendant's actions being consciously directed by his or her mind and intended to kill or cause serious bodily harm. Without such an intention there would be no need to raise the defence.

The 1957 Act

1.33 Section 3 of the 1957 Act provides:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The section was intended to widen the scope of conduct which could amount to provocation. Before the 1957 Act it was a rule of law that words could not constitute provocation (other than possibly in exceptional circumstances). The opening words of the section recognise that the person might be provoked by things done or things said or both. However, the section has been interpreted as removing the first requirement altogether, that is, that there must have been conduct which was inherently provocative in its character. The Judicial Studies Board's specimen direction to the jury is that "provoked" means no more than "caused".[33] On this view conduct may amount to provocation which is both entirely lawful and morally blameless: a planning officer enforcing an order[34] or a baby crying.[35] Nor need the provocation come from the deceased.[36] Further, on this view, logically there is no reason in principle why "provocation" should be

[32] *Duffy* [1949] 1 All ER 932, 932.

[33] See Part IV, para 4.8.

[34] *Dryden* [1995] 4 All ER 987.

[35] *Doughty* (1986) 83 Cr App R 319.

[36] *Davies* [1975] QB 691.

confined, as it is by the 1957 Act, to "provocation" from a human being. A dog barking can be as irritating as a baby crying. So can other things, such as a car breaking down or a bus not arriving on time.

The "reasonable person" test

1.34 The 1957 Act appeared to preserve the "reasonable man" test. Whether the law of provocation should incorporate that test had been addressed in the Report of the Royal Commission and was the subject of much debate when the Homicide Bill was passing through Parliament.[37]

1.35 Since 1957, the application of the "reasonable man" test has caused persistent difficulties. The history and case law is examined in detail in Parts III and IV below.

1.36 The most recent decision of the House of Lords is *Smith (Morgan)*[38] in which there was a 3:2 decision as to how the "reasonable man" test should be applied. The defendant became angry with the deceased when the latter denied having stolen some tools belonging to the defendant. He attacked the deceased and killed him. There was evidence that the defendant suffered from a depressive illness. The defendant advanced the defences of diminished responsibility and provocation. The trial judge ruled that medical evidence about the defendant's depression and its possible effect on his self-control was to be ignored when applying the "reasonable man" test. The speeches are analysed below,[39] but, in summary, the majority held that the jury was entitled to take into account the effect of the defendant's depression in considering whether he had measured up to the standard of self-control required by the "reasonable man" test. The minority held that the jury should have taken the evidence of the defendant's medical condition into account in deciding whether he was provoked to lose his self-control and how grave the provocation was for a defendant in his circumstances, but that they must ignore his depressive illness when considering whether a reasonable person in the same situation would have acted as the defendant did.

1.37 The question to what extent the defendant's experiences, cultural background and personal characteristics should be taken into account in deciding whether a "reasonable person" in the defendant's position might have acted as the defendant did is highly problematical, as many cases in this country and other countries with a similar system of law have shown. Both the majority's and the minority's positions in *Smith (Morgan)* have their problems.

1.38 The minority's approach is problematic because of the artificiality and complexity of dividing the defendant's personality so as to separate his or her "power of self-control" from his or her susceptibility to the gravity of provocation. A person's characteristics may mould not only his or her perception of the gravity of the provocation but also his or her emotional and psychological disposition in response to such provocation.

[37] See Part XI, paras 11.23 – 11.28.

[38] [2001] 1 AC 146.

[39] Part IV, paras 4.69 – 4.140.

1.39 On the other hand, the majority's position requires or enables the jury to judge the defendant by the standard of self-control of an "ordinary" person suffering from an abnormal condition that reduces his capacity for self-control. This test is not just artificial but self-contradictory and is tantamount to dispensing with the objective test.

1.40 Lord Hoffmann struggled to give some content to the "reasonable man" requirement of section 3.[40] The jury, he suggested, should be told that the law expects people to retain control over their emotions and that a tendency to violent rages is a defect in character rather than an excuse. In deciding whether the circumstances were such as to make a loss of self-control sufficiently excusable to reduce murder to manslaughter, the jury must apply what they consider to be "appropriate standards" of behaviour. In this, they should make allowance for human nature, but not allow someone to rely on his or her own violent disposition. If the defendant, however, had a characteristic, permanent or temporary, which affected the degree of control which society could reasonably expect of him, and which the jury thought that it would be unjust not to take into account, they would be at liberty to give effect to it.

1.41 We do not believe that it is possible satisfactorily to reconcile the statutory "reasonable man" criterion set out in section 3 and a desire to allow the jury to take into account personal characteristics of the defendant which include an unusual propensity to violence.

1.42 Lord Hoffmann's approach gives the jury no clear guidance as to what, as a matter of law, reduces murder to manslaughter on grounds of provocation. In particular, it does not explain how the jury is to differentiate between a violent disposition, which is a defect of character, and a violent disposition which is the product of a characteristic properly to be taken into account. For example, is alcoholism a defect in character, a product of a defect in character, or is it a relevant characteristic? In the absence of this guidance, juries are left to judge the accused by any standard they think appropriate.

1.43 It is not a satisfactory answer to say that in the law there will always be borderline cases. Borderline cases have to be determined according to clearly understood underlying principles.

1.44 Lord Hoffmann made it clear that he was not seeking to lay down a prescriptive formula for judges directing juries. He expressed confidence that if judges were freed from having to invoke the formula of the reasonable man with an array of unreasonable characteristics, they would be able to explain the principles in simple terms. But this assumes that the principles of law are clear to the judges themselves.

1.45 The debate also raises serious moral and policy questions about the proper approach of the law to standards of self-control. We have already referred[41] to the ambiguity of the requirement that the defendant should have acted under a sudden

[40] [2001] 1 AC 146, 173.

[41] Para 1.32.

loss of self-control, making him or her for the moment "not master of his mind". Historically, passion was recognised as something that might temporarily deprive a person of his reasoning faculties.[42] In modern cases a person's capacity for self-control is treated as a medical or psychological matter, but it is important to recognise the limits of medicine. In provocation, we are concerned with cases where the defendant's conduct is volitional in the sense of being rationally directed. Psychiatrists can explain whether the defendant was suffering from an abnormality of mind recognised as a mental illness or from a personality disorder. Psychiatrists may also help to explain why a particular person may respond in particular circumstances in a particular way. But a doctor cannot answer medically the question whether a person *can* control himself (except in cases which would be classified legally as automatism, such as sleep walking). Where conduct is volitional in the sense of being rationally directed, the law operates under a belief of free will. All sorts of events from the moment of conception may affect someone's personality and temperament, including their propensity to anger. But, subject to limited exceptions, the criminal law sets uniform standards of behaviour for public policy reasons. The principal exceptions relate to children and young persons and to mentally abnormal offenders.

1.46 The law of provocation prior to the 1957 Act reflected that general policy. It involved a concession to human frailty, but the frailty was that of mankind at large, not the frailty of an individual defendant.

1.47 The cases between 1957 and *Smith (Morgan)* are capable of different interpretations and show some ambivalence of approach. These cases are discussed in detail below.[43] The decision of the majority in *Smith (Morgan)* unquestionably represents a major departure from the general approach of the criminal law in its interpretation of the "reasonable man" test. The departure raises important moral and policy questions. The debate is essentially the same as that which took place in Parliament during the passage of the 1957 Act.[44] The answer given by the majority of the House of Lords is different.

Other problems with provocation

1.48 There are other major problems with the present law of provocation. We have referred to the fact that, since the 1957 Act, conduct may be "provocation" which would not be regarded as provocation in the ordinary sense of the word, still less gross provocation. So in many cases the word "provocation" has become a misnomer. An acquittal of murder on grounds of provocation can, and often does, appear to relatives of the victim to be a travesty of justice. It appears to imply a judgment by the court that the defendant's responsibility for killing the deceased was seriously lessened by the behaviour of the victim. Thus, in a case where a defendant has killed through sexual jealousy because the victim has formed an association with someone else, a verdict of manslaughter by reason of provocation often understandably appears to the victim's relatives to be an insult added to injury.

[42] See, for example, *Oneby* (1727) 2 Ld Raym 1485; 92 ER 465.

[43] Part IV, paras 4.29 – 4.68.

[44] See Part XI, paras 11.23 – 11.28.

1.49 Such cases could not generally qualify as provocation before 1957. The defence was available if a husband found his wife in the act of adultery, as Lord Holt held in *Mawgridge*.[45] But by the twentieth century that rule was regarded as an anachronism not to be extended.[46]

1.50 It has also to be recognised that the law of provocation has reflected an essentially male view of society. Many killings by men of their partners are because of sexual jealousy. Killings by women of their partners are more likely to be because of abuse. In the former category, provocation is often available because the man acts in a sudden temper. In the latter, provocation was traditionally not available in many cases, because there was often a time interval between the abuse and the killing. The direction in *Duffy*,[47] treated as a classical statement of the law, was given in just such a case.

1.51 In a series of cases examined below,[48] the courts have sought to address this problem by relaxing the *Duffy* requirement of an immediate response, but in so doing have created further problems. This is because the relaxation has also affected other types of cases in which the facts have been very different. So, where a defendant fetched a gun from his attic, set off in pursuit of a man who had supplied drugs to the defendant's son, parked his car, walked to the man's house and shot him dead, the defendant's conviction for murder was quashed because the judge failed to leave provocation to the jury.[49] As a result of this development, there is now no clear test for differentiating between a "provoked killing" and a "revenge killing".

Avenues for reform

1.52 In summary, the boundaries of the defence of provocation have expanded greatly since the 1957 Act. It no longer has (if it ever did have) clear boundaries or a clear moral basis. The act no longer has to be provocative in the ordinary sense; the response no longer has to be on the spur of the moment; and the response no longer needs to be that which would be expected of an ordinary person.

1.53 There is widespread agreement that there is a need for reform, but radically different views about what direction such reform should take. There are many variants but the three main possible avenues for reform would be:

(1) to abolish both the defence and the mandatory sentence;

(2) to retain the defence in a more restricted form (with the argument for abolition of the mandatory sentence varying in strength according to the extent of the restriction); or

[45] (1707) Kel J 119, 137; 84 ER 1107, 1115.

[46] See *Holmes v DPP* [1946] AC 588, 598 *per* Viscount Simon.

[47] [1949] 1 All ER 932.

[48] In Part IV, paras 4.18 – 4.28.

[49] *Baillie* [1995] 2 Cr App R 31.

(3) to retain the defence where it is presently available, to abolish the "reasonable man" test and, possibly, to fuse or amalgamate the defences of provocation and diminished responsibility (which have been growing closer together through the expansion of provocation).

These options and others are explored in this consultation paper.

DIMINISHED RESPONSIBILITY

1.54 The Report of the Royal Commission[50] considered the introduction of a partial defence of diminished responsibility but did not recommend it. It was acknowledged that the test of criminal responsibility for the defence of insanity under the M'Naghten Rules[51] was inadequate and in need of reform. It concluded, however, that that it would be inappropriate to introduce piecemeal reform by way of establishing a defence of diminished responsibility in the case of murder alone. Parliament disagreed, however, and introduced section 2 of the 1957 Act. Subsection (1) provides:

> Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

1.55 The language of the subsection has attracted strong academic criticism. Despite its theoretical difficulties (which are discussed below),[52] it has in practice generally served the purpose for which it was introduced. However, the requirement that the "abnormality of mind" shall have "substantially impaired his mental responsibility" has caused some problems which we discuss (particularly as to the proper role of psychiatrists). The subsection has, nevertheless, provided a practically convenient method for the prosecution, defence and the court, by agreement, to dispose of cases where nobody would wish to see the imposition of a mandatory life sentence. This has been achieved by a sometimes strained and sympathetic approach to the medical evidence and the language of the statute. We are seeking to explore with a number of distinguished forensic psychiatrists their experience of the workings of the defence.

1.56 If the mandatory sentence were abolished, there would be an argument for abolishing diminished responsibility, which was only introduced because of the mandatory penalty. That would, however, mean that the only defence of mental abnormality available to a defendant facing a charge of murder would be a defence under the M'Naghten Rules. These are limited in scope. The Report of the Royal Commission concluded that it would be preferable to reform the law regarding mental abnormality in crime generally, rather than introduce a piecemeal reform of the law of murder. It might seem perverse fifty years later to abolish the defence of

[50] (1953) Cmd 8932.

[51] *M'Naghten's* Case (1843) 10 Cl & Fin 200; 8 ER 718.

[52] In Part VII.

diminished responsibility without a comprehensive review of the M'Naghten Rules.[53]

1.57 There is some controversy over the proper roles of the defences of provocation and diminished responsibility. As mentioned, there is a school of thought that diminished responsibility and provocation should be brought together.

1.58 There is also a body of opinion that provocation has been wrongly stretched to accommodate cases which should, if anything, be treated as diminished responsibility. If provocation is abolished and diminished responsibility retained, it is predictable that some cases, which are presently defended on grounds of provocation, will be sought to be defended on grounds of diminished responsibility.

EXCESSIVE SELF-DEFENCE

1.59 At times there have been flickerings in English law of a partial defence of excessive self-defence, but the law did not develop in that direction.[54] In the nineteenth century there were cases which can be read as giving recognition to such a doctrine.[55] However, in *Palmer*,[56] after an extensive review of the authorities, the Privy Council rejected the argument that at common law excessive force in self-defence was a partial defence to murder. In *Clegg*,[57] the House of Lords held that it would not be appropriate for the courts to create such a defence and that the matter was one for decision by the legislature.

1.60 There have been a number of recommendations that there should be such a defence: the Fourteenth Report of the Criminal Law Revision Committee,[58] the Law Commission Report on Codification of the Criminal Law (1985),[59] the draft Criminal Code Bill, clause 59[60] and the Report of the House of Lords Select Committee on Murder and Life Imprisonment.[61]

1.61 The central argument for a change is this. If a person, confronted with violence or threatened violence to himself or herself or another, responds with force and does no more than he or she believes to be necessary in the circumstances, it is harsh that he or she should be convicted of murder and sentenced to life imprisonment

[53] A matter which is the subject of other work which we are currently undertaking as part of our project of codification of the criminal law of England and Wales in which we are revisiting Part I of the draft Criminal Law Code 1989.

[54] Such a doctrine could have developed from Lord Holt's judgment in *Mawgridge* (1707) Kel J 119; 84 ER 1107.

[55] *Whalley* (1835) 7 Car & P 245; 173 ER 108, 110; *Patients* (1837) 7 Car & P 775; 173 ER 338, 338.

[56] [1971] AC 814, 831.

[57] [1995] 1 AC 482, 500.

[58] Offences against the Person (1980) Cmnd 7844, para 288.

[59] Criminal Law: Codification of the Criminal Law: A Report to the Law Commission (1985) Law Com No 143.

[60] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177.

[61] (1988-89) HL 78-1, paras 86–89.

because on an objective view the degree of force used is judged to have been excessive.

1.62 The argument for not changing the law is that to do so would be unnecessary and overcomplicated. It would be unnecessary because a jury is directed that if a person in the heat of the moment does no more than he or she instinctively believes to be necessary in self-defence, that is very strong evidence that their conduct was reasonable and therefore lawful. If a defendant does overreact angrily there is also the partial defence of provocation.

1.63 The argument has been advanced that provocation should be abolished and a partial defence of excessive self-defence introduced on the ground that the law should look more sympathetically towards someone who uses excessive force in fear than in angry retaliation. On the other hand it is also argued that a new partial defence would be unnecessary if provocation and the mandatory sentence were abolished, because overreaction in self-defence would be taken into account in assessing sentence as in the case of non-fatal offences of violence.

1.64 If a partial defence of excessive self-defence were to be introduced, further questions would arise whether it should extend to force used in the protection of a person's home or business and also whether it should extend to the use of force against a threat by the deceased which is not immediate.

1.65 The Indian Penal Code 1860 has from its inception contained a partial defence of excessive use of force in self-defence.[62] At times it has also been a defence in certain of the Australian states.[63] In Canada, the majority of the provinces recognised the defence prior to the decision in *Faid*.[64] In that case the Supreme Court of Canada held that the defence formed no part of Canadian law. In Scotland, there are suggestions in the works of the institutional writers that the excessive use of force in self-defence could found a partial defence.[65] In *Crawford v HM Advocate*[66] and *Fenning v HM Advocate*[67] it has been held, however, that the use of excessive force in self-defence does not operate as a partial defence to murder.[68]

[62] Section 300, exception 2.

[63] The jurisdictions of Northern Territory, Queensland and Western Australia have criminal codes, none of which recognises the use of excessive force in self-defence as a partial defence to murder. The defence was first recognised at common law in 1957 (*McKay* [1957] VR 560) and subsequently abolished by the courts themselves in 1987 (*Zecevic v DPP (Vic)* (1987) 162 CLR 645). The defence was re-introduced in statutory form in South Australia in 1991 (Criminal Law Consolidation (Self-Defence) Amendment Act 1991*)* and in New South Wales in 2002 (Crimes Amendment (Self-Defence) Act 2001.

[64] [1983] 1 SCR 265.

[65] D Hume, *Commentaries on the Law of Scotland, Respecting Crimes* (4th ed 1844) vol 1, p 223 & p 227; A Alison, *Principles of the Criminal Law of Scotland* (1832) p 102; J Walker and D J Stevenson, *Macdonald, A Practical Treatise on the Criminal Law of Scotland* (5th ed 1948) p 131.

[66] 1950 JC 67.

[67] 1985 JC 76.

[68] Interestingly, the Report of the House of Lords Select Committee on Murder and Life Imprisonment (1988-89) HL 78-1 concluded (para 89) that Scots law did recognise a partial defence of the use of excessive force in self-defence.

A partial defence of excessive force in self-defence has never been recognised under New Zealand law.

ABUSED WOMEN WHO KILL

1.66 It is obvious that the criminal law ought not to have a gender bias.

1.67 Our reference asks us to examine particularly the law relating to partial defences to murder in the context of domestic violence. Domestic violence is an extremely worrying problem. The law must deal with it in a way which is fair and shows proper respect for human life. At the same time it would be wrong to introduce special rules relating to domestic killings unless there is medical or other evidence which demonstrates a need and a proper basis on which to do so.

1.68 In this context we are seeking the assistance of psychiatrists, in particular about the current state of medical opinion concerning battered woman syndrome (BWS). This consultation paper includes a Part in which that topic is discussed,[69] but the issues discussed in it overlap with the issues discussed in the other Parts.

[69] Part X.

PART II
STATISTICS AND EMPIRICAL STUDIES

INTRODUCTION

2.1 The objective of this Part is to set out relevant statistical data which is currently available and to explain the nature and purpose of the other sources we are tapping into where our work remains in progress. The data, whether already available or currently being obtained, pertains both to the use of the current partial defences to murder and to the public perception of how, if at all, these defences accurately reflect society's needs. Accordingly, this Part will reflect that division. We consider first the use of the partial defences to murder.

PAST AND CURRENT USE OF THE PARTIAL DEFENCES TO MURDER

2.2 Several sources are relevant to this issue, some of which are complete and some of which comprise work we are undertaking and is yet to be completed. The earlier completed research and the relevant data emanating from it is described and set out immediately below. We then go on to describe the research and surveys currently being undertaken in connection with our project.

Published studies

Dell (1984)

2.3 In 1978 Susanne Dell began a research project to examine trends in the use of diminished responsibility as a partial defence to murder together with attendant sentencing trends. The results of her research were published in 1984.[1] The research period spanned the fifteen years 1964 – 1979 although the main emphasis was on the years 1966 – 1977. The project only considered homicide convictions for males, not females. Whilst the main focus of the research was on sentencing trends, three of the statistical tables which Dell produced are of relevance for the present terms of reference.[2] These are reproduced below.[3]

2.4 Table 1 shows all convictions of males for homicide and is replicated from Home Office statistics. Tables 2 and 3 contain the specific findings made by Dell's research, using only a sample of murder convictions.[4]

[1] S Dell, *Murder into Manslaughter: The diminished responsibility defence in practice* (1984).

[2] *Ibid*, Appendix: Tables and Figure, Table1.2, Table 2.6 and Table 2.7.

[3] Table 1.2 is reproduced as Table 1, Table 2.6 is reproduced as Table 2 and Table 2.7 is reproduced as Table 3.

[4] According to Dell, "In deciding how to sample the population, one of the problems was that the total number of diminished responsibility convictions was in the early years considerably smaller than in the later years… . Because of this … it was decided to … sample the first [period] at a higher rate than the other two. … [t]he sampling procedure was to select two-thirds of the men convicted in the early years [1966-9], and one third of those convicted in the middle [1970-3] and late [1974-7] years". S Dell, *Murder into Manslaughter: The diminished responsibility defence in practice* (1984) p 4.

TABLE 1: CONVICTIONS FOR HOMICIDE BY MEN

	Murder		**Manslaughter by reason of diminished responsibility**		**Manslaughter by other means**		**Total number of homicides**
	Number	*%*	*Number*	*%*	*Number*	*%*	*Number*
1964	44	*32*	31	*23*	59	*44*	134
1965	56	*34*	39	*24*	68	*42*	163
1966	70	*34*	44	*21*	94	*45*	208
1967	62	*32*	37	*19*	97	*49*	196
1968	73	*35*	33	*16*	102	*49*	208
1969	74	*36*	30	*15*	102	*50*	206
1970	94	*37*	55	*21*	108	*42*	257
1971	94	*37*	53	*21*	107	*42*	254
1972	76	*30*	57	*23*	119	*47*	252
1973	87	*31*	60	*21*	135	*48*	282
1974	108	*34*	63	*20*	150	*47*	321
1975	102	*32*	49	*15*	166	*52*	317
1976	104	*30*	70	*20*	172	*50*	346
1977	112	*38*	65	*22*	117	*40*	294
1978	101	*35*	65	*23*	119	*42*	285
1979	126	*35*	72	*20*	157	*44*	355

TABLE 2: RELATIONSHIP BETWEEN OFFENDER AND VICTIM

	1966-9		1970-3		1974-7		Average
	No	**%**	**No**	**%**	**No**	**%**	**%**
Wife[5]	36	*38*	25	*35*	36	*42*	*38*
Son or daughter	11	*11*	10	*14*	4	*5*	*10*
Mother	3	*3*	1	*1*	6	*7*	*4*
Father	3	*3*	5	*7*	2	*2*	*4*
Stranger	14	*15*	7	*10*	11	*13*	*13*
Others	29	*30*	24	*33*	26	*31*	*31*
Totals	96	*100*	72	*100*	85	*100*	*100*

TABLE 3: MOTIVES

	1966-9		1970-3		1974-7		Average
	No	**%**	**No**	**%**	**No**	**%**	**%**
Amorous jealousy/possessiveness	15	*16*	10	*14*	18	*21*	*17*
Explosive reaction to quarrel, reprimand, etc.[6]	18	*19*	15	*21*	7	*8*	*16*
Sexual	8	*8*	4	*6*	3	*4*	*6*
Loss of control with child: baby battering	3	*3*	6	*8*	2	*2*	*5*
In course of theft, burglary, etc.	2	*2*	4	*6*	5	*6*	*4*
Killing of seriously ill family member	2	*2*	3	*4*	5	*6*	*4*
Other motives	6	*6*	3	*4*	5	*6*	*5*
Offender psychotic	36	*38*	21	*29*	33	*39*	*35*
Motivation unclear	6	*6*	6	*8*	7	*8*	*8*
Totals	96	*100*	72	*100*	85	*100*	*100*

[5] This statistic includes cohabitee (9 cases), mistress (4) and girlfriend (2). In the 18 cases where there was more than one victim, the first is shown.

[6] Other than in a setting of amorous jealousy.

Home Office Study (1989)

2.5 A slightly more recent set of statistics were gathered by the Home Office covering the period from 1982 to 1989 and included all convictions for domestic homicide in England and Wales. Usefully this data is subdivided into gender. However, the grouping of manslaughter convictions does not purport to distinguish between provocation and lack of intent as reasons for reducing murder to manslaughter. The tables are reproduced below.[7]

TABLE 4: DOMESTIC HOMICIDE VERDICTS – FEMALE DEFENDANTS

	1982	**1983**	**1984**	**1985**	**1986**	**1987**	**1988**	**1989**	***Total***
Murder	3	2	1	4	1	7	4	5	27
Section 2 Manslaughter	3	10	4	3	5	2	4	5	36
Other Manslaughter	8	4	11	8	9	9	10	11	70
Lesser Offence	—	—	—	—	3	—	—	1	4
Acquitted / unfit to plead	4	5	6	4	4	6	7	4	40
Total	18	21	22	19	22	24	25	26	177

TABLE 5: DOMESTIC HOMICIDE VERDICTS – MALE DEFENDANTS

	1982	**1983**	**1984**	**1985**	**1986**	**1987**	**1988**	**1989**	***Total***
Murder	34	28	29	29	43	26	38	51	278
Section 2 Manslaughter	44	31	31	31	33	22	20	27	239
Other Manslaughter	27	27	26	33	33	29	30	20	225
Lesser Offence	—	2	—	—	3	—	1	3	6
Acquitted / unfit to plead	5	1	9	5	6	6	3	2	37
Total	110	89	95	98	115	83	92	103	785

[7] Quoted in Written Answer, *Hansard* (HC) 17 October 1991, vol 196, cols 190-192. See S Bandalli, "Provocation from the Home Office" [1992] Crim LR 716. Bandalli explains, in n 3, "whilst the term 'domestic homicide' is used, in fact the category includes lover, former lover, … spouse's lover and lover's spouse or other associate".

Home Office Statistics: Crime in England and Wales 2001/2002, Supplementary Volume (January 2003)

2.6 In July 2002 the Home Office published its first report in a new annual series entitled *Crime in England and Wales.* The supplementary volume published in January 2003 provides further detailed information gathered from police-recorded crimes and the British Crime Survey as well as other sources of crime data. The relevant information has been extracted and reproduced below.

2.7 In 2001/02 there were 858 deaths initially recorded by the police as homicides in England and Wales. Of these, 26 deaths were no longer recorded as homicides leaving a total of 832 (582 male victims and 250 female victims). 72 per cent of female victims, in comparison to 40 per cent of male victims knew the main or only suspect at the time of the offence. Of particular importance is the significant difference between the *percentage* of homicides committed by male partners/ex-partners compared to that committed by female partners/ex-partners.

TABLE 6: PERCENTAGE OF HOMICIDE VICTIMS KILLED BY PARTNER/EX-PARTNER AS CURRENTLY RECORDED[8]

	91	**92**	**93**	**94**	**95**	**96**	**97**	**97/ 98**	**98/ 99**	**99/ 00**	**00/ 01**	**01/ 02**
Male Victims	8	9	5	9	9	6	8	8	6	5	5	5
Female Victims	43	45	42	38	42	45	46	48	35	38	44	46

Crime in England and Wales 2002/2003 (July 2003)

2.8 This is the second publication by the Home Office in the *Crime in England and Wales* series. It too brings together statistics from police-recorded crimes and the British Crime Survey. "Domestic violence" in this Home Office paper is defined as "all violent incidents, except mugging, which involve partners, ex-partners, household members or other relatives".[9]

2.9 Consistent with the results above, domestic violence is the only category of violence where the risks for women (73 per cent) were higher than for men (27 per cent). By contrast, the risk of violence being perpetrated by strangers was substantially higher for male victims than for female victims.

[8] As at 2 October 2003.

[9] Research, Development and Statistics Directorate, *Crime in England and Wales 2002/2003* (2003) 76.

TABLE 7: NUMBER OF VIOLENT INCIDENTS AGAINST MEN AND WOMEN ACCORDING TO BRITISH CRIME SURVEY TYPOLOGY OF VIOLENCE (2002/03)

	All (thousands)	% of all incidents	% against men within violence type	% against women within violence type
All Violence	2, 781[10]	100	62	38
Domestic	501	18	27	73
Mugging	388	14	59	41
Stranger	949	34	83	17
Acquaintance	942	34	60	40

Ongoing studies

Nuffield Foundation Project relating to defences of diminished responsibility and provocation

2.10 This project relating to the defences of diminished responsibility and provocation (and those of insanity and cases in which the defendant claims unfitness to plead) is being led by Professor Mackay. It involves extracting data from a sample of cases over a five year period from 1997 to 2001. The sample contains all Crown Court cases in which a defence of diminished responsibility, provocation or insanity was raised or where the defendant claimed unfitness to plead. Amongst the data collected the researchers have access to suitably anonymised psychiatric reports, which will reveal whether there has been a section 2 diagnosis and the type of mental illness diagnosed. It should also show where there has been disagreement between experts as to the diagnosis. The results of Professor Mackay's research are due to become available in early 2004. We are most grateful to the Nuffield Foundation and to Professor Mackay for making this research available to us.

Judges' reports in murder cases

2.11 We have undertaken a survey to collect relevant anonymised details from the judges' reports which are prepared in all cases where the mandatory sentence of life imprisonment has been imposed following a conviction for murder. Approximately 450 such reports were collated, covering the period from October 2000 to June 2003. The material is currently being processed for analysis.

2.12 This survey is intended to provide information on matters relevant to our terms of reference. The use of the existing partial defences to murder will be analysed with particular reference to whether, and to what extent, gender affects which defences are raised, and whether it affects the likelihood of multiple defences being raised. The survey will also seek to elicit information on which defences are pleaded by which gender in cases of killing of a current or former partner.

[10] This total is the actual and not the rounded total which is achieved by adding the totals from the sub-categories. The rounded total is 2,780.

2.13 Whether there is any correlation between the defence pleaded and the method of killing or the relationship of the accused to the deceased is also to be examined. Further questions probe the issues of the use of psychiatric reports in murder cases and any correlation between the context of the offence and the tariff recommended.

Crown Prosecution Service internal review of homicide

2.14 The Crown Prosecution Service is also currently undertaking, at our request, an internal review of their homicide caseload. The sample they are surveying comprises approximately 300 cases spanning the period from July 2000 to June 2003. The survey will be considered in tandem with our judges' reports survey. The CPS survey is of those cases where one or both of the partial defences have been raised, whether the plea was successful or not. The CPS is collating data on issues such as the relationship of the accused to the deceased, their respective gender, method of killing, context of the crime, defences pleaded and psychiatric or other medical evidence adduced.

2.15 Completion of the Crown Prosecution Service work is anticipated during the consultation period. We are most grateful to the CPS for undertaking this work on our behalf.

PUBLIC PERCEPTIONS OF CURRENT HOMICIDE LAW

2.16 Considerable research in this field has been carried out by Professor Barry Mitchell of Coventry University. Professor Mitchell has also conducted a study into the role of psychiatrists in cases of diminished responsibility, focusing on the perspective and concerns of the medical practitioners involved.[11] That research is of importance to the present project, in particular diminished responsibility, and we refer to it in Part VII.[12]

Published studies

2.17 Professor Mitchell, in collaboration with Social and Community Planning Research, conducted a quantitative study in 1998 with the "primary aim of testing the law's assumption that it has public support for the way in which it deals with homicides".[13] The research sample was designed to be representative of the key demographic variables in the English and Welsh populations. There were 822 participants. Each respondent was presented with eight hypothetical scenarios of homicide, including situations of battered spouses[14] and self-defence.[15] The

[11] B Mitchell, "Putting diminished responsibility into practice: a forensic psychiatric perspective" (1997) 8 Journal of Forensic Psychiatry 620.

[12] See paras 7.66 – 7.68.

[13] B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 456.

[14] The text given to the participants read: "A woman had been physically and sexually abused by her husband for three years. He came home one evening and started hitting her again. She felt that she couldn't stand any more abuse, so she waited until her husband was sleeping, then hit him over the head with a saucepan, killing him", B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 457.

participants were asked to rank the seriousness of each scenario, giving reasons. They were also asked to indicate what they felt to be the appropriate sentence in the most extreme cases and how their perception of the crime and the appropriate sentence would alter if certain variations were made to the scenarios posed.

2.18 The research revealed that the personal culpability of the defendant was a key factor in the public's evaluation of homicides. Particular factors which were influential in assessing personal culpability were premeditation, planning, the vulnerability of the victim, justifiable self-preservation and the extent of the defendant's fault.[16] Professor Mitchell notes that the law differentiates between gravity in homicides solely on the basis of the killer's culpability. He also notes, however, that "one dimension of culpability which the law largely seeks to avoid when framing offences and identifying justifications and excuses concerns the killer's motive and yet this very factor featured quite prominently in respondents' assessments".[17] Professor Mitchell raises the question whether any law reform would be able adequately to take account of motives without being open to abuse.[18] Similar observations can be made in relation to matters of wider social policy such as "mercy killing" and situations where the moral imperative would be to act to preserve human life, but where there is no law requiring the person to do so.

2.19 In addition, the participants were asked to place the different scenarios into offence categories. The purpose was to see whether "the public recognise variations in the gravity of homicides and, if they do, whether they feel such variations should be reflected in convictions for different offences such as murder and manslaughter, or some alternative form of formal labelling".[19] Interestingly, in relation to the terms of reference of this project, the battered spouse scenario was placed by approximately one quarter of participants in the same category as "mercy killing",[20] which was in itself widely considered to be the least culpable of the scenarios.[21]

2.20 13 per cent of participants gave the lowest available score to those scenarios where the killing had been perpetrated in self-defence or self-preservation. No participants used the word "murder" to describe either the battered spouse or self-

[15] The text given to the participants read: "Two men were having a heated argument at work which developed into a fight. One of them picked up a screwdriver and lunged at the other. Fearing that he would otherwise be stabbed, the unarmed man grabbed a spanner, and in self-defence he hit the other man over the head with it, killing him", B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 457.

[16] B Mitchell "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at pp 467–468.

[17] *Ibid*, at p 468.

[18] *Ibid*.

[19] *Ibid*, at p 465.

[20] 26% of the sample associated the two scenarios. B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 466.

[21] 49% of the sample attributed the lowest rating to mercy killing. B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 464.

defence scenarios. Approximately 15 per cent considered these examples to be "killings", and the same proportion described the self-defence scenario as "manslaughter".[22] 21 per cent classified the self-defence scenario as "self-preservation", but only 14 per cent made the same assessment for the battered spouse scenario.[23] The "necessity" scenario elicited a similar percentage of categorisations as self-preservation.[24]

2.21 The response to the killing by the battered spouse was wide ranging. It was classified as planned or premeditated by 12 per cent of participants. Factors cited by participants as affecting their evaluation of the relative gravity of the offence included the presence of alternative courses of action, premeditation and, by way of contrast, the persistent abuse suffered as well as elements of self-preservation.[25]

2.22 In 2000 Professor Mitchell carried out a small follow-up study with 33 of the original participants. The purpose was stated to be to "enhance our understanding of public opinion on how the criminal justice system should respond to homicide, and in particular to obtain more data on the extent to which there is public support for fundamental principles such as individual autonomy, fair labelling, and correspondence".[26]

2.23 The participants were referred back to the same scenarios used in the initial study. They were asked to comment on and explain their observations pertaining to gravity and the existence and effect of any aggravating factors. A number of new issues were also introduced. Of particular relevance for the present project were the questions concerning the treatment of mentally ill killers by the criminal justice system.[27] The unanimous response was that the killer should not even be subjected to criminal prosecution if it could be proved that he would not have committed the fatal act but for his mental illness.[28] There was, however, a consistent opinion that a mentally ill killer must be taken "out of circulation" in order to protect society. Four of the participants expressed sympathy for the killer.

2.24 Professor Mitchell concludes; "the follow up survey provided encouraging evidence that, *given the opportunity to consider the matter*, the public present neither knee-jerk nor especially punitive views about the away in which the criminal justice system should deal with homicide … . [T]here were real signs of attempts to give

[22] B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 466.

[23] *Ibid*.

[24] The text given to the participants read: "Two mountain climbers were roped together. One of them slipped and fell. The other tried to hold on to the rocks for both of them, but he knew that if he did *not* cut the rope, they would both die. To save himself, he cut himself loose, knowing that the other climber would fall to his death." B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 457. 20% of respondents categorised this as self-preservation.

[25] B Mitchell, "Public Perceptions of Homicide and Criminal Justice" (1998) 38 British Journal of Criminology 453 at p 460.

[26] B Mitchell, "Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide" [2000] Criminal Law Review 814 at p 815.

[27] *Ibid*, at p 817.

[28] *Ibid*, at p 820.

proportionate and discriminating responses, of efforts to focus not solely on the loss of life but to take account of the circumstances generally, including the personal culpability of the killer… . [T]here is little doubt that they share the view that distinctions in gravity should be made according to the offender's personal culpability".[29]

Ongoing studies

2.25 As part of the Law Commission's current project, Professor Mitchell is undertaking a more specifically focused research study on public attitudes towards pleas of provocation, diminished responsibility and excessive use of force in self-defence. The research sample will include approximately 40 individuals of varied backgrounds. Again participants will be presented with a series of scenarios and will be asked to comment on their relative gravity and the effect on their view where the facts are adjusted. Participants will also be asked to place the scenarios into groups marking respectively the least and most serious as well as those where the participant believes that no offence has been committed. They will also be asked how this grouping of scenarios into offences would be affected by there being a mandatory life sentence for the most serious group.

2.26 Whilst the scale of this study is such that it could not be described as a national survey of public opinion, it represents the detailed response of a group which reflects a broad spectrum of individual characteristics, together with those of secondary victims. It will, in our view, provide a valuable indication not only of the range of views about the way that the criminal justice system currently deals with these homicides, but also about the reforms that people would like to see implemented.

2.27 We hope to receive the results of Professor Mitchell's research in early 2004.

[29] B Mitchell, "Further Evidence of The Relationship Between Legal and Public Opinion on the Law of Homicide" [2000] Criminal Law Review 814 at pp 825-826. (emphasis added)

PART III
THE HISTORY OF THE DEVELOPMENT OF THE PARTIAL DEFENCE OF PROVOCATION

INTRODUCTION

3.1 Horder claims that, conceptually, provocation can be traced back to the wide responsibilities and discretion given to juries in the early thirteenth century.[1] However, the foundations of the concept of provocation as it is understood today were not laid until the seventeenth century.[2]

3.2 In this Part we will focus on this more recent history of provocation. Our understanding of the historical basis upon which this partial defence has developed will, in turn, inform our assessment of the basis for its operation as a contemporary partial defence to murder.

3.3 Consideration of the development of provocation prior to the Homicide Act 1957[3] needs to take account of:

1) whether the defence is a partial justification, a partial excuse or an amalgam of both;

2) the contemporary understanding of mens rea; and

3) the changing social mores and conditions in which the law developed.

Justification and excuse

3.4 The partial defence of provocation arose in response to the mandatory death sentence for murder. When reviewing the law of provocation in the mid twentieth century, the Royal Commission on Capital Punishment 1949-1953 Report stated that:

> Provocation can never render an unlawful homicide excusable or justifiable; but if the act by which death is caused is done in the heat of passion caused by provocation, this may reduce the crime from murder to manslaughter.[4]

3.5 While this is true, as provocation is only a partial defence reducing a potential murder conviction to manslaughter, addressing whether provocation is based on a partial justification theory or a partial excuse theory or, indeed, a hybrid of the two, is helpful in our assessment of its development. In particular, it may assist in

[1] J Horder, *Provocation and Responsibility* (1992) pp 6-9.

[2] *Ibid*, at p 23.

[3] In this Part referred to as "the 1957 Act".

[4] (1953) Cmd 8932 at para 124.

identifying whether the defence developed on the foundations of a coherent moral basis or whether it developed in casuistic fashion responding primarily to changes in contemporary moral and social standards of behaviour.

3.6 The essence of the distinction between partial justification and partial excuse is that the former focuses on the conduct of the provoker while the latter focuses on the behaviour of the provoked. If the defence is viewed as a partial justification the focus is placed on whether the provoker's conduct was in some way untoward in the first place. If viewed as a partial excuse, the focus is placed on whether or not the defendant is entirely to blame for his conduct.

3.7 In the thirteenth century the law of homicide was reformed and all felonious homicides were made capital offences. To mitigate the harshness of the mandatory sentence, two categories of non-felonious homicide were created: justifiable homicide and excusable homicide. A finding of justifiable non-felonious homicide led to an acquittal, where a finding of excusable non-felonious homicide provided a strong case for a royal pardon, which was granted almost automatically.[5]

3.8 Although the law on homicide has now developed far beyond this structure, there has recently been a resurgence of interest in whether the defence is one of partial justification or partial excuse.[6] The cases before 1957 do not, however, expressly articulate the concepts of partial justification and partial excuse.

Mens rea

3.9 The mens rea of murder changed significantly from the mid seventeenth century to the mid twentieth century. In the seventeenth century the "wickedness" of murder was held to be "aggravated by the circumstances of secrecy or treachery".[7] However, by 1727 it was said to have "been long since settled to be, the voluntary killing a person of malice prepense, and that whether it was done secretly, or publickly".[8] Malice, in the legal sense, was said to import "a wickedness, which includes a circumstance attending to an act, that cuts off all excuse".[9] This understanding of malice aforethought, involving not only pre-meditation, but also some kind of "wicked disposition"[10] or "bad spirit"[11], continued up until the late nineteenth century, when it began to be interpreted as requiring no more and no less than an intention to kill or cause grievous bodily harm.[12]

5 J Horder, *Provocation and Responsibility* (1992) p 6.

6 *Smith and Hogan*, *Criminal Law* (10th ed 2002) p 210, fn 1. In addition, see J Dressler "Provocation: Partial Justification or Partial Excuse?" (1988) 51 MLR 467; F McAuley "Anticipating the Past: The Defence of Provocation in Irish Law" (1987) 50 MLR 133.

7 As referred to in *Oneby* (1727) 2 Ld Raym 1485, 1487; 92 ER 465.

8 *Ibid*, at p 1487.

9 *Ibid*, at pp 1487-8.

10 *Thomas* (1837) 7 C&P 817, 819; 173 ER 356.

11 *Ibid*.

12 *Welsh* (1869) 11 Cox CC 336, 337.

3.10 It would seem that the approach to provocation in the case law develops alongside the changing understanding of the mens rea for murder, and this will be noted as we trace the history of the partial defence.

Social circumstances

3.11 The development of the partial defence of provocation has been influenced by the social circumstances in which it has operated. Although the early case law does not specifically refer to the social context, its significance was identified in 1949 by Lord Goddard CJ:

> At a time when society was less secure and less settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken to-day when life and property are guarded by an efficient police force and social habits have changed.[13]

3.12 As social habits have changed, so have our perceptions of what is partially justifiable or excusable behaviour. In 1997 Lord Bingham CJ found it hard to "imagine circumstances in which a reasonable man would strike a fatal blow with the necessary intention, whatever the provocation".[14] However, in the early 18th century an "affront" of "pulling … the nose, or filliping upon the forehead" was held to be sufficient provocation to reduce murder to manslaughter.[15]

3.13 It would appear that in the early eighteenth century conduct of a kind which would now be considered trifling was considered a grave affront.[16] It is evident, therefore, that the prevailing social mores at any particular time have played a vital role in the development of the defence.

Developing a partial defence of provocation

Nature of the "provocation"

3.14 The understanding of what behaviour is capable of constituting "provocation" evolved over the years before 1957. It is arguable that the evolution reflected changing contemporary standards as to what was acceptable behaviour and a desire to ensure that there were appropriate limits as to what could constitute "provocation".

3.15 In the early eighteenth century case of *Mawgridge*[17] the defendant initially insulted a woman. On the victim's request that he leave the room, he proceeded to throw a bottle at the victim. The victim responded in kind and the defendant then drew his

[13] *Semini* [1949] 1 KB 405.

[14] *Campbell* [1997] 1 Cr App R 199, 207.

[15] *Mawgridge* [1707] Kel J 119, 135; 84 ER 1107.

[16] One can only speculate how such behaviour would have been viewed by the agricultural labourer. Such "trifling" affronts by one member of the nobility to another probably had a significance which would puzzle the modern observer.

[17] [1707] Kel J 119; 84 ER 1107.

sword and stabbed the victim. The jury's verdict was murder. The victim's response of throwing a bottle was held not to be provocation. Lord Holt CJ stated what conduct was capable of constituting "provocation":

> First, if one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter…
>
> Secondly, if a man's friend be assaulted by another, or engaged in a quarrel that comes to blows, and he in the vindication of his friend, shall on a sudden take up a mischievous instrument and kill his friend's adversary, that is but manslaughter…
>
> Thirdly, if a man perceives another by force to be injuriously treated, pressed, and restrained of his liberty, though the person abused doth not complain, or call for aid or assistance; and others out of compassion shall come to his rescue, and kill any of those that shall so restrain him, that is manslaughter…
>
> Fourthly, when a man is taken in … adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property…[18]

3.16 This judgment demonstrates that what was capable of constituting provocation was confined to a limited number of defined categories. Ashworth submits that the link between these four categories of provocation is that of "unlawfulness".[19] Horder refutes this however, asserting that "Ashworth's analysis of the early modern law lacks … a theory or frame of reference for explaining the gravity of provocation, which is grounded in an account of 'the natural feelings of [that] past time'".[20]

3.17 It is significant that in *Mawgridge* the judgment hinges on a lack of "malice prepensed". Although the above four categories of provocation are outlined, it is also noted that "provocation" of a lesser degree may be capable of reducing murder to manslaughter if the reaction to that "provocation" is also limited, so as to demonstrate that death was not intended:

> Suppose upon provoking language given by B to A, A gives B a box on the ear, or a little blow with a stick, which happens to be so unlucky that it kills B . . ., this blow though not justifiable by law, but is a wrong, yet it may be but manslaughter, because it doth not appear that he designed such a mischief.[21]

3.18 The period of just over a century following the decision in *Mawgridge* witnessed the industrial revolution, the establishment of the Metropolitan Police, followed

[18] *Ibid*, at pp 135-137.

[19] "The Doctrine of Provocation" (1976) 35 CLJ 292 at pp 293-4.

[20] *Provocation and Responsibility* (1992) p 25.

[21] [1707] Kel J 119, 131; 84 ER 1107.

shortly thereafter by rural police forces, and considerable social unrest and violence, particularly in the decades following the conclusion of the Napoleonic War in 1815. Whether coincidental or not, in the decade from 1830 to 1840 there were a number of cases on provocation.

3.19 In *Lynch*[22] it was stated that:

> It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter.

3.20 In their summing up to the jury, however, the judges focussed on lack of intent. The defendant had murdered his friend following an altercation outside a pub in which the two had been drinking. The victim had punched the defendant, who had called the police and left, but had then returned some moments later with a knife and stabbed the victim, who died. Lord Tenterden stated:

> if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder.[23]

3.21 This approach is evident in *Hayward*,[24] which makes little mention of the provoking circumstances but focuses on whether the defendant had "shewn thought, contrivance, and design …[which]… denoted rather the presence of judgment and reason, than of violent and ungovernable passion".[25]

3.22 A change in approach is discernible with the emergence of the "reasonable man" in *Welsh*.[26] Keating J sums up the change:

> in law it is necessary that there should have been a serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow - something which might naturally cause an ordinary and reasonable minded man to lose his self control and commit such an act.[27]

This new approach emphasises not only loss of self-control, but also the need for a sufficient degree of provocation. This emphasis on the need for the "provocation" to be "serious" is a theme of the case law prior to the 1957 Act.[28] There must be "such an amount of provocation as would be excited by the circumstances in the

[22] (1832) 5 C&P 324, 324-5; 172 ER 995.

[23] *Ibid*.

[24] (1833) 6 C&P 157; 172 ER 1188.

[25] *Ibid*, at p 159.

[26] (1869) 11 Cox CC 336.

[27] *Ibid*, at p 339.

[28] For example: *Alexander* (1913) 9 Cr App R 139; *Lesbini* [1914] 3 KB 1116; *Mancini* [1942] AC 1; *Holmes* [1946] AC 588; *McCarthy* [1954] 2 QB 105.

mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion".[29]

3.23 In *Rothwell*[30] Blackburn J stated that "if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter".[31] This suggested that words alone might be capable of constituting "provocation".

3.24 A consistent theme of later cases, however, was the refusal of the courts to treat words alone as capable of constituting "provocation". In *Alexander*[32] the defendant killed his wife following her confession that she was considering moving in with another man. A murder verdict was returned on the basis that the "provocation" was insufficient. Darling J did not completely rule out that words alone could constitute "provocation", but limited the possibility to "exceptional circumstances".[33] In *Holmes*,[34] also a case of domestic killing resulting from an alleged confession of adultery, Viscount Simon reiterated that "in no case could words alone, save in circumstances of a most extreme and exceptional character, [reduce the crime from murder to manslaughter]".[35] He also highlighted the relevance of social change, emphasising that "we have left behind us the age when the wife's subjection to her husband was regarded by the law as the basis of the marital relation . . . Parliament has now conferred on the aggrieved wife the same right to divorce her husband for unfaithfulness alone as he holds against her, and neither, on hearing an admission of adultery from the other, can use physical violence against the other which results in death and then urge that the provocation received reduces the crime to mere manslaughter".[36]

3.25 In *McCarthy*[37] Lord Goddard CJ suggested that in some circumstances words alone might be capable of constituting "provocation". The victim had allegedly propositioned the defendant with an invitation to "commit sodomy", upon which the defendant had "knocked him down and beat his face or head on the surface of the road, thereby causing severe injuries".[38] Whilst it was held that the provocation was insufficient to excuse such a violent response, Lord Goddard CJ conceded that "this provocation would no doubt have excused … a blow, perhaps more than one".[39] This emphasises the need for a reasonable relationship between the

[29] See the judgment of Lord Reading CJ, citing *Welsh*, in *Lesbini* [1914] 3 KB 1116, 1120.

[30] (1871) 12 Cox 145.

[31] *Ibid*, at p 147.

[32] (1913) 9 Cr App R 139.

[33] *Ibid*, at p 141.

[34] [1946] AC 588.

[35] *Holmes* [1946] AC 588, 600.

[36] *Ibid*.

[37] [1954] 2 QB 105.

[38] *Ibid*, at p 106.

[39] *Ibid*, at p 109.

provocation and the mode of showing resentment and is reminiscent of what Lord Holt CJ had said in *Mawgridge*.[40]

Nature of the response

TIME PASSED AND WEAPON USED

3.26 The history of provocation is consistent in requiring that there be a sufficient nexus in time between the provocative act and the fatal response and that any weapon used should be immediately to hand and not retrieved from elsewhere for use. The longer the lapse in time between the provocation and the response, the greater the evidence that the defendant was not labouring under a sudden passion or loss of self–control at the time of the killing.

3.27 While the requirement of a time nexus has been consistent, judicial interpretation of it has not been entirely consistent. In *Oneby*[41] the "cooling period" was held to be variable on the grounds that "passions in some persons are stronger and their judgments weaker than in others; and by consequence it will require a longer time in some, for reason to get the better of their passions, than in others".[42]

3.28 This subjective approach was followed in *Lynch*.[43] The verdict was manslaughter. Two considerations were of particular relevance. First, the defendant's father gave evidence that the defendant always carried the knife with him. Had he left to get the knife and then returned with it this would have been evidence of contrivance and design and weakened the assertion that he was acting under the passion provoked by the punch received.[44] The second was the judge's direction to the jury:

> If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter.[45]

This approach is consistent with the focus of the early case law on the presence or absence of "malice prepensed".

3.29 By the early twentieth century the focus had become less subjective following the emergence of the "reasonable man" in *Welsh*.[46] In 1913 in *Alexander*[47] a two hour time lapse was held to be too long and the court made no reference to the

[40] See para 3.17.

[41] (1727) 2 Ld Raym 1485; 92 ER 465.

[42] *Ibid*, at p 1494. Cited with approval by Lord Clyde as support for his view in *Smith (Morgan)* [2001] 1 AC 146, 177.

[43] (1832) 5 C&P 324; 172 ER 995.

[44] As was held in the case of *Hayward* (1833) 6 C&P 157; 172 ER 1188.

[45] (1832) 5 C&P 324, 325; 172 ER 995.

[46] (1869) 11 Cox CC 336.

[47] (1913) 9 Cr App R 139.

individual make-up of the defendant. In *Mancini*[48] Viscount Simon stated that it was of particular importance:

> (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and
>
> (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger.[49]

3.30 This more objective approach to the lapse of time coincides with the period in which the mens rea for murder was being redefined, removing the requirement for "wickedness" and "bad spirit" and focussing instead on pre-meditated intent. In addition, changing perceptions of what is permissible social behaviour have played a role. Whereas in *Lynch*[50] the defendant's use of a knife was accepted because he was found to have carried it habitually, by the mid twentieth century carrying a knife was not socially acceptable and therefore much less likely to be excused as a proportionate response to a provoking punch.[51]

A PROPORTIONATE RESPONSE

3.31 The requirement of a proportionate response to the provocation has also been a constant element throughout the history of provocation. However, as with the proximity requirement, the interpretation of the requirement has evolved.

3.32 In *Oneby*[52] the judge explained the approach to proportionality by explaining the reasoning behind two previous cases. The first case[53] involved two boys fighting. Boy A scratched boy B's face causing a great deal of bleeding from the nose. B ran home to his father. On seeing his son all bloody, the father picked up a "cudgel" and ran three quarters of a mile to boy A whereupon he struck him on the head and he died. The verdict handed down in the case was manslaughter. This verdict was adjudged to be the result of two factors:

1) that although there had obviously been considerable time between the provocative act and the response, there had been continuing "sudden passion" until the time of the killing; and

2) that the father had only used a little club[54] to beat boy B "from which no such fatal event could be reasonably expected".[55]

[48] [1942] AC 1.

[49] *Ibid*, at p 9.

[50] (1832) 5 C&P 324; 172 ER 995.

[51] Under current law this would constitute a criminal offence. See Prevention of Crime Act 1953, s 1.

[52] (1727) 2 Ld Raym 1485; 92 ER 465.

[53] Cited only as 12 Co. 17, see *Oneby* (1727) 2 Ld Raym 1485, 1498; 92 ER 465.

[54] The words actually used in the original report are "little cudgel" see *Oneby* (1727) 2 Ld Raym 1485, 1498; 92 ER 465.

The judge also cited *Turners Case*[56] in which a servant boy failed to clean a woman's clogs well, as a result of which the woman's husband hit the boy with a clog on the head and killed him. Although there was no other provocation it was held to be manslaughter because "the clog was so small, there could be no design to do any great harm to the boy, much less kill him".[57]

3.33 In *Oneby*[58] the length of time permissible between the provocative act and the response was said to vary because "it will require a longer time in some, for reason to get the better of their passions, than in others".[59] This test was applied in *Lynch*[60] where in summing up it was stated that the jury should consider the fact that the defendant "proved to be of no very strong intellect" in deciding whether there was a sufficient time interval for his passions to cool.[61]

3.34 In the later case of *Thomas*[62] in 1837 the drunkenness of the accused was also held to be relevant to deciding whether or not intention to kill had been formed. In this case the defendant had drunkenly been challenging anyone to strike him, saying he "would make them repent it".[63] In summing up the judge outlined that "if a man makes himself voluntarily drunk, that is no excuse for any crime he may commit whilst he is so".[64] However, he went on to state that "drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is . . . whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So, where the question is, whether words have been uttered with a deliberate purpose or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered".[65]

3.35 The judge here suggests that drunkenness can be considered for two purposes: if the defendant was acting under passion and in considering any behaviour which may display an intent, in this case, the uttering of words.

3.36 Once again the emphasis, in these early eighteenth century cases, is on an absence of wicked intent. Proportionality is relevant only in relation to demonstrating this lack of wickedness. One obviously acting under a "sudden passion" and therefore without the necessary maliciousness, was much more likely to receive a

[55] *Ibid*.

[56] Comberbatch 407, 8.

[57] See *Oneby* (1727) 2 Ld Raym 1485, 1499; 92 ER 465.

[58] *2* Ld Raym 1485; 92 ER 465.

[59] *Ibid*, at p 1494.

[60] (1832) 5 C&P 324; 172 ER 995.

[61] *Ibid*, at p 325.

[62] 7 C&P 817; 173 ER 356.

[63] *Ibid*, at p 818.

[64] *Ibid*, at p 820.

[65] *Ibid*.

manslaughter verdict, even if his actions may have been somewhat excessive in response to the provocation received.

3.37 A shift of emphasis starts to emerge in the mid nineteenth century. In *Kirkham*[66] the analysis is still explicitly focussed on the lack of malice,[67] but the judgment concludes that the defendant:

> must be excused if the provocation was recent and he acting on its sting, and the blood remained hot, but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because, though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.[68]

3.38 Following the emergence of the "reasonable man" in *Welsh*[69] the courts increasingly emphasised the need for a "reasonable relationship" between the provocation and the response.[70] Whereas, initially, proportionality had been employed to test whether or not the killing had been perpetrated with the "wickedness" associated with malice prepensed, over time it was transformed into an objective test. Where there was no reasonable relationship between the provocation and the response, and the "reasonable man" would not have reacted to the provocation as the defendant did, the defence failed.[71]

Emergence of the Reasonable Man

3.39 In 1869 in *Welsh*[72] Keating J said:

> The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.

Although Keating J believed he was only re-stating existing law (and to some extent this was true as his decision clarified earlier attempts to confine the subjective nature of the defence),[73] the case marks an important point in the development of provocation.

[66] (1837) 8 C&P 115; 173 ER 422.

[67] *Ibid*, at p 117.

[68] *Ibid*, at pp 118-119.

[69] (1869) 11 Cox CC 336, 338.

[70] See generally *Mancini* [1942] AC 1, *Duffy* [1949] 1 All ER 932 and *McCarthy* [1954] 2 QB 105.

[71] See *McCarthy* [1954] 2 QB 105 and *Bedder* [1954] 1 WLR 1119.

[72] (1869) 11 Cox CC 336.

[73] See *Kirkham* (1837) 8 C&P 115, 118-9, where it was observed that the law "considers man to be a rational being, and requires that he should exercise reasonable control over his passions"; 173 ER 422.

3.40 In a number of cases between 1869 and the 1957 Act the courts strictly applied the reasonable man test and refused to allow consideration to be given to the effect of the "provocation" on mentally deficient individuals,[74] those with hot-tempered dispositions[75] and unusually excitable or pugnacious persons.[76] The test was what effect the provocation would have had on the "reasonable man", and the "reasonable man" was not to be endowed with specific characteristics of the individual that may have increased the severity of the provocation.[77]

3.41 The extent to which drunkenness could be considered was also restricted in *McCarthy*.[78] Before *Welsh*[79] it could be considered in relation to whether the defendant acted out of passion as a result of the provocation. In *McCarthy*,[80] however, it was held that there is no distinction between "a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication".[81] The court, however, left open the possibility that drunkenness could be considered if it were "such a complete and absolute state of intoxication as to make [the defendant] incapable of forming the intent charged".[82]

3.42 The late nineteenth and early twentieth centuries saw the courts limiting provocation through a new and restricted understanding of mens rea for murder and the introduction of the "reasonable man". It is possible that these restrictions may have been related to a new social order evolving due to the presence of a police force. The Metropolitan Police Force was introduced in 1829 but it was not until the 1856 Police Act that rural forces became obligatory. As the country adapted to the new social order, it would appear the courts found a new legal focus. However, it is not clear how consistent the courts were in their application of the reasonable man test in practice. The Royal Commission on Capital Punishment 1949 – 1953 Report, noted the conflicting tendencies in the evolution of provocation law in England.

> On the one hand the courts have steadily limited the scope of provocation recognised as adequate to reduce murder to manslaughter, and have subjected it to increasingly strict and narrow tests. On the other hand the greater severity of the law has been tempered by leniency in its application. Judges have instructed juries in terms more favourable than the letter of the law would allow.

[74] *Alexander* (1913) 9 Cr App R 139.

[75] *Lesbini* [1914] 3 KB 1116.

[76] *Mancini* [1942] AC 1.

[77] See *Bedder* [1954] 1 WLR 1119 where the victim, a prostitute, teased the defendant when he failed to have sexual intercourse with her because he was impotent. The court held that his impotence was irrelevant because the test was that of the reasonable man, not the reasonable man in the specific circumstances of the defendant.

[78] [1954] 2 QB 105.

[79] (1869) 11 Cox CC 336.

[80] [1954] 2 QB 105.

[81] *Ibid*, at p 112.

[82] *Ibid*.

> Juries, sometimes with the encouragement of the Judge, sometimes in the face of his direction, have returned verdicts of manslaughter where, as a matter of law, the most favourable interpretation of the evidence could scarcely justify them in doing so. Successive Home Secretaries have been ready to recommend the exercise of the Prerogative of Merby where the prisoner has been convited of murder but has acted under substantial provocation of a kind or degree insufficient in law to reduce the crime to manslaughter.
>
> Each of these tendencies reflects corresponding developments in the evolution of society … the distinction between murder and manslaughter was first elaborated at a time when the common mischief to be guarded against was the occurrence of set fights with deadly weapons, and it had later to be adapted to a changed situation, where the common mischief was the taking of inordinate vengeance for comparatively trifling injuries, such as returning a box on the ear by a pistol shot or a deadly stab … In a more civilised society the citizen was expected to react less violently to provocation that was not gross.[83]

CONCLUSION

3.43 Examination of the development of the defence reveals that before 1957 it had no consistent moral basis. At different times the case law vacillated between viewing the defence on the one hand as a partial justification and on the other as a partial excuse. In some cases the focus was on whether the defendant had the necessary mens rea and/or was sufficiently blameworthy, while in others it was on the conduct of the provoker and whether it constituted sufficient "provocation" to justify the response of the defendant.[84] The problematic nature of this compromise did not go unnoticed:

> The rule of law that provocation may, within narrow bounds, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness, but it suffers from the common defects of a compromise.[85]

It would seem, as Horder asserts, that the partial defence of provocation has developed not on a defined moral basis, but rather as a response to the gravity of "provocation" according to the natural feelings of past times. The lack of a consistent moral basis continues to influence the development of the law.

[83] See Royal Commission on Capital Punishment 1949 – 1953 Report (1953) Cmd 8932 at paras 134–135.

[84] For further argument see generally: J Dressler, "Provocation: Partial Justification or Partial Excuse?" (1988) 51 MLR 467; F McAuley, "Anticipating the Past: The Defence of Provocation in Irish Law" (1987) 50 MLR 133.

[85] See Royal Commission on Capital Punishment 1949 – 1953 Report (1953) Cmd 8932 at p 53.

PART IV
SUMMARY OF THE PRESENT LAW OF PROVOCATION AND ANALYSIS OF ITS DEFECTS

INTRODUCTION TO THE PRESENT LAW

4.1 The common law rule which allows a defendant, who killed with the mens rea for murder but who was provoked, to be convicted of manslaughter not murder[1] was modified by section 3 of the Homicide Act 1957.[2]

4.2 Section 3 provides:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

4.3 It remains the case that it is by virtue of the common law that the offence of murder can be reduced to manslaughter in such cases. Until 1957 there were three ingredients to this defence. There had to have been provocation,[3] it must have caused the defendant to lose self-control and act as he or she did, and it must have been such as would cause a reasonable person to do the same. Even before 1957 the first and third ingredients were sometimes elided.[4]

[1] In *Duffy* [1949] 1 All ER 932, 933 Lord Goddard approved Devlin J's direction at first instance, adding, "it might well stand as a classic direction". The direction read:

> Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind. (at p 932).

Note, for this definition to continue to apply after enactment of the Homicide Act 1957, it is necessary to delete the third phrase, and insert "done or words spoken" in its place.

[2] In this Part referred to as "the 1957 Act".

[3] Ordinarily by the deceased.

[4] See para 126 of the Royal Commission on Capital Punishment 1949 – 1953 Report (1953) Cmd 8932, where the law is summarised as follows:

> Two fundamental conditions must be fulfilled in order that provocation may reduce to manslaughter a homicide which would otherwise be murder. First, the provocation must be gross and must be such as might cause a reasonable man to lose his self-control and use violence with fatal results. [*Lesbini* [1914] 3 KB 116; *Mancini v DPP* [1942] AC 1] Secondly, the accused must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime while so deprived. [*Mancini v DPP* and *Holmes v DPP*

4.4 This process of blurring the first and third ingredients continued after the 1957 Act,[5] the formula being that provocation was conduct that might have caused a reasonable person to act as the defendant did. Before 1957 judges used to rule as a matter of law on the question of what could and what could not constitute provocation as a matter of law. Not everything that might have caused a defendant to have lost self-control satisfied the pre-1957 requirement of being provocative conduct within the meaning of the law. However, under the 1957 Act, section 3, provides — "Where on a charge of murder there is evidence on which *the jury* can find that the person charged was provoked (whether by things done or *by things said* or by both together) to lose his self-control …".[6] This has been held to abolish all previous rules of law as to what can or cannot amount to provocation.[7]

4.5 The second phrase of section 3 provides — "the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury". This makes clear that

> if there was any evidence that the accused himself at the time of the act which caused death in fact lost his self-control in consequence of some provocation, however slight it might appear to the judge, he was bound to leave to the jury the question, which is one of opinion not law: whether a reasonable man might have reacted to that provocation as the accused did.[8]

Finally, the jury is told, in determining that question, to "take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man".

4.6 Thus, under section 3, the courts apply a dual test of provocation, drawn from the common law, namely (1) "the provocation must … have caused the accused to lose his self-control" and (2) it "must also be such as might cause a reasonable man to react to it as the accused did".[9] The prior question of law asked at common law, whether the conduct of the deceased was capable in law of constituting provocation, is not included. Section 3 removed from the judge the power to withdraw the defence of provocation from the jury in a case where there was

> [1946] AC 588, 597] It is for the Judge to decide whether, on a view of the evidence most favourable to the accused, there is sufficient material for a reasonable jury to form the view that he acted under such a provocation. If the Judge is satisfied that there is no sufficient material, it is his duty to direct the jury as a matter of law that the evidence cannot support a verdict of manslaughter.

It is to be noted that the first condition in fact contains two distinct ingredients.

5 Even though section 3 is arguably open to an interpretation which includes the three ingredients. See T Macklem and J Gardner, "Provocation and pluralism" (2001) 64 MLR 815.

6 (Emphasis added).

7 *DPP v Camplin* [1978] AC 705, 716, thus reversing the House of Lords decision in *Holmes v DPP* [1946] AC 588, in which it was held that the appellant could not rely on a verbal confession of adultery as constituting provocation.

8 *DPP v Camplin* [1978] AC 705, 716.

9 *Ibid*, *per* Lord Diplock.

evidence that in fact the defendant had lost his or her self-control but the judge did not believe that a reasonable man would have done so.[10] The section does this by expressly providing that it is for the jury to decide whether the provocation was enough to make a reasonable man do as the accused did.

4.7 The first of the two tests under the 1957 Act is obviously a subjective test. The second is, on the face of it, an objective test. It will be seen, however, that the courts have recognised the relevance of certain of the defendant's personal characteristics, when applying the second test.[11] This has introduced a subjective measure to the second part of the test. The extent of subjectivity has, quite recently, been increased significantly by the House of Lords decision in *Smith (Morgan)*.[12]

THE MEANING OF PROVOCATION

4.8 Before 1957 conduct could only amount to provocation if it was inherently objectionable. Since 1957 that is no longer the case. The word "provoked" in section 3 has come to be interpreted as meaning simply "caused".[13] This has meant that conduct can qualify as provocation within the 1957 Act in cases when the conduct would never have been considered capable of being provocation prior to the Act.

4.9 Accordingly, the conduct said by the defendant to have "provoked" his or her response of killing the victim might be entirely lawful and morally blameless. As a result, there have been cases involving an official enforcing a court order (*Dryden*[14]), or a baby crying (*Doughty*[15]) or a person denying having stolen another's tools (*Smith (Morgan)*)[16] in which the courts have accepted that the conduct in question was *capable* of constituting provocation. The question for the jury was whether the above dual test had been met.

4.10 The way in which this change in the interpretation of "provoke" has broadened the scope for raising the defence of provocation can also be demonstrated by looking at the approach taken before and after the Act in cases concerning sexual impropriety. Throughout the first half of the twentieth century the courts regarded the fact that the defence of provocation was available when a man caught a woman in the act of adultery as an anachronism in a world where there were divorce laws

[10] Reversing *Mancini v DPP* [1942] AC 1.

[11] Paras 4.39 – 4.68.

[12] [2001] 1 AC 146.

[13] The Judicial Studies Board specimen direction to the jury of April 2003 as to the "special meaning" meaning of provocation in this defence is as follows:

> A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been [said and/or done] by [X and/or others].

[14] [1995] 4 All ER 987.

[15] (1986) 83 Cr App R 319.

[16] [2001] 1 AC 146.

for dealing with marital breakdown.[17] The courts refused to extend the availability of the defence to engaged couples[18] or people living together.[19]

4.11 The modern argument voiced by critics of the present law of provocation that having an affair should never found the possibility of a defence is thus a concept supported by judges throughout the first half of the twentieth century. That was even though the courts were bound by ancient authority to allow the defence in cases when a man found his wife in the act of adultery.

PROOF OF PROVOCATION

4.12 On the issue of provocation, it is for the Crown to satisfy the jury that the defendant had not been provoked. This differs from the issue of diminished responsibility, where section 2 of the 1957 Act places the onus of proof on the defendant.[20]

4.13 The question whether a defendant was provoked to lose his or her self-control is a question of fact. "In accordance with the general rule, it is for the judge to say whether there is any evidence of that fact."[21] Once there, then it is the responsibility of the judge to leave the "second" question to the jury. It is for them to decide whether a reasonable man would have done as the defendant did. For this reason, the judge must leave the issue of provocation to the jury in such a case even where counsel expressly informs the court that the defendant does not wish to rely on that defence.[22]

4.14 The courts recognise that for a defendant to seek to rely on provocation (which is a partial defence) could undermine his or her complete defence, for example in a case in which the defendant argues that he or she killed in self-defence. Even if a defendant denies having lost self-control, if there is evidence that he or she did, the

[17] *Holmes v DPP* [1946] AC 588, 600.

[18] *Palmer* [1913] 2 KB 29, 31.

[19] *Greening* [1913] 3 KB 846, 849.

[20] The difference between the two is clearly illustrated by the case of *Smith* (*Morgan)* [2001] 1 AC 146. The psychiatric evidence was insufficient for the defendant to prove diminished responsibility under section 2 of the 1957 Act. On appeal to the Court of Appeal, a verdict of manslaughter was substituted for murder on the ground of provocation. The evidence of the defendant's mental impairment was a characteristic to be attributed to the notional reasonable man for the purposes of the defence of provocation. The House of Lords dismissed the Crown appeal.

The discrepancy in burdens may result in defendants making purely tactical choices as to which defence to rely upon. The breadth of the provocation defence since *Smith (Morgan)* is such that it may be more attractive for a defendant to run the provocation defence. See A Ashworth 'Commentary' [2003] Crim LR 552 at p 552.

[21] *Smith and Hogan, Criminal Law* (10th ed 2002) p 364. For example, see the ruling of the trial judge in *Cocker* [1989] Crim LR 740.

[22] *Burgess* [1995] Crim LR 425, 426; *Kulkit Singh Dhillon* [1997] 2 Cr App R 104, 114 and *Stewart* [1995] 4 All ER 999, 1006–1007.

jury must be invited to consider the question whether a reasonable man would have done so.[23]

THE LOSS OF SELF-CONTROL

Background

4.15 When the defence of provocation emerged in the seventeenth and eighteenth centuries only conduct that fell within particular recognised categories could be regarded as provocation in law.[24] In the nineteenth century, judges preferred to regard provocation as something which temporarily deprived a defendant of his or her reason, rather than such a killing being regarded as rational behaviour which had gone too far. The Victorian judges adapted the law in two ways to achieve this preference.

4.16 In place of the specific categories which the old law had regarded as sufficient, a more general rule was introduced: whatever the nature of the alleged provocation, the response had to be "reasonable".[25] Second, instead of asking whether the angry retaliation by the accused, though excessive, was in principle justified, the question was whether the accused had lost self-control.[26]

4.17 The courts required provocation and loss of self-control to occur at, or about, the same time.[27] Historically the theoretical basis for this requirement stemmed from the fact that the mental element of murder was "malice aforethought". If a

[23] In *Cox* [1995] Crim LR 741, the Court of Appeal said that for the future "it must be made clear that both counsel have an obligation to the court. If it appears to either counsel that there is evidence on which the jury could find provocation, they should regard it as their duty to point it out to the judge, before he sums up" (at p 741).

In *R (o/a Farnell) v The Criminal Cases Review Commission* [2003] EWHC 835, the Divisional Court quashed the decision of the Commission not to refer the case to the Court of Appeal. It remitted the case to the Commission with a direction that "it should be reconsidered having regard to the approach we have endeavoured to identify in our judgments" (at para 40). The Divisional Court emphasised (at para 33) that the question in section 3, whether the provocation was enough to make a reasonable man do as he did, is "one of opinion not law and the relevant opinion is that of the jury" (see *DPP v Camplin* [1978] AC 705, 716). The Court found that the trial judge had not given an adequate direction on provocation.

The difficult question, which is not fully resolved by the judgment of the Divisional Court, relates to the approach to be taken in the Court of Appeal where the ground of appeal relates to fresh evidence relating to provocation. It can be expected that the Commission will refer this case to the Court of Appeal where the approach to be taken in such a case will be clarified.

[24] *Mawgridge* (1707) Kel J 119, 130–137; 84 ER 1107. See Part III, paras 3.15 – 3.16.

[25] *Kirkham* (1837) 8 C & P 115, 119. This is discussed by Lord Hoffmann in *Smith (Morgan)* [2001] 1 AC 146.

[26] See *Smith (Morgan)* [2001] 1 AC 146, 160, *per* Lord Hoffmann.

[27] *Oneby* (1727) Ld Ryam 1485; 92 ER 465. In this case it was stated that to reduce a crime from murder to manslaughter the provocation had to arouse:

> [S]uch a passion as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office … the law will no longer under that pretext of passion exempt him from the punishment he justly deserves.

defendant acted in hot blood, this generally negatived "malice aforethought". Conversely, a premeditated killing could never be a provoked killing.

Sudden and temporary loss of control

4.18 The direction regarded as classic by the Court of Appeal in *Duffy*[28] refers to the need for a "sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind."[29] Later in the summing up in *Duffy,* in a passage again approved by the Court of Appeal, Devlin J said:

> Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation.[30]

4.19 Lord Diplock in *DPP v Camplin,*[31] clearly thought the loss of self-control must occur at or about the time of the provocation, he spoke of "any evidence that the accused himself *at the time of the act which caused the death* in fact lost his self-control."[32]

4.20 In *Ibrams,*[33] *Thornton,*[34] and *Ahluwalia*[35] the Court of Appeal has re-affirmed the requirement of a "sudden and temporary loss of self-control". In *Ahluwalia,*[36] Lord Taylor CJ said that the phrase "encapsulates an essential ingredient of the defence of provocation in a clear and readily understandable phrase. It serves to underline that the defence is concerned with the actions of an individual who is not, at the moment when he or she acts violently, master of his or her own mind." The moral footing of this is that, in one way, such a defendant lacks full mens rea. Although it might appear from the defendant's conduct that an intentional serious harm or death has occurred, the effect of the provocation may be that the moral responsibility for the death is reduced.

Significance of delay between acts of provocation and killing

4.21 Even though the loss of self-control must be sudden, the more recent cases do not insist on it being immediate.[37] Addressing the relevance of an interval between the

[28] [1949] 1 All ER 932. Approved in numerous cases, particularly *Whitfield* (1976) 63 Cr App R 39, 42.

[29] *Ibid,* at p 932E.

[30] *Ibid,* at p 932H.

[31] [1978] AC 705.

[32] *Ibid,* at p 716. (emphasis added)

[33] (1982) 74 Cr App R 154, 160.

[34] [1992] 1 All ER 306; *Thornton (No 2)* [1996] 1 WLR 1174, 1181.

[35] [1992] 4 All ER 889, 895.

[36] *Ibid*.

[37] *Ahluwalia* [1992] 4 All ER 889.

provocative conduct and the reaction of the defendant to it, Lord Taylor CJ said in *Ahluwalia*:[38]

> Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control. The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation.[39]… There are important considerations of public policy which would be involved should provocation be redefined so as possibly to blur the distinction between sudden loss of self-control and deliberate retribution.[40]

4.22 However, addressing the submission on the appellant's behalf that expert evidence showed that women who have been subjected frequently over a period to violent treatment may react to the final act or words by "slow burn" reaction rather than by an immediate loss of self-control, Lord Taylor CJ said:

> We accept that the subjective element in the defence of provocation would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a 'sudden and temporary loss of self-control' caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation.[41]

4.23 *Baille*[42] is another case in which there was a time delay between the acts of provocation and the killing. The defendant armed himself with a sawn-off shotgun and cut-throat razor and drove to the home of the deceased who had been supplying drugs to the defendant's three teenage sons, where he shot him. Quashing the conviction and ordering a retrial, the court held that the judge had taken too austere an approach for the purposes of section 3 and ought to have left the defence of provocation to the jury. The court recognised that there were evidential difficulties in the defence succeeding. However the court also observed that it had been referred to cases where the matter had been left to juries and the defence had succeeded, even though there were the same qualities of the desire for revenge, as great a lapse of time, as much planning and as many of the features as pointed against a sudden and temporary loss of self-control as in this case.[43]

[38] *Ibid.*

[39] *Ibid,* at pp 895–896.

[40] *Ibid,* at p 896.

[41] *Ibid,* at p 896.

[42] [1995] Crim LR 739.

[43] *Ibid,* at pp 739–740.

Where acts of provocation took place over a long period of time

4.24 In *Pearson*[44] the fact that the defendants waited until the deceased was asleep and then armed themselves with a sledgehammer was not fatal to the defence. The deceased, described as a "violent tyrant of a man", was the father of the two brothers (M and W) who killed him. M had suffered 8 years of his father's behaviour. W was directly exposed to it for less than a year. On the day of the killing the deceased had struck out at M who was suffering from toothache and threatened to knock all his teeth out. He also threatened W with violence. The jury convicted M of manslaughter due to provocation and W of murder. Allowing W's appeal and substituting a verdict of manslaughter, it was held:

> [I]n drawing a distinction between William and Malcolm [the judge] omitted to direct [the jury] that in deciding whether William had reasonably lost his self-control they could have regard to the father's words and conduct not simply against him but against Malcolm, especially since it appeared that William's return had been prompted by a desire to protect Malcolm from further violence. The jury could have been left with the impression that the eight years when Malcolm was alone with the father were not material and only provocation based on William's personal experience was relevant.[45]

The significance of planning the offence to the issue of loss of self-control

4.25 In *Ibrams*,[46] the existence of a plan to attack the deceased (carried out five nights after the last act of provocation) was regarded as inconsistent with the loss of self-control required by the defence. The Court of Appeal regarded the acts of provocation in that case (gross bullying, terrorising by the deceased) as more grave than any of the cases to which they had been referred.[47] Nevertheless, as nothing happened on the night of the killing which caused loss of self-control the defence was not available.[48] While accepting that the gross bullying and terrorising had almost certainly impaired the judgment of the appellants, the court added: "but that impairment of judgment is not the same as loss of self-control."[49]

4.26 In *Dryden*,[50] it was the overwhelming evidence of advance planning and the carrying out of that plan which satisfied the court that the appellant had not lost his self-control.[51]

[44] [1992] Crim LR 193.

[45] *Ibid*, at p 193.

[46] (1982) 74 Cr App R 154.

[47] *Ibid*, at p 159.

[48] *Ibid*, at pp 159–160.

[49] *Ibid*, at p 160.

[50] [1995] 4 All ER 987.

[51] *Ibid*, at p 998:

> [T]he evidence here was overwhelming that the appellant had announced his intention a considerable time before the event; that he had told people what he intended to do; that he had prepared himself for the occasion. He knew that the council were coming. He had hoped that the notices he had put upon his gate

Conclusion on loss of self-control

4.27 When we talk of "loss of self-control" this is an ambiguous and potentially misleading phrase.[52] There is an increased readiness in the courts to find that a case may be left to the jury on the issue of loss of self-control. The courts are less inclined to rule that there is no evidence of loss of control by reason of lapse of time between the last act of provocation and the killing, or the fact that the defendant armed him or herself. *Baille*[53] is a particularly good example of this. However, it remains the case that unless the jury is satisfied that the defendant did in fact lose self-control, there can be no question of a conclusion that he or she was provoked. Loss of self-control remains a requirement. Mere "impairment of judgment is not the same as loss of self-control".[54] Similarly, loss of self-restraint is not the same as loss of self-control.[55]

4.28 However, the readiness of the courts to accept the possibility of a "slow burn" reaction to provocation, culminating in a loss of self-control gives rise to a difficult question. It leaves no clear way of differentiating between a "provoked killing" and a "revenge killing" as the case of *Baille*[56] illustrates. How can such a case be distinguished from a revenge attack in response to the provocation? If on facts such as those in *Baille,* a jury accepted the defence of provocation, that would break the moral plank on which the defence of provocation has, at least since Victorian times, rested. Namely, that due to the loss of self-control, the defendant was not master of his or her own mind, and, in one way, lacked the full mens rea of the offence.

WHETHER THE PROVOCATION WAS ENOUGH TO MAKE A REASONABLE MAN DO AS THE DEFENDANT DID

4.29 In determining whether the provocation was "enough to make a reasonable man do as he did", section 3 of the Homicide Act 1957 requires that the jury "shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man". It is the latter phrase, which has given rise to most difficulty in the application of section 3. Historically, it had been held that the reasonable man test was not to be modified to take into consideration particular characteristics of the defendant. Consequently, no account could be

> might repel them. When those notices did not do that, he went into his premises, got his gun which was already loaded, came out with it and … pointed the gun at [the deceased] and steadily taking aim discharged it into his chest. In those circumstances, there was nothing to suggest that he did lose his self-control … his conduct afterwards strongly indicated that he had a plan to carry out; that there were people he was going to attack; and that he was determined, if he could, to attack them.

52 Part I, paras 1.50–1.51.

53 [1995] Crim LR 739.

54 *Ibrams* (1981) 74 Cr App R 154.

55 See *Cocker* [1989] Crim LR 740, in which the defendant suffocated his incurably ill, severely incapacitated wife who repeatedly begged him to kill her. The Court of Appeal found that the applicant "gave way to his wife's entreaties and far from losing his self-control acceded to what she wished to happen" (when he suffocated her) and dismissed the application for leave to appeal against conviction for murder.

56 [1995] Crim LR 739.

taken of the degree of mental ability of defendants in *Alexandra*[57] and *Lesbini*[58]. Nor was "an unusually excitable or pugnacious individual" entitled to rely on provocation "which would not have led an ordinary person to act as he did."[59] The impotence of *Bedder*[60] was not material when testing whether there had been "provocation by the deceased to justify the violence used" although Bedder killed after being taunted about his impotence.[61]

4.30 The requirement in section 3 that "the jury shall take into account everything both done *and said* according to the effect which, in their opinion, it would have on a reasonable man" changed the relevance of "characteristics" of the defendant in provocation cases. The courts recognised that it would not always be possible to take proper account of things said without taking consideration of certain pertinent characteristics.[62]

DPP v Camplin

4.31 In *DPP v Camplin*,[63] (House of Lords) Lord Diplock explained:

> It would stultify much of the mitigation of the previous harshness of the common law in ruling out verbal provocation as capable of reducing murder to manslaughter if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts or insults when applied to the person whom they are addressed. So to this extent at any rate the unqualified proposition accepted by this House in *Bedder* … that for the purposes of the "reasonable man" test any unusual physical characteristics of the accused must be ignored requires revision as a result of the passing of the Act of 1957.[64]

[57] (1913) 9 Cr App R 139, in which the appellant had been convicted of murder of the woman with whom he cohabited, who he killed two hours after she said she was going to live with someone else. The jury made "a strong recommendation to mercy on the ground of his mental deficiency". The appellant's argument that if the provocation was sufficient "in that particular case of mental deficiency, to cause a state of irresponsibility in which a man did not realise the nature and quality of the act he committed, then the provocation, even if only by words, was sufficient to reduce the crime to manslaughter" was rejected. It was held, *per* Darling J, at p 141: "There is no authority for such a proposition, and this Court cannot make laws; that is the function of Parliament".

[58] [1914] 3 KB 1116, in which the applicant shot dead the attendant at a rifle range whose remarks he had found offensive. The hot tempered, sensitive applicant "was not of good mental balance though not insane in the proper legal sense of the term" at p 1119, *per* Lord Reading CJ.

[59] *Mancini v DPP* [1942] AC 1, 9.

[60] *Bedder v DPP* [1954] 1 WLR 1119.

[61] See *ibid*, at p 1121:

> no distinction is to be made in the case of a person who, though it may not be a matter of temperament, is physically impotent, is conscious of that impotence, and therefore mentally liable to be more excited unduly if he is 'twitted' or attacked on the subject of that particular infirmity.

[62] See A Ashworth, "The Doctrine of Provocation" (1976) 35 CLJ 292 at pp 298–314.

[63] [1978] AC 705.

[64] *Ibid*, at p 717.

4.32 Thus, in *DPP v Camplin* those characteristics that affect the *gravity* of the taunt were held to be relevant under section 3. Lord Diplock concluded:

> The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.[65]

4.33 There are two limbs to this explanation of the expression "reasonable man"[66] in section 3:

(1) the person has the "power of self-control to be expected of an ordinary person of the sex and age of the accused"; but

(2) "in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him".

4.34 The first, partly objective, limb set a "norm" with which people were expected to conform. Lord Simon explained the reason for this. It is "to avoid the injustice of a man being entitled to rely on his exceptional excitability or pugnacity or ill-temper or on his drunkenness. (I do not purport to be exhaustive in this enumeration)".[67]

4.35 The second, subjective, limb identifies the type of characteristics of the accused which should be taken into account – those which affect the gravity of the provocation.

4.36 The logic of the second limb of Lord Diplock's test is that without it, the jury would be prevented from fulfilling the function conferred on them by section 3 according to its terms. In determining the question of whether the provocation was

[65] *Ibid*, at p 718E–F. This is the test that was codified in the Draft Criminal Code Bill proposed in Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, vol 1, clause 58 which provides:

> A person who, but for this section, would be guilty of murder is not guilty of murder if —
>
> a) he acts when provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and
>
> b) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control.

[66] Lord Diplock described this term as an "apparently inapt expression, since powers of ratiocination bear no obvious relationship to powers of self-control." (*Ibid*, at p 716G) He later described the reasonable man as "not exceptionally excitable of pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society today". (at p 717A)

[67] *Ibid*, at p 726F.

enough to make a reasonable man so act, the jury are required to "take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man".[68] This requirement would be meaningless if jurors, when purporting to assess the gravity of a taunt, did so disregarding all characteristics of the person to whom the taunt was addressed.[69]

4.37 However, Lord Diplock conceded, when contemplating the relevance of Camplin's age to the issue of provocation, that:

> [I]n strict logic there is a transition between treating age as a characteristic that may be taken into account in assessing the gravity of the provocation addressed to the accused and treating it as a characteristic to be taken into account in determining what is the degree of self-control to be expected of the ordinary person with whom the accussed's conduct is to be compared. But to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity to which Sir Michael Foster ascribed the doctrine of provocation more than two centuries ago. The distinction as to the purposes for which it is legitimate to take the age of the accused into account involves considerations of too great nicety to warrant a place in deciding a matter of opinion, which is no longer one to be decided by a judge trained in logical reasoning but is to be decided by a jury drawing on their experience of how ordinary human beings behave in real life.[70]

4.38 In July 2000, the House of Lords in *Smith (Morgan)*[71] held that all the particular characteristics of the defendant were to be taken into account in deciding whether the defendant was in fact provoked and whether the objective element was satisfied. No distinction was to be drawn between those characteristics which affect the defendant's powers of self-control and those which affect the gravity of the provocation to the defendant.

The journey from *Camplin* to *Smith (Morgan)*

4.39 In *DPP v Camplin* their Lordships gave examples of a number of characteristics which should be considered, if the provocation related to them. They included age, sex, race, colour, ethnic origin, physical deformity or infirmity, impotence, some shameful incident in the past, abscess on the cheek (where the provocation relied on was a blow to the face) or, in a female defendant, the conditions of pregnancy or menstruation.[72] Since *DPP v Camplin*, the difficult question has been, what other characteristics should be considered, and whether a characteristic can only be considered if the provocation related to it? At various levels in the judicial

[68] Homicide Act 1957, s 3.

[69] *DPP v Camplin* [1978] AC 705, 726C, *per* Lord Simon, who commented that:

> The effect of an insult will often depend entirely on a characteristic of the person to whom the insult is directed.

[70] *Ibid*, at pp 717G–718A.

[71] [2001] 1 AC 146.

[72] These characteristics are summarised in this way by Lord Taylor in *Morhall* [1993] 4 All ER 888, 892.

hierarchy the arguments associated with characteristics and their relevance have been articulated persuasively in opposing directions. Extracts from those judgments will be given in this section.

The need for account to be taken of some of the characteristics of the defendant

4.40 In *DPP v Camplin*,[73] Lord Diplock suggested a definition of "reasonable man" as used in section 3 of the 1957 Act. He said:

> It means an ordinary person of either sex, not exceptionally excitable of pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today.[74]

4.41 Lord Simon, also in *DPP v Camplin*,[75] explained the reasons behind reference to the reasonable man in this branch of the law:

> The original reasons in this branch of the law were largely reasons of the heart and of common sense, not the reasons of pure juristic logic. The potentiality of provocation to reduce murder to manslaughter was … "in compassion to human infirmity." But justice and common sense then demanded some limitation: it would be unjust that the drunk man or one exceptionally pugnacious or bad-tempered or over-sensitive should be able to claim that these matters rendered him peculiarly susceptible to the provocation offered, where the sober and even-tempered man would hang for his homicide. Hence, I think, the development of the concept of the reaction of a reasonable man to the provocation offered … But it is one thing to invoke the reasonable man for the standard of self-control which the law requires: it is quite another to substitute some hypothetical being from whom all mental and physical attributes (except perhaps sex) have been abstracted.[76]

Can any characteristic modify the hypothetical reasonable man?

4.42 On the question of which of the defendant's characteristics can be possessed by the reasonable man Lord Taylor CJ, observed in *Dryden*:[77]

[73] [1978] AC 705.

[74] *Ibid*, at p 717, *per* Lord Diplock, who continued: "A crucial factor in the defence of provocation from earliest times has been the relationship between the gravity of provocation and the way in which the accused retaliated, both being judged by the social standards of the day."

[75] *Ibid*, at p 725.

[76] *Ibid*.

[77] [1995] 4 All ER 987, 997. This case concerned an eccentric obsessional man who shot dead a planning officer following a dispute concerning buildings erected on his land. The fact that the appellant had announced his violent intentions a considerable time before the event and prepared himself for the occasion was evidence that the appellant had not lost self-control. The appeal against conviction was dismissed. (see p 998)

> What characteristics are appropriate for the jury to consider has been a vexed question since *Camplin*. If one adds all the characteristics of the appellant to the notional reasonable man, there is a danger that the reasonable man becomes reincarnated as the appellant. However, the point in *Camplin*, which was emphasised not only by Lord Diplock but also by Lord Simon of Glaisdale was that the purpose of taking the reasonable man was to have a yardstick to measure the loss of self-control that will be permitted to found a defence of provocation.

4.43 The New Zealand case of *McGregor*[78] was, at one stage, influential in the English courts.[79] The following extract from the judgment of North J, offers one explanation of which of the defendant's characteristics can modify the reasonable man:

> It is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man. The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality. A disposition to be unduly suspicious or to lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as a mood of depression, excitability or irascibility. These matters are either not of sufficient significance or not of sufficient permanency to be regarded as "characteristics" which would enable the offender to be distinguished from the ordinary man … It is to be emphasised that of whatever nature the characteristic may be, it must be such that it can fairly be said that the offender is thereby marked off or distinguished from the ordinary man of the community.[80]

4.44 However, regarding the use made in English courts of this New Zealand case, Lord Goff pointed out in the Privy Council in *Luc Thiet Thuan*,[81]

> it must be unwise to impose uncritically upon an English statute an interpretation placed upon a statute from another jurisdiction which is not expressed in the same words. … [T]he wholesale adoption, without analysis, of a substantial part of this obiter dictum, which covers a wide range of points on a notoriously difficult subject with

[78] [1962] NZLR 1069, 1081.

[79] In *DPP v Camplin* [1978] AC 705, Lord Simon (at p 727) expressed the opinion that English law was "substantially the same" as section 169(2) of the New Zealand Crimes Act 1961 as explained in *McGregor* [1962] NZLR 1069. Lord Goff points out in *Luc Thiet Thuan* [1997] AC 131, 142 that neither the New Zealand Act nor *McGregor* receive any mention in the other judgments of the court in *Camplin*. Nonetheless, Lord Simon's mention, in an imprecise way, would appear to have provided the genesis of the judgment of the English Court of Appeal in *Newell* (1980) 71 Cr App R 331, 340, *per* Lord Lane CJ, who describes the direction as "impeccable". See also *Ahluwalia* [1992] 4 All ER 889, 897–898, *per* Lord Taylor CJ; *Morhall* [1993] 4 All ER 888, 892, *per* Lord Taylor CJ; *Dryden* [1995] 4 All ER 987, 997, *per* Lord Taylor CJ.

[80] *McGregor* [1962] NZLR 1069, 1081.

[81] [1997] AC 131, 142.

> particular reference to the New Zealand statute, is not a satisfactory approach to the interpretation of the objective test in provocation as recognised in the English statute.

4.45 In due course, North J's dictum was found to create difficulties when applied in practice and it was disapproved by the New Zealand Court of Appeal in *McCarthy*.[82] Lord Goff expressed regret in *Luc Thiet Thuan*, that this disapproval had not been brought to the attention of the court in *Ahluwalia*,[83] *Dryden*[84] and *Humphreys*.[85]

Characteristics that are repugnant to the concept of the reasonable man

4.46 Lord Taylor CJ pointed out in *Morhall*[86] (in the Court of Appeal) that none of the characteristics given as examples in *DPP v Camplin*, as those which should be considered if provocation related to them,[87] is inconsistent with the general concept of a reasonable or ordinary person.[88] On the other hand, on appeal to the House of Lords, Lord Goff said:

> [T]here is nothing in the speeches in *R v Camplin* to suggest that a characteristic of this kind should be excluded from consideration. On the contrary … Lord Diplock spoke of the jury taking into consideration "all those factors" which would affect the gravity of the taunts or insults when applied to the defendant.[89]

4.47 In *Morhall*,[90] the appellant was a glue-sniffer who had been persistently criticised by the deceased and others about his addiction before the fatal stabbing. The issue concerning the relevance of this addiction was decided differently in the Court of Appeal and in the House of Lords. The latter ruled that where such a characteristic affected the gravity of the provocation it was a relevant characteristic to be taken into account by the jury.[91] The arguments in both courts are of interest and will now be set out.

4.48 Agreeing with the Crown's argument that such a characteristic did not qualify for consideration, Lord Taylor said:

> Otherwise, some remarkable results would follow. Not only would a defendant, who habitually abuses himself by sniffing glue to the point of addiction, be entitled to have that characteristic taken into account in his favour by the jury; logic would demand similar indulgence

[82] [1992] 2 NZLR 550.

[83] [1992] 4 All ER 889.

[84] [1995] 4 All ER 987.

[85] [1995] 4 All ER 1008.

[86] [1993] 4 All ER 888.

[87] Para 4.39.

[88] *Morhall* [1993] 4 All ER 888, 892.

[89] [1996] 1 AC 90, 97.

[90] [1996] 1 AC 90 (HL) and [1993] 4 All ER 888 (CA).

[91] [1996] 1 AC 90, 97.

> towards an alcoholic,[92] or a defendant who had illegally abused heroin, cocaine, or crack to the point of addiction. Similarly, a paedophile, upbraided for molesting children, would be entitled to have his characteristic weighted in his favour on the issue of provocation. Yet none of these addictions or propensities could sensibly be regarded as consistent with the reasonable man. It is to be noted, and we emphasise, that section 3 refers to a 'reasonable man', not just to a person with the self-control of a reasonable man. Whilst *DPP v Camplin* decided that the 'reasonable man' should be invested with the defendant's characteristics, they surely cannot include characteristics repugnant to the concept of the reasonable man.[93]

4.49 The Court of Appeal concluded:

> In our judgment, however, a self-induced addiction to glue sniffing brought on by voluntary and persistent abuse of solvents is wholly inconsistent with the concept of a reasonable man. In effect, [the appellant's] argument would stultify the test. It would result in the so-called reasonable man being a reincarnation of the appellant with his peculiar characteristics whether capable of being possessed by a reasonable man or not and whether acquired by nature or by his own abuse.[94]

4.50 That decision was however reversed in the House of Lords. Lord Goff explained:

> Judging from the speeches in *R v Camplin*, it should indeed have been taken into account. Indeed, it was a characteristic of particular relevance, since the words of the deceased, which were said to constitute provocation, were directed towards the defendant's shameful addiction to glue-sniffing and his inability to break himself of it.[95]

4.51 The contrary conclusion reached in the Court of Appeal seemed to flow from a misunderstanding of the "so-called 'reasonable person test' in this context".[96] Lord Goff continued that:

> [T]he 'reasonable person test' is concerned not with ratiocination, nor with the reasonable man whom we know so well in the law of negligence … nor with reasonable conduct generally. The function of the test is only to introduce, as a matter of policy, a standard of self-control which has to be complied with if provocation is to be established in law… .[97]

[92] Concerning alcoholism as a characteristic, see *Holley v A-G* [2003] JCA 013. The Jersey Court of Appeal held chronic alcoholism to be a relevant characteristic. The Privy Council granted leave in July 2003 and has not yet considered the appeal.

[93] [1993] 4 All ER 888, 893.

[94] *Ibid*, at p 894.

[95] [1996] 1 AC 90, 97.

[96] *Ibid*, at p 97G.

[97] *Ibid*, at pp 97–98.

4.52 In addition to the *characteristics* which the jury think would affect the gravity of the provocation, Lord Goff said that:

> [I]n an appropriate case, it may be necessary to refer to other circumstances affecting the gravity of the provocation to the defendant which do not strictly fall within the description 'characteristics', as for example the defendant's history or the circumstances in which he is placed at the relevant time… .[98]

4.53 Thus, however discreditable a condition may be, "it may where relevant be taken into account as going to the gravity of the provocation".[99] That is not to say that being intoxicated at the time of killing should be taken into account. Lord Goff was clear that those factors should not be taken into account "because that, like displaying a lack of ordinary self-control, is excluded as a matter of policy."[100]

4.54 In *Humphreys*[101] the Court of Appeal was again concerned with the question whether abnormal characteristics (immaturity and attention seeking by wrist slashing) were inconsistent with or repugnant to the concept of the reasonable man. The court also considered whether those characteristics could be considered by the jury in determining on the issue of loss of self-control. The case will be discussed in the following section.

Are any abnormal characteristics of the defendant eligible for consideration by the jury on the issue of loss of self-control?

4.55 In *Dryden*[102] (a case concerning a land owner who shot dead a planning officer) the English Court of Appeal held that obsessiveness and the eccentric character of the appellant were sufficiently permanent and set him apart from the ordinary man sufficiently to amount to characteristics that should be left to the jury.[103]

4.56 *Humphreys*[104] concerned an appellant who turned to drugs and prostitution in adolescence. Aged 17 she lived with a 33-year-old man with whom she had a tempestuous relationship. He lived in part on her earnings from prostitution, was jealous and possessive and beat her on numerous occasions. On the night that she killed this man, she had first cut her wrists out of fear that when he returned, drunk, he would beat her and force her to have sex with him and possibly with others. On his return, the man taunted her, saying that she had not made a very good job of slashing her wrists and she stabbed and killed him with a kitchen knife.

[98] *Ibid*, at p 98.

[99] *Ibid*, at p 100.

[100] *Ibid*, at p 100. Lord Goff added that the drunkenness of the defendant was rightly excluded as irrelevant in *Newell* (1980) 71 Cr App R 331. See also n 92 above.

[101] [1995] 4 All ER 1008.

[102] [1995] 4 All ER 987.

[103] Lord Taylor said: "[T]his was a characteristic—the obsessiveness on the part of the appellant and his eccentric character—which ought to have been left to the jury for their consideration. We consider that they were features of his character or personality which fell into the category of mental characteristics and which ought to have been specifically left to the jury." *Ibid*, at p 998.

[104] [1995] 4 All ER 1008.

4.57 The Court held in respect of the abnormal immaturity and attention seeking by wrist slashing:

> [T]he appellant's tendency to attention seeking by wrist slashing … can, in truth, be regarded as a psychological illness or disorder which is in no way repugnant to or wholly inconsistent with the concept of the reasonable person. It is also a permanent condition … . Furthermore, it was clearly open to the jury to conclude that the provocative taunt relied upon as the trigger inevitably hit directly at this very abnormality and was calculated to strike a very raw nerve … . [T]he judge should have left for the jury's deliberation these two relevant characteristics as eligible for attribution to the reasonable woman, it being for them to decide what, if any, weight should be given to them in all the circumstances.[105]

4.58 Another important development in this case relates to the approach that should be taken in cases where provocative circumstances comprise a complex history:

> [W]e do not think that on the facts of this case a mere historical recital, devoid of any analysis or guidance, was sufficient. This tempestuous relationship was a complex story with several distinct and cumulative strands of potentially provocative conduct building up until the final encounter. Over the long term there was the continuing cruelty … . [W]e consider that guidance, in the form of a careful analysis of these strands, should have been given by the judge so that the jury could clearly understand their potential significance.[106]

4.59 The question of whether abnormal characteristics of the accused are eligible for consideration by the jury in determining whether a reasonable person having characteristics of the appellant would have lost self-control was further considered in *Thornton (No 2)*.[107]

4.60 In this case the Court of Appeal explained the two ways in which battered woman syndrome may be relevant:

> First, it may form an important background to whatever triggered the actus reus. A jury may more readily find there was a sudden loss of control triggered by even a minor incident, if the defendant has endured abuse over a period, on the 'last straw' basis. Secondly, depending on the medical evidence, the syndrome may have affected the defendant's personality so as to constitute a significant characteristic relevant … to the second question the jury has to consider in regard to provocation. [108]

4.61 The further medical evidence before the court in this, the second appeal, raised the appellant's personality disorder for consideration as a relevant characteristic, and

[105] [1995] 4 All ER 1008, 1022.

[106] *Ibid*, at pp 1023–1024.

[107] [1996] 1 WLR 1174.

[108] *Ibid*, at p 1181–1182.

the element of "battered woman syndrome".[109] It was clear that mental as well as physical characteristics should be taken into account, and the judge should give the jury directions as to what, on the evidence, is capable of amounting to a relevant characteristic. The question was "whether the hypothetical reasonable woman possessing the appellant's characteristics would have reacted to the provocative conduct so as to do what the appellant did."[110]

4.62 In *Luc Thiet Thuan*[111] the Privy Council doubted the decisions in *Humphreys* (and others in this line of cases) and firmly took the contrary position in respect of relevance of the characteristics of the defendant to the issue of self-control. It held that the reasonable man referred to by section 3 of the 1957 Act (and section 4 of the Homicide Ordinance of Hong Kong, from where the case emanated) was a person who shared such of the individual characteristics of the defendant as the jury might consider would affect the *gravity* of the provocation, but who had the power of self-control to be expected of an ordinary man or woman or young person. The line of cases after *Camplin* which had held that the jury should be directed to take into account brain damage of a defendant which made it difficult for him or her to control impulses had, the court said, been wrongly decided.

4.63 Lord Steyn, in a minority opinion in *Luc Thiet Thuan*, said that the later cases referred to were not inconsistent with *Camplin*, rather they constituted a logical extension of its reasoning and were in accordance with justice.[112] He added that:

> The law remains that a defendant may not call in aid his own irascibility or pugnacity. The Royal Commission was confident that "minor abnormalities of character" must be ignored … . That does not mean that it was right to ask the jury to ignore the defendant's brain damage. Counsel for the prosecution argue that it may prove difficult to say where the line should be drawn. We ought not to shrink for this reason from recognising a rational and just development. The traditional common law answer is apposite: any difficult borderline cases will be considered if and when they occur. In the meantime nobody should underestimate the capacity of our law to move forward where necessary, putting an end to demonstrable unfairness exposed by experience.[113]

4.64 In *Campbell*[114] Lord Bingham CJ addressed the position of domestic courts, faced with the conflicting approach taken by the Law Lords in the Privy Council. He said that if the court were entitled to choose between the competing views

[109] *Ibid*, at p 1183.

[110] The crucial first question was whether the appellant herself was caused suddenly to loose her self-control. A re-trial was ordered. *Ibid*, at pp 1183–1184.

[111] [1997] AC 131, which concerned a defendant who admitted killing the victim and relied on defences of provocation and diminished responsibility. The judge directed the jury that medical evidence that the defendant suffered from brain damage and was prone to respond to minor provocation by losing his self-control and acting explosively was relevant to the defence of diminished responsibility only.

[112] [1997] AC 131, p 156E–H.

[113] *Ibid*, at pp 156H–157B.

[114] [1997] 1 Cr App R 199.

expressed "we should face a difficult task".[115] While there was compelling force in the construction of section 3 by the majority – the provision makes no express warrant for elaborating or qualifying the concept – Lord Bingham CJ continued:

> We are, however, conscious that the body of Court of Appeal authority which is in doubt represents a judicial response, born of everyday experience in criminal trials up and down the country, to what fairness seems to require. If the concept of the reasonable man expressed in section 3 were accepted without any qualification, successful pleas of provocation would be rare indeed, since it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation. It is in recognition of human frailty that the scope of the defence of provocation has, to a very limited extent, been enlarged. As Lord Steyn put it at p 66H: 'But even more important than the promptings of legal logic is the dictates of justice. Justice underpinned these decisions.'[116]

4.65 The above represents the journey taken by the courts from *DPP v Camplin* to the decision in *Smith (Morgan)* in which the House of Lords held (3:2) that all the particular characteristics of the defendant were to be taken into account in deciding *both* whether he or she was in fact provoked and whether the objective element of provocation was satisfied.

4.66 Lord Slynn emphasised that this approach:

> [D]oes not mean that the objective standard of what 'everyone is entitled to expect that his fellow citizens will exercise in society as it is today' is eliminated. It does enable the jury to decide whether in all the circumstances people with his characteristics would reasonably be expected to exercise more self-control than he did … .[117]

4.67 Lord Hoffmann emphasised that "what has been rendered unworkable is not the principle of objectivity which (subject to the changes noted in *Camplin)* section 3 was plainly intended to preserve, but a particular way of explaining it".[118]

4.68 The case of *Smith (Morgan)* is of significant importance in this area of the law. The basis of the five opinions delivered varies quite considerably, even amongst those who agreed with each other on the outcome of the case. There follows a detailed analysis of this case.

ANALYSIS OF HOUSE OF LORDS JUDGMENT IN *SMITH (MORGAN)*

Introduction

4.69 The majority judgments delivered by Lord Hoffmann, Lord Clyde and Lord Slynn dismissed the Crown's appeal from the Court of Appeal. They held that in murder

[115] *Ibid,* at p 207.

[116] *Ibid,* at pp 207.

[117] *Smith (Morgan)* [2001] 1 AC 146, 155E–F.

[118] *Ibid,* at p 173C.

cases where there is evidence that the defendant may have been provoked, the question for the jury was whether the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. All the particular characteristics of the defendant were to be taken into account in deciding both whether the defendant was in fact provoked and whether the response of the defendant was such that it ought to give rise to liability only for manslaughter. This includes, where appropriate in order to do justice, evidence of lack of capacity of the defendant to exercise self-control.

4.70 The dissenting judgments delivered by Lord Hobhouse and Lord Millett take the view that evidence of the defendant's characteristics has relevance only to (i) the issue whether D in fact lost self-control, and (ii) the gravity of the provocation. It is not admissible in respect of the standard of self-control that all defendants are expected to exercise.[119]

4.71 A common feature of judgments both in the majority and in dissent, is the view that the expression "reasonable man" is unhelpful.[120]

Lord Hoffmann

4.72 The basis of Lord Hoffmann's judgment – that the effect of Smith's depression on his powers of self-control was something that the jury should have been free to consider when deciding whether he had been provoked to kill McCullagh (V) – is as follows.

The changes made by section 3 of the Homicide Act 1957

4.73 The revision of the common law relating to the partial defence of provocation effected by section 3 of the 1957 Act made two plain changes to the law:[121]

(1) If "there was evidence that the accused was provoked to lose his self-control (the subjective element) then the question of whether the objective element was satisfied had to be left to the jury".

(2) The "jury could for this purpose take into account 'everything both said and done'. This removed any legal restriction on the kind of acts that could amount to provocation".[122]

[119] In respect of this, Lord Millett said that the question for the jury is:

> whether a person of ordinary self-control would have reacted as the accused reacted if he were similarly placed, that is to say, having the history, experiences, background, features and attributes of the accused. (at p 210A)

[120] [2001] 1 AC 146, 173B–D, *per* Lord Hoffmann; 179B–E, *per* Lord Clyde; 205E, *per* Lord Hobhouse; 208A–D and 209G, *per* Lord Millett. This strong condemnation from the judiciary suggests that reintroducing the concept in any reform recommendation will be inadvisable.

[121] That this is the effect of section 3 is recognised both in the majority and the dissenting judgments. The 1957 Act also removed the requirement of strict proportionality found in *Mancini v DPP* [1942] AC 1. Once 'words' were sufficient for legally recognised provocation, strict proportionality could have no place in the law, or certainly could not be a legal prerequisite for the defence to operate. See also paras 4.1 – 4.7 above regarding the changes effected by the 1957 Act.

4.74 Much importance is placed on the change in the respective roles of judge and jury.[123] This change removed from the judge the power to withdraw the issue of provocation from the jury. Prior to 1957 that was a means of deflecting the jury from a perverse verdict. Under section 3:

> The jury was to be sovereign and have the power in theory as well as in practice to decide whether the objective element was satisfied.[124]

The effect of these statutory changes

4.75 Lord Hoffmann reasoned that section 3 gave the jury a normative function in addition to their fact-finding function. They could determine the standard of behaviour required in any case.

4.76 That being the case it would be trespassing on the function of the jury for the judge to tell them, as a matter of law, that "they should ignore any factor or characteristic of the accused in deciding whether the objective element of provocation had been satisfied".[125]

4.77 The jury would need assistance in fulfilling their normative role. Lord Hoffmann suggested that the jury be told that the doctrine of provocation includes the principle of objectivity. They should have regard to that principle when deciding whether the act in question was sufficiently provocative to be acceptable as a partial excuse.[126]

Camplin

4.78 Lord Hoffmann drew attention to passages in *Camplin* which he said supported his interpretation. He argued that Lord Diplock had not intended his suggested direction on the facts of *Camplin* to be interpreted as meaning that in every case the only factors, which were relevant to the issue of loss of self-control, were those of age and sex.[127]

4.79 Lord Hoffmann did not accept that *Camplin* was authority for drawing a distinction between those characteristics which affect the gravity of the provocation and those which go to the issue of self-control. However, because that distinction has been adopted in New Zealand, Australia and Canada and by the Privy Council

[122] [2001] 1 AC 146, 157H.

[123] *Ibid*, at p 162G–H.

[124] *Ibid*, *per* Lord Hoffmann.

[125] *Ibid*, at p 163B–C. This is to be contrasted with the view of Lord Hobhouse who believes that it is not acceptable to leave the jury without definitive guidance as to the objective criterion to be applied. Lord Hobhouse added: "It is not proper to leave the decision to the essentially subjective judgement of the individual jurors who happen to be deciding the case". (at p 206B–C) Taken to its logical conclusion, Lord Hoffmann's approach would forbid reference to characteristics such as racism. What of others such as sexism?

[126] *Ibid*, at p 163B–E.

[127] *Ibid*, at pp 165A–166H.

for Hong Kong, and it has received much academic support, the distinction is addressed in Lord Hoffmann's judgment.[128]

The relationship between sections 2 and 3

4.80 The theoretical basis for the distinction is that provocation is a defence for the mentally "normal". A defendant who claims that mental abnormality affected his or her powers of self-control should plead diminished responsibility.[129]

4.81 It was accepted that there is a clear philosophical distinction between the defendant who claims to be partially excused, as his or her behaviour was a normal response to external circumstance and the defendant whose mental characteristics prevented him or her from behaving normally.[130] The difficulty is that in practice, in many cases, for example *Rongonui,*[131] the two forms of claim are inextricably muddled. The same factor or characteristic may bear relevance both to loss of self-control and to gravity of provocation. Juries are puzzled by directions that the evidence has relevance to one but not the other. Professor Stanley Yeo explains this puzzlement by the fact that the distinction bears no relationship to either of the underlying rationales for the partial defence (be it relative morality, or inability to control full mental faculties).[132]

[128] *Ibid,* at pp 167B–169G.

[129] This is the view taken by Lord Hobhouse at pp 189G–192G and by Lord Millett at p 214E–F.

[130] This apparently clear distinction between partial excuses and justifications is far from straightforward. Diminished responsibility has usually been understood to be an excusatory defence, but provocation appears to have elements of excuse ("I lost my temper") and elements of justification ("it was reasonable for me to do so and to kill in these circumstances"). The distinction between the approaches could be important in distinguishing between the defences and in delineating their boundaries. With diminished responsibility, D is arguably denied, on medical grounds, the ability to exercise effective powers of control. This is seen as a classic type of excuse. With provocation, D does have the ability to exercise his control (albeit perhaps a reduced capacity), but he fails to exercise that control. See J Dressler "Partial Justification or partial excuse?" (1988) 51 MLR 467 (Dressler suggests it is uncertain whether the provocation defence is one of justification or excuse) and F McAuley "Anticipating the past: The defence of provocation in Irish Law" (1987) 49 MLR 133 (McAuley emphasises the justificatory nature of the provocation defence, relying on the fault of the victim).

[131] [2000] 2 NZLR 385. Lord Hoffmann gives this example at p 167A. D killed a neighbour who produced a knife in a non-threatening way. D was a woman with a history of violence against her, suffering from post–traumnatic stress disorder. The Court of Appeal agreed that it was very difficult to distinguish between the gravity of the provocation (D's previous experience of violence making the mere production of a knife a graver provocation than otherwise) and D's capacity for self-control (which had been affected by the psychological stress of the violence). However, in Lord Hobhouse's view, the facts of that case should not give rise to the same problem in English Law. The conundrum raised in that case is, he says, "peculiar to New Zealand and the 'mental gymnastics' complained of by Tipping J would not be required by English Law" (p 187A). Presumably this is because in England diminished responsibility is available as a defence under s 2 of the 1957 Act, which is not the case in New Zealand.

[132] S Yeo, *Unrestrained killings and the law* (1998) p 61. That may be so. However, the jury might not be puzzled by the restricted relevance of characteristics, if they understood, as Lord Hobhouse said at p 195G, that a standard level of self-control is required by the law in order to "impose a constraint upon the availability of what would otherwise be liable to become an exorbitant defence".

4.82 Apart from the practical difficulties, Lord Hoffmann thinks it wrong to assume that there is a neat dichotomy between the ordinary person contemplated by the law of provocation and the abnormal one contemplated by the law of diminished responsibility. It is inevitable that there is a possibility of overlap between these because section 3 consigns the whole objective element to the jury.[133]

The need for an objective element in the defence of provocation

4.83 Lord Hoffmann accepts that:

> A person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his antisocial propensity as even a partial excuse for killing.[134]

He agreed with the result in *Stingel*[135] (an Australian case in which a jealous ex-boyfriend stalked his former girlfriend and killed the man he found having sex with her) saying:

> I respectfully agree. Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover … . [I]t is suggested, a direction that characteristics such as jealousy and obsession should be ignored in relation to the objective element is the best way to ensure that people like Stingel cannot rely upon the defence.[136]

IS THE GRAVITY OF PROVOCATION/SELF-CONTROL DISTINCTION VITAL TO ACHIEVE AN OBJECTIVE STANDARD?

4.84 Lord Hoffmann identifies "one really serious argument in favour of the distinction between characteristics affecting the gravity of the provocation and characteristics

[133] That there will be overlap in some cases between these defences is not denied by those in dissent, see for example Lord Hobhouse at 192G where he refers to the fact that the defences of diminished responsibility and provocation can very often operate in conjunction.

[134] *Ibid*, at p 169C.

[135] (1990) 171 CLR 312.

[136] [2001] 1 AC 146, 169G. In *Weller* [2003] EWCA Crim 815, Mitchell J refers to this part of Lord Hoffmann's judgment noting, at para 12, that "Lord Hoffmann is here simply restating a suggestion and not commending an approach". There is a problem with the suggestion that Lord Hoffmann appears to support. What if there is medical evidence to the effect that the defendant had a morbidly jealous or obsessional personality as a result of some form of illness or personality disorder? It is unclear on Lord Hoffmann's approach if this should be subject to direction or whether the jury should be allowed to make up their own mind. Professor Ormerod argues that the reference to *Stingel* by Lord Hoffmann exposes the weakness of his conclusion saying: "His Lordship is prepared to abdicate responsibility to the jury for setting moral benchmarks, but only to a point. By making this reference to *Stingel*, his Lordship acknowledges that with some issues the jury's moral rigour is not to be trusted. In terms of principle and practice it is not obviously easier to identify this cut off point than to distinguish which characteristics pertain only to the gravity of the provocation."

affecting the power of self-control".[137] The argument is that this is the only way to hold the line against complete erosion of the objective element in provocation.

4.85 The obvious concern is that if there is no limit to the characteristics which can be taken into account, then "the fact that the accused lost self-control will show that he is a person liable in such circumstances to lose his self-control. The objective element will have disappeared completely".[138]

4.86 However, referring to the English Court of Appeal decisions since *Camplin* – in *Newell*,[139] *Ahluwalia*,[140] *Dryden*[141] and *Campbell*[142] – Lord Hoffmann expressed reluctance at the prospect of turning back the strong current of authority from three successive Lord Chief Justices unless those cases were inconsistent with statute. He did not think they were. In *Ahluwalia*[143] Lord Taylor said that characteristics relating to the mental state or personality of an individual could be taken into account[144] and, in *Dryden*,[145] that mental characteristics of obsessiveness and eccentricity should be considered. Lord Hoffmann relied heavily on the fact that in neither case was it said that the jury should have been directed to have regard to these characteristics *only in so far as* they might have affected the gravity of the provocation[146] but not in so far as they might have affected his powers of self-control.[147]

[137] [2001] 1 AC 146, 169A.

[138] *Ibid*, at p 169B–C.

[139] (!980) 71 Cr App R 331.

[140] [1992] 4 All ER 889.

[141] [1995] 4 ALL ER 987.

[142] [1997] 1 Cr App R 199, 207.

[143] [1992] 4 All ER 889.

[144] The fresh psychiatric evidence before the Court of Appeal had not been before the Crown Court. If it had been Lord Taylor said that different considerations might have applied (*ibid*, at p 898). However, the appeal was allowed on the basis that in view of the fresh psychiatric evidence there might well have been an arguable defence of diminished responsibility, which was not put before the jury (at pp 899–890). A re-trial was ordered.

[145] [1995] 4 All ER 987.

[146] The force of Lord Hoffmann's reliance on these cases is arguably quite weak. It was implicit in these rulings of *Ahluwalia* and *Dryden* that the objective approach (subject to *Camplin*) applied in relation to characteristics not affecting the gravity of the provocation. There was, following *Morhall*, no reason to suggest that counsel should seek to include in a jury direction *all* the defendant's characteristics in respect of *all* aspects of the objective limb.

[147] [2001] 1 AC 146, 170F–G. However, on the basis of a different analysis, it will be seen that Lord Hobhouse regards the first three of these cases as being contrary to Smith's argument. Of *Newell*, he said at p 199D "the reasoning does not support the respondent's argument here: it is an authority against the respondent" as the alcoholism of *Newell* was not relevant to the provocation (a disparaging remark about the defendant's former young girlfriend). *Ahluwalia* is discussed at pp 200F–201A and *Dryden* from p 201B–G. Of *Campbell*, Lord Hobhouse explained at 204D-F that in that case there is no discussion of the authorities. It was on an assumption that the dissenting judgment of Lord Steyn in *Luc Thiet Thuan* [1997] AC 131 accorded with English law, that it was said that the Court of Appeal decisions should be followed until overruled by the House of Lords.

4.87 Some assume that unless the judge can direct the jury that certain characteristics of the accused are legally irrelevant to the objective element in the defence, "the jury may receive the impression that the law actually requires them to take such matters into account".[148] Lord Hoffmann disagreed. He recognised that there would always be such a risk but he believed that Parliament considered

> that risk less likely to cause injustice than to confine the jury within the rules of law which had been developed about the notional characteristics of the reasonable man.[149]

THE REASONABLE MAN – AN UNWORKABLE EXPRESSION IN THIS CONTEXT

4.88 Lord Hoffmann regarded the main obstacle to directing juries effectively in provocation cases to be the way that courts and writers had married two concepts:

(1) the "old formula that the provocation must have been such as to cause a 'reasonable man' to act in the same way as the accused"; and

(2) the rule in section 3, that "no circumstances or characteristics should be excluded from the consideration of the jury".[150]

4.89 The marrying of these concepts has led to juries being told that certain characteristics are to be "attributed" to the reasonable man – resulting in "monsters" like the reasonable obsessive, or the reasonable depressive alcoholic. To substitute "ordinary" for "reasonable" does not help.[151] If the characteristic is to be attributed in this way, that will lead a jury to believe that it is not only a matter in law which they are entitled to take into account, but that they are "qualities for which allowances must be made".[152]

4.90 All that the reasonable man test achieves in this area of law is to convey to the jury that, even under provocation, people must conform to an objective standard of behaviour that society is entitled to expect.[153]

4.91 It is questionable whether Keating J was right in *Welsh*[154] in thinking that the expression "reasonable man" borrowed from the definition of negligence would be a good way of explaining this principle. Whatever the position was before 1957, "the value of the image has been hopelessly compromised by the 1957 Act".[155]

[148] [2001] 1 AC 146, 171A.

[149] *Ibid*, at p 171B.

[150] *Ibid*, at p 172B.

[151] In contrast, Lord Hobhouse (at p 205E) suggests that the jury should consider whether a person having "ordinary powers of self-control would have done what the defendant did". Similar wording is suggested by Lord Millett at p 208E.

[152] *Ibid*, at p 172C–D.

[153] Since 1957 the reasonable man has been used as the sole definitional aid to the meaning of provocation. Before 1957 it was part of that definition only. See paras 4.3 – 4.7.

[154] (1869) 11 Cox CC 336, 339.

[155] [2001] 1 AC 146, 172H.

THE PRINCIPLE OF OBJECTIVITY SHOULD BE EXPOUNDED IN CLEAR LANGUAGE

4.92 Lord Hoffmann emphasised that what had been rendered unworkable was not the principle of objectivity which section 3 was plainly intended to preserve, but the particular way of explaining it. He suggested that the principle should be expounded in clear language rather than by the use of an opaque formula.

4.93 **Conclusion of Lord Hoffmann**

(1) Judges should not be required to describe the objective element in the provocation defence by reference to a reasonable man, with or without attribution of personal characteristics.

(2) Judges may find it more helpful to explain in simple language the principles of provocation:

(a) the requirement that D killed while he or she had lost self-control and something caused that loss of self-control;

(b) the fact that something caused D to lose self-control is not enough:

(i) the law expects people to exercise control over their emotions – tendency to violent rages or childish tantrums is a defect in character rather than an excuse;

(ii) were the circumstances such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offence from murder to manslaughter?

(iii) it is for the jury alone to decide this last issue:

(A) by applying the appropriate standards and deciding what degree of self-control everyone is entitled to expect that his fellow citizens will exercise in society as it is today: on the one hand making allowance for human nature and the power of emotions but, on the other, not allowing someone to rely upon his or her own violent disposition.

(B) In most cases, nothing more need be said.[156] In an appropriate case they should be reminded that this is a principle not a rigid rule. It may sometimes

[156] *Weller* [2003] EWCA Crim 815 and *Taylor* [2003] EWCA Crim 2447 discussed in the following section of this Part "The application of *Smith (Morgan)"* show some of the arguments that have arisen in the Court of Appeal in connection with this direction. In the latter case, the failure of the trial judge to return to his direction on provocation when dealing with the psychiatric evidence was not regarded as making the conviction unsafe, in view of the clear, correct earlier direction. Latham LJ (presiding) remarked that in complex cases involving directions relating both to diminished responsibility and provocation, it would be better if counsel are invited to consider and comment on a draft direction before the judge sums up to the jury.

> have to yield to a more important principle, which is "to do justice in a particular case". The jury may think there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of him or her and which it would be unjust not to take into account.

Lord Clyde

Injustice of limiting jury consideration of characteristics to those that affect the gravity of provocation and not the capacity to exercise self-control

4.94 The main basis of Lord Clyde's judgment is that injustice may occur if the case is decided "not by the actual facts relating to the particular accused but by the blind application of an objective standard of conduct".[157] There would be a serious risk of injustice being done in some cases where the homicide is due to provocation but the condition of the accused falls short of a mental abnormality.[158]

4.95 Lord Clyde was concerned about cases where the capacity of particular individuals to restrain themselves in the face of provocation is lessened by some affliction, which falls short of a mental abnormality. It did not seem just that in assessing their guilt in a matter of homicide a standard of behaviour had to be applied, which they are incapable of attaining. He gave the example of a plea of provocation made by a battered wife whose condition falls short of a mental abnormality. He stated that:

> The reasonable person in such a case should be one who is exercising a reasonable level of self-control for someone with her history, her experience and her state of mind.[159]

Relevance of section 2 – diminished responsibility

4.96 Lord Clyde pointed out that the scope of the common law defence of provocation, as qualified by the provisions of section 3, should not be determined by the arrival of the distinct statutory defence of diminished responsibility.[160]

Proportionality between provocation and response

4.97 Lord Clyde believes that the critical question when assessing reasonableness in provocation is that of proportionality between the provocation and the response.[161]

[157] *Ibid*, at p 179E.

[158] *Ibid*, at p 177E. Professor Ormerod comments: "The response to this line of argument underpinning Lord Clyde's judgment is surely to create a new defence tailor-made to suit the perceived problem rather than stretching the concepts of other defences beyond their intended scope?" The question is whether such a new defence would be justified.

[159] *Ibid*, at p 177F–H.

[160] *Ibid*, at p 175E. It is to be noted that while the dissenting judgments have drawn attention to the fact that a legislative scheme is provided by sections 2 and 3, they do not use the terms of section 2 to interpret section 3.

This is because the concept of reasonableness in the statute seems to open the way to analysis of both the provocation and the response to it.[162]

The concept of the reasonable man

4.98 In respect of the "reasonable man" element of provocation, like Lord Hoffmann, Lord Clyde does not find this expression to be helpful. He does not go as far as Lord Hoffmann, in saying that it is wrong to speak of the reasonable man attributed with certain characteristics, but he questions whether the addition of this expression has added unnecessary obscurity to what ought to be a matter of relative simplicity.[163]

4.99 Like Lord Hoffmann, Lord Clyde does not think that the potential tension between the requirement of society, that people should restrain their natural passions and the law's compassion for those who, under the stress of provocation, temporarily lose their self-control, is solved by recourse to the concept of the reasonable man. Lord Clyde re-iterates his belief that the standard of reasonableness "should refer to a person exercising the ordinary power of self-control over his passions which someone in his position is able to exercise and is expected by society to exercise."[164] He added:

> By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced. Society should require that he exercise a reasonable control over himself, but the limits within which control is reasonably to be demanded must take account of characteristics peculiar to him which reduce the extent to which he is capable of controlling himself.[165]

Interpretation of **Camplin**

4.100 Again, like Lord Hoffmann, Lord Clyde believes that *Camplin*[166] should be read as recognising the relevance of characteristics of the defendant to the powers of self-

[161] *Ibid*, at p 178D. Lord Clyde drew support for this view from a passage in *Duffy* [1949] 1 All ER 932 where Devlin J directed the jury to consider "whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given".

[162] *Ibid*, at p 178A–C. As noted above, one response to this aspect of *Duffy* might be that it was based on the proportionality rule in *Mancini v DPP* [1942] AC 1 which did not survive the 1957 Act. If the jury were posed the problem in terms of proportionality of response, would they ever accept that killing was warranted? Perhaps only in some of the age-old categories of the common law, for example, the defendant killing his wife's rapist.

[163] *Ibid*, at p 179B. This suggests that the major failing was ambiguity in exposition not in moral standards.

[164] *Ibid*, at p 179G.

[165] Ibid, at p 179G–H. Some of Lord Clyde's statement would appear to allow for even the most inexcusable characteristics to be taken into consideration in the jury's assessment of the loss of self-control. Taken to its logical conclusion the judgment would seem to advocate some kind of general incapacity/diminished defence for serious crimes.

[166] [1978] AC 705.

control as well as to the gravity of the provocation.[167] They both point out that the actual facts in *Camplin* were not primarily concerned with characteristics which affect the gravity of the provocation.[168] Both judges emphasised that the words used in the suggested direction in *Camplin* have to be read in the factual context of the particular case.[169]

Lord Slynn

4.101 The judgment of Lord Slynn is short. He relies on the endorsement of the New Zealand authority of *McGregor*[170] in *Newell*[171] as showing that the jury can also take characteristics relating to the mental state or personality of an individual into account, providing that they have the necessary degree of permanence.[172]

4.102 Quoting Lord Bingham in *Campbell*,[173] Lord Slynn pointed out[174] that the body of Court of Appeal authority "represents a judicial response, born of everyday experience in criminal trials up and down the country, to what fairness seems to require."

Camplin

4.103 Lord Slynn regards the passage in Lord Diplock's judgment in *Camplin*,[175] taken as a whole, as indicating that personal characteristics may be something the jury could take into account. He was certainly not limiting the characteristics which can be taken into account to age (or sex), in saying:

> That he was only 15 years of age at the time of the killing is the *relevant* characteristic of the accused *in the instant case*.[176]

Lord Hobhouse

4.104 Lord Hobhouse disagrees with the majority. In his view, it is "not acceptable to leave the jury without definitive guidance as to the objective criterion to be applied".[177] It is not proper to leave the decision to the essentially subjective judgment of individual jurors as that is likely to lead to "idiosyncratic and inconsistent decisions".[178] Non-specific criteria also create difficulties for the

[167] *Smith (Morgan)* [2001] 1 AC 146, 165D–166G, *per* Lord Hoffmann and 180D–181F, *per* Lord Clyde.

[168] *Ibid*, at p164H, *per* Lord Hoffmann and p 180D, *per* Lord Clyde.

[169] *Ibid*, at p 166D, *per* Lord Hoffmann and p 181B, *per* Lord Clyde.

[170] [1962] NZLR 1069.

[171] (1980) 71 Cr App R 331.

[172] *Ibid*, at p 153G.

[173] [1997] 1 Cr App R 199, 207.

[174] [2001] 1 AC 146, 153H–154A.

[175] [1978] AC 705, 717.

[176] *Smith (Morgan)* [2001] 1 AC 146, 154F. (emphasis in original)

[177] *Ibid*, at p 206B.

[178] *Ibid*.

conduct of criminal trials, as they do not set the necessary parameters of admission of evidence or the relevance of argument.[179]

4.105 Lord Hobhouse states that evidence of characteristics has relevance to only *two* questions: first, whether D in fact lost self-control (a preliminary factual question);[180] and second, the gravity of the provocation. Lord Hobhouse subdivides the question whether a reasonable man would have done as the defendant did into its two elements: (i) the assessment of the gravity of the provocation; and (ii) the application of a standard of self-control. It is only in respect of the former that such evidence is relevant.

4.106 As to the standard of self-control, Lord Hobhouse does not accept that in respect of this issue the jury should apply a qualified standard to reflect the defendant's lack of capacity to exercise self-control. He says that the role of the question "whether a reasonable man would have done as the defendant did" is being misunderstood. Its purpose is to provide a standard of control.[181]

4.107 Sections 2 and 3 clearly form two parts of a legislative scheme for dealing with defendants who should not be treated as fully responsible for the death they have caused. The provisions are capable of operating separately, although very often they operate in conjunction.[182] Section 3 must be construed in its context. [183]

4.108 If the defendant suffered from an abnormality but the jury does not consider that it has substantially impaired his mental responsibility, he will not have a defence under section 2. This simply reflects the policy of the statute. It would be wrong to extend section 3 to provide a defence "advisedly denied him by section 2".[184]

Camplin

4.109 Lord Hobhouse emphasised that Lord Diplock's formulation is based upon the assumption of the possession of ordinary powers of self-control and it is only *in other respects* that the defendant's abnormal characteristics are to be taken into account. Lords Morris, Fraser and Scarman agreed with the speech of Lord Diplock. Lord Simon equated the concept of a reasonable man with one with ordinary powers of self-control.[185]

[179] Professor Ormerod points out, in addition, that moral subversion of the objective limb aside, the practical implications of this will include inconsistent verdicts from different juries in cases that are factually indistinguishable; a greater likelihood of a provocation plea being made in a greater number of cases since the accused will have "nothing to lose" by pleading the defence – this in turn will lead to more trials and trials of greater length; an evidential free for all. There is also the problem that the jury are being left to determine in each case a question of law – what is the ambit of the defence of provocation.

[180] [2001] 1 AC 146, 185F–G.

[181] *Ibid*, at p 196C.

[182] *Ibid*, at p 192G.

[183] *Ibid*, at p 189D.

[184] *Ibid*, at p 191C.

[185] *Ibid*, at p 198A–B.

The term "reasonable man"

4.110 The function of the word "reasonable" in section 3 (and in a range of other criminal offences) is to prevent a legitimate defence from becoming a licence to commit crimes. It is to constrain what would otherwise be an exorbitant defence.[186]

4.111 Lord Hobhouse is critical of the tendency of common lawyers to anthropomorthise concepts. When the phrase "reasonable man" is used the common lawyer immediately tries to visualise and define some physical human being with identified characteristics. In fact the phrase "reasonable man" is meant to identify a standard of self-control.[187] That standard is as said in *Camplin* "such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today." That this is the purpose of the term "reasonable man" was confirmed by Lord Taylor in *Dryden* and by Lord Goff in *Morhall*.

4.112 Although used in the section, the term "reasonable man" is better avoided. "[A] person having ordinary powers of self-control" is a preferable phrase. The word "characteristics" should also be avoided.[188]

The effect of other Court of Appeal judgments relied on by the majority

4.113 In a closely argued judgment Lord Hobhouse reasons that the judgments of Lord Lane in *Newell*,[189] and of Lord Taylor in *Ahluwalia*,[190] *Dryden*,[191] *Morhall*,[192] *Humphreys*[193] and *Thornton (No 2)*[194] do not favour the respondent's case. Rather, they contradict it.[195]

4.114 In addition, Lord Goff's judgment in *Morhall*, binding authority in English law, distinguishes between matters going to the gravity of the provocation and the required standard of proof. In respect of the latter, it is not permissible to have regard to an abnormal trait of the defendant. While in line with the previous authorities, *Morhall*, moves away from regarding the judgment of North J in *McGregor*[196] as the place to find all relevant answers.[197] Lord Hobhouse regarded

[186] *Ibid*, at p 195D–G.

[187] *Ibid*, at p 188C–E.

[188] *Ibid*, at p 205E. Professor Ormerod comments:

> Although avoidance of the "reasonable" man term may be easily achieved in reform, it may be difficult to avoid reference to characteristics. The term is not loaded as with that of reasonable man, and it would seem to be one that the jury can readily grasp.

[189] (1980) 71 Cr App R 331. Discussed at *ibid*, at p 198G–199C.

[190] [1992] 4 All ER 889.

[191] [1995] 4 All ER 987.

[192] [1993] 4 All ER 888.

[193] [1995] 4 All ER 1008.

[194] [1996] 1 WLR 1174.

[195] *Smith (Morgan)* [2001] 1 AC 146, 200F–202H.

[196] [1962] NZLR 1069.

[197] [2001] 1 AC 146, 203C.

that case as one of the sources of confusion and the extent to which that case had been relied on in earlier cases to be ill-founded.[198]

4.115 Finally, of the Court of Appeal judgment in *Smith (Morgan)*, Lord Hobhouse said that though it appeared that the relevant cases from *Newell* onwards were cited, the analysis of them seemed to be based on Lord Steyn's dissenting judgment in *Luc Thiet Thuan*.[199]

Lord Millett

4.116 Lord Millett also regards the defences of diminished responsibility (section 2 of the Homicide Act 1957) and provocation (section 3 of the Act) as distinct defences capable of overlapping.[200] He draws attention to the very different rationales. The former, is that "You can't really call it murder: the poor man wasn't fully responsible for his actions". The latter, is that "You can't really call it murder. It was at least partly the victim's fault. Any one of us might have reacted in the same way if we had been in the defendant's shoes".[201] The reference in the latter is to human frailty to which we are *all* subject.[202]

4.117 The provocation must have been sufficient to cause a reasonable man to react in the same way. Only killings in response to grave provocation merit extenuation.[203] When the law of provocation was revised in 1957, it was necessary to preserve some objective test of the sufficiency of the provocation that led D to lose self-control "[o]therwise, loss of self-control alone would be sufficient, for the accused could always say that he was provoked by *something*."[204]

[198] *Ibid*, at pp 186G–188C. Lord Hobhouse said, at p 199F:

> What has gone wrong in some later cases is that isolated sentences have been lifted from North J without his qualifications and Lord Lane has been treated as approving such unqualified statements whereas the whole basis of the judgment and decision in Newell is the acceptance of the qualifications and the insistence that they be satisfied.

[199] [1997] AC 131. That was the case, even though the distinction between matters which may aggravate the provocation and the objective standard of self-control made by the law, can be found not only in *Luc Thiet Thuan*, but also in the relevant Court of Appeal, and *in Morhall* [2001] 1 AC 146, 205A–B, *per* Lord Hobhouse.

[200] [2001] 1 AC 146, 206E–F.

[201] *Ibid*, at p 207. In respect of the emphasis placed by Lord Millett on partial fault of the victim, Professor Ormerod points out that this is not necessarily true in all cases. He says there is a danger in introducing the notion of "victims" fault into the construction of the defence, since this may distract the jury from the appropriate inquiry into blame. The present law requires neither that the provocation emanates from the victim nor that the victim was in any way at fault. The judgment also raises the question of the classification of the defence as partial justification and/or partial excuse. See n 130 above.

[202] [2001] 1 AC 146, 207A.

[203] *Ibid*, at p 207D–E.

[204] *Ibid*, at pp 207H–208A. (emphasis added)

Reasonable Man

4.118 In common with most of their Lordships, Lord Millett is critical of the expression "the reasonable man". Despite a long and respectable ancestry in the law, "its use in section 3 is an unhappy one".[205]

4.119 The term is not intended to invoke the concept of reasonable conduct, as it can never be reasonable to react to provocation by killing the person responsible. A defendant who pleads provocation does not claim to have acted reasonably. The claim is that the D acted unreasonably only because of the provocation. The point is that even normally reasonable people may lose their self-control and react unreasonably if sufficiently provoked. That human characteristic is what the defence of provocation acknowledges.

4.120 Lord Millett concludes that in this context, "the reasonable man" simply means a person with ordinary powers of self-control.[206]

Characteristics

4.121 Lord Millett regarded it as unfortunate that the use of the word "characteristics" had diverted attention from the true nature of the inquiry.

The need for a morally defensible role

4.122 Lord Millett thought that the law had taken a wrong turning. It was time to restore a coherent and morally defensible role to the defence.

Camplin

4.123 Lord Millett disagreed with Lord Hoffmann and Lord Clyde who considered that "Lord Diplock's reference to age and sex of the accused was not meant to be exhaustive".[207]

Criticism of approach taken in Court of Appeal in Smith (Morgan)

4.124 This approach requires the accused to be judged by his or her own reduced powers of self-control. It eliminates the objective element altogether and removes the only standard external to the accused by which the jury may judge the sufficiency of the provocation relied on. The introduction of a variable standard of self-control subverts the moral basis of the defence. It is also inconsistent with the terms of section 3 and with the requirement that D must not only have lost his or her self-control, but must have been provoked to do so. The latter requirement is illusory,[208] if there is no basic standard against which it can be measured.

[205] *Ibid*, at p 208A.

[206] *Ibid*, at p 208C.

[207] *Ibid*, at p 210E.

[208] *Ibid*, at p 208F–H.

Disagreement with Lord Hoffmann's reformulation

4.125 Lord Millett respectfully disagreed with Lord Hoffmann's reformulation of the objective test: "whether the defendant's behaviour fell below the standard which should reasonably have been expected *of him*" if that meant D should be taken to have only his or her reduced powers of self-control. That would be inconsistent with Lord Diplock's reference to "the degree of self-control to be expected of the ordinary person with whom the accused's conduct is to be compared". In addition it would confuse the jury, as it is a meaningless question.[209]

Agreement with Lord Hobhouse

4.126 Lord Millett agreed with Lord Hobhouse's analysis that the present position is the result of a combination of errors, among which must be numbered:

> [T]he New Zealand jurisprudence, a mistaken desire to use the defence of provocation to cater for those who are mentally inadequate when this is properly the province of the defence of diminished responsibility, an inaccurate citation of the concluding words of section 3 which omits the words "anything done or said," and an unjustified extrapolation from Lord Diplock's speech in *Camplin*.[210]

4.127 The decision of the Court of Appeal in *Smith (Morgan)* could not be adopted without departing from *Morhall*,[211] a unanimous decision of the House of Lords less than five years old.[212]

The question for the jury

4.128 The question for the jury is one of opinion, namely:

> whether a person of ordinary self-control would have reacted as the accused reacted if he were similarly placed, that is to say, having the history, experiences, background, features and attributes of the accused.[213]

4.129 Lord Millett explained that such a question would not require the jury to conjure up a picture of a hypothetical ordinary person or the judge to direct them which characteristics of the accused should be attributed to him or her and which should be disregarded. It might be easier to answer the question, he suggested, if it was reformulated to ask:

> [W]ould or might the provocation have produced the like reaction *from the accused* if *he* had exercised normal powers of self-control.[214]

[209] *Ibid*, at p 209A–B.

[210] *Ibid*, at p 209D.

[211] [1996] AC 90.

[212] [2001] 1 AC 146, 212H.

[213] *Ibid*, at p 210A.

[214] *Ibid*, at p 211F. (emphasis in original)

4.130 Later, Lord Millett adapts the question to fit a battered woman who pleads provocation in defence:

> [W]hether a woman with normal powers of self-control, subjected to the treatment which the accused received, would or might finally react as she did.[215]

4.131 Such a question calls for the exercise of imagination rather than medical evidence, but it does not dispense with the objective element.

Limits to the scope of section 3

4.132 Lord Millett explained that he saw no difference where D's inability to exercise an ordinary degree of self-control proceeds from depressive illness rather than chronic alcoholism or bad temper. That might seem hard but those who cannot help themselves are intended to be catered for by the defence of diminished responsibility. According to Lord Millett,

> [t]he defence of provocation should be reserved for those who can and should control themselves, but who make an understandable and (partially) excusable response if sufficiently provoked.[216]

4.133 Agreeing with Professor Ashworth, Lord Millett said that:

> Where an individual who is congenitally incapable of exercising reasonable self-control is provoked by a petty affront, his loss of self-control must be ascribed to his own personality rather than to the provocation he received.[217]

Concluding remarks on the House of Lords judgment in *Smith (Morgan)*

4.134 The dissenting judgments each present comprehensive, logical arguments against allowing those characteristics which affect a persons level of self-control to be taken into consideration when deciding whether the defence of provocation should be available to a defendant. Essentially, their concern is that to do so, would remove the standard of control which is a vital element of the defence. Without that standard, the limits of the defence would be unclear and the defence could be exorbitant. If the jury is not given definitive guidance as to the objective criterion, idiosyncratic and inconsistent decisions are likely.

4.135 The dissenting judges do not find the expression "reasonable man" helpful.[218] Both Lord Hobhouse and Lord Millett would substitute for the reasonable man, "a person having/with ordinary powers of self-control". Moreover, neither of them likes the word "characteristics".[219]

[215] *Ibid*, at p 213E.

[216] *Ibid*, at p 212G.

[217] *Ibid*, at p 214A–B.

[218] Paras 4.112 and 4.118 – 4.120.

[219] Paras 4.112 and 4.121.

4.136 Two of the three majority judgments are fully reasoned. The majority also regards the expression "reasonable man" as unhelpful. Lord Clyde would substitute "a person exercising the ordinary power of self-control over his passions which someone in his position is able to exercise and is expected by society to exercise."[220] Lord Hoffmann regards the expression "reasonable man" as unworkable in the context of the defence of provocation. He says that to substitute ordinary for reasonable would not help. The confusion has arisen from marrying the concept of the reasonable man, with the rule in section 3 that no characteristic should be excluded from consideration by the jury. Certain characteristics currently attributed to the reasonable man would continue to be attributed to the "ordinary" man, causing confusion.[221] The purpose of the expression "reasonable man" was to show that people must conform to an objective standard of behaviour. That principle of objectivity should be expounded in clear language rather than by opaque formulae.

4.137 The majority judgments justify removing a rigid objective standard from the defence on the basis that this is necessary if it is to be possible to reach a just, fair, verdict in every case. If the rigid objective measure was to remain, that could result in unfairness. Lord Clyde points out the injustice of assessing guilt in cases of homicide by applying a standard of behaviour which the defendant is incapable of attaining.[222] Similarly, Lord Hoffmann draws attention to the case where the jury may think there was some characteristic of the accused which affected the degree of control which society could reasonably have expected of him or her and which it would be unjust not to take into account.[223]

4.138 Thus, the difference between the majority and the dissenters here is whether it would be unjust to contain the defence of provocation in the way argued by Lords Hobhouse and Millett.

4.139 On the question of whether sections 2 and 3 of the 1957 Act form part of a legislative scheme for dealing with defendants who should not be treated as fully responsible for the death they have caused, the dissenting judges are firmly of the view that they do provide such a scheme, the former for those under a mental disability and the latter for those who acted under provocation. Lord Millett describes clearly the very different rationales between the two.[224]

4.140 The majority judges dispute the suggestion that sections 2 and 3 provide such a scheme. They draw attention to the factual overlap which arises in various cases and argue that it requires the provocation defence to extend to cover cases where for mental reasons a defendant has reduced powers of self-control, though the mental condition would not afford a defence under section 2 (diminished responsibility). The dissenting judges do not deny that such factual overlap may arise (Lord Hobhouse pointed out that the provisions are capable of operating

[220] Para 4.99.

[221] Para 4.89.

[222] Para 4.95.

[223] The impact of the mandatory sentence on these issues is raised in Part XII, paras 12.22 – 12.26.

[224] Para 4.116.

separately, although very often they operate in conjunction) but they argue that section 3 must be construed in its context. The availability of either defence depends on whether the facts demonstrate an arguable case that one, or other, or both of the defences is made out.

Academic commentary on *Smith (Morgan)*

4.141 The decision in *Smith (Morgan)* has been the subject of much academic commentary.[225] Most but not all commentators are strongly critical of the reasoning of the majority, although some of those who criticise the reasoning are sympathetic to a liberalisation of the doctrine, at least while the mandatory sentence remains. The main criticisms made by commentators can be summarised under the following heads:

(1) statutory interpretation;

(2) previous authority;

(3) policy;

(4) internal inconsistency; and

(5) lack of clarity.

Statutory interpretation

4.142 Critics argue that the decision of the majority emasculates the requirement retained by section 3 that the provocation should have been "enough to make a reasonable man do as [the defendant] did" by introducing a variable standard according to the defendant's powers of self-control.

[225] Chan Wing Cheong, "The Present and Future of Provocation as a Defence to Murder in Singapore" [2001] Singapore Journal of Legal Studies 453; J A Coutts, "Standard of self-control of the Reasonable Man" (2001) 6 Journal of Criminal Law 130; Catherine Elliot, "The Partial Defence of Provocation: the House of Lords Decision in Smith" (2000) 64 Journal of Criminal Law 594; John Gardner and Timothy Macklem, "Compassion without Respect? Nine Fallacies in R v Smith" [2001] Crim LR 623 and "Provocation and Pluralism" (2001) 64 MLR 815; Stephen O'Doherty, "Provocation and diminished responsibility: sections 2 and 3 of the Homicide Act 1957" (2001) 165 Justice of the Peace and Local Government Law 776; Simon Parsons, "Compassionate, Simple – but inconsistent and discriminatory?" [2001] Legal Executive 20 and "Provocation: to Be or Not to Be an Attributed Characteristic" [2000] Denning Law Journal 139; Prof Sir John Smith, "Commentary on *Smith*" [2000] Crim LR 1005; Graham Virgo, "Clarifying the Defence of Provocation" (2000) 10 Archbold News 4 and "Provocation: Muddying the Waters" (2001) 60 CLJ 23; Paul Dobson, "Murder – Provocation" (2001) 32 Student Law Review 24; Susan Edwards, "The Erosion of the Objective Test in Provocation: Leaving it to the Jury? R v Smith: Towards a just law of Provocation?" (2001) 23 Journal of Social Welfare and Family Law 227; Neil Gow, "Provocation and the Reasonable Man" (2000) 48 Criminal Law Bulletin 7; Russell Heaton, "Anything Goes" (2001) 10 Nottingham Law Journal 50; J E Stannard, "Towards a Normative Defence of Provocation in England and Ireland" (2002) 66 Journal of Criminal Law 528.

Previous authority

4.143 Critics[226] argue while there was some ambiguity in parts of Lord Diplock's judgment in *Camplin*,[227] there was no ambiguity in the later unanimous decision in *Morhall*.[228] The reasoning of the majority in *Smith (Morgan)* was inconsistent with the reasoning in *Morhall*.[229] However, none of the majority in *Smith (Morgan)* analysed *Morhall* and all three made only brief references to the case.

Policy

4.144 The criticisms made under this head relate to the foundation of the doctrine of provocation and the respective roles of the defences of provocation and diminished responsibility. They are succinctly expressed in an article by Russell Heaton as follows:

> The provocation excuse should be a concession to extraordinary external circumstances not to the extraordinary internal make-up of the accused. The moral foundation for the extenuation is the necessity for very serious provocation. The more trivial the provocation, the more the defendant's reaction is attributable to his or her own personality and make-up and not to the provocative conduct. The more serious the provocative conduct, the more his or her retaliation is attributable to the provocation rather than his or her own deficiencies. That is why a distinction should be made between assessing the gravity of the provocation and assessing the standard of self-control required. If the reaction is essentially due to the internal character of the accused, his or her excusatory claim, if any, should sound in diminished responsibility. That is the proper defence for the abnormal. 'The defence of provocation is for those who are in a broad sense mentally normal'[230] but who snap under the weight of very grave provocation.[231]

4.145 Professor Sir John Smith similarly made the point that where an abnormality of mind was insufficient to give rise to a defence of diminished responsibility, it cannot have been Parliament's intention that it should enable a defence of provocation to be advanced by a defendant who would otherwise not have been able to do so. He also asked rhetorically:

> If the crying of a baby can constitute provocation (and the judge must not tell the jury that it cannot – Lord Hoffmann referring to

[226] See, in particular Prof Sir John Smith, "Commentary on *Smith*" [2000] Crim LR 1005 and Russell Heaton, "Anything Goes" (2001) 10 Nottingham Law Journal 50.

[227] [1978] AC 705.

[228] [1996] 1 AC 90.

[229] The defendant's glue-sniffing addiction was relevant *only* because it enhanced the gravity of the provocative conduct, which included taunts about that addiction.

[230] A Ashworth, "The Doctrine of Provocation" (1976) 35 CLJ 292, 312.

[231] Russell Heaton, "Anything Goes" (2001) 10(2) Nottingham Law Journal 50, 55 – 56.

> *Doughty*[232]) why not a young woman flaunting her charms in sight of a sexual psychopath?[233]

Internal inconsistency

4.146 Several scholars have pointed to a contradiction between Lord Hoffmann's interpretation of section 3 and his suggested directions to a jury. On the one hand he said that

> it would not be consistent with section 3 for the judge to tell the jury as a matter of law that they should ignore any factor or characteristic of the accused in deciding whether the objective element of provocation had been satisfied[234]

because "the purpose of section 3 was to legitimate the normative role of the jury"[235]. On the other hand, to lessen the risk of a jury reaching an inappropriate verdict, he referred with apparent approval to a suggestion of giving a direction to the jury that characteristics such as jealously and obsession should be ignored.[236] He also suggested directing the jury that a tendency to violent rages is a defect in character rather than an excuse, and that a person is not entitled to rely on his own violent disposition.

Lack of clarity

4.147 There has been strong criticism that the approach of the majority leaves the jury with no fixed standard of self-control to measure the defendant against and with no clear guidelines. Professor John Gardner and Timothy Macklem described the result as,

> an evaluative free–for-all in which anything that induces sympathy by the same token helps to excuse, and in which little more than lip service is paid to the all-important objective (impersonal) standard of the reasonable person in section 3… .[237]

4.148 Among those critics who are sympathetic to the liberalism of the decision, there is also concern about the way in which it may work. Susan Edwards has applauded the fact that the ruling may assist battered women who kill, and who have previously found themselves outside the ambit of provocation, but expressed concern that

> at the same time the exponential expansion of the objective test has the facility to include those very morally repugnant and reprehensible characteristics which Lord Hoffmann in the leading judgment in *Smith* and Lord Taylor in the Court of Appeal in *Morhall* … reasoned

[232] (1986) 83 Cr App R 319.

[233] Prof Sir John Smith, "Commentary on *Smith*" [2000] Crim LR 1005, 1007.

[234] [2001] 1 AC 146, 163.

[235] *Ibid*.

[236] *Ibid*, at p 169.

[237] [2001] Crim LR 623, 635.

> should be specifically excluded. The fears that the reasonable man may become cloned as the accused are real.[238]

4.149 She welcomed Lord Hoffmann's abhorrence of male proprietorialness as constituting a reasoned ground for justifiable rage, but was concerned that the defence of provocation,

> will be shaped by the characteristics of ethnicity, gender, sexual orientation, class etc of jury members, which taken together will determine the legitimacy of a loss of self-control to the standard of using deadly force. This may mean that the jury continues to treat male proprietorialness as a sufficient ground … . Already, it can be observed how the judiciary has created its own anthropomorphic man of provocation. Leaving the question to the jury's subjectivism may produce a reasonable man who is racist, sexist, and ethnocentric.[239]

Our views

4.150 We consider that the academic criticisms made of the reasoning of the majority in *Smith (Morgan)* have considerable force.

THE APPLICATION OF *SMITH (MORGAN)*

Introduction

4.151 In this section the decisions in three cases will be considered. In *R (o/a Farnell) v The Criminal Cases Review Commission*,[240] the Administrative Court applied *Smith (Morgan)* and quashed the decision of the Commission not to refer Farnell's application to the Court of Appeal. In *Weller*,[241] the Court of Appeal dismissed an appeal on the ground that a failure by the trial judge to specifically direct the jury to take into consideration the unusually possessive and jealous nature of the appellant constituted a mis-direction. In *Paria v The State*,[242] the Privy Council found no need to decide which decision should be followed, *Luc Thiet Thuan*[243] (Privy Council) or *Smith (Morgan)*[244] (House of Lords) because whichever approach was taken the appellant's arguments on provocation would fail.

Provocation cases decided since *Smith (Morgan)*

4.152 In *R (o/a Farnell) v The Criminal Cases Review Commission*[245] the claimant had been upset by the barking of a dog belonging to his neighbours (the deceased and his wife). When the claimant confronted the deceased in the street about this, his

[238] (2001) 23 Journal of Social Welfare and Family Law 227 at pp 227–228.

[239] *Ibid*, at p 236.

[240] [2003] EWHC 835.

[241] [2003] EWCA Crim 815.

[242] [2003] UKPC 36.

[243] [1997] AC 131.

[244] [2001] 1 AC 146.

[245] [2003] EWHC 835.

protestations were summarily dismissed. The claimant went to his car and got a crow bar. In evidence he said that this was to show his neighbours, so that they would take him seriously. However, as he approached them they both jeered and said: "What are you going to do with that?" The claimant then struck and killed the deceased.[246]

4.153 At the claimant's trial in 1996 there was psychiatric evidence that he was suffering from a depressive illness which "severely restricted his capacity to control his actions". The defence, however, expressly disavowed the defence of provocation and relied instead on that of diminished responsibility. The judge nevertheless left the issue of provocation to the jury but, in his directions on provocation, did not refer to any aspect of the psychiatric evidence. The judge left the issue of provocation to the jury because it was his duty to do so. In view of the fact that the defence explicitly accepted that no reasonable person might have reacted as the accused did, the judge added that the jury would, perhaps, not be troubled by consideration of the issue of provocation for very long.

4.154 On the application for judicial review, the Administrative Court held that the judge's directions to the jury on provocation had been inadequate. Mitchell J stated that "[t]he jury would have received a very different direction as a result of Smith …"[247] and quashed the decision of the Commission not to refer the case to the Court of Appeal.

4.155 In both *Smith (Morgan)* and the instant case the defendant had been suffering from a depressive illness which according to the expert evidence impacted on his powers of self-control. In 1996, experienced leading counsel for Farnell had "expressly disavowed" provocation as a defence, on the facts of the case. In 2003, the Administrative Court found that on the state of the law in 1996, there had arguably been a mis-direction on provocation. Mitchell J continued:

> The decision of the House of Lords in Smith puts beyond doubt the relevance of the depressive illness to the issue of provocation in this case.[248]

4.156 *Weller*[249] concerned an appellant who had killed his former girlfriend after she told him that she wished to end their relationship. There was evidence that this was because he was unduly possessive and jealous. Three days after they had first split up, they returned together to the flat. During a heated argument over her conduct with other men the appellant grabbed her by the throat and strangled her. He was convicted of murder. The issue on appeal was the adequacy of the directions to the jury on provocation.

4.157 Defence counsel had invited the trial judge to make *specific* reference to the defendant's unusually possessive and jealous nature in her summing up to the jury.

[246] The "provocation" was, therefore, the conduct of the neighbour in response to the complaint about the dog, rather than simply the barking of the dog.

[247] *Ibid*, at para 26.

[248] *Ibid*, at para 25.

[249] [2003] EWCA Crim 815.

She declined to do so specifically, preferring a general direction which required the jury to consider all the circumstances, making allowances for emotions and the like, and concluded with the need to consider what society expects of a man like this defendant.

4.158 The conviction was upheld. Mantell LJ stressed that the trial judge had not removed obsessiveness and jealousy from the jury's considerations.[250] He described *Smith (Morgan)* as having established that:

> the question whether the defendant should reasonably have controlled himself is to be answered by the jury taking all matters into account. That includes matters relating to the defendant, *the kind of man he is* and his mental state, as well as the circumstances in which the death occurred. The judge should not tell the jury that they should, as a matter of law, ignore *any* aspect. He may give them some guidance as to the weight to be given to some aspects, provided he makes it clear that the question is one which, as the law provides, they are to answer and not him.[251]

4.159 The court commended the approach in *Smith (Morgan)*:

> [It] has the considerable advantage that it is unnecessary to determine whether what has been called a "characteristic" of the accused is an eligible characteristic for the purposes of the second element in provocation, the objective element, or is one of which no account should be taken … . It is all a matter for the jury.[252]

4.160 In *Paria v The State*[253] the appellant had killed three women, the mother of his two children, her mother and her sister, after a row. The row developed when the appellant, whose father was ill with cancer, tried to arrange for the children to stay the night with him and his father.

4.161 On appeal to the Privy Council it was submitted that the trial judge ought to have directed the jury that they should consider the appellant's evidence that he had been depressed. It was held that whether one applied the test as laid down by the Privy Council in *Luc Thiet Thuan*[254] or that in *Smith (Morgan)*, the appellant's argument on provocation must fail.[255] It was thus unnecessary to decide which of the two cases ought to be followed in the Privy Council.[256] The reasons for rejecting the appellant's arguments on provocation were twofold:

[250] *Ibid*, at para 21. Lord Clyde in *Smith (Morgan)* [2001] 1 AC 146, 179 would have excluded from the jury's consideration characteristics which were self-induced. He also said at p 180 that characteristics such as "exceptional pugnacity or excitability will not suffice". The facts of this particular case may not have prompted any such mention.

[251] *Ibid*, at para 16. (emphasis added)

[252] [2003] EWCA 815, para 17.

[253] [2003] UKPC 36.

[254] [1997] AC 131.

[255] The appeal against conviction was however allowed on the other ground of appeal concerning the direction as to good character. Verdicts of manslaughter were substituted.

[256] [2003] UKPC 36, para 13.

(1) The appellant's reaction to his father's cancer was an entirely normal and natural reaction. It was not a mental illness, as opposed to the clinical depression in *Smith (Morgan)*, and was not, therefore, a characteristic.

(2) Even if it was a "characteristic" there was no evidence that it affected the way the appellant reacted when he killed the three women. It would have been "sheer speculation" on the part of the jury if they had taken it into account in relation to either the subjective or the objective test.

PROBLEMS WITH THE PARTIAL DEFENCE OF PROVOCATION

The defence is inherently contradictory

4.162 Introduced as a concession to human frailty, this partial defence has internal contradictions. It suffers the defects of compromise. It raises the question whether a reasonable person should ever respond to provocation by killing.[257] The "objective" requirement, "whether a reasonable man would have done as the defendant did", has been considered by the House of Lords / Privy Council four times in the last twenty-five years, culminating in *Smith (Morgan)*[258] with a 3:2 split. This demonstrates fundamental problems with the concept of the "reasonable man".

The wide meaning of "provocative" conduct

4.163 The fact that under section 3 of the 1957 Act there is no limit to what conduct is capable of provoking a defendant to kill means that completely innocent conduct of the deceased might be regarded as provocation by the defence. This is contrary to one of the fundamental rationales of the defence,[259] which is that the victim "contributed" to the defendant's lethal loss of temper.[260]

The defence of provocation elevates the emotion of sudden anger above emotions of fear, despair, compassion and empathy. Is it morally sustainable for sudden anger to found a partial defence to murder?

4.164 It is questionable whether, in moral terms, a killing is necessarily less culpable when performed in anger as a result of provocation. Indeed there is an argument that it is morally unsustainable for anger and sudden loss of self-control to found a defence.

[257] *Campbell* [1997] 1 Cr App R 199, 207, *per* Lord Bingham, quoted by Lord Slynn in *Smith (Morgan)* [2001] 1 AC 146, 153H–154A. It has been explained that the expression "reasonable man" in section 3 was intended to set a basic standard of behaviour with which everyone could be expected to meet. This has not stopped judges and academics from raising questions about whether a reasonable man would ever so respond to provocation.

[258] [2001] 1 AC 146.

[259] Two well-recognised rationales behind the partial defence of provocation are: (1) that the deceased contributed to the killing so it is harsh to call the offence murder having regard to the relative moral blameworthiness; and (2) by reason of the provocation the defendant was not in a position to exercise his or her full mental faculties. See S Yeo, *Partial Excuses to Murder* (1990) pp 19–20.

[260] There is no moral culpability that can be properly placed on a baby if its crying causes the defendant to suffer a disturbed night.

4.165 The idea that a "reasonable person" could kill when seeing red is one that jars. Even as a partial defence, it shows a degree of acceptance of killing in those circumstances. Many would argue that it is no longer "acceptable" to kill in anger in the 21st century, even though provocation emerged as a defence in 17th and 18th centuries.

Sexual bias

4.166 By providing a partial defence where the response to provocation is to kill in sudden anger but not where it is to kill in a planned way, this defence is seen to favour those men who react in violent anger, over fearful women.

4.167 In respect of defendants with battered woman syndrome, provocation may not be a suitable defence because the killer is reacting out of fear or despair. There is no defence of killing out of fear or despair.

It is difficult to distinguish revenge killings, so as to exclude them from this defence

4.168 The courts have stretched the subjective requirement, "loss of self-control", initially in order to deal with battered woman syndrome cases. The wider measure for loss of self-control when applied in other cases, such as *Baille*,[261] raises the question of whether the scope of the defence is too wide, or potentially so. How do gangland killings stay out of the scope of the defence?

The defence blames the victim of murder

4.169 Provocation unduly makes the deceased the "defendant". It blames the victim for the defendant's inability to exercise self-control. In court the deceased cannot answer defence assertions.

Subjectivisation of the reasonable man

4.170 The effect of the majority judgment in *Smith (Morgan)*[262] is significantly to reduce the threshold of self-control that individuals are entitled to demand of all members of society.

PRACTICAL DIFFICULTIES WITH THE OPERATION OF THE DEFENCE OF PROVOCATION

Difference in relation to burden of proof for defence of diminished responsibility

4.171 The fact that the burden of proof remains on the Crown in cases of provocation but is borne by the defence in relation to diminished responsibility may cause confusion, or anomolies, in cases where a defendant runs both defences.

[261] [1995] Crim LR 739.

[262] [2001] 1 AC 146.

Obligation on judge to leave issue of provocation in cases where the defence do not seek to rely on the defence

4.172 It is confusing to juries that in a case in which the defendant's reaction of killing was not remotely a reasonable thing to do, and the defendant does not seek to argue that it was, the judge nevertheless leaves the issue of provocation to them. The judge is obliged to do so whenever there is evidence that the words or conduct of the deceased may have caused the defendant to lose self-control suddenly.

CONCLUSION

4.173 For the reasons which have been identified in this Part, we regard the law of provocation in England and Wales as profoundly unsatisfactory. In the following Part we will carry out a review of the law on provocation in other common law jurisdictions. In the final part of this paper (Part XII) we identify options for reform, together with the arguments associated with each option. **We invite views from consultees on the options discussed in Part XII.**

PART V
THE LAW OF PROVOCATION IN OTHER COMMON LAW JURISDICTIONS

INTRODUCTION

5.1 The first six papers appended to this consultation paper[1] emanate from Australia (including a section on the relevant law of India), Canada, Ireland, New Zealand, Scotland and South Africa. Each includes an account of the current law of provocation in the jurisdiction to which the paper relates. (Another appendix contains some relevant statutory provisions from those countries, from the Model Penal Code of the USA, and some versions suggested either by Law Reform bodies or academics). In this Part, first we identify several general themes concerning provocation in these jurisdictions. Second, we provide a synopsis of each of the papers, thereby providing a brief outline of the law of provocation in each country.

EXISTENCE OF THE PARTIAL DEFENCE

5.2 Amongst the fourteen jurisdictions considered,[2] provocation is a partial defence to murder in twelve. There are two exceptions. In South Africa, provocation is a complete defence where it establishes that an accused lacked criminal capacity. By contrast, in Tasmania the partial defence of provocation has recently been abolished.[3]

GENERAL THEMES

Provocative conduct

5.3 There is considerable variation amongst the jurisdictions as to what conduct is capable of constituting "provocation". In Scotland only violent conduct and infidelity or confessions of infidelity are capable of constituting "provocation".[4] In Canada there must be a "wrongful act or insult".[5] In New South Wales words and gestures are capable of constituting "provocation" but only if they are "grossly insulting".[6] By contrast in India and New Zealand there is no restriction on what is capable of constituting "provocation".

[1] Available on our website at www lawcom.gov.uk, via the link to publications.

[2] Included within the fourteen jurisdictions are eight Australian ones, the Australian States of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia as well as the two Australian Territories of Australian Capital Territory and Northern Territory.

[3] See para 5.33.

[4] See paras 5.108 - 5.110.

[5] See paras 5.53 – 5.55.

[6] See para 5.18.

Standard of self-control

5.4 Amongst the fourteen jurisdictions considered, there are a range of approaches to the standard of self-control against which the accused is measured:

(1) where the accused's response is judged by reference to the objective standard of the reasonable or ordinary person who shares the accused's characteristics of sex and age but no other *(New Zealand and all Australian States and Territories, save Tasmania)*;

(2) reasonable or ordinary person tests in which the reasonable or ordinary person is clothed with certain characteristics of the accused *(characteristics which give the provocative conduct special significance as in Canada and characteristics of ethnic, cultural or social background as in India)*; and

(3) subjective tests in which the finders of fact must assess whether there is evidence that the accused, having regard to his or her characteristics, might have lost control in response to the provocation *(Ireland and South Africa)*.

5.5 The position in Scotland is unclear. The accused is held to the standard of self-control of the ordinary man, but it is unclear what characteristics of the accused are capable of being attributed to the "reasonable man".[7]

Cumulative provocation and "slow-burn" responses

5.6 The jurisdictions vary both in the extent to which they recognise cumulative provocation (where evidence of provocation over time is considered relevant) and in the extent to which they require that the response to the provocative conduct must be sudden.

5.7 A number of jurisdictions accept that evidence of cumulative provocation is capable of founding the defence *(New South Wales, Australian Capital Territory, India and New Zealand)*. Some appear to be moving towards this position *(Canada, Ireland)*, while other jurisdictions adhere to the requirement that the provocation must have occurred suddenly in the sense of taking the accused by surprise *(South Australia, Victoria, Western Australia, Queensland and Scotland)*.

5.8 Several jurisdictions require the response to provocation to be sudden or immediate *(Northern Territory, Ireland, Scotland)*, but this is no longer a requirement in others *(New South Wales, Australian Capital Territory, South Australia, Victoria, India)*.

Reform agenda

5.9 Many jurisdictions are conscious of the problems posed by the partial defence of provocation and, in recent years, a number law reform bodies have addressed the issue.[8] The New South Wales Law Reform Commission has recommended

[7] See para 5.113.

[8] Examples are New South Wales (see paras 5.47 – 5.50), New Zealand (see paras 5.103 – 5.106) and Ireland (see paras 5.94 – 5.95).

replacing the objective standard of self-control with a subjective test coupled with a standard based on community standards of blameworthiness. By contrast, in Tasmania, the defence of provocation has been abolished.[9] The New Zealand Law Commission has recommended abolition of the partial defence of provocation.[10] Consultation / discussion papers have very recently been published both by The Law Reform Commission of Ireland,[11] and the Victorian Law Reform Commission.[12]

AUSTRALIA

5.10 In Queensland, South Australia and Victoria, the law of provocation is governed by the Australian common law.[13] By contrast, the Australian Capital Territory, Northern Territory, New South Wales and Western Australia have statutory provisions governing the defence. This outline focuses on the law of provocation in New South Wales, which possesses what has been described as the "most progressive" statutory formulation of the partial defence.[14] In describing the law of New South Wales, we will at the same time summarise the common law. We will then provide a brief summary of significant features of the partial defence in the other jurisdictions.

New South Wales statutory provisions and the common law of Australia

5.11 The law of provocation in New South Wales is governed by Section 23 of the Crimes Act 1900 (NSW), as amended.[15]

5.12 There is no mandatory sentence for murder in New South Wales. Life imprisonment is the maximum penalty, but a lesser penalty may be imposed.[16]

Provocative conduct

5.13 At common law, the provocation by the deceased must have occurred suddenly and taken the accused by surprise.[17] By contrast, the 1900 Act provides that conduct can amount to provocation if it occurred "immediately before the act or

[9] See para 5.33.

[10] New Zealand Law Commission, *Report on Some Criminal Defences with Particular Reference to Battered Defendants* Report 73 (2001) para 120.

[11] The consultation paper entitled *Homicide: The Plea of Provocation* was published on 29 October 2003. See also paras 5.94 – 5.95, below.

[12] The Discussion Paper, entitled *Defences to Homicide: Options Paper*, was published in October 2003.

[13] It is true that in Queensland the defence is contained in s 304 of the Queensland Criminal Code. It has been held, however, that the section incorporates the common law – *Herlihy* [1956] St R Qd 18; *Callope* [1965] Qd R 456.

[14] See Appendix A, S Yeo, para 1.3.

[15] In this Part referred to as "the 1900 Act".

[16] Crimes (Life Sentences) Amendment Act 1989 (NSW), schedule 1.

[17] *R v R* (1981) 28 SASR 321, 326.

omission causing death or at any previous time".[18] Provocative conduct can therefore include cumulative instances of, for example, domestic violence.[19]

5.14 Section 23(2)(a) of the 1900 Act incorporates the common law rule that the provocation need not be *directed at* the accused.[20] It states that the relevant conduct can be "towards or affecting the accused".

5.15 In general, for the accused to rely on the defence of provocation at common law, the deceased must have been the person provoking the accused.[21] There are four exceptions:[22]

(1) the accused was honestly (perhaps reasonably) mistaken that the victim's conduct was directed at him or her;

(2) the accused accidentally killed an innocent bystander instead of the provoker;

(3) the accused killed an innocent bystander who was intervening to protect the provoker from the accused; and

(4) the deceased was closely related or physically proximate to the provoker.

5.16 Section 23 of the 1900 Act reflects the common law rule by, throughout the section, referring to the relevant provocative conduct as "conduct of the deceased", but no reference is made to the four common law exceptions. The New South Wales Law Reform Commission has recommended amending section 23 so as to recognise the first three exceptions.[23]

5.17 There is a common law rule against "hearsay provocation".[24] In other words the accused must have directly experienced the provocation. The New South Wales Law Reform Commission has recommended that this rule should be abolished and that the only relevant issue was whether an ordinary person could have lost self-control.[25]

5.18 At common law, words can constitute provocation but only if they are of an extreme and exceptional character.[26] Section 23(2)(a) of the 1900 Act reflects the

[18] Section 23(2).

[19] *Chhay* (1994) 72 A Crim R 1.

[20] *Terry* [1964] VR 248.

[21] See Appendix A, S Yeo, para 1.12.

[22] *Ibid*.

[23] New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide: Report 83* (1997) paras 2.92 to 2.100; in this Part referred to as "NSWLRC Report 83 (1997)".

[24] See Appendix A, S Yeo, para 1.10.

[25] NSWLRC Report 83 (1997) para 2.91.

[26] See Appendix A, S Yeo, para 1.14. Yeo cites *Moffa* (1977) 138 CLR 601 (HCA).

common law by including "grossly insulting words or gestures" within the possible provocative conduct of the deceased.[27]

5.19 At common law, an accused cannot rely on the partial defence if he or she induced the provocation.[28] This would also appear to be the position under section 23 of the 1900 Act, although there is no decided case on this issue.[29] The New South Wales Law Reform Commission has recommended that section 23 of the 1900 Act should be amended to state that the defence is unavailable where the accused has provoked another with a premeditated intention to kill or cause serious bodily harm in response to any retaliation.[30]

5.20 It is unclear whether the common law requires that the deceased's conduct must have been unlawful.[31] Section 23 of the 1900 Act is silent on the issue. The New South Wales Law Reform Commission has recommended that, as a matter of law there should be no requirement that the provocative conduct must have been unlawful.[32]

Actual loss of self-control

5.21 Both the common law and section 23(2)(a) of the 1900 Act require that, for the partial defence to succeed, the provocation must have actually caused the accused to lose self-control.[33]

5.22 Although the courts originally defined loss of self-control as a sudden event, in New South Wales there has been judicial acceptance that the response to provocation may be a "slow-burn" involving anger, despair and fear.[34]

5.23 In deciding whether the accused in fact lost self-control, the jury are required to consider all the personal characteristics of the accused, including ethnic origin, temperament and whether he or she was intoxicated. [35]

5.24 At common law and under section 23(2)(c), the accused may have intended to kill or inflict grievous bodily harm and still succeed with a provocation defence.[36] As stated in *Chhay*,[37] courts distinguish between such intention arising from provocation and intention arising from hatred, resentment and revenge.[38]

[27] See Appendix A, S Yeo, para 1.14.

[28] *Ibid*, at para 1.15.

[29] *Ibid*.

[30] NSWLRC Report 83 (1997) para 2.109.

[31] See Appendix A, S Yeo, para 1.17.

[32] NSWLRC Report 83 (1997) para 2.104.

[33] See Appendix A, S Yeo, para 1.18.

[34] *Ibid*, at para 1.20.

[35] *Ibid*, at para 1.22.

[36] *Ibid*, at para 1.23.

[37] (1994) 72 A Crim R 1.

[38] *Ibid*, at p 9.

The "ordinary person" test

5.25 Section 23(2)(b) of the 1900 Act mirrors the common law concerning the standard of self-control. This section provides that the:

> … conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased … .

5.26 The "ordinary person" test is objective, but also has a subjective component. This distinction was made in *Stingel*.[39] The High Court of Australia held that, in certain circumstances, the jury could attribute certain personal characteristics of the accused to the ordinary person. When considering the gravity of the provocation, the ordinary person will bear all the accused's characteristics which are relevant to the provocation. This may include the accused's "age, sex, ethnicity, physical features, personal attributes, mental states, personal relationships and past history."[40]

5.27 When considering the power of self-control expected of an ordinary person, the ordinary person will only possess the accused's age. The High Court of Australia has not included other characteristics in the standard of self-control test. For example, in *Masciantonio*[41] the High Court of Australia rejected the inclusion of ethnicity.

Response to the provocation

5.28 The common law no longer insists that the accused must have killed very soon after the last provocative act/words or immediately upon losing self-control.[42] This is reflected in section 23(3)(b) of the 1900 Act.

5.29 Likewise, there is now no rule at common law that the mode of retaliation must bear a reasonable relationship to the provocation.[43] This is reflected in section 23(3)(a) of the 1900 Act.

5.30 Further, it is questionable whether, at common law, the mode of killing is relevant to establishing the provocation defence. In *Masciantonio*,[44] the High Court of Australia stated that the question of whether the ordinary person would use the means adopted by the accused is less relevant than the question of whether the ordinary person would form an intent to kill or do grievous bodily harm.[45] Section

[39] *Stingel* (1990) 171 CLR 312 (HCA).

[40] See Appendix A, S Yeo, para 1.27.

[41] (1995) 183 CLR 58 (HCA).

[42] See *R v R* (1981) 28 SASR 321.

[43] See *Johnson* (1976) 136 CLR 619 (HCA).

[44] (1995) 183 CLR 58 (HCA).

[45] *Ibid*, at p 69.

23 of the 1900 Act has removed the "moral relevance of the manner of the accused's physical response to the provocation."[46]

Procedure and role of the jury

5.31 At common law the burden of proof lies on the prosecution to negate provocation beyond a reasonable doubt.[47] Section 23(4) of the 1900 Act expressly adopts this rule.

5.32 The jury can consider the partial defence only if the trial judge decides, on a view of the evidence most favourable to the accused, that the jury may not be satisfied beyond a reasonable doubt that the killing was unprovoked.[48]

Provocation in other Australian States and Territories

Tasmania

5.33 The Tasmanian Parliament abolished provocation as a defence in May 2003.[49] Tasmania does not have a mandatory life sentence for murder so that courts can consider provocation as a mitigating factor at the sentencing stage.[50]

South Australia and Victoria

5.34 In South Australia and Victoria,[51] provocation is governed by the common law as described above.

Queensland

5.35 The law of provocation is governed by section 304 of the Queensland Criminal Code. It has been held, however, that the section incorporates the common law.[52]

Western Australia

5.36 Section 281 of the Criminal Code (WA) states that:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute wilful murder or murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for his passion to cool, he is guilty of manslaughter only.[53]

[46] See Appendix A, S Yeo, para 1.43.

[47] *Ibid*, at para 1.45.

[48] *Ibid*, at para 1.47; *Stingel* (1990) 171 CLR 312, 334; *Masciantonio* (1995) 183 CLR 58, 67-68; *Tuncay* [1998] 2 VR 19.

[49] Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003 (Tas).

[50] See Appendix A, S Yeo, para 1.52.

[51] The Victorian Law Commission has recently published a Discussion Paper, entitled *Defences to Homicide: Options Paper* (October 2003).

[52] *Herlihy* [1956] St R Qd 18; *Callope* [1965] Qd R 456.

[53] Criminal Code 1914 (WA), s 281.

5.37 This section does not mention the ordinary person test. However, it has been held that the definition of provocation contained in section 245 of the Criminal Code (WA) applies to cases of homicide.[54] The first paragraph of section 245 mirrors the common law "ordinary person" test.

5.38 Accordingly, both Western Australia and Queensland appear to reflect the common law. In particular, both jurisdictions require an objective standard of self-control. In contrast to the position in New South Wales, moreover, both jurisdictions appear to require provocation to be sudden.

Australian Capital Territory

5.39 In the Australian Capital Territory, the relevant statutory provision is section 13 of the Crimes Act 1900 (ACT). This provision follows the provision in New South Wales except that section 13(2)(b) states that:

> [T]he conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control: (i) as to have formed an intent to kill the deceased; or (ii) *as to be recklessly indifferent to the probability of causing the deceased's death* … .[55]

5.40 Under section 23(2)(b) of the 1900 Act the relevant intent of the accused is that he or she intended to kill or inflict grievous bodily harm.

Northern Territory

5.41 In the Northern Territory, section 34(2) of the Criminal Code (NT) provides that:

> (2) When a person who has unlawfully killed another under circumstances that, but for this subsection, would have constituted murder, did the act that caused death because of provocation and to the person who gave him that provocation, he is excused from criminal responsibility for murder and is guilty of manslaughter only provided -
>
> (a) he had not incited the provocation;
>
> (b) he was deprived by the provocation of the power of self-control;
>
> (c) he acted on the sudden and before there was time for his passion to cool; and
>
> (d) an ordinary person similarly circumstanced would have acted in the same or a similar way.

5.42 Accordingly, this section follows a similar line to the New South Wales provision, save that it requires the accused to act "on the sudden".

[54] *Mehemet Ali* (1957) 59 WALR 28; *Censori* [1983] WAR 89 (CCA); *Roche* [1988] WAR 278.

[55] Emphasis added.

Proposals for reform in Australia

Provocation and gender

5.43 The partial defence has been criticised for being biased against female defendants.[56] Australian courts have increasingly attempted to redress this bias by, for example:

(1) removing the requirement of suddenness and a triggering incident (although not all jurisdictions are uniform in this respect);

(2) recognising cumulative provocation; and

(3) admitting expert evidence of "battered women syndrome".

5.44 Both the Victorian Law Reform Commission and the New South Wales Law Reform Commission cite empirical studies which suggest that the defence is no longer gender biased.[57]

5.45 However, the Model Criminal Code Officers Committee disagreed, instead recommending the abolition of the defence.[58] The Committee states that battered women syndrome:

> … illustrates the unsatisfactory nature of provocation as presently formulated. The defendant, who in such cases often kills her partner after years of abuse, may adopt a method of killing that is undoubtedly premeditated, but is actuated by no less psychological stress and trauma than persons who kill in response to an immediate provocation.[59]

No State or Territory has enacted the Model Criminal Code.

5.46 When the partial defence of provocation was abolished in Tasmania one of the reasons offered was that the defence was gender biased.[60]

Reform of the standard of control test

5.47 The New South Wales Law Reform Commission considered replacing the ordinary person test for provocation. It rejected a number of proposed reforms including:[61]

(1) a purely subjective test – this might prevent a jury evaluating the blameworthiness of the accused and would be unduly lenient;

[56] See Appendix A, S Yeo, para 1.49.

[57] NSWLRC Report 83 (1997) para 2.142.

[58] See Appendix A, S Yeo, para 1.51.

[59] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper, Draft Model Criminal Code: Chapter 5. Fatal Offences against the Person* (1998) p 91.

[60] See Appendix A, S Yeo, para 1.52.

[61] *Ibid*, at para 1.34.

(2) expanding the characteristics of the accused which can be considered by the jury to include his or her sex and ethnicity. The Commission was anxious about applying different standards of criminal behaviour to different groups by measuring blameworthiness according to the accused's sex or, in particular, ethnicity. The Commission thought the result would be speculation and ill-informed stereotyping; and

(3) considering the accused's sex and ethnicity in assessing the likely response to provocation of the ordinary person *after* losing self-control. The Commission felt this involved making artificial distinctions and was unworkable in practice.

5.48 Instead, the New South Wales Law Reform Commission recommended replacing the ordinary person test with a subjective test combined with community standards of blameworthiness.[62] The proposed formulation provides:

> [T]he accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter.[63]

5.49 The Commission noted concerns that this test left the determination of the provocation defence to the discretion of the jury. In turn, it conceded that there was a risk that juries may make decisions on the basis of prejudice or ignorance.[64] However, the Commission regarded this as a risk inherent in the jury system.[65] On the other hand, it argued that the new approach made the test clearer, less complicated and focused on the important question – namely: whether murder should be reduced to manslaughter.[66]

5.50 In order to address particular concerns about intoxicated defendants, the Commission proposed a specific provision that would require self-induced intoxication to be disregarded in assessing provocation.[67]

CANADA

The Criminal Code provision relating to provocation and its interpretation

5.51 Section 232 of the Criminal Code makes provision for a partial defence of provocation. This provision has been subject to only minor amendments since first enacted in 1892.[68]

[62] NSWLRC Report 83 (1997) para 2.81.

[63] Proposed s 23(2)(b).

[64] NSWLRC Report 83 (1997) para 2.83.

[65] *Ibid*.

[66] *Ibid*.

[67] See Appendix A, S Yeo, para 1.36.

[68] The 1892 provision was derived from the English Draft Criminal Code of 1879.

5.52 There are four elements to the provocation defence:

(1) there must have been a wrongful act or insult;

(2) the act or insult must have been such that an ordinary person would be deprived of his power of self-control;

(3) the defendant must actually have been provoked by the act or insult; and

(4) the wrongful act or insult and the defendant's response to it must have been sudden.[69]

There is therefore no proportionality requirement associated with the defence. The requirement is that an ordinary person would have been deprived of his self-control, not that the ordinary person would have reacted in the same manner as the defendant.

Provocative conduct

5.53 The provocation must consist of a "wrongful act or insult".[70] The phrase has consistently been interpreted in a broad manner.[71]

5.54 To be wrongful, an act need not be prohibited by law. Conversely, an act cannot amount to provocation if the deceased was exercising a legal right that he or she was entitled to exercise.[72]

5.55 The term "insult" includes any form of contemptuous, scornful, offensive or wounding speech.[73]

An ordinary person would be deprived of the power of self-control by that act or insult[74]

5.56 The Canadian courts have modified their approach to the "ordinary person" test. Initially, the courts adopted a strict approach which allowed no consideration of the particular characteristics and circumstances of the defendant.

5.57 Influenced by developments in England, the ordinary person test was expanded by the Supreme Court of Canada in *Hill*[75] to take into account "any general characteristics relevant to the provocation in question".[76] It was emphasised that factors such as intoxication and temper were *not* to be taken into account.

[69] See Appendix B, D Ives, p 74.

[70] Canadian Criminal Code, s 232(2).

[71] See Appendix B, D Ives, p 75.

[72] *Thibert* [1996] 1 SCR 31, 54-55.

[73] *Taylor* [1947] SCR 462, 475; *Tripodi* [1955] SCR 438, 445.

[74] See Appendix B, D Ives, pp 75 - 76.

[75] [1986] 1 SCR 313.

[76] *Ibid*, at p 331.

5.58 In 1996, the Court expanded on the earlier ruling and held that the ordinary person "must be of the same age, and sex, and share with the accused such other factors as would give the act or insult in question a special significance and have experienced the same series of acts or insults as those experienced by the accused".[77]

The defendant was actually provoked by the act or insult[78]

5.59 The courts have consistently interpreted the subjective element of the defence in a similarly broad manner. The trier of fact is required to take into account all subjective factors in deciding whether the defendant was actually provoked by the wrongful act or insult. This includes, for example, any evidence of intoxication, prior relationship, mental condition and temperament.

The wrongful act or insult and the defendant's response to it were both sudden[79]

5.60 Traditionally, Canadian courts have held that the suddenness requirement of this defence will not be satisfied if the defendant had prior knowledge of the act or insult said to constitute the provocation.[80]

5.61 Provocation cannot consist of a predictable response by V to D's own unlawful conduct. However, the strictness of this requirement has, arguably, been relaxed in recent years. Most notably, in *Thibert*,[81] the Supreme Court concluded that the deceased's comment and actions just before the defendant shot him were sufficient to create an air of reality to the defence even though it was the defendant who instigated the confrontation with the deceased and he already knew that the deceased was having a relationship with his wife.[82]

Criticism of the defence of provocation

5.62 Five principle criticisms have been articulated:[83]

(1) the defence is justified as a concession to human frailty on the basis that all individuals are susceptible to uncontrollable bursts of anger and passion that may result in violence to another. It is argued, however, that the defence also condones and legitimises the use of violence by some, notably heterosexual males, to gain and retain control over others, particularly women, gay men and marginalised persons;

[77] *Thibert* [1996] 1 SCR 37, 49.

[78] See Appendix B, D Ives, p 75.

[79] *Ibid*, p 76.

[80] *Tripodi* [1955] SCR 438.

[81] [1996] 1 SCR 37.

[82] Note the question raised in D Ives' paper, Appendix B, n 19, p 76, as to whether recently the Supreme Court of Canada has signified a desire to tighten up the provocation defence by returning to a stricter suddenness requirement.

[83] See Appendix B, D Ives, pp 76 - 78.

(2) the defence blames the deceased for the inability of the defendant to exercise self-control. It diminishes the lives of the victims of such violence, suggesting that some murders are less serious than others;

(3) the defence privileges the emotion of anger over other emotions such as compassion, empathy, fear or despair;

(4) the wrongful act or insult requirement is interpreted in an excessively broad manner and therefore encourages and promotes violence against disadvantaged groups;

(5) the subjectivisation of the ordinary person requirement in Canada has significantly lowered the threshold of self-control that is demanded of all members of society to the detriment of women, gay men and members of minority ethnic groups. In part this is because of a failure by the court to distinguish carefully between the use of individual characteristics and circumstances in order to put the gravity of the insult into context, and their use to determine the level of self-control of the defendant.

Proposals for reform[84]

5.63 There is general agreement in Canada that changes should be made to the law on provocation but no general consensus on the type of reform that should be pursued. The five main options for reform are:

(1) abolition of the defence contingent on the simultaneous abolition of the mandatory life sentence for murder;

(2) abolition of the defence except in cases of excessive force used in self-defence;

(3) abolition of the defence in cases of spousal homicide only;

(4) reform the elements of the defence;

(5) reform the elements of the defence and extend it to other offences.

Option 1: Abolish provocation defence and mandatory life sentence

5.64 Leading feminist advocacy groups support this option. They are sceptical about ever creating a truly non-discriminatory defence. They feel that a conviction for murder is appropriate given that the defendant had the *intent* for murder.

5.65 The mandatory life sentence should also be abolished so that sentencing discretion can exist for disadvantaged groups. However, feminist groups also advocate sentencing guidelines to ensure decisions on sentence reflect modern non-discriminatory principles.

[84] *Ibid*, pp 78 - 84.

Option 2: Abolish the defence except for cases where excessive force is used in self-defence

5.66 This option would abolish the defence in circumstances where a male defendant kills his partner in a rage provoked by a non-violent act or insult. At the same time it would allow a defence of provocation where battered women kill abusive partners in circumstances where excessive force is used in self-defence.

5.67 On the other hand, there is concern about the complexity of this defence, that it would not cover all circumstances where battered women kill and that it might lead to relatively more convictions for manslaughter (pleading provocation) where defendants could otherwise be acquitted (pleading self-defence).

Option 3: Abolish the defence for spousal homicides only

5.68 This option directly addresses the most contentious use of the defence. However, this option has been criticised for ignoring other objectionable uses of the defence, for example, homophobic or racist attacks and for failing to provide a partial defence for battered women.

Option 4: Reforming the elements of the defence

5.69 Three aspects of the defence have received the most attention:

(1) the wrongful act or insult element;

(2) the ordinary person test; and

(3) the suddenness requirement in relation to the defendant's reaction.

These aspects are dealt with in the following paragraphs.

5.70 One proposal is to replace the "wrongful act or insult" element with an "unlawful act". This would mean that neither mere insults nor lawful acts could activate the provocation defence. For some, this proposal is too restrictive. Some would prefer general phraseology such as "act or statement", while others propose that certain acts and insults should be deemed incapable in law of constituting provocation. Examples of such acts are infidelity and non-violent homosexual advances.

5.71 Several commentators advocate reforming the ordinary person test by codifying a mixed subjective-objective test. This could include an explicit direction that individual characteristics should be considered only insofar as they relate to the gravity of the provocation as opposed to the degree of self-control. Feminist scholars prefer incorporating non-discriminatory principles directly into the definition of the ordinary person. For example, the ordinary person would be defined as a person who was not sexist, homophobic or racist. A jury would not be able to take into account the accused's sexism, homophobia and racism even when assessing the gravity of the provocation.

5.72 Removing the requirement that the defendant acted "on the sudden" has been proposed. This might make the defence more available to abused persons, particularly women. Feminist scholars are opposed to this proposal, however, preferring reform of the law of self-defence.

Option 5: Reforming the elements of the defence and extending it to a wider number of offences

5.73 The intent of this proposal is to more fully acknowledge and express compassion for human weakness. Feminist legal scholars oppose this option, believing that it would simply aggravate the disadvantaged position of women and marginalised groups.

INDIA

5.74 English lawyers devised the Indian Penal Code 1860 as an idealised version of the contemporary criminal law of England.[85] The provocation defence is contained in exception 1 to section 300 of the Code. It provides that:

> Culpable homicide is not murder if the offender while deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of another person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Provocative conduct

5.75 The Indian Supreme Court has taken a broad view of the suddenness requirement. In *Nanavati v State*,[86] Subba Rao J stated:

> The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation.[87]

This means that so long as the accused killed while lacking self-control, the lack of self-control can be evidence of provocation even though it did not occur immediately following the provocative conduct.

5.76 The Supreme Court also accepts the concept of cumulative provocation. Again, in *Nanavati v State*,[88] Subba Rao J stated:

[85] See Appendix A, S Yeo, para 2.1.

[86] AIR 1962 SC 605.

[87] *Ibid*, at p 630.

[88] AIR 1962 SC 605.

> The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence.[89]

5.77 The Code does not require the provocation to be directed towards the accused.[90] Nor does it require the provocative conduct to have emanated from the deceased.[91] Thus, the defence is available even if the accused by mistake or accident killed a person other than the provoker. Also, words alone are sufficient to found provocation.[92]

5.78 Self-induced provocation is specifically precluded from constituting provocation under the Code.[93] However, the Karnataka High Court has allowed defendants to plead provocation in cases where the defendant had acted in such a way that *risked* them being provoked, as opposed to deliberately seeking the provocation as an excuse for killing.[94]

5.79 Lawful conduct is capable of constituting provocation. The final two provisos of exception 1 of section 300, however, provide that provocation cannot be pleaded in two circumstances concerning a lawful exercise of a power or right – the *lawful* exercise of the powers of a public servant and the *lawful* exercise of the right of private defence.

Actual loss of self-control

5.80 The Court of Criminal Appeal of Ceylon (now Sri Lanka) suggested that the required loss of self-control must occur as "violent anger" or "violent passion".[95]

The reasonable person test

5.81 Indian courts have avoided a purely objective approach when applying the reasonable person test. Yeo states:

> When the Indian courts first began applying the concept found in the English law, they realised that a purely objective test would be inoperable and would create injustice if applied to a multi-cultural, multi-religious and multi-class structured society like the one in India.[96]

Accordingly, in *Nanavati v State*,[97] Subba Rao J stated:

[89] *Ibid*, at p 630.

[90] Indian Penal Code 1860, s 300, exception 1.

[91] See Appendix A, S Yeo, para 2.9.

[92] *Nanavati v State* AIR 1962 SC 605, 630.

[93] Indian Penal Code 1860, s 300, exception 1.

[94] *State v Kamalaksha* (1978) Cr LJ 290.

[95] *Appuhamy* (1952) 53 New LR 313, 316.

[96] See Appendix A, S Yeo, para 2.15.

[97] AIR 1962 SC 605.

> The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society to which the accused belongs, and placed in the situation in which the accused was placed, would be so provoked as to lose his self-control.[98]

5.82 India distinguishes the issues of the gravity of the provocation on the one hand and the standard of self-control of the reasonable person on the other. In order to assess the gravity of the provocation, the Indian courts have recognised that almost all relevant characteristics of the accused can be taken into account, provided that the provocative conduct was directed to that characteristic.[99] There are dicta, however, which suggest that certain antisocial characteristics may be excluded.[100] In order to assess whether the accused has exercised the appropriate degree of self-control, the Indian courts have expounded a single standard of the reasonable person. However, within this standard, courts have determined that the accused's age (in the sense of youthful immaturity) is a relevant characteristic but not his or her sex. More importantly, the courts have recognised that an accused's ethnic, cultural or social background is capable of being taken into account. The level of self-control contemplated is that of a whole class of normal people of a particular ethnic, cultural or social group.[101]

5.83 Yeo argues that the advantage of the Indian law is that it appreciates that the accused's reaction to the provocation is not solely the result of the provocation being an affront to his or her ethnic or cultural values but that it is also "the result of her or his emotional and psychological disposition moulded by those values."[102] However, Yeo also notes that this kind of approach might only work in India where "a multitude of communities continue to be rigidly separated from one another by caste, race, religion and socio-economic conditions."[103] In contrast, he argues ethnic groups in countries like Australia or England have "undergone different degrees of assimilation into their host country."[104]

Response to provocation

5.84 There is no rule that requires the retaliation of the accused to be reasonable.[105] But the Indian courts have required that the manner in which the accused reacted was one which might also have been adopted by a reasonable person in the position of the accused.[106]

[98] *Ibid*, at p 630.

[99] See Appendix A, S Yeo, para 2.16.

[100] *Akhtar v State* AIR 1964 All 262 at 269, *per* Beg J.

[101] See Appendix A, S Yeo, para 2.17.

[102] See Appendix A, S Yeo, para 2.18.

[103] *Ibid*.

[104] *Ibid*.

[105] *Ibid*, at para 2.19.

[106] *Shyama Charan v State* AIR 1969 All 61 at 64, *per* Chanadra J.

IRELAND

Outline of law of provocation in Ireland

5.85 In Ireland, provocation is a partial defence to murder. Until 1978, Irish law on provocation shared a history with English law. From 1978, it developed a contrasting, subjective approach.[107]

Loss of self-control

5.86 To establish the provocation defence, the accused must establish that he or she suffered a sudden and complete loss of control and acted in the heat of passion.[108]

Immediacy requirement

5.87 In general, the partial defence requires that the provoked killing was carried out in hot blood.[109]

5.88 However, the courts have increasingly been prepared to admit evidence of provocative acts over time together with expert testimony of "battered women syndrome" or post-traumatic stress disorder.[110] The courts have, however, not yet specifically recognised the concept of cumulative provocation.[111]

Standard of self-control

5.89 Until 1978, Ireland had an objective test for self-control. In other words, juries would ask themselves whether the accused exercised the standard of self-control to be expected of a reasonable person.

5.90 However, in *People (DPP) v MacEoin*,[112] the Court of Criminal Appeal adopted a new test. Kenny J described this new test as follows:

> [T]he trial judge at the close of the evidence should rule on whether there is any evidence of provocation which, having regard to the accused's temperament, character and circumstances, might have caused him to lose control of himself at the time of the wrongful act and whether the provocation bears a reasonable relation to the amount of force used by the accused.[113]

5.91 It is unclear whether the proportionality component of this test is an objective element. There is, however, authority to suggest that the question is merely a factor

[107] See Appendix C, Law Reform Commission of Ireland, para 1.

[108] *Ibid*, at para 20.

[109] *Ibid*, at para 21.

[110] *People (DPP) v O'Donoghue*, *The Irish Times* 16-20 March 1992; *People (DPP) v Bell*, *The Irish Times* 14 November 2000.

[111] See Appendix C, Law Reform Commission of Ireland, para 22.

[112] *People (DPP) v MacEoin* [1978] IR 27.

[113] *Ibid*, at p 34.

to be considered in judging the credibility of the accused's testimony that he or she was actually provoked.[114]

5.92 The Court of Criminal Appeal identified problems with this subjective approach in *People (DPP) v Davis*.[115] It noted that changes in society suggest that the provocation defence may have to be circumscribed, for otherwise accused persons might successfully plead provocation in cases where the accused's behaviour is socially repugnant. A purely subjective test would allow, for example, the accused to plead provocation in a case of "road rage". The Court concluded that society expects minimal standards of self-control from its members, but did not explain how these standards should be determined.[116]

Raising the defence

5.93 The defence does not arise automatically. The accused must be able to show that provocation is a live issue. Before the issue is put to the jury, the trial judge must determine that there is sufficient evidence for a reasonable jury to conclude that all the elements of the defence are present.[117]

Proposals for reform in Ireland

5.94 The Law Reform Commission of Ireland has, very recently, published their consultation paper "Homicide: The Plea of Provocation".[118] In particular, this paper addresses:

(1) the concerns raised in *People (DPP) v Davis*,[119] namely that the current law does not require the jury to consider whether the accused fell short of the standard of self-control to be expected of an ordinary person; and

(2) the question of cumulative provocation, to take account of cases in which the accused is provoked by ongoing domestic violence – cases that at the moment would fail the immediacy requirement.

5.95 The Law Reform Commission proposes retaining provocation as a partial defence, but in an amended form. The proposed amended form is designed to reflect the current law in Canada, Australia and New Zealand. It would include a two-part test. First, the jury would consider whether the accused was provoked (the "narrative" issue). In this query, all characteristics of the accused would be relevant. Second, the jury would consider whether, judged by community standards of self-control, the accused ought to have acted as he did (the "normative" issue). The amended form would also remove the immediacy

[114] *People (DPP) v Noonan* [1998] 2 IR 439, 442.

[115] [2001] 1 IR 146.

[116] *Ibid*, at p 160.

[117] See Appendix C, Law Reform Commission of Ireland, para 19.

[118] Published on 29 October 2003.

[119] [2001] 1 IR 146.

requirement through provisions along the lines of those in New South Wales and the Australian Capital Territory.[120]

NEW ZEALAND

The Crimes Act 1961

5.96 Section 169(2) of the Crimes Act 1961 provides that:

> Anything done or said may be provocation if–
>
> (a) In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control; and
>
> (b) It did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

Standard of self-control

5.97 The extent to which "characteristics" of the accused are considered for the purposes of section 169(2)(a) has been a source of ongoing controversy.[121] Recent decisions of the New Zealand Court of Appeal have distinguished between the accused's sensitivity or susceptibility to provocation (the gravity question) and his or her power of self-control (the standard of self-control question).[122] The accused's characteristics are relevant to the former question, but not the latter.[123]

5.98 When considering the gravity question, the New Zealand courts have taken a wide range of individual characteristics into account including:

(1) battered woman syndrome;[124]

(2) post traumatic stress;[125] and

(3) rape trauma syndrome.[126]

5.99 There is growing unrest concerning the interpretation of section 169(2)(a). *McGregor*, an earlier New Zealand Court of Appeal decision (1962) had suggested that the self-control exercised by the accused should be tested against the self-control of an ordinary person who possessed at least certain personal

[120] Paras 5.13.

[121] See Appendix D, W Brookbanks, paras 21-25.

[122] *McCarthy* [1992] 2 NZLR 550 (CA); *Campbell* [1997] 1 NZLR 16 (CA); *Rongonui* [2000] 2 NZLR 385 (CA).

[123] See Appendix D, W Brookbanks, para 25.

[124] *Gordon* (1993) 10 CRNZ 430; *Oakes* [1995] 2 NZLR 673 (CA).

[125] *Leilua* 20/9/85, CA 18/85.

[126] *Masters* 25/5/94, HC Auckland, 7323/93, *per* Anderson J.

characteristics of the accused.[127] The dissenting judgments in *Rongonui*[128] expressed sympathy for this position. In *Makoare*,[129] the New Zealand Court of Appeal was encouraged to revisit the issue in view of the decision of the House of Lords in *Smith (Morgan)*.[130] The Court of Appeal, while unanimously calling for statutory reform, refused to overturn its recent decisions pending, amongst other things, a report of New Zealand's Law Commission.

Proximity between provocation and response

5.100 As a general rule, during the period between the provocation and the killing, the accused must have remained in a "continuous state of hot blood" or "remained in a state of uncontrolled anger".[131]

5.101 However, there is an exception to this rule. Courts have accepted that the accused can raise the partial defence even when there was a time lapse between the provocation and the killing so long as the victim's original provocative conduct created smouldering resentment in the accused and subsequent events revived that earlier provocation.[132]

Role of the jury

5.102 Provocation is a question for the jury. However, the trial judge can remove this question from them if there:

> … is insufficient proximity in point of time between the alleged provocation and the homicide, such that there is no ground for holding that the accused acted in the heat of passion and before there was time for the passion to cool.[133]

Proposals for reform

5.103 The New Zealand Law Commission considered provocation in a report published in 2001.[134] It considered arguments for and against retaining provocation as a partial defence for murder. The arguments for retaining the defence were:[135]

(1) killing under provocation is less culpable than other intentional killing and should not be stigmatised as murder in the same way as other intentional killing; and

[127] *McGregor* [1962] NZLR 1069 (CA).

[128] [2000] 2 NZLR 385 (CA).

[129] [2001] 1 NZLR 318 (CA).

[130] [2001] 1 AC 146.

[131] See Appendix D, W Brookbanks, para 51.

[132] *Taaka* [1982] 2 NZLR 198 (CA).

[133] See Appendix D, W Brookbanks, para 16; *Erutoe* [1990] 2 NZLR 28 (CA).

[134] *Some Criminal Defences with Particular Reference to Battered Defendants*: Report 73 (2001).

[135] See Appendix D, W Brookbanks, para 62.

(2) where there is evidence of provocation, the jury should have a role in determining the level of the accused's culpability.

5.104 The arguments for abolishing the defence were:[136]

(1) provocation is a historical anomaly that is unnecessary once the mandatory life sentence for murder is abolished;[137]

(2) treating intentional killings differently confuses lay people, particularly relatives or friends of the victim;

(3) the judiciary has criticised provocation as incomprehensible;

(4) the current law on provocation risks being applied unevenly by judges and juries;

(5) provocation is gender biased;

(6) provocation can be more easily dealt with during sentencing; and

(7) the stigma argument is overstated.

5.105 The New Zealand Law Commission advocated abolishing the partial defence.[138] This echoed the recommendation of the New Zealand Criminal Law Reform Committee in 1976 which also recommended abolition so long as the mandatory life sentence was also abolished.[139]

5.106 The Sentencing Act 2002 replaced the mandatory life sentence for murder with a maximum life sentence, although there is a strong presumption in favour of imposing the maximum sentence.

Scotland

Effects of the defence

5.107 In Scotland, provocation is a partial defence to murder. A successful defence will lead to the accused being found guilty of "culpable homicide" rather than murder.[140]

Provocative conduct

5.108 The provocative conduct must consist of either violence and/or infidelity.[141]

[136] *Ibid*, at para 63.

[137] The Sentencing Act 2002 abolishes the mandatory life sentence for murder.

[138] See Appendix D, W Brookbanks, para 64.

[139] *Report on Culpable Homicide* (1976).

[140] See Appendix E, J Chalmers, C Gane and F Leverick, p 169.

[141] *Ibid*, at p 173.

5.109 Originally, provocation could be pleaded only in cases of infidelity if the accused caught his or her spouse in the act of adultery.[142] This has since been extended to include:

(1) confessions of adultery by the deceased to the accused, [143]provided that the confession of infidelity was clear and unequivocal and "accepted as such by the [accused]",[144] and

(2) relationships other than marriage "of such a character that fidelity, as in marriage, [was] expected on both sides".[145]

5.110 In other contexts, words alone are unlikely to be provocative.[146] The same is true of a non-violent homosexual advance.[147]

Immediate loss of self-control

5.111 To establish provocation, the accused must have lost his or her self-control and been provoked into killing as an immediate response to the provocation.[148] This position precludes juries from considering evidence of cumulative provocation.[149]

Standard of self-control

5.112 Since *Drury v HM Advocate*,[150] the jury must consider whether the "ordinary man" would have reacted as the accused did in response to such provocation.[151] When making this analysis, the jury may give the ordinary person the accused's age and sex.[152]

5.113 There is still no authority on whether other characteristics borne by the accused are to be considered relevant to an assessment of self-control to be expected of the ordinary man.[153]

[142] *Ibid*, at p 170.

[143] *HM Advocate v Hill* 1941 JC 59.

[144] *McCormack v HM Advocate* 1993 SLT 1158, 1163.

[145] *HM Advocate v McKean* 1997 JC 32 where the accused was female.

[146] *Thomson v HM Advocate* 1986 SLT 281; *Cosgrove v HM Advocate* 1990 JC 333.

[147] *Robertson v HM Advocate* 1994 SLT 1004.

[148] See Appendix E, J Chalmers, C Gane and F Leverick, pp 173 - 174.

[149] *Thomson v HM Advocate* 1986 SLT 281, 284. It has been suggested, however, that some cases where the accused has killed after a period of sustained domestic violence, may be dealt with by discretion from the prosecution, with the Crown being prepared to accept pleas of guilty to culpable homicide. See Appendix E, section 4.

[150] 2001 SLT 1013.

[151] *Ibid*, at para 34.

[152] See Appendix E, J Chalmers, C Gane and F Leverick, p 177.

[153] *Ibid*, at pp 178 - 179.

Proportionality

5.114 Prior to *Drury v HM Advocate*, the accused's response to violent provocation had to be in proportion to the provocative act,[154] save that there was no such requirement in cases involving infidelity. It is unclear whether following *Drury* the proportionality test remains as a separate element of the provocation defence in cases where the provocation consists of violent conduct.[155]

SOUTH AFRICA

5.115 The starting point for discussion in South African law is Roman and Roman-Dutch law. Neither Roman nor Roman-Dutch law excused criminal conduct committed by a person in a state of anger, jealousy or for any other emotional reason. They were only factors to be considered in mitigation of sentence.

5.116 The defence of provocation was introduced into South African law by section 141 of the old Transkeian Penal Code of 1886.[156] In section 141, 'provocation' is defined as that which is "sufficient to deprive any ordinary person of the power of self-control". This set out an objective assessment of provocation, the test being whether a reasonable man would have lost his or her self-control.

5.117 In 1917 the mandatory death penalty for murder was introduced.[157] This remained in force until June 1995 when the Constitutional Court in *S v Makwanya and another* declared the death penalty unconstitutional.[158] South African law might have followed the approach of Roman and Roman-Dutch law had it not been for the introduction of the death penalty for murder. The mandatory death penalty led the South African courts to adopt a different and more lenient approach.

5.118 In 1924 the Appellate Division in *R v Buthelezi*[159] held that section 141 of the 1886 Code correctly expressed South African law on provocation. In order, however, to dilute the effect of the 1917 Act, the courts interpreted section 141 so as to recognise a type of partial excuse situation, where, even if the killing was intentional, a conviction of "culpable homicide" was justified if the accused's self-control had been impaired.[160]

5.119 The 1949 case of *R v Thibani*[161] witnessed the beginning of a new phase in the development of the defence of provocation.[162] The court regarded evidence of provocation as a:

[154] *Ibid*, at p 175.

[155] *Ibid*, at pp 177 - 178.

[156] In this Part referred to as "the 1886 Code".

[157] Criminal Procedure Evidence Act 1917; in this Part referred to as "the 1917 Act".

[158] Constitutional Court of South Africa CCT3/94.

[159] 1924 AD 160.

[160] Van den Heever JA in *R v Hercules* 1954 (3) SA 826 (A), held that an example of such a situation would be a husband who surprised his wife in the act of adultery and killed her lover.

[161] 1949 (4) SA 720 (A).

> [s]pecial kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved intent as well as the act beyond reasonable doubt.[163]

5.120 This decision led to a diminished influence of section 141 of the 1886 Code. Following *Thibani*, the courts were undecided as to whether an objective or a subjective test should be applied.[164] It was only in 1971 that the Appellate Division, in *S v Mokonto*,[165] finally decided that the approach in judging provocation must be completely subjective. The Court made it clear that the test for provocation is no longer how an ordinary reasonable man would have reacted to the provocation, but how the *particular* accused, taking into account his personal characteristics such as jealousy or a quick–temper, in fact reacted, and what his state of mind was at the crucial time. At this stage, however, the Court was not willing to hold that provocation could be a complete defence to a charge of murder.

5.121 Until 1981, South African criminal practice generally recognised only two defences based on criminal incapacity: youth[166] and insanity.[167] In 1981, however, the Appellate Division in *S v Chretien*[168] included intoxication. This gave rise to the question: if severe intoxication could exclude the basic elements of criminal liability, then why not provocation?

5.122 The term "non-pathological criminal incapacity" began to be used in cases where a defence based on immature age or mental illness was *not* pleaded. It was introduced for the first time in 1988 in *S v Laubscher*.[169] Joubert JA used this term to separate this defence from that created by section 78 of the Criminal Procedure Act 51 of 1977 which applied to pathological disturbances.[170] Although the Court did not find it necessary to decide whether a defence of "non-pathological incapacity" existed, it did not reject the possibility.

5.123 In the 1980s the Appellate Division held, in a number of cases, that there could be a complete defence of incapacity even if the incapacity was not the result of mental illness, immature age or intoxication.[171] The process of moving towards a complete subjectivisation of the defence of provocation is discernible in the cases of *S v Van*

[162] C. R. M. Dlamini, "The Changing Face of Provocation" (1990) *South African Journal of Criminal Justice* 130.

[163] 1949 (4) SA 720 (A) at p 731.

[164] See *L v Lubbe* (1963) (4) SA 459 (W); *S v Mangondo* 1963 (4) SA 160 (A); *S v Dlodlo* 1966 (2) SA 401 (A); *S v Delport* 1968 (1) PH h172 (A).

[165] 1971 (2) SA 319 (A).

[166] *R v K* 1956 (3) SA 353 (A); *S v Van Dyk* 1969 (1) SA 601 (C); *S v S* 1977 SA 305 (O); *S v M* 1978 (3) SA 557 (Tk).

[167] *S v Mahlinza* 1967 (1) SA 408 (A); *S v Kavin* 1978 (2) SA 731 (W); *S v McBride* 1979 (4) SA 313 (W); *S v Mnyandu* 1976 (2) SA 751 (A); *S v Mngomezulu* 1972 (1) SA 797 (A).

[168] 1981 (1) SA 1097.

[169] 1988 (1) SA 163 (A).

[170] *Ibid*, at p 167.

[171] *S v Van Vuuren* 1983 (1) SA 12 (A); *S v Arnold* 1985 (3) SA 257; *S v Adams* 1986 (4) SA 882 (A); *S v Campher* 1987 (1) SA 940 (A); *S v Laubscher* 1988 (1) SA 163 (A); *S v Calitz* 1990 (1) SACR 119 (A); *S v Wiid* 1990(1) SACR 561 (A).

Vuuren[172] and *S v Lesch.*[173] Although the accused in both cases were convicted of murder, the importance of the decisions lies in the Court's consideration and analysis of provocation and its relevant in the determination of the accused's criminal capacity:

> I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe emotional stress. In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing. Other factors which may contribute to the conclusion that he failed to realise what was happening or to appreciate the unlawfulness of his act must obviously be taken into account in assessing his criminal liability. But in every case the critical question is—what evidence is there to support such a conclusion?[174]

5.124 The legal position with regard to the defence of non-pathological criminal incapacity was authoritatively dealt with by the Appellate Division in *S v Kalogoropoulos*[175] and *S v Potgieter*[176] respectively. Botha JA in *S v Kalogoropoulos* affirmed that the accused who relies on non-pathological causes in support of a defence of criminal incapacity is required in evidence to lay a factual foundation, sufficient at least to create reasonable doubt on the point of criminal capacity.[177]

5.125 The need for careful scrutiny of the evidence presented in support of the defence of non-pathological criminal incapacity was also stressed by Kumleben JA in *S v Potgieter*. The judge reached the following conclusion:

> Facts which can be relied upon as indicating that a person was acting in a state of automatism are often consistent with, in fact the reason for, the commission of a deliberate, unlawful act. The court recognised that stress, frustration, fatigue and provocation for instance may diminish self-control to the extent that, colloquially put, a person 'snaps' and a conscious act amounting to a crime results. Similarly, subsequent manifestations of certain emotions, such as fear, panic, guilt and shame, may be present after either a deliberate or an involuntary act has been committed. The facts must therefore be closely examined to determine where the truth lies.[178]

5.126 The significance of both these cases is that the courts will carefully scrutinise the defence of non-pathological incapacity and, if the version of the facts presented by the accused is held to be unreliable or untruthful, the psychiatric evidence based

[172] 1983 (1) SA 12.

[173] 1983 (1) SA 814 (O).

[174] *Per* Diemont JA in *S v Van Vuuren*1983 (1) SA 12,17.

[175] 1993 (1) SACR 12 (A).

[176] 1994 (1) SACR 61 (A).

[177] 1993 (1) SACR 12 (A), 21.

[178] 1994 (1) SACR 61 (A), 73-74.

on the supposed truthfulness of the accused's version of the facts will not be accepted by the courts.[179]

5.127 The case law throughout the 1980s and 1990s indicates that the courts are prepared to accept and recognise provocation and emotional stress as factors which are capable of excluding the voluntariness of the conduct of criminal capacity. There has not, however, been a uniform approach as to whether or not provocation is a *complete* defence. The preponderance of authority, however, is that it is a complete defence.[180]

5.128 Two cases which warrant attention are *S v Nursingh*[181] and *S v Moses.*[182] In *Nursingh* the accused was charged with the murder of his mother, grandfather and grandmother. It was contended on behalf of the accused that at the relevant time his mind "became so clouded by an emotional storm that seized him that he would not have the mental ability to distinguish between right and wrong and act in accordance with that insight".[183]

5.129 Evidence of prolonged sexual abuse had been placed before the court. A psychiatrist and a psychologist gave evidence to the effect that the previous history of abuse by the accused's mother triggered off a "state of altered consciousness" which significantly reduced his awareness of normality with accompanying loss of judgement and self- control.[184] Squires J held that the onus was on the state to show that the accused had the necessary criminal capacity to establish the *mens rea* necessary to commit an offence. However, where an accused person relies on non-pathological causes in support of a defence of criminal capacity, he is required to lay the factual foundation for it in evidence, sufficient at least to create a reasonable doubt on the issue as to whether he had that mental capacity.[185] Having regard to all the evidence before the court, Squires J found that the accused had demonstrated the necessary factual foundation, which had at least created a reasonable doubt as to his capacity to form criminal intent. The accused was accordingly acquitted.

5.130 Professor Burchell's commentary raises the following concerns:

[179] See *S v Kensley* 1995 (1) SACR 646; *S v Ingram* 1995 (1) SACR 1 (A).

[180] *S v Arnold* 1985 (3) SA 256 (C); *S v Mandela* 1992 (1) SACR 661 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Nursingh* 1995 (2) SCAR 331 (D); *S v Cunningham* 1996 (1) SACR 631 (A); *S v Moses* 1996 (1) SACR 710 (C); *S v Henry* 1999 (1) SACR 13 (SCA). In other cases the courts have been prepared to accept in principle that provocation can be a complete defence, but the defence has not succeeded on the facts: *S v Henry* 1999 (1) SACR 13 (SCA); *S v Seymour* 1998 (1) SACR 66; *S v Goitsemag* 1997 (1) SACR 99; *S v Phama* 1997 (1) SACR 485 (ECD); *S v Ingram* 1995 (1) SACR 1 (A); *S v Els* 1993 (1) SACR 723; *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Pederson* 1998 (2) SACR 383.

[181] 1995 (2) SCAR 331 (D).

[182] 1996 (1) SACR 710 (C).

[183] *S v Nursingh* 1995 (2) SCAR 331 (D), 332.

[184] *Ibid*, at p 333.

[185] *Ibid*, at p 334.

> [O]ne cannot help feel a measure of disquiet about the conclusion that an intelligent person, albeit under a good deal of stress, can shoot his mother and grandfather by firing three bullets into their bodies and his grandmother by firing four bullets into her body. In the past, the evidence of behavioural scientists regarding the unfortunate background circumstances faced by an accused would have been led, more appropriately, in mitigation of sentence. But, even if this evidence should be led on the issue of liability: was Nursingh under any more stress or pressure than the accused in *Potgieter* or *Campher*?[186]

5.131 In *Moses*, the accused and the deceased were homosexual lovers and on the first occasion when the accused had unprotected penetrative intercourse with the deceased, the deceased revealed that he had AIDS. The accused testified that upon hearing this he was provoked to the extent that he lost control over his actions, in that he could realise what he was doing but was so angry that he could not stop himself. The accused gave a detailed history of his family situation and upbringing and how he had been sexually abused by his father.

5.132 The court accepted the expert testimony of a psychiatrist and a psychologist who supported the finding that there was a reasonable possibility that the accused had lacked criminal capacity, even though he may possibly have retained some measure of control over his actions by the time he inflicted the final wound. The Court found that the State had failed to prove beyond reasonable doubt that the accused's control, even at that stage, was not significantly impaired. The accused was therefore acquitted.

5.133 Professor Burchell's criticism of *Nursingh* is again pertinent: was *Moses* under any more stress or pressure than the accused in *Potgieter*,[187] or *Campher*?[188] In those cases there was evidence of *prolonged* provocation. There were a number of provocative incidents which led to an accumulation of anger over a period of time and finally the fatal incident in question.[189] For example, in *Campher*, the accused was subject to abusive and degrading treatment by the deceased over a long period of time; he mocked her religion; he was authoritarian and he regarded her children as an encumbrance.

5.134 The South African law of provocation is, therefore, radical in that it affords the accused the prospect of a complete acquittal if he or she can establish a factual foundation sufficient to create reasonable doubt on the issue of criminal capacity.[190] Over the last three decades, the High Court in three decisions[191] and the Supreme

[186] J M Burchell, *South African Criminal Law and Procedure: Volume 1 General Principles of Criminal Law*, (1997) p 210.

[187] 1994 (1) SACR 61 (A).

[188] 1987 (1) SA 940 (A).

[189] R T du Toit, "Provocation to killing in Domestic Relationships" (1993) *Responsa Meridiana* 230 at p 249.

[190] See Appendix F, J Burchell, p 188.

[191] *S v Arnold* 1985 (3) SA 256 (C); *S v Nursingh* 1995 (2) SCAR 331 (D); and *S v Moses* 1996 (1) SACR 701 (C).

Court of Appeal in one ruling[192] have completely acquitted accused persons charged with murder. The accused relied on the defence of non-pathological incapacity, and in each case the acquittal was based on evidence of his or her provocation/emotional stress at the time of the fatal incident, or before the killing, leading to the conclusion that the State had not proved criminal capacity beyond reasonable doubt.[193]

5.135 The courts, however, have not adopted an entirely consistent approach and it is not clear to what extent a person should be expected to tolerate provocative conduct.[194] The courts have not yet drawn a clear distinction between *provocation*, which is caused by human beings, and *emotional stress*, which is a series of events caused by both human beings and surrounding circumstances over a long period of time.[195] It appears that a major problem has been the attempt by the court to adopt an "all-or-nothing" approach to provocation, when quite clearly it cannot be "pigeon-holed" into one specific category.[196]

5.136 As the law currently stands, where an accused person successfully raises the defence of insanity, he or she faces a long period of institutionalisation. On the other hand, if an accused person raises the defence of non-pathological criminal incapacity, and is successful, he or she is completely acquitted.

5.137 There has been strong criticism of how the South African law has developed. In 1985, Snyman asked:

> Are we not making it progressively easier for those who fall below the standards required by the law to contravene the law with impunity? Are we not diminishing the incentives to conform to the standards of law which are so vital to upholding the law? The search for criminal justice is not, as some "subjectivists" would tend to believe, confined to a determination and recognition of the individual accused's personal knowledge and capabilities.[197]

5.138 In 2002, the Supreme Court of Appeal in *S v Eadie*,[198] comprehensively reviewed the jurisprudence on provocation and emotional stress. Professor Burchell sets out a detailed review of *Eadie's* case and the extent to which Navsa JA's judgment revises the courts' approach to the defence of provocation in Appendix F.[199] He comments that:

[192] *S v Wiid* 1990 (1) SACR 561 (A).

[193] See Appendix F, J Burchell, p 188.

[194] Burchell and Milton, *Principles of Criminal Law*, (1997), p 291.

[195] C. R. M. Dlamini, "The Changing Face of Provocation" (1990) *South African Journal of Criminal Justice* 130 at p136.

[196] *Ibid*, at p 137.

[197] C.R. Snyman, "Is there such a defence in our criminal law as 'emotional stress'?" (1985) *South African Law Journal* 240 at p 251.

[198] 2002 (3) SA 719 (SCA). The Supreme Court of Appeal affirmed the decision of the High Court and rejected the accused's defence of non-pathological incapacity where he battered another to death in purported road rage.

[199] See Appendix F, J Burchell, pp 188 - 198.

> The *Eadie* judgment signals a warning that in future the defence of non-pathological incapacity will be scrutinized most carefully. Persons who may in the past have been fortunate enough to be acquitted, in circumstances where they killed someone who had insulted them, will now find the courts ready to evaluate, against objective standards of acceptable behaviour, the evidence adduced by them to support their defence of provocation/emotional stress.[200]

5.139 Navsa JA did not specifically over-rule the subjective test for capacity, and it still remains the test for capacity in South African law. He acknowledges that it is not the principle that is at fault, but rather its misapplication. He was critical of the decision in A*rnold*, *Nursingh*, and *Moses* because the court placed too much emphasis on the accused's *ipse dixit*:[201]

> I agree that the greater part of the problem lies in the misapplication of the test [of capacity]. Part of the problem appears to me to be a too-ready acceptance of the accused's ipse dixit concerning his state of mind. It appears to me to be justified to test the accused's evidence about his state of mind, not only again his prior and subsequent conduct but also again the court's experience of human behaviour and social interaction. Critics may describe this as yielding to policy. In my view it is an acceptable method for testing the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence.[202]

5.140 Navsa JA was not referring to a revision of the test for capacity, "but rather applying correctly, using permissible inference from objective facts and circumstances".[203] The learned judge was critical of *Arnold's* case as the court readily accepted the accused's version of the events and did not give enough attention to "focused and goal-directed behaviour before, during and after the event."[204]

5.141 *Eadie*, therefore, continues to allow provocation to be subjectively test. However, the practical implementation of this test would now accommodate the reality that the policy of the law, in regard to killings involving provocation, must be one of reasonable restraint.[205] The court should now evaluate why the accused reacted the way he or she did, against the objective norms of behaviour to determine whether he or she could reasonably be expected to have acted differently.[206] It is for this reason that *Eadie* was convicted of murder after violently losing his temper in a road rage battle.

[200] *Ibid*, at p 190.

[201] *Ibid*, at p 192.

[202] 2002 (3) SA 719 (SCA) at paras 64 and 65.

[203] See Appendix F, J Burchell, p 190.

[204] 2002 (3) SA 719 (SCA) at para 46.

[205] See Appendix F, J Burchell, p 191.

[206] *Ibid*, at p 202.

5.142 However, despite this change in attitude to provocation by Navsa JA in *Eadie*:

> a scintilla of a possibility will exist in South Africa that an accused, who raises lack of capacity resulting from provocation (or emotional stress) in a predicament of extremely severe provocation (or emotional stress), probably extending over a lengthy period of time, could be completely excused from liability on the basis of lack of capacity, provided a reasonable person in his or her position or group would have acted in the same way as the accused did ie the accused could not reasonably have been expected to have acted differently.[207]

[207] *Ibid*, at p 204.

PART VI
THE INTRODUCTION INTO ENGLISH LAW OF THE DEFENCE OF DIMINISHED RESPONSIBILITY

BACKGROUND

The Royal Commission on Capital Punishment (1949-1953)

6.1 The defence of diminished responsibility was introduced into the law of England and Wales by section 2 of the Homicide Act 1957.[1] From its inception, it has been a defence which, if successfully pleaded, entitles the defendant to be acquitted of murder and instead convicted of manslaughter. For this reason, it is frequently referred to as a partial defence. Its essence is that the defendant suffered from such "abnormality of mind", arising from or induced by certain specified causes, as "substantially impaired his mental responsibility" for his conduct.

6.2 The enactment of the 1957 Act represented the legislature's response to the Report published by the Royal Commission on Capital Punishment 1949 – 1953.[2] When the Royal Commission was established in 1949, the mandatory sentence for murder was death. The Royal Commission was asked to consider and report on whether liability to suffer capital punishment should be limited or modified and, if so, to what extent and by what means. A substantial portion of the Report was devoted to considering "how far persons suffering from insanity, from mental deficiency or from lesser forms of mental abnormality should on that ground be relieved of the liability to suffer capital punishment for murder".[3]

6.3 The Report addressed the fundamental distinction which then existed, namely mental abnormality which as a matter of law was capable of founding the defence of insanity and mental abnormality which was not. Those found to be legally insane lacked *any* responsibility for their conduct. This was in contrast to those who were "mentally abnormal, but not to such a degree as to justify their being regarded as wholly irresponsible".[4] The implication, of course, was that such persons were considered to be only *partially* responsible for their conduct.

6.4 The distinction reflected the fact that mental disorder which amounted in law to insanity had legal consequences in contrast to other forms of mental disorder. A defendant who proved that he was legally insane was entitled to a special verdict of

[1] In this Part referred to as "the 1957 Act". Section 2 has no application to Scotland and Northern Ireland. The defence had, however, previously been recognised at common law in Scotland. The first judicial use of a phrase akin to "diminished responsibility" was in *HM Advocate v Edmonstone* 1909 2 SLT 223, 224, *per* Lord Gultrie, but the underlying principles can be traced back to at least 1867.

[2] (1953) Cmd 8932; in this Part referred to respectively as "the Report" and "the Royal Commission".

[3] Para 211.

[4] Paras 215 and 373.

"guilty but insane".[5] In the context of murder this meant that he was not liable to be sentenced to death but would be ordered to be detained without limitation of time in a mental hospital. By contrast, the mentally disordered defendant charged with murder who could not prove that he was legally insane would, if convicted, be subject to the death sentence. His mental disorder had no legal consequences.[6]

6.5 In pleading insanity a defendant had to prove that he was "insane so as not to be responsible in law for his actions".[7] For the purpose of attributing criminal *liability*, the law was not concerned with *degrees* of responsibility. There was a dichotomy of sane or insane, responsible or not responsible, mad or bad. Since 1843 it had been accepted that the test of responsibility was contained in the M'Naghten Rules.[8] The test will be explained in detail below[9] but, for present purposes, it is sufficient to emphasise that it was, and still is, narrow in scope. It focused exclusively on the cognitive features of the defendant's mind. The defendant had to be suffering from a "defect of reason" arising from a "disease of the mind". In addition, the defendant had to prove either that he did not know the nature and quality of his act[10] or that he did not know that it was wrong in the sense of being contrary to the law.[11] The criticism most frequently levelled at the test was that it was based on an entirely obsolete belief in the pre-eminent role of reason in controlling social behaviour. Critics argued that contemporary psychiatry and psychology stress that social behaviour is determined more by how a person has learned how to behave than by what he knows or understands. Insanity, it was argued, did not only, or even primarily, affect the cognitive or intellectual faculties, but the whole personality, including the will and the emotions. The M'Naghten Rules have never permitted the defendant's *emotional* state of mind to be examined.

6.6 The Royal Commission's Report agreed that the test of responsibility laid down by the M'Naghten Rules was inadequate. The majority recommended[12] that the Rules should be abrogated and, instead, the jury should be asked to determine whether the defendant, at the time of the act or omission, was suffering from either a disease of the mind *or mental deficiency* to such a degree that he ought not to be held responsible.

6.7 Four of the twelve members of the Royal Commission dissented from that recommendation. Their criticism was that it abolished the existing test without providing a satisfactory replacement. It dispensed with a criterion, however

[5] Prior to the enactment of the Criminal Lunatics Act 1883, the verdict was one of not guilty by virtue of insanity. The defendant, although not guilty, was nevertheless liable to be detained indefinitely.

[6] He might obtain a reprieve by virtue of the executive exercise of the Royal Prerogative of Mercy. If so, a sentence of life imprisonment would be substituted.

[7] Trial of Lunatics Act 1883, s 2(1).

[8] 10 Cl & Fin 200; 8 ER 718.

[9] See paras 6.26–6.43.

[10] In this case insanity negatives the mental element in the definition of the offence.

[11] In this case insanity is a special exculpatory defence which is based on lack of capacity for normative understanding. It is an exception to the general rule that "ignorance of the law is no defence".

[12] Para 333.

defective, of criminal responsibility and instead left the issue at large to the jury on the basis that criminal responsibility is essentially an ethical question to which only a subjective answer, not based upon any objective criterion, can be given. In the minority's view, this gave insufficient recognition to the principle that criminal responsibility must be t decided with reference to established legal criteria.

6.8 The Report did *not* recommend the introduction of diminished responsibility as a defence (partial or otherwise) to murder. The reason was not that it was envisaged that juries would find the issue too difficult, or would tend to err in the direction of undue leniency. Rather, it was that, whereas murder and insanity were both rare occurrences and often went together,[13] forms of mental abnormality which caused *diminution* of responsibility were of frequent occurrence and were potentially of importance to a wide range of offences. It was felt, however, that the Royal Commission's terms of reference did not permit examination of whether diminished responsibility should be available as a defence of general application affecting liability to and punishment for all crimes. With regard to murder, the Report concluded that a "radical" amendment to the existing law would not be justified for the "limited" purpose of enabling the court to take account of a special category of "mitigating" circumstances in cases of murder so as to avoid passing the death sentence in cases where such circumstances existed.[14]

6.9 Although not advocating a defence of diminished responsibility, the Report's recommendation for a new test of responsibility in relation to the insanity defence did, in one respect, foreshadow the defence of diminished responsibility which was eventually introduced by the 1957 Act. This is because the proposed test would have enabled "mental deficiency" as well as "disease of the mind" to be capable of constituting insanity. Likewise, the 1957 Act did not restrict the availability of the defence of diminished responsibility to those defendants whose mental abnormality arose from a "disease of the mind". It is important, however, not to equate the Report's proposed test with the concept of diminished responsibility to be found in the 1957 Act. The Report maintained the distinction between mental abnormality which *negated* the defendant's responsibility and mental abnormality which *diminished* his responsibility. The proposed new test of insanity, while it extended the aetiology beyond "disease of the mind", was not designed to assist those whose responsibility the jury considered to be merely diminished (as opposed to negated).[15]

[13] Because murder attracted the death sentence, there was every incentive to plead insanity even though, if successfully pleaded, it resulted in detention without limitation of time.

[14] The Royal Commission did recommend, however, that in *all* cases where the defendant was convicted of murder, the *jury* should determine whether there were such extenuating circumstances as to justify the substitution of a sentence other than death.

[15] This is clearly demonstrated at para 357. The majority stated that they agreed with the view of the British Medical Association that "the criterion of criminal responsibility ought to apply to all cases of mental defectives, the jury being left to decide, on the evidence in each case, whether the degree of mental defect was such as to *negative*, or only to *diminish*, the responsibility of the accused". (emphasis added)

The relevance of mental disorder in cases of murder immediately prior to the enactment of the 1957 Act

6.10 Prior to the enactment of the 1957 Act, there were a limited number of ways in which a person's mentally disordered state might affect the outcome of criminal proceedings for murder:

(1) The defendant's mental state *at the time of the commission of the offence* was such as to give rise to a verdict of not guilty by reason of insanity.[16] In 1957, and until 1992 a verdict of not guilty by reason of insanity following trial on indictment resulted in a mandatory order that the defendant be admitted to a special hospital where he might be detained indefinitely.[17] As previously explained, the test was a narrow one and, significantly, more restricted than that applied under Scots law.[18] Given the mandatory disposal following a verdict of not guilty by reason of insanity, it might be thought that prior to 1957 defendants would prefer not to seek such a verdict but rather plead guilty and hope for as lenient a sentence as possible. This was indeed the case in respect of allegations other than murder which did not carry the mandatory death sentence. Accordingly, prior to 1957, the defence of insanity was in practice only very infrequently pleaded to offences other than murder.

(2) The defendant, by reason of mental disorder, might be unable to understand or participate meaningfully in the criminal proceedings. The focus was on the state of the defendant's mind, not at the time of the alleged commission of the offence, but *at the date of trial*. The test for determining whether he was *fit to plead* (or to be tried) was not that laid down in the M'Naghten Rules but was similar in the following respect. The jury had to focus on the defendant's cognitive capacity to comprehend the nature of a criminal trial and follow its proceedings. If the jury found that D was unfit to plead, prior to 1992, there was no trial of the facts. The law mandated indefinite hospitalisation in such cases.[19] If they found that D had done the act or made the omission charged, the court had to order admission to a special hospital where he or she might be detained without limitation of time.

(3) The defendant might plead not guilty on the basis of automatism.[20] The plea is an assertion by the defendant that his conduct was involuntary.[21]

[16] The defence was not confined to murder.

[17] This mandatory disposal still applies in respect of offences for which the sentence is fixed by law – murder. For other offences, a wider range of disposals is now available by virtue of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, which came into force on 1 April 1992.

[18] Whether this is still the case is debatable since, on one view, the ambit of the defence of insanity in Scots law has since narrowed.

[19] Since 1992, in such a case, another jury will decide whether the defendant "did the act or made the omission charged against him as an offence". If the jury finds that the defendant did not commit the conduct element of the offence, he is entitled to be acquitted

[20] There has been considerable academic discussion as to whether automatism is a denial that the conduct element of the offence has been committed or rather that the defendant lacked the fault element of the offence.

Like the defence of insanity, its application is not confined to murder. The defendant is asserting that his conduct happened either against or, at least, without his will. In that sense, there is a denial of responsibility. Examples were provided by Humphreys J in *Kay v Butterworth*.[22] One is where D, driving his motor car, is attacked by a swarm of bees and is disabled from controlling the vehicle. Alternatively, he is struck by a stone and rendered unconscious. Lord Goddard CJ subsequently observed of such examples that the defendant "could not really be said to be driving at all".[23] In neither example is the defendant mentally disordered. The relevance of mental disorder to automatism arose where the involuntary nature of the defendant's conduct was caused by a "disease of the mind". In such cases, despite the conduct being involuntary, the courts held that, as a matter of law, what was being raised was not the issue of automatism but the defence of insanity.[24] Thus, if successful, the defendant was not acquitted of the offence but found to be "guilty but insane". The reasons for the law adopting this stance related to public policy.[25] The distinction, depending on whether or not the involuntary nature of the conduct resulted from a "disease of the mind", had only started to emerge prior to 1957.[26] The process subsequently gathered momentum resulting in a body of complex case law.

THE DEFENCE OF INSANITY AND ITS RELATIONSHIP TO AUTOMATISM PRIOR TO THE HOMICIDE ACT 1957

Introduction

6.11 In 1957 Devlin J stated:

> For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, *it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free*. But if disease is present, the same thing may happen again and therefore,

[21] The word "involuntary" in the context of offences against the person has three different meanings. In relation to the defendant's conduct it means "unwilled" or "unconscious". Such conduct amounts to automatism. In addition, the word is used to describe one of two kinds of manslaughter recognised at common law. Here the word is used in relation to the defendant's state of mind rather than his conduct. Manslaughter is involuntary if the defendant did not form the mental element required for a murder conviction. Finally, the word is used in relation to the specific act of becoming intoxicated. Here it means blameless or non-culpable.

[22] (1945) 61 TLR 452, 453.

[23] *Hill v Baxter* [1958] 1 QB 277, 283.

[24] *Kemp* [1957] 1 QB 399.

[25] See paras 6.35 and 6.48.

[26] *Kemp* [1957] 1 QB 399.

> since 1800, the law has provided that persons acquitted on this ground should be subject to restraint.[27]

6.12 In that passage a distinction was drawn between automatism, resulting in an outright acquittal, and the defence of insanity which, even if successfully pleaded, resulted in a special verdict and the indefinite detention of the defendant. According to Devlin J, in neither case was the defendant responsible for his conduct. The practical consequences of his not being responsible, however, differed considerably.

6.13 This Part considers the defence of insanity, together with its relationship to automatism, just prior to the creation of the partial defence of diminished responsibility. This is necessary for a number of reasons.

6.14 First a proper understanding of the reasons for, and the significance of, the introduction of the new defence depends upon a corresponding understanding of the then scope of the defence of insanity.

6.15 Second, it may well be that the ambit of the defence of insanity has exerted some influence on the judicial interpretation of the defence of diminished responsibility.

6.16 Third, a proper understanding of the scope of the defence of insanity in 1957 requires an examination of its relationship to the concept of automatism, because judicial concern over the scope of automatism had already begun to affect the way the courts defined at least one element of the M'Naghten Rules.

INSANITY

Historical introduction

Before 1800

6.17 Walker maintains that prior to 1800 the defence of insanity was employed much more commonly than is usually suggested.[28] At that time there was no fixed test of what constituted insanity and, according to Walker, if the jury were trying an ordinary theft or case of violence – as opposed to a Jacobite or a terrorist – the important question for them was whether the defendant was really insane.[29]

6.18 If the jury found that the defendant was insane he was entitled to be acquitted and might be discharged, although this was not invariably the case. According to Beattie:

> Much depended on whether relatives were willing to take care of the prisoner and guarantee his future behaviour. If no such person could be found, the court could send the discharged lunatic back to jail.[30]

[27] *Hill v Baxter* [1958] 1 QB 277, 285–286. (emphasis added)

[28] N Walker, *Crime and Insanity in England vol 1* (1968) pp 15–16.

[29] N Walker, "The Insanity Defense before 1800" (1985) 477 The Annals of the American Academy of Political and Social Science 25 at p 30.

[30] J M Beattie, *Crime and the Courts in England 1660-1800* (1986) p 84.

The Criminal Lunatics Act 1800

6.19 In 1800 James Hatfield was acquitted of the attempted murder of King George III. At the invitation of the court, the jury stated that it was because they believed him to be insane at the time he committed the attempt. As a result of judicial concern, the Criminal Lunatics Act 1800[31] was enacted and applied retrospectively to Hatfield. The Act mandated the indefinite detention[32] of those acquitted of "treason, murder or felony" if the jury specifically stated that it was acquitting the defendant because in their opinion he was "insane at the time of the commission of such offence". The Act marks the introduction of a special verdict for defendants who are considered to be legally insane.

M'Naghten's Case 1843

6.20 Daniel M'Naghten assassinated the Prime Minister's secretary but was acquitted of murder on the grounds that he was "insane at the time of the commission of the offence". By virtue of the Criminal Lunatics Act 1800 he was detained until his death some 22 years later. The fact that he was acquitted, however, caused a public outcry. A House of Lords debate followed and it was decided that the judges should be summoned to give their opinion "as to the law respecting crimes committed by persons afflicted with insane delusions".[33] The reference to "delusions" was no accident. M'Naghten had committed the assassination while labouring under the delusion that he was being persecuted by the Prime Minister, Robert Peel. He killed the latter's secretary in the mistaken belief that he was the Prime Minister. The judges were requested to answer certain questions and those questions together with the answers given constitute the M'Naghten Rules.[34]

The M'Naghten Rules

6.21 The importance of the Rules cannot be exaggerated. They have been treated as authoritative for more than a century and continue to form the definitive statement of the insanity defence not only in English law but also in many other legal systems in the Anglo-American tradition.

6.22 The Rules consist of the judges' answers to five questions. Question 5 is not of immediate concern. Three of the other four questions are predicated on the defendant being either "afflicted with" or "under" an insane delusion. The answer which is considered to be the most important constituent of the Rules is that given to question 3. Neither that question nor the answer to it is by their terms confined to cases of insane delusions.

6.23 Question 3 asked:

[31] An Act for the Safe Custody of Insane Persons Charged With Offences, 39 and 40 Geo III c 94 (1800).

[32] Over the course of time this came to mean confinement in a mental hospital or an institution for criminal lunatics or mental defectives, with control over release vested in the Home Secretary.

[33] Richard Moran, *Knowing Right from Wrong, The Insanity Defence of Daniel M'Naghten* (1981).

[34] *M'Naghten's Case* (1843) 10 Cl & Fin 200; 8 ER 718.

> In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?[35]

The key passage of the answer states:

> [T]he jurors ought to be told in *all* cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[36]

6.24 The courts have refused to countenance submissions that the application of the Rules should be confined to cases where the defendant is labouring under a delusion.[37] The way the Rules have been interpreted will be considered in more detail below.[38]

The Trial of Lunatics Act 1883

6.25 Prior to the enactment of the Criminal Lunatics Act 1800, a finding by the jury that the defendant was insane resulted in an absolute acquittal. That Act did not alter the form of the verdict, but it did provide that a person acquitted of "treason, murder or felony" on the specific ground that he "was insane at the time of the commission of such offence" was, despite being acquitted, to be detained indefinitely. The Trial of Lunatics Act 1883 modified the common law by introducing a qualified form of acquittal in contrast to the former absolute form of acquittal. Henceforth, the special verdict to be returned by the jury was to be one of "guilty of the act or omission charged against him, but . . . insane . . . at the time when he did the act or made the omission".[39] As previously explained, the court was mandated to order the indefinite detention of the defendant.

Judicial interpretation of the M'Naghten Rules prior to the enactment of the Homicide Act 1957

6.26 The Rules focused (and continue to focus) exclusively on the cognitive aspects of the defendant's mind, that is, on the defendant's knowledge and understanding of his conduct. Even at the time they were promulgated, medical science had been stressing that mental disorder might deny the sufferer the ability to control his

[35] *Ibid*, at p 203.

[36] *Ibid*, at p 210. (emphasis added)

[37] *Windle* [1952] 2 QB 826.

[38] See paras 6.26–6.43.

[39] Section 2(1). The modern form of that verdict – "guilty but insane" – was described by Devlin J in *Hill v Baxter* [1958] 1 QB 277, 286 as "illogical and disagreeable". The Criminal Procedure (Insanity) Act 1964 restored the acquittal by providing for the jury to bring in a special verdict of "not guilty by reason of insanity". The words "by reason of" imply a causal connection.

conduct. Such volitional or emotional disorder is not, however, encompassed by the Rules.

6.27 Under the Rules there were two lines of defence available to the defendant:

(1) he was labouring under a *defect of reason* from *disease of the mind* so as not to know the *nature and quality* of the act he was doing, or

(2) he was labouring under a *defect of reason* from *disease of the mind* so that, even if he was aware of the nature and quality of the act, he did not know that what he was doing was *wrong*.

"Defect of reason"

6.28 The powers of reasoning had to be impaired. A mere failure to exercise powers of reasoning which one possessed would not suffice. An abnormality of mind, such as an inability to control one's emotions or resist impulses, which did not reflect impaired powers of reasoning, was not capable of constituting a "defect of reason".

6.29 The scope of the term "defect of reason" was, in theory, circumscribed by the requirement that it had to arise from "disease of the mind". The latter phrase, however, came to be broadly interpreted.

"Disease of the mind"

6.30 "Disease of the mind" is a legal and not a medical concept, although this was not always appreciated in the period leading up to the enactment of the 1957 Act.[40] The most significant authority prior to 1957 is that of *Kemp*.[41] K, an elderly man of excellent character, made an entirely motiveless and irrational attack on his wife. He was charged with causing grievous bodily harm with intent. The medical evidence was that he suffered from arteriosclerosis (hardening of the arteries) which resulted in a congestion of blood on the brain. The condition had not reached the stage where he was exhibiting any general signs of mental trouble, other than that he was depressed because of his poor *physical* state of health. It was agreed that his condition had resulted in a temporary lapse of consciousness during which he perpetrated the attack. He was not conscious that he had picked up a hammer, let alone that he had struck his wife with it. Afterwards, he had no recollection of the event. The Crown conceded that D was suffering from a "defect of reason" and that he did not know the "nature and quality" his act.

6.31 In pleading not guilty, K submitted that the defect of reason was a result not of "disease of the mind" but a purely physical condition. In other words, he was

[40] This is demonstrated by Devlin J's attempt in *Kemp* [1957] 1 QB 399 (Assizes) to distinguish *Charlson* [1955] 1 WLR 317 (Assizes). He distinguished it on the basis that in *Charlson* all the doctors were agreed that a cerebral tumour did not constitute a "disease of the mind". The fact that the doctors were all agreed, however, should not have been determinative of the issue.

[41] [1957] 1 QB 399 (Assizes). What is reported is Devlin J's ruling on 27 June 1956 at Bristol Assizes in relation to how he was going to direct the jury. Despite its non-appellate status and the unconvincing attempt to distinguish *Charlson*, over time it has come to be recognised as a seminal authority and was approved by the House of Lords in *Sullivan* [1984] AC 156.

relying on (non-insane) automatism. The submission was that the arteriosclerosis, until it caused the brain cells to degenerate, was a temporary interference with the working of the brain just like a concussion. It was a physical disease which only became a "disease of the mind" when the brain cells degenerated.

6.32 The submission was emphatically rejected by Devlin J. He said that acceptance of the submission would result in:

> a very difficult test to apply for the purposes of the law. I should think it would be a matter of great difficulty medically to determine precisely at what point degeneration of the brain sets in, and it would mean that the verdict depended upon a doubtful medical borderline.[42]

6.33 According to Devlin J:

(1) the law is concerned not with the brain but with the mind, meaning the mental faculties of reason, memory and understanding;

(2) the condition of the brain is irrelevant, as are the questions whether the disease is curable or incurable and whether it is temporary or permanent;

(3) although mental diseases can be either organic or functional in origin, the distinction is legally irrelevant because the law is not concerned with the origin or cause of the mental condition but with the mental condition itself.

6.34 Devlin J stressed that the phrase "disease of the mind" had to be judicially interpreted so as accurately to reflect the purpose intended for it by the answer given to question 3 in *M'Naghten's Case*:

> [t]he words "from disease of the mind" are not to be construed as if they were put in for the purpose of distinguishing between diseases which have a mental origin and diseases which have a physical origin, a distinction which in 1843 was probably little considered. They were put in for the purpose of limiting the effect of the words "defect of reason". A defect of reason is by itself enough to make the act irrational and therefore normally to exclude responsibility in law. But the Rule was not intended to apply to defects of reason caused simply by brutish stupidity without rational power. It was not intended that the defence should plead: 'Although with a healthy mind he nevertheless had been brought up in such a way that he had never learned to exercise his reason, and therefore he is suffering from a defect of reason.' The words ensure that unless the defect is due to a diseased mind … there is insanity within the meaning of the Rule.[43]

6.35 Paradoxically, the effect of Devlin J's ruling is that words, which he maintains were inserted for the purpose of *limiting* the ambit of the defence of insanity, receive an extremely wide interpretation capable of incorporating mental conditions which

[42] [1957] 1 QB 399, 407.

[43] *Ibid*, at p 408.

have a physical cause and which may result in a short period of insanity. This paradox results from a perceived need to limit the scope of automatism. The concern was that if defendants could plead automatism and secure an outright acquittal, the result would be the release into the community of individuals who were dangerous and prone to repeat their conduct. The policy is clear but has been criticised. According to Simester and Sullivan:

> The legitimate concern for public safety should be resolved through civil rather than criminal procedures . . . persons of good character. .. may prefer to plead guilty to offences they did not commit rather than pursue an insanity plea with all its pejorative overtones.[44]

"Nature and quality of the act"

6.36 The phrase "nature and quality of the act" had been interpreted to refer to the *physical* nature and quality of the act and not to its moral or legal quality. In *Codere*[45] C was charged with murder. It was submitted on his behalf that "nature " refers to the physical act of the defendant and "quality" to its morality. In rejecting the submission Lord Reading CJ stated:

> The Court is of the opinion that in using the language "nature and quality" the judges were only dealing with the physical character of the act, and were not intending to distinguish between the physical and moral aspects of the act.[46]

6.37 Illustrations of a defendant not knowing "the nature or quality of his act" were provided by leading commentators:

(1) A kills B under an insane delusion that he is breaking a jar,[47] and

(2) the madman who cuts a woman's throat under the [delusion] that he was cutting a loaf of bread.[48]

"Did not know that what he was doing was wrong"

6.38 In *Windle*[49] W killed the woman to whom he was unhappily married. She was continually speaking of committing suicide and medical evidence was led at W's trial that she was certifiably insane. Eventually, on the "advice" of a work colleague, W gave his wife 100 aspirins. He was charged with her murder.

6.39 W pleaded insanity. A doctor called on his behalf testified that W was suffering from a form of communicated insanity known as *folie a deux*. If a person was in

[44] *Criminal Law: theory and doctrine* (2nd ed, 2002) p 577. The criticism is not apposite in the case of defendants, who prior to the suspension of the death sentence in 1965, were charged with capital murder.

[45] (1916) 12 Cr App R 21.

[46] *Ibid*, at pp 26–27.

[47] Stephen, *Digest of the Criminal Law*, (9th ed, 1950) p 5.

[48] Kenny, *Outlines of Criminal Law*, (19th ed, 1966) p 83.

[49] [1952] 2 QB 826.

constant attendance on another who was of unsound mind, in some way the insanity might be communicated to the attendant so that, for a time at any rate, the attendant might develop a defect of reason. This testimony was described by the Court of Criminal Appeal as "exceedingly vague". Although medical evidence in rebuttal was called, all the doctors agreed that when W administered the fatal dose, he knew that he was doing an act which was contrary to the law. Devlin J ruled that there was no evidence of insanity to go to the jury.

6.40 On appeal, it was submitted that when promulgating the M'Naghten Rules the judges were dealing with hypothetical cases of insanity in which the defendant was alleged to be suffering from delusion, that is, a belief that an imaginary state of facts exists. Neither W nor his wife was labouring under any delusion. It followed, according to this submission, that the M'Naghten Rules were not applicable. Alternatively, if they were applicable, the test was whether the defect of reason had prevented W from distinguishing between right and wrong.

6.41 Lord Goddard CJ rejected both submissions:

> In all cases of this kind, the real test is responsibility. A man may be suffering from a defect of reason, but if he knows that what he is doing is "wrong" and by "wrong" is meant contrary to the law, he is responsible.[50]

6.42 He continued:

> Courts of law can only distinguish between that which is in accordance with the law and that which is contrary to the law . . . The law cannot embark on the question and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law . . .[51]

6.43 Read literally, this *obiter dictum* suggests that if the defendant knows that his act is morally wrong but, owing to a "disease of the mind", does not appreciate that it is also contrary to the law, he is entitled to rely on the defence.

AUTOMATISM

Voluntary and involuntary acts or omissions

6.44 According to Professor Mackay:

> A starting point is the fundamental principle accepted by most common law jurisdictions that, if a person is to be convicted of any criminal offence, his act or omission must have been a voluntary one.

[50] [1952] 2 QB 826, 832. A defect of the judgment is that Lord Goddard CJ conflates the concepts of "defect of reason" and "disease of the mind".

[51] [1952] 2 QB 826, 833. The requirement in the law of theft that the defendant must have "dishonestly appropriate[d]" property *does* require the jury to make a moral judgment – *Ghosh* [1982] QB 1053.

> If the action is found to be involuntary, then generally speaking, the agent in question cannot be held criminally responsible.[52]

6.45 In order to explain the distinction between a voluntary and involuntary act, the law has adopted the Austinian doctrine of the philosophy of the will.[53] This doctrine holds that we will or desire certain movements. The antecedent wishes and the immediate consequent movements are described respectively as human volitions and human acts. In turn, acts give rise to consequences. Voluntary acts and omissions are therefore willed acts and omissions which give rise to consequences. This adherence to the Austinian doctrine was noted by McCarthy J in the New Zealand case of *Burr*[54] where he observed:

> Some people consider this concept inadequate in the light of modern medical knowledge but it still dominates our law relating to intention.[55]

6.46 When a defendant is asserting that his conduct was "involuntary" he is raising the issue of automatism. It is an "issue" rather than a "defence" because automatism is a denial of responsibility for the conduct element of the offence. In *Cottle*[56] the President of the Court of Appeal for New Zealand described automatism as:

> action without any knowledge of acting, or action with no consciousness of doing what was being done.[57]

6.47 An example of an involuntary act is where A forcibly seizes B's hand and with it strikes C. B is not guilty of any criminal assault as he is merely the innocent agent of A. Of more significance, however, are cases where the act of the defendant is involuntary for reasons other than the intervention of another human being. Classic examples, already referred to above,[58] are where D, driving his motor car, is attacked by a swarm of bees or rendered unconscious as a result of being hit by a stone and thereby disabled from controlling the movement of the vehicle. Such cases prior to 1957 were unusual and the concept of automatism, which usually consists of a plea of *unconscious* involuntary action, is of recent origin.[59]

6.48 An involuntary act or omission, which may pose a danger to others, can result from a range of different causes or conditions. Some, particularly those which are external to the defendant, such as being attacked by a swarm of bees, are unlikely to recur. By contrast, others such as cerebral tumour, arteriosclerosis, epilepsy, hyperglycaemia (diabetes) and convulsions are likely to continue or recur. The dilemma facing the courts arises from the tension between the dictates of logic and

[52] R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) p 8.

[53] J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (1885).

[54] [1969] NZLR 736.

[55] [1969] NZLR 736, 748.

[56] [1958] NZLR 999.

[57] [1958] NZLR 999, 1020. See also *Watmore v Jenkins* [1962] 2 QB 572, p 586.

[58] See para 6.10(3).

[59] The first recorded case in which the term appears is *Harrison-Owen* [1951] 2 All ER 726.

considerations of public policy. Logically, if the conduct of the defendant is involuntary then, regardless of its cause, he is not perpetrating the conduct element of the offence and an outright acquittal should follow. On the other hand, if all defendants whose actions are involuntary were entitled to be acquitted on the basis of automatism, society would be at risk from a repetition of their conduct.

6.49 Over the course of time, the judicial response was to ensure that the concept of automatism leading to an outright acquittal was circumscribed. Prior to 1957, however, the courts were only just starting to address the issue. Herein lies the significance of *Kemp*[60] where, as stated above,[61] Devlin J held that arteriosclerosis resulting in a lapse of consciousness was a "disease of the mind". There is now a body of case law which serves to distinguish "non-insane automatism", entitling the defendant to an outright acquittal, from "insane automatism", resulting (if the offence is murder) in indefinite detention. In 1957, however, *Kemp* was an isolated "authority." It had yet to be considered by an appellate court and sat uneasily with the earlier first instance decision in *Charlson*.[62]

CONCLUSIONS

6.50 Prior to the 1957 Act a mentally disordered defendant charged with murder, if fit to plead, could either plead the defence of insanity or seek to rely on automatism. If pleading insanity, he was faced with the burden of proving that he was not responsible within the meaning of the M'Naghten Rules. The concept "disease of the mind" had started to be given a broad policy based interpretation by the courts. Professor Mackay has remarked, however, that although an expansionary attitude had begun to be adopted towards that phrase, this had been "counterbalanced by the narrow interpretation given to the other elements of the Rules".[63]

6.51 The upshot was that *vis-à-vis* automatism the ambit of the insanity defence was expanding. However, because of its stress on the cognitive aspects of the mind and judicial reluctance to countenance arguments which would have diluted those aspects, insanity remained a strictly and narrowly defined defence. In particular, it offered no succour to those who, because of mental disorder, wholly or substantially lacked the capacity to control their impulses.

6.52 Although the Report of the Royal Commission on Capital Punishment had recommended that the test of responsibility for the purposes of the M'Naghten Rules should be broadened, the Government did not pursue the recommendation. The 1957 Act left the M'Naghten Rules untouched. Parliament did acknowledge, however, that, in the context of criminal liability for murder, mental disorder falling short of insanity within the meaning of the M'Naghten Rules should be afforded some legal recognition. This was to be achieved by the introduction of the partial defence of diminished responsibility. Henceforth, there was to be no rigid dichotomy between sane or insane, responsible or not responsible, bad or mad.

[60] [1957] 1 QB 399.

[61] See paras 6.30 – 6.35.

[62] [1955] 1 WLR 317.

[63] R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) p 100.

PART VII
THE DEVELOPMENT OF THE DEFENCE OF DIMINISHED RESPONSIBILITY IN ENGLISH LAW

INTRODUCTION

7.1 Section 2 of the Homicide Act 1957 Act[1] provides as follows:

> (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing;
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder;[2]
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

7.2 In introducing the clause (in the Homicide Bill) which was to become section 2(1) the Home Secretary remarked:

> A new defence will be open to those who, although not insane in [the] legal sense, are regarded in the light of modern knowledge as insane in the medical sense and those who, not insane in either sense, are *seriously* abnormal, whether through mental deficiency, inherent causes, disease or injury.[3]

7.3 Supporting the clause, Mr Rees-Davies MP referred to the defence of diminished responsibility in Scots law:

> The Scots, with their very admirable common sense, have an anomaly which lawyers cannot defend but which works out in practice.[4]

7.4 It is a precondition to the application of the partial defence that the prosecution has proved beyond reasonable doubt that the defendant is otherwise liable for murder. The prosecution must therefore prove that the defendant caused the death

[1] In this Part referred to as "the 1957 Act".

[2] In *Lambert, Ali and Jordan* [2002] QB 1112 the Court of Appeal held that the imposition of the burden of proof on the defendant was compatible with the presumption of innocence contained in Article 6(2) of the European Convention on Human Rights.

[3] *Hansard* (HC) 15 November 1956, vol 560, col 1154. (emphasis added)

[4] *Hansard* (HC) 15 November 1956, vol 560, col 1213.

of another human being by a voluntary act or omission and either intended to kill or to cause grievous bodily harm.[5]

7.5 In order to discharge the burden of proof, the defendant must prove on a balance of probabilities that:

(1) at the time of the killing, he was suffering from an "abnormality of mind";

(2) the "abnormality of mind" arose from one of the causes listed within the parenthesis in section 2(1); and

(3) the abnormality of mind which arose from one or more of the legally recognised causes, "substantially impaired his mental responsibility" for the killing.

7.6 The terminology of section 2(1) together with the way it has been judicially interpreted[6] means that the scope of the partial defence (in the context of murder) is much wider than the complete defence of insanity.[7] Whereas insanity is confined to certain cognitive disorders, diminished responsibility covers volitional disorders, for example uncontrollable urges and extreme emotional states, as well as states of cognitive disorder which fall outside the terms of the M'Naghten Rules.

7.7 As a partial defence, diminished responsibility reduces liability from murder to manslaughter. Two consequences flow from this. The first is that the mandatory sentence for murder is avoided so that the sentencing judge has a discretion with regard to the most appropriate sentence. Importantly, however, a life sentence can be imposed for manslaughter and this is not an uncommon outcome in cases where a successful defence of diminished responsibility has been founded on a condition which is likely to continue.

7.8 The second consequence relates to the "labelling" of offenders. Those who successfully plead the defence are convicted of the less stigmatic offence of "manslaughter". The justification for this is that if the defence is successful the defendant will have proved on a balance of probabilities that, although having the intention to kill or to cause grievous bodily harm, his mental responsibility for his conduct was *substantially* impaired.

7.9 It is doubtful, however, whether Parliament was motivated to a significant extent by a desire to achieve fair and accurate labelling of offenders. If that had been a primary concern, there is no logical reason why the defence should have been restricted to murder and not made available for attempted murder. D1 assaults P1 intending to kill him. P1 dies. D1 successfully pleads diminished responsibility and is convicted of manslaughter rather than murder. D2, of similar mental abnormality to D1, assaults P2 intending to kill him. P2 survives. D2 is charged

[5] In *Matheson* [1958] 1 WLR 474, 478 Lord Goddard CJ observed "an abnormal mind is as capable of forming an intention and desire to kill as one that is normal; it is just what an abnormal mind might do." See also *Rose v The Queen* [1961] AC 496 at p 508.

[6] See paras 7.22 – 7.31.

[7] Insanity, of course, is not confined to proceedings for murder.

with attempted murder. He is precluded from pleading diminished responsibility[8] and carries the stigma associated with a verdict of attempted murder.[9] In 1957, as now, he would have been liable to a sentence of life imprisonment but not the death sentence. It seems therefore that the dominant explanation for the restriction of the defence to murder is that in 1957 murder was the only offence, apart from high treason and piracy, which attracted the death sentence.

THE STRUCTURE AND LANGUAGE OF SECTION 2(1)

7.10 Writing in 1988, Professor Griew criticised the subsection in the following terms:

> The phrase "substantially impaired his mental responsibility for his act in doing … the killing" is … improperly elliptical. The word "responsibility" serves a double function. Following "impaired … mental" it suggests a condition of the defendant – perhaps his capacity to comprehend and (so far as his "mind" affects the matter) to conform to the requirements of the law. Preceding the phrase "for his act in doing … the killing" it suggests the social consequences of that condition – an assessment of culpability and, in the context of a murder charge, the outcome of that assessment in a decision on the level of liability … Parliament, it is submitted, has clumsily compacted two ideas – those of reduced (impaired) capacity and of reduced (diminished) liability. The former presumably justifies the latter by virtue of a third idea – that of reduced culpability.[10]

7.11 Professor Griew's criticism is that the statutory language results in a defence which is conceptually confused and flawed. The language employed should have referred to substantial impairment of the defendant's capacity which in turn results in a reduced culpability and criminal liability.

7.12 In 1975 the Report of the Committee on Mentally Abnormal Offenders[11] commented on the evidence which it had taken from judges to the effect that section 2(1) embodies a concept which is "easier to grasp than to define".[12] The evidence of the judges is summarised as suggesting that the partial defence:

> might be broadly, if not wholly accurately in law, expressed by saying that, if the jury think on the evidence before them that the defendant has shown recognisably abnormal mental symptoms and that in all the circumstances it would not be right to regard his act as murder in the ordinary sense, it is open to them to bring in a verdict of manslaughter.[13]

Of course, what one jury might conclude were circumstances justifying a conviction for manslaughter, another jury might not.

[8] *Campbell* [1997] Crim LR 495.

[9] Admittedly, not so great a stigma as being convicted of murder.

[10] E Griew, "The Future of Diminished Responsibility" [1988] Crim LR 75, pp 81–82.

[11] (1975) Cmnd 6244; in this Part referred to as "the Butler Report".

[12] *Ibid*, at para 19.4.

[13] *Ibid*.

DIRECTING JURIES ON THE MEANING OF SECTION 2(1)

7.13 Section 2(1) contains a number of expressions – "abnormality of mind", "inherent causes", "disease", "injury" and "mental responsibility" – which are not defined by the 1957 Act. It was not long before the Court of Criminal Appeal had to consider how trial judges should direct juries on their meaning. The early cases addressed the phrase "abnormality of mind".

7.14 In *Spriggs*[14] the Court of Criminal Appeal held that in directing the jury the trial judge should do no more than recite the words of the subsection. According to Lord Goddard CJ:

> The judge put the case to the jury in the *only way it can* be put, and it is not the duty of the judge to enter into metaphysical distinctions …[15]

7.15 By contrast, in *Walden*[16] the basis of the appeal was that the trial judge had "attempted to define or re-define what Parliament had already defined in section 2(1) … ." In dismissing the appeal, the Court of Criminal Appeal held that the decision in *Spriggs* did not preclude the trial judge from pointing out by way of illustration or explanation the sort of thing that the jury could look for to see if the case came within the subsection. *Spriggs* had merely decided that it was a *sufficient* direction if the judge had done no more than draw the attention of the jury to the words of the subsection.

7.16 To the extent that there was a tension between *Spriggs* and *Walden*, the issue was clarified in *Terry*[17] where Lord Parker CJ stated:

> it is not sufficient merely to refer to the words of the section … [A] proper explanation of the terms of the section as interpreted in *Reg v Byrne* ought to be put before the jury.[18]

ACCEPTANCE OF A PLEA OF GUILTY TO MANSLAUGHTER ON THE GROUNDS OF DIMINISHED RESPONSIBILITY

7.17 After some initial uncertainty,[19] the position was clarified in *Cox*.[20] Winn LJ stated:

> that there are cases where, on an indictment for murder, it is perfectly proper, *where the medical evidence is plainly to this effect*, to treat the case as one of substantially diminished responsibility and accept, if it be

[14] [1958] 1 QB 270.

[15] *Ibid*, at pp 276–277. (emphasis added)

[16] [1959] 1 WLR 1008.

[17] [1961] 2 QB 314.

[18] *Ibid*, at p 322.

[19] Initially, in *Matheson* [1958] 1 WLR 474 the Court of Criminal Appeal, consisting of five judges, had laid down a rule of practice that a plea of guilty to manslaughter on the ground of diminished responsibility should not be accepted by the Crown. It appears, however, that between 1957 and 1962 there were a number of cases where defendants had to sit through hours of evidence of what they had done while in a state of mental imbalance. This caused judicial consternation.

[20] [1968] 1 WLR 308.

> tendered, a plea to manslaughter on that ground, and avoid a trial for murder.[21]

7.18 As a result jury involvement in such cases became comparatively rare.[22] Nevertheless, ten years after *Cox*, disquiet at the practice of accepting guilty pleas to manslaughter was still being expressed. Thus, in *Vinagre*[23] Lawton LJ stated:

> … pleas to manslaughter on the grounds of diminished responsibility should only be accepted when there is clear evidence of mental imbalance.[24]

THE ELEMENTS OF THE DEFENCE

"Abnormality of mind"

The weight to be afforded to the medical evidence on the issue

7.19 In *Matheson*[25] the uncontradicted and unchallenged medical evidence was that the defendant, who was charged with a particularly gruesome murder, was not insane within the meaning of the M'Naghten Rules but that "his mind was so abnormal as substantially to impair his mental responsibility." He was convicted of murder. On appeal, a conviction for manslaughter was substituted. Lord Goddard CJ stated:

> If, then, there is *unchallenged* evidence that there is abnormality of mind and consequent substantial impairment of mental responsibility, and *no facts or circumstances appear* that can displace or throw doubt on that evidence, … a verdict of murder is unsupported by the evidence … . This decision … in no way departs from what has been said in other cases, that the decision is for the jury and not for the doctors; it only emphasises that a verdict must be supported by evidence.[26]

[21] *Ibid*, at p 310. (emphasis added)

[22] Exceptionally, a trial judge may refuse to accept a plea to manslaughter even where the Crown is disposed to accept it. An example is the case of Peter Sutcliffe, who is sometimes referred to as the "Yorkshire Ripper". Despite all the psychiatrists being of the view that he was a paranoid schizophrenic and ought to be convicted of manslaughter, he was convicted of murder. He was later transferred to Broadmoor as everybody agreed that he was psychotic.

[23] (1979) 69 Cr App R 104.

[24] *Ibid*, at pp 106–107. In *Vinagre* the view of the psychiatrists to the effect that the defendant was suffering from a condition, colloquially known as "Othello syndrome", was not in dispute. In that sense the medical evidence was plain and unequivocal. Lawton LJ's real concern was that such a condition should be deemed capable of constituting "abnormality of mind".

[25] [1958] 1 WLR 474.

[26] *Ibid*, at p 479. (emphasis added) The law report does not indicate whether or not the defendant gave evidence at his trial. In fact he did not and so the jury would not have observed his demeanour in the witness box. Interestingly, it was in *Matheson* that the court laid down the rule of practice that the prosecution should not accept a plea of guilty to manslaughter but that the issue should be left to the jury.

7.20 In *Byrne*[27] Lord Parker CJ stated:

> Whether the accused was at the time of the killing suffering from any "abnormality of mind" in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into account all the evidence, *including the acts or statements of the accused and his demeanour*. They are not bound to accept the medical evidence if there is other material before them which, *in their good judgment*, conflicts with it and outweighs it.[28]

7.21 Professor Glanville Williams was of the opinion that *Byrne* was inconsistent with *Matheson*.[29] This, with respect, is doubtful. In each case, the court was adamant that it was for the jury to decide whether or not the defendant was suffering from an "abnormality of mind".[30] It must reach its verdict on the evidence, but it is only bound to accept a medical opinion that the defendant was suffering from an abnormality of mind if it is unchallenged or there is no material on which to reject it.[31] Here a number of points are pertinent. First, where there is a contested issue of diminished responsibility in England and Wales there will in practice always be medical evidence from the prosecution. Second, medical evidence in support of a defence of diminished responsibility will almost inevitably be based to a greater or lesser degree on a history given to the expert by the defendant. If the jury disbelieves that history (for example, because it is inconsistent with evidence as to the nature and circumstances of the killing or with actions or statements of the defendant before, at the time of and after the killing) the result will be to weaken or destroy the medical opinion based on it. Third, if the jury accepts that the defendant was suffering from an abnormality of mind, it is then for the jury to decide whether this substantially impaired the defendant's mental responsibility.

Judicial interpretation of the meaning of "abnormality of mind"

7.22 The term "abnormality of mind" is not based on either legal or medical concepts and, accordingly, expert witnesses and juries may encounter difficulties in interpreting it. For expert witnesses, the exact meaning of "mind" may engender disagreement. Further, the term "abnormality of mind" would seem to assume an ascertainable range of "normal" functioning of the mind beyond which a mind is "abnormal". The difficulty is in pinpointing with any precision the boundary between the normal and the abnormal. Although based on neither legal nor

[27] [1960] 2 QB 396.

[28] *Ibid*, at p 403. (emphasis added)

[29] *Criminal Law: The General Part* (2nd ed 1961) p 546.

[30] Where *Matheson* goes further is in appearing to suggest that unchallenged medical evidence *in relation to the issue of substantial impairment of the defendant's mental responsibility* must be accepted by the jury.

[31] In *Walton* [1978] AC 788 the Privy Council held that the judge was under no obligation to instruct the jury that they had to accept uncontradicted, *but not unchallenged*, medical evidence. In that case the defence called three medical witnesses with different results. The prosecution did not call medical evidence but challenged the defendant's principal medical expert in detailed cross-examination. Lord Keith (at p 794) described the "quality and weight" of the medical evidence in that case as falling "a long way short" of that in *Matheson*.

medical concepts, the term itself *is* a legal concept which has been judicially interpreted and developed.

7.23 According to Professor Mackay:

> Although the term has received a much wider interpretation than "disease of the mind" within the M'Naghten Rules, it has not received the same degree of judicial scrutiny.[32]

7.24 The leading authority is *Byrne*.[33] B had strangled a young woman and then mutilated her body. The uncontradicted and unchallenged medical evidence was that he was a sexual psychopath suffering from an abnormality of mind which arose from a condition of "arrested or retarded development of mind" or "inherent causes", and that he was afflicted with violent and perverted sexual desires which he found impossible or difficult to control. Save for when under the influence of his sexual desires, he was in other respects normal. All the doctors agreed that the killing was perpetrated when under the influence of his perverted desires and that, while not legally insane, he was partially insane in the medical sense.

7.25 The trial judge directed the jury that if they were of the view that B found it very difficult or even impossible to resist putting his desires into practice but that, apart from his sexual addictions and practices, he was "normal in every other respect", those findings of fact would not bring him within the scope of the defence. B was convicted of murder.

7.26 In allowing the appeal, the Court of Criminal Appeal contrasted the defences of insanity and diminished responsibility. The test under the M'Naghten Rules was described as "rigid". It related solely to a person's intellectual ability. If he had the intellectual ability to appreciate the physical act he was doing and that it was legally wrong, his inability to control his physical acts by the exercise of his will was irrelevant. By contrast, according to Lord Parker CJ, the term:

> "Abnormality of mind," which has to be contrasted with the time-honoured expression in the M'Naghten Rules "defect of reason," means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It … [is] wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement as to whether an act is right or wrong, but also *the ability to exercise will power to control physical acts in accordance with that rational judgement*.[34]

7.27 Commenting on this very broad interpretation, Professor Mackay stated:

> This dictum has had a profound effect on the development of diminished responsibility, for by permitting psychiatric evidence of

[32] RD Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim LR 117 at p 118.

[33] [1960] 2 QB 396.

[34] *Ibid*, at p 403. (emphasis added)

> sexual psychopathy to be admitted as a form of abnormality of mind, irresistible impulse was introduced into English law.[35]

7.28 The formulation in *Byrne* has exerted a continuing influence on the law of diminished responsibility. The term "abnormality of mind" is *capable* of encompassing the mind's capacity:

(1) to perceive one's acts or omissions;

(2) to evaluate whether one's acts or omissions are right or wrong; and

(3) to control one's acts or omissions.

7.29 Thus, unlike the defence of insanity, diminished responsibility extends to volitional defects and not merely to defects of understanding or cognition. It is possible for a defendant successfully to plead diminished responsibility even if at the time of the killing he was capable of making a rational judgment provided he proves that, for reasons other than a bare propensity towards anti-social behaviour, he lacked the capacity to act in accordance with that judgment. Where the mental disorder relates to understanding or cognition, the test is a less severe one than that which must be satisfied to prove insanity by virtue of "defect of reason".

7.30 The formulation reflects the difficulty in attempting to describe with precision the boundary between the normal and the abnormal. It reflects the legislative assumption that "ordinary human beings" all possess a state of mind which can be described as normal. "Abnormality of mind" is no more and no less than a state of mind "so different" from the normal that the reasonable person would describe it as "abnormal". The formulation does serve an important function, however, even though it is a very imprecise test. Mental states such as anger, jealousy, temper, exasperation, feeling depressed, love and compassion are emotions and propensities, often ephemeral, to which all ordinary people are susceptible. The reasonable person would not classify them as abnormal, even when such emotions are heightened. Thus, a motorist who kills because he has lost his temper with another motorist is not able to plead diminished responsibility. The more difficult question is the extent to which distinctive mental conditions associated with or arising from *extreme forms* of common emotional states are, and ought to be, capable of founding the defence.[36] The Butler Report provided the following commentary:

> [C]ases which have been felt to merit sympathetic consideration have resulted in more lenient disposal. The main examples relate to killing

[35] RD Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim LR 117 at p 118.

[36] For example, morbid jealousy. In *Vinagre* (1979) 69 Cr App R 104 the Crown, and the trial judge, accepted a plea of guilty to manslaughter on the grounds of diminished responsibility. The basis of the plea was that the defendant killed his wife as a result of "Othello syndrome", in other words "morbid jealousy for which there is no cause". The appeal related to the sentence of life imprisonment which the trial judge had imposed. Although the appeal succeeded, Lawton LJ expressed obvious distaste for the fact that the plea had been accepted. He was of the view (at p 106) that "however much the concept of the Othello syndrome may have entered modern psychiatric medicine, it is not one which appeals to this court".

> in compassion or from jealousy. There have been several cases where a father has killed his severely handicapped infant; he is charged with murder, medical evidence of a reactive depression is given, the verdict is one of diminished responsibility … . There have also been cases of morbid jealousy where an elderly woman has killed her husband, rightly or wrongly believing that he is being unfaithful, and where again the sentence, after a verdict of diminished responsibility, has been a probation order.[37]

7.31 In expressing some unease, the authors of the report further observed:

> Sometimes depression and jealousy can properly be diagnosed as mental disorders; but the distinction between conditions which can be so diagnosed and normal depression or normal jealousy may be one of degree only, and the effect of the present law is to put strong pressure on the psychiatrist to conform his medical opinion to the exigency of avoiding a very severe sentence, fixed by law, for a person for whom everyone has the greatest sympathy.[38]

Does the defendant have to prove that the abnormality of mind is such that he is "partially insane" or "bordering on insanity"?

7.32 When the Homicide Bill was being debated at Committee stage, an amendment was proposed which would have deleted from the Bill the words that now appear in parenthesis in section 2(1). In objecting to the proposed amendment the Attorney General stated:

> We want to do two things by the inclusion of those words. First, we want to indicate that the serious abnormality of mind must in some way be similar to the Scottish phrase, 'bordering upon insanity'.[39]

7.33 In *Byrne*[40] Lord Parker CJ stated, without any hint of criticism, that the Court of Criminal Appeal had previously approved directions given to juries which had followed those given in Scottish cases. He said that they involved directing the jury with reference to a mental state which

> in *popular* language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity or being on the borderline of insanity.[41]

7.34 The reference to partial insanity, even in a popular sense, is initially difficult to reconcile with the width of the interpretation which the court accorded to the phrase "abnormality of mind". The dictum is understandable, however, in the context of *Byrne* where the medical evidence was that B's condition could be described as one of partial insanity. In the earlier case of *Walden*[42] Paull J, after

[37] The Butler Report at para 19.7.

[38] *Ibid*.

[39] *Hansard* (HC) 27 November 1956, vol 561, col 320.

[40] [1960] 2 QB 396.

[41] *Ibid*, at p 404. (emphasis added)

[42] [1959] 1 WLR 1008.

referring to insanity in the specific context of the M'Naghten Rules, referred to a defendant "being on the borderline between sane and insane". In upholding the conviction for murder, the Court of Criminal Appeal stated that:

> the judge was only giving an illustration of the sort of thing which the jury might consider in deciding whether upon the facts the case came within the section.[43]

7.35 In *Rose*[44] the trial judge had directed the jury that they had to assess the degree of the defendant's abnormality by reference to the borderline between legal sanity and legal insanity as laid down in the M'Naghten Rules. The Privy Council held this to be a misdirection and, in delivering its opinion, Lord Tucker stated:

> [We] would not, however, consider that the Court of Criminal Appeal [in *Byrne*] was intending to lay down that in every case the jury must necessarily be directed that the test is always to be the borderline of insanity … If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised that there is no formula that can safely be used in every case – the direction to the jury must always be related to the particular evidence that has been given and there may be cases where the words "borderline" and "insanity" may not be helpful.[45]

7.36 One such case was *Seers*[46] where the abnormality of mind was reactive depression and the issue was its severity. Quashing the conviction for murder, the Court of Appeal held that the trial judge should not have directed the jury by reference to a test of "partially insane or on the borderline of insanity".[47]

7.37 Recent developments in Scots law are instructive. Since *HM Advocate v Savage*[48] a state of mind bordering on insanity has been required. In *Galbraith v HM Advocate (No 2)*[49] a Full Bench of the High Court cited *Seers* with approval and held that there is no requirement in Scots law that the defendant's state of mind at the time of the killing must have bordered on insanity.

[43] *Ibid*, at p 1012.

[44] [1961] AC 496.

[45] *Ibid*, at pp 507–508.

[46] (1984) 79 Cr App R 261.

[47] Accordingly, the dictum of Lord Keith in *Walton* [1978] AC 788, 793, that "what the jury are essentially seeking to ascertain is whether at the time of the killing the defendant was suffering from a state of mind bordering on but not amounting to insanity" must be treated with caution.

[48] 1923 JC 49.

[49] 2002 JC 1.

THE AETIOLOGY OF "ABNORMALITY OF MIND"

Introduction

7.38 The "abnormality of mind" must arise "from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury", the words contained in parenthesis in section 2(1).

7.39 The words constitute a reconstruction of section 1(2) of the Mental Deficiency Act 1927. In a withering assessment, Professor Griew commented:

> It was a remarkably inept reconstruction of the definition of "mental defectiveness" in section 1(2) of the Mental Deficiency Act 1927 … In 1957 the same words are used; but their reorganisation drastically changes the function of the "whether … " formula. In view of the history, the phrase "whether arising from inherent causes or induced by disease or injury" in the 1927 Act seems plainly to mean "however arising or caused". The 1957 parenthesis, on the other hand, is intended for *limitation* rather than the avoidance of doubt. Not everything that might be called an "abnormality of mind" is to be capable of founding a diminished responsibility defence. The terms "inherent causes" "disease" and "injury", which need no explanation in the 1927 context, thus acquire a crucial significance in 1957.[50]

7.40 It is questionable whether Professor Griew was correct in asserting that in the 1927 Act the words plainly meant "however arising or caused". During the debate on the Mental Deficiency Bill its proposer contrasted the wording of the Bill with that of a Government Bill of the previous Session which had not proceeded. The previous Bill had referred to "arrested or incomplete development of mind innate or induced after birth by disease, injury or *other cause*". The framers of the Bill which became the 1927 Act deliberately omitted the reference to the phrase "other cause" because it was felt that its inclusion would provoke opposition on the ground that the provision would be regarded as unduly wide.[51] The words *were* intended, therefore, to be ones of limitation but with an important difference compared with the function they perform in the 1957 Act. In the 1927 Act the words "from inherent causes or induced by disease or injury" qualify and limit the concept of "arrested or incomplete development of mind" whereas in the 1957 Act they, *together* with the phrase "arrested or retarded development of mind", qualify and limit the meaning of "abnormality of mind".

7.41 Nevertheless, the content of the debate at the Committee stage of the Homicide Bill substantially vindicates Professor Griew's interpretation of the parenthesis. An amendment was moved which would have included, in what became section 2(1) of the Act, the phrase 'abnormality of mind *(howsoever arising)*'. The amendment was defeated. In opposing it, the Attorney General stated:

[50] E Griew, "The Future of Diminished Responsibility" [1988] Crim LR 75 at p 77. (emphasis added)

[51] *Hansard* (HC) 18 March 1927, vol 203, col 2322.

> We want to exclude the mere outburst of rage or jealousy … especially if he were a bad tempered man.[52]

7.42 Those moving the amendment had maintained that the words which became the parenthesis in section 2(1) were unnecessary because a "mere outburst of rage or jealousy" would not in any event amount to an "abnormality of mind". This, it is submitted, is the better view. Scots law has no equivalent provision, and Chalmers has commented:

> It would … be mischievous to suggest that, because this proviso has not been incorporated into Scots law by *Galbraith*, such motivations might provide a foundation for a defence of diminished responsibility.[53]

The need for, and the weight to be afforded to, medical evidence

7.43 In *Byrne*[54] Lord Parker CJ stated:

> The aetiology of the abnormality of the mind … does, however, seem to be a matter determined on expert evidence.[55]

Lord Parker was contrasting the determination of the question whether the defendant was suffering from an "abnormality of mind" with that of determining what was its aetiology.

7.44 Although in practice a psychiatric report may express the view that a defendant suffered from abnormality of mind within section 2 (1), without specifying under which of the terms specified in parenthesis in the subsection, it is for the defendant to show that the abnormality fell within one of the specified categories. This was confirmed in *Dix*,[56] in which the Court of Appeal rejected a submission that the words in parenthesis are descriptive of all forms of abnormality of the mind. Having considered *Byrne*, the court concluded that:

> while the subsection does not in terms require that medical evidence be adduced in support of a defence of diminished responsibility, it makes it a practical necessity if that defence is to begin to run at all.[57]

Judicial analysis and interpretation of the aetiological components

Introduction

7.45 There has been very little systematic analysis of the aetiological components by the English courts.[58] When the Court of Appeal has attempted to embark on such an analysis,[59] its conclusions have been called into question.[60]

[52] *Hansard* (HC) 27 November 1956, vol 561, col 320.

[53] J Chalmers, "Abnormality and Anglicisation: First Thoughts on *Galbraith v HM Advocate (No 2)*" (2002) 6 Edin LR 108 at p 115.

[54] [1960] 2 QB 396.

[55] *Ibid*, at p 403.

[56] (1981) 74 Cr App R 306.

[57] *Ibid*, at p 311.

7.46 In addition to the lack of any systematic analysis, Professor Griew has noted that the:

> courts (perhaps advisedly) have offered no real *elucidation* on the parenthesis.[61]

7.47 The difficulty which results from this lack of elucidation is that, although the defence cannot succeed in the absence of medical evidence relating to the aetiology of the defendant's "abnormality of mind", the words in parenthesis refer to legal and not to medical concepts. Dell found that, because the four specified aetiologies had no defined or agreed psychiatric meaning, different doctors classified the same conditions in many different ways.[62] Since they are legal concepts, it is to the courts that practitioners need to look for guidance.

7.48 An explanation for the paucity of judicial guidance is to be found in the Butler Report. The authors suggested that underlying the application of section 2 was a benevolent conspiracy involving psychiatrists, trial judges and prosecutors:

> the medical profession is humane and the evidence is often stretched, as a number of witnesses remarked. Not only psychopathic personality but reactive depressions and dissociated states have been testified to be due to "inherent causes" within the section.[63]

The individual aetiological components

"ARRESTED OR RETARDED DEVELOPMENT OF MIND"

7.49 In order to understand the provenance of the phrase, it is necessary to trace briefly the legislative history of the first part of the twentieth century in relation to "mental deficiency". The Mental Deficiency Act 1913 distinguished between four classes of mental defective, namely "idiots", "imbeciles", "feeble-minded persons" and "moral defectives". The distinctions between the first three classes reflected

[58] Australian courts, by contrast, have displayed a greater willingness to analyse the components. The New South Wales Law Reform Commission in its Report on Partial Defences to Murder, Diminished Responsibility (1997), para 3.39, provided the following illustration of the complexity which has resulted:

> For example, where an accused relies on an "inherent cause", the condition must be shown to be permanent, though not necessarily hereditary, but when either disease or injury is relied on as the cause of the abnormality, it need not be permanent, although it must be more than ephemeral or of a transitory nature … Where an inherent cause is relied on, it is sufficient to prove that the accused suffered from an "inherent abnormality", without having to prove the cause of the abnormality as a separate element. However, where one of the other two causes is relied on, the cause must be established as a separate element from the abnormality.

[59] *Sanderson* (1994) 98 Cr App R 325.

[60] R D Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim LR 117.

[61] E Griew, "The Future of Diminished Responsibility" [1988] Crim LR 75 at p 78. (emphasis added)

[62] S Dell, *Murder into Manslaughter* (1984) p 39.

[63] The Butler Report at para 19.5.

the severity of the mental defectiveness. The last class incorporated persons whose mental defectiveness, of whatever severity, was coupled with "strongly vicious or criminal propensities". Whatever class a person fell into, only those who were mentally deficient "from birth or from an early age" came within the scope of the 1913 Act. The characteristics shared by all persons legally classified as either "idiots" "imbeciles" or "feeble- minded" were, first, that they had never possessed a normal degree of intellectual capacity and, second, that their lack of normal intellectual capacity was permanent and not susceptible of cure. The 1913 Act did not, however, contain a general legal concept to define or describe the first of those characteristics.

7.50 The lack of such a concept was rectified by the Mental Deficiency Act 1927[64] in which the phrase "arrested or incomplete development of mind" is first employed.[65] Its function was to define the meaning of "mental defectiveness". An important departure from the 1913 Act was in removing the requirement that the condition of mental defectiveness had to exist "from birth or from an early age". It sufficed if it existed before the age of eighteen years. During the course of the Second Reading of the Bill it was emphasised that persons were susceptible not only at an early age but throughout life to disease,[66] illness or injury resulting in "mental defectiveness". Examples were given of encephalitis, meningitis, epileptic fits and having a brick dropped on one's head.[67] If the logic of the argument had been applied there would have been no age limit, but, according to the proposer of the Bill, "to avoid opposition to the Bill we had better put the age as low as possible".[68]

7.51 By contrast, in an insane person faculties which were originally normal had been impaired by "disease of the mind". In theory, the mental defective could not rely on the defence of insanity because his faculties had not been impaired by "disease of the mind" as opposed to failure of development. Evidence given to the Royal Commission on Capital Punishment revealed, however, that the defence of insanity was not being denied to mental defectives merely because their condition could not be said to be due to "disease of the mind".[69] It appears from the Royal Commission's Report that the consensus was that defect of intelligence in an idiot or imbecile was so gross that, assuming he was found fit to plead, a jury would usually have no difficulty in finding that he did not *know* the nature and quality of his act or did not know that it was wrong.[70] This was not so, however, in the case of the feeble-minded defendant. According to the Report, the defects of reason or self-control of the feeble-minded defendant:

[64] s 1(2).

[65] The 1957 Act substituted "retarded" for "incomplete".

[66] As opposed to "disease of the mind" within the meaning of the M'Naghten Rules.

[67] *Hansard* (HC) 18 March 1927, vol 203, col 2319.

[68] *Hansard* (HC) 18 March 1927, vol 203, col 2322.

[69] Royal Commission's Report (1953) Cmd 8932 at para 344.

[70] According to the Royal Commission's Report, *ibid*, at para 348, crimes of violence were rarely, if ever committed by idiots or imbeciles.

> although so great that it would not be right to hold him morally responsible for his actions, will not bring him within the ambit of the M'Naghten Rules as they now stand or justify a jury in returning a verdict of guilty but insane.[71]

7.52 The Royal Commission recommended that the M'Naghten Rules should be abrogated, or at least amended, so that the defence of insanity could be founded on the basis of "mental deficiency" as well as "disease of the mind". By "mental deficiency" the Royal Commission clearly meant "arrested or incomplete development of mind". This recommendation for reformulating the M'Naghten Rules was not implemented, but instead Parliament afforded legal recognition to "mental deficiency" in the form of "arrested or retarded development of mind" by introducing the new defence of diminished responsibility.

"INDUCED BY DISEASE OR INJURY"

7.53 We consider here the concept of "disease or injury" before "inherent causes" because of the implications of *obiter dicta*[72] in the judgment of Roch LJ in *Sanderson*.[73] If those *dicta* are correct the meaning of both "disease" and "injury" has been circumscribed, although whether this has resulted in a corresponding widening of the meaning of "inherent causes" is unclear.

7.54 There is no doubt that "disease or injury" includes organic or physical disorders such as physical deterioration of the brain (even if the result of prolonged substance abuse), epilepsy, pre-menstrual syndrome and post-traumatic stress disorder.

7.55 On the other hand, in *Di Duca*[74] the Court of Criminal Appeal considered it to be "very doubtful" if the transient effect of alcohol, even if producing a toxic effect on the brain, could amount to an "injury" within the meaning of the section. *Di Duca* was a case where the defendant killed the deceased while in a temporary state of *voluntary* intoxication.[75] By contrast, it is clear that alcoholism can constitute a "disease" within the meaning of section 2(1).[76]

7.56 It is unclear, as a result of *Sanderson*,[77] whether functional disorders such as neurosis, psychosis and personality disorders are within the meaning of "disease or injury". In *Sanderson*[78] S, aged 22, killed his partner following a stormy relationship. He suspected her of being unfaithful and there was a violent argument in the course of which he struck her more than 100 times. The medical

[71] *Ibid*, at para 345.

[72] Para 7.57.

[73] (1994) 98 Cr App R 325.

[74] (1959) 43 Cr App R 167.

[75] There is no authority in English law as to whether a toxic effect on the brain caused as a result of *involuntary* intoxication is capable of amounting to an "injury" for the purposes of section 2(1).

[76] *Tandy* [1989] 1 WLR 350.

[77] (1994) 98 Cr App R 325.

[78] *Ibid*.

evidence adduced on his behalf was that he had had an unhappy childhood marked by hostility and aggression from his father. In addition, from the age of ten years he had used controlled drugs, graduating from class B to class A. At the time of the killing he was a regular user of both heroin and "crack" cocaine.

7.57 A psychiatrist called on by the defence testified that S was suffering from "abnormality of mind" arising from "inherent causes". More precisely, the abnormality of mind consisted of a paranoid psychosis which manifested itself by his forming incorrect and abnormal beliefs about people.[79] The condition was present irrespective of the drug abuse. It arose, it was said, from inherent causes – his upbringing – although it could have been exacerbated by his use of cocaine. Nevertheless, even if there had been no drug abuse, there was an abnormality of mind and it affected his ability to control himself. The psychiatrist for the Crown maintained that S was suffering from paranoia induced by the taking of cocaine. The Court of Appeal was of the view that the trial judge's directions might have confused the jury and, accordingly, substituted a verdict of manslaughter. However, Roch LJ, in delivering the judgment of the court, said:

> [Counsel for the appellant] submitted that "disease" in the phrase "disease or injury" in section 2(1) meant "disease of the mind" and was apt to cover mental illnesses which were functional as well as those which were organic. This interesting and difficult question does not, in our view, require an answer in this case … We incline to the view that the phrase "induced by disease or injury" must refer to organic or physical injury or disease of the body including the brain, and that that is more probable, because Parliament deliberately refrained from referring to the disease of, or injury to, the mind but included as permissible causes of an abnormality of the mind "any inherent cause" which would cover functional mental illness.[80]

7.58 Professor Mackay perceives two difficulties. First, applying the dictum, a "disease of the mind" within the meaning of the M'Naghten Rules will not automatically be a "disease" within the meaning of section 2(1). He suggests that the resulting confusion is undesirable and that it would be preferable to characterise functional mental illnesses as both "diseases" and "inherent causes" for the purposes of section 2(1).

7.59 The second difficulty, according to Professor Mackay, is:

> the notion that "injury" must refer to "organic or physical injury". If this is correct then how is psychological injury to be classified? … what is being suggested is that "injury" can no longer be of a non-organic nature, and this will make it more difficult in future to bring the reactive depression mercy-killing cases … within the bracketed clauses. This surely cannot have been the court's intention and yet in such cases it will be very difficult to find another acceptable cause within section 2(1) … . Nor could reactive depression easily fall

[79] This is reminiscent of Daniel M'Naghten.

[80] (1994) 98 Cr App R 325, 336.

> within "inherent cause", as it is neither long standing nor hereditary but rather due to a reaction to a major emotional upset.[81]

7.60 We share Professor Mackay's doubt as to whether a reactive depression of sufficient severity and duration to constitute a functional mental illness should be classified as an "inherent cause", as would appear to be the logic of *Sanderson*.[82] We agree, however, with the Court of Appeal that the question whether "disease" in section 2(1) includes functional mental illnesses is difficult. We prefer the view that it does, but the law on the point is not clear.

"INHERENT CAUSES"

7.61 The expression does not as a general rule include external factors such as a traumatic event or other environmental influences. The dictum in *Sanderson* is to the effect that functional mental illnesses are covered. Thus, a paranoid psychosis of the type suffered by *Sanderson* could be said to have arisen from an inherent cause. It is more doubtful if reactive depression can be said to be an "inherent cause" as it is a reaction to a major emotional upset. By contrast, endogenous depression is within the meaning of the expression.

"MENTAL RESPONSIBILITY"

7.62 There are two conflicting views about the concept of "mental responsibility" in section 2(1). One is that it has a strong ethico-legal connotation, equivalent to culpability, and that the issue is one exclusively for the jury, not for doctors. This is the dominant view.[83]

7.63 The alternative view focuses on the presence of the word "mental" describing "responsibility". The adherents to this view contend that this requires the court to consider the general health of the defendant's mind and that this is the domain of psychiatry.

7.64 In *practice*, psychiatrists frequently testify not only on the diagnosis of the defendant's mental health but also on what is termed the "ultimate issue": whether the plea of diminished responsibility should or should not succeed. They proffer an opinion as to whether the defendant's "mental responsibility" was "substantially impaired". This was noted in the Butler Report:

> It is either a concept of law or a concept of morality; it is not a clinical fact relating to the defendant … . It seems odd that psychiatrists should be asked and agree to testify as to legal or moral responsibility. It is even more surprising that courts are prepared to hear that testimony. Yet psychiatrists commonly testify to impaired "mental responsibility" under section 2. Several medical witnesses

[81] R D Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim LR 117 at pp 122–123.

[82] (1994) 98 Cr App R 325.

[83] According to the research of Professor Barry Mitchell, out of 19 psychiatrists interviewed, only one did not adhere to the dominant view; see B Mitchell, "Putting diminished responsibility law into practice: a forensic psychiatric perspective" (1997) 8 Journal of Forensic Psychiatry 620 at p 625.

> pointed out to us that the difficulty is made worse by the use of the word "substantial".[84]

7.65 Professor Griew suggested reasons why the courts have been prepared to indulge, even encourage psychiatrists to give evidence in relation to the "ultimate issue". He said that amongst them:

> undoubtedly, has been the convenience of the expert opinion as a device for stretching the scope of the section – for humanely using it to produce a greater range of exemption from liability for murder than its terms really justify … . But there is no getting away from the fact that the use of this stretching device has depended upon the willingness of psychiatrists to assert their own views of the proper borderline between murder and manslaughter.[85]

7.66 Professor Mitchell found a degree of discomfort amongst most of those interviewed over the role they were being expected to play. They felt that they had no special knowledge or expertise which enabled them to make a judgment on a matter which they thought should be decided by the jury.[86] There is, however, some evidence to suggest that their willingness to proffer their own views on the "ultimate issue" is of assistance to juries. In giving evidence to the House of Lords Select Committee on Murder and Life Imprisonment, the Director of Public Prosecutions, commenting on suggestions for reformulating section 2(1), stated:

> the phrase "mental responsibility" means nothing that a doctor could or should pronounce on. On the other hand, if the revised wording were introduced the demarcation between the jury's function and the psychiatrist's function would become infinitely clearer, but a result of that would be that the psychiatrist would give *very much less* assistance to the jury than he does under the theoretically much less satisfactory state of the law as it stands for the moment. So there are proposals for reform, but whether these proposals for reform would in fact improve the situation rather than cause a deterioration it is difficult to say because it is undoubtedly true that juries *do* derive *immense* assistance from the medical profession in their approach to the very difficult topic of diminished responsibility.[87]

"Substantial impairment"

7.67 Whether there is "impairment" of "mental responsibility" and whether it is "substantial" is a matter of fact for the jury. It is not susceptible to any objective or scientific test. This was noted by Lord Parker CJ in *Byrne*:[88]

> This is a question of degree and essentially one for the jury. Medical evidence is, of course, relevant, but the question involves a decision

[84] The Butler Report at para 19.5.

[85] E Griew, "The Future of Diminished Responsibility" [1988] Crim LR 75 at p 84.

[86] B Mitchell, "Putting diminished responsibility law into practice: a forensic psychiatric perspective" (1997) 8 Journal of Forensic Psychiatry 620 at p 625.

[87] HL Paper 20-v (1988-89) para 464. (emphasis added)

[88] [1960] 2 QB 396.

> not merely as to whether there was some impairment of the mental responsibility of the accused for his acts but whether such impairment can properly be called "substantial", a matter upon which juries may quite legitimately differ from doctors … . [T]he step between "he did not resist his impulse" and "he could not resist his impulse" is … one which is incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way.[89]

7.68 Although the issue is not susceptible to any objective or scientific test, again it has been the practice for psychiatrists to address it in their testimony. Professor Mitchell, perhaps unsurprisingly, found that his respondents derived little assistance from the case law. That said, it seems that they were relatively sanguine about being asked and expected to testify on the issue:

> Rather, they tended to talk about the individual's degree of (ir)rationality or ability to exercise will power, choice and self-control. A large proportion said they felt reasonably confident about impairment in cases of psychosis, but found personality disorder and (to a slightly lesser degree) depression more difficult, apparently because the latter cases tended not to show a marked contrast with "normal, healthy" people. Indeed, some felt it was not infrequently a matter of adopting a common-sense approach, simply reflecting how different the killer was from ordinary individuals, or (emphasising the importance of a causal link between illness and offence) whether he or she would have killed if there had been no signs of disorder or depression.[90]

7.69 The little case law that there is establishes that the impairment need not be total but it must be more than trivial or minimal.[91] Since it is a question of fact, the judge may withdraw the issue from the jury if, in his or her view, there is no evidence from which a reasonable jury could conclude that the defendant's mental responsibility was substantially impaired.[92]

7.70 The research of Professor Mitchell and the evidence of the Director of Public Prosecutions to the House of Lords Select Committee on Murder and Life Imprisonment, to which we have referred,[93] suggests unease amongst expert witnesses and the existence of a paradox. The paradox is that while it is recognised that as a matter of principle the expert witness should not be testifying in relation to the question whether or not there was "substantial impairment of mental

[89] *Ibid*, at pp 403–404.

[90] B Mitchell, "Putting diminished responsibility law into practice: a forensic psychiatric perspective" (1997) 8 Journal of Forensic Psychiatry 620 at p 627.

[91] *Lloyd* [1967] 1 QB 175.

[92] *Campbell* (1986) 84 Cr App R 255.

[93] Para 7.66, above.

responsibility" at the time of the killing, it is felt that the concept is so difficult for juries that they require the assistance of expert testimony.[94]

ALCOHOL, DRUGS AND DIMINISHED RESPONSIBILITY

Introduction

7.71 Delivering the judgment of the Court of Appeal in *Dietschmann*[95] Rose LJ enunciated the following statement of principle which was subsequently cited with approval by Lord Hutton in the House of Lords:[96]

> The *general* rule that drink does not give rise to an abnormality of mind due to inherent causes was authoritatively established in *R v Fenton* … and confirmed in *R v Gittens* … . In line with those authorities, *R v Tandy* … established that drink is only capable of giving rise to a defence under section 2 if it either causes damage to the brain or produces an irresistible craving so that consumption is involuntary.[97]

7.72 For the sake of clarity, in examining this general rule we make a distinction between abnormality of mind and its aetiology.

"Abnormality of mind"

7.73 The starting point is *Di Duca*.[98] The Court of Criminal Appeal held that on the evidence, which showed no more than a *transient* state of intoxication, the jury could not properly have concluded that the defendant was suffering from an "abnormality of mind". The authorities clearly establish, therefore, that a *transient state* of drunkenness cannot constitute an "abnormality of mind".

7.74 By contrast, the courts have recognised that a *desire* for alcohol (or drugs), if sufficiently strong, is capable *in itself* of amounting to an "abnormality of mind". In *Fenton*[99] Lord Widgery CJ acknowledged that, while a state of self-induced intoxication is not an "abnormality of mind", the evidence with regard to the defendant's desire for alcohol or drugs may entitle a jury to conclude he was suffering from an "abnormality of mind":

> cases may arise where the accused proves such a craving for drink or drugs as to produce *in itself* an abnormality of mind.[100]

7.75 That left open the question what degree of craving was required. In *Tandy*[101] Watkins LJ stated *obiter*:

[94] A view shared by one of the psychiatrists we have spoken with.

[95] [2001] EWCA Crim 2052.

[96] [2003] 1 AC 1209, 1214.

[97] Emphasis added.

[98] (1959) 43 Cr App R 167.

[99] (1975) 61 Cr App R 261.

[100] *Ibid*, at p 263. (emphasis added)

> for a craving for drinks or drugs in itself to produce an abnormality of mind, within the meaning of section 2(1) of the Act of 1957, the craving must be such as to render the accused's use of drink or drugs *involuntary*.[102]

7.76 This is not a helpful test because it is difficult to see how any doctor can say as a matter of medical science whether a person is capable of saying "no" to the offer of a drink.[103]

"arising from … any inherent causes or induced by disease or injury"

7.77 In *Di Duca*[104] the Court of Criminal Appeal considered that it was "very doubtful" if the transient effect of drink, even if it did produce a toxic effect on the brain, constituted an "injury" within the meaning of section 2(1).

7.78 In *Tandy*[105] T was an alcoholic who, after consuming nearly a bottle of vodka in the course of a day, strangled her daughter. At her trial she pleaded diminished responsibility on the basis that she was suffering from an "abnormality of mind" which consisted of, not an irresistible craving for alcohol as referred to by Lord Widgery CJ in *Fenton*,[106] but grossly impaired judgment and emotional responses. On her behalf it was submitted that this "abnormality of mind" was induced by "disease", namely alcohol dependence syndrome (alcoholism) and that this had substantially impaired her mental responsibility for the killing.

7.79 The court accepted that alcoholism may constitute a disease within the meaning of section 2(1). However, there was a separate issue of causation, ie whether the defendant's abnormality of mind was induced by her alcoholism.

7.80 The critical issue on the appeal concerned the trial judge's direction to the jury regarding the taking of the first drink. His direction had been that, provided the jury were of the view that T had no choice over whether or not to have the first drink, the "abnormality of mind" – the impaired judgment and emotional responses – would have been induced by "disease". If, however, the taking of the first drink was not involuntary, then the whole of the subsequent drinking on the day of the killing was voluntary and the "abnormality of mind" was not induced by "disease". This direction was approved by the Court of Appeal. Watkins LJ stated that it was for T to establish three elements, the second of which was that the "abnormality of mind" – the grossly impaired judgment and emotional responses - was induced by disease, namely the disease of alcoholism. He continued:

[101] [1989] 1 WLR 350.

[102] *Ibid*, at 273. (emphasis added)

[103] Consider the example of an alcoholic who is faced with the choice of having a drink and missing the chance of a lift to his home which is ten miles away and in a village without public transport, or accepting the lift and saying "no" to the offer of a drink.

[104] (1959) 43 Cr App R 167.

[105] [1989] 1 WLR 350.

[106] (1975) 61 Cr App R 261.

> The principles … are … as follows. [T] would not establish the second element of the defence unless the evidence showed that the abnormality of mind at the time of the killing was due to the fact that she was a chronic alcoholic. If the alcoholism had reached the level at which her brain had been injured by the repeated insult from intoxicants so that there was gross impairment of her judgment and emotional responses, then the defence of diminished responsibility was available to her … . Further, if [T] were able to establish that the alcoholism had reached the level where although the brain had not been damaged to the extent just stated, [T's] drinking had become involuntary, that is to say she was no longer able to resist the impulse to drink, then the defence of diminished responsibility would be available to her … because if her drinking was involuntary, then her abnormality of mind at the time of the act of strangulation was induced by her condition of alcoholism.[107]

7.81 Professor Mackay is very critical of this passage. In his view:

> What the court has done is to develop the "craving for drink" dictum contained in *Fenton* in such a way that it is almost impossible to satisfy. It is one thing to say that the accused may be suffering from an abnormal craving for drink, but quite another to require that before such a craving can be established, the first drink in the relevant series must be shown to have been consumed "involuntarily".[108]

7.82 There is much force in this criticism. Even if the jury had found that the taking of the first drink was not "involuntary",[109] the reality was that it was not the taking of the first drink alone which resulted in T's grossly impaired judgment and emotional responses on the day in question. Her condition was the result of a whole day's drinking. It might be though that the analysis of the Court of Appeal is artificial but the underlying public policy is clear. If a person voluntarily takes a drink, knowing or believing that it will result in an uncontrollable craving for more alcohol, the defence of diminished responsibility will not be available.

Pre-existing mental disorder and self-induced intoxication

7.83 In *Fenton*[110] F had consumed a large quantity of drink. In the course of the evening he killed four people. He pleaded guilty to manslaughter by reason of diminished responsibility but was convicted of four counts of murder.

7.84 All the medical witnesses agreed that F was suffering from an "abnormality of mind". These experts said that there were four factors which in combination had brought him to breaking point and caused him to kill. One factor was an excessive intake of alcohol. The trial judge, contrary to F's submission that all the factors had to be taken into account, directed the jury that they would have to convict F of

[107] *Ibid*, at p 356.

[108] R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) p 197.

[109] It does not *necessarily* follow from the jury's verdict that they did so find. It is possible that they convicted T because they were not satisfied that T's mental responsibility had been "substantially impaired".

[110] (1975) 61 Cr App R 261.

murder if they were satisfied that the combined effect of the factors, *excluding the intake of alcohol*, was insufficient to amount to a substantial impairment of his mental responsibility. In upholding the convictions for murder, the Court of Appeal approved the direction. More importantly, the court also held that the trial judge had been correct in leaving the issue to the jury even if they were of the view that the killings would not have occurred had F not had so much to drink.

7.85 *Fenton*[111] was subsequently approved in *Gittens*.[112] The Court of Appeal explained what had been established in *Fenton*:

> The jury should be directed to disregard what … the effect of the alcohol or drugs upon the defendant was, since abnormality of mind induced by alcohol or drugs is not (generally speaking) due to inherent causes and is not therefore within the section. Then the jury should consider whether the combined effect of the other matters which do fall within the section amounted to such abnormality of mind as substantially impaired the defendant's mental responsibility within the meaning of "substantial" set out in *Lloyd* … .[113]

7.86 The law as stated was clear and sensible. On the one hand voluntary consumption of drink and/or drugs was not to be taken into account as a factor which diminished responsibility. As Simester and Sullivan explain:

> As a matter of policy, it would be unacceptable if self-induced conditions were to improve a defendant's prospects of a successful defence.[114]

On the other hand, the mere fact that the defendant had imbibed alcohol or drugs should not *automatically* disentitle him from relying on the defence.

7.87 In two subsequent Court of Appeal decisions,[115] it was held that the defendant could successfully rely on the defence only if he could satisfy the jury that the killing would still have occurred even if he had *not* taken the drink or drugs. However, those authorities were disapproved by the House of Lords in *Dietschmann*.[116]

7.88 In *Dietschmann* D killed the victim while he (D) was heavily intoxicated. He was also suffering from a mental abnormality which all the medical witnesses described as an adjustment disorder arising from a depressed grief reaction to the death of his aunt with whom he had a close physical and emotional relationship. D was convicted of murder following a direction to the jury that D had to satisfy them that if he had not taken the drink he would have killed as he did and that he would

[111] *Ibid*.

[112] (1984) 79 Cr App R 272.

[113] *Ibid*, at p 277.

[114] *Criminal Law: theory and doctrine* (2nd ed 2003) p 586.

[115] *Atkinson* [1985] Crim LR 314 and *Egan* (1992) 95 Cr App R 278.

[116] [2003] 1 AC 1209.

have been under diminished responsibility when he did so. The House of Lords held that this was misdirection.

7.89 Lord Hutton, having stressed that the case did not involve alcohol dependence syndrome, stated:

> the meaning to be given to the subsection would appear on first consideration to be reasonably clear … . [I]f the defendant satisfies the jury that, notwithstanding the alcohol he had consumed and its effect on him, his abnormality of mind substantially impaired his mental responsibility for his acts in doing the killing, the jury should find him … guilty of manslaughter. I take this view because I think that in referring to substantial impairment of mental responsibility, *the subsection does not require the abnormality of mind to be the sole cause of the defendant's acts in doing the killing.* In my opinion, even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts.[117]

7.90 Lord Hutton addressed the policy argument submitted on behalf of the Crown, namely that self-induced intoxication cannot constitute a defence to a criminal charge. Lord Hutton said that the policy of the criminal law in relation to persons suffering from mental abnormality is to be found in the words of section 2(1) and that:

> a brain-damaged person who is intoxicated and who commits a killing is not in the same position as a person who is intoxicated, but not brain-damaged, and who commits a killing.[118]

CONCLUSION

7.91 Generally speaking, although section 2(1) can properly be criticised as conceptually flawed, it seems to have operated in practice broadly as intended, ie in producing convictions for manslaughter rather murder in the case of those who kill while in a significantly abnormal (and not self-induced) mental state. The judicial approach to the subsection has been essentially pragmatic. It is interesting to note that the leading authority on the subsection remains the Court of Appeal's decision in *Byrne*. In contrast to provocation, the House of Lords has had occasion to visit the subsection on only one occasion in almost fifty years

7.92 In Part XII we invite consultees to consider whether the defence should be retained (particularly if the other principal partial defence, ie provocation, and the mandatory sentence are abolished). We also invite consultees to consider whether it should be revised. From time to time there have been suggestions for clarifying the wording of the statutory test. We are particularly concerned about the second limb and the role of psychiatrists in relation to it. A possible avenue would be to reformulate the test in terms of causation. The focus would no longer be on whether there was "substantial impairment of mental responsibility" but rather on

[117] *Ibid*, at pp 1216–1217. (emphasis added)

[118] *Ibid*, at p 1227.

whether the defendant's "abnormality of mind" *was a significant cause* of his acts or omissions in doing or being a party to the killing. Such an approach would be consistent with *Dietschmann*[119] and would clarify the role of the expert witness. The medical expert would be expected to testify as to the "abnormality of mind" and, from the medical viewpoint, whether it caused or materially contributed to the killing. Both matters would properly be within the domain of expert testimony. In Part XII we invite comments on various possible versions.

[119] [2003] 1 AC 1209.

PART VIII
DIMINISHED RESPONSIBILITY: OTHER JURISDICTIONS

8.1 In this Part we summarise, in tabular form, the law relating to diminished responsibility and/or comparable defences in seven other countries. The summary is drawn from the academic papers contained in Appendices A – F.[1] Professor Yeo's paper (appendix A), relating to Australia and India, considers the four Australian jurisdictions which have the defence of diminished responsibility. Of the other five Australian jurisdictions[2] that do not have the defence, only the position in Victoria is summarised, due to the recent reconsideration of the issue in that State.

8.2 Overall, the law in eleven jurisdictions is considered in this Part. These jurisdictions fall into two groups: those that do have a specific defence referred to as diminished responsibility and those that do not. Those jurisdictions that do have the defence are summarised from both substantive and procedural perspectives, concentrating on those elements that are most relevant to the current terms of reference.

8.3 Those jurisdictions that do not have the defence are examined for the presence of other defences that may affect persons currently falling within the English definition of diminished responsibility. Particular reference is made to other mental incapacity defences. Further, any proposed reforms to the current status of mental incapacity defences or their equivalent are summarised.

SUMMARY CONCLUSIONS

8.4 The information contained in the ensuing tables primarily demonstrates the lack of consistency in addressing the issue of reduced mental capacity in homicide cases. Of the eleven jurisdictions considered, five have a partial defence of diminished responsibility. The remaining six do not have either the defence or a significantly comparable equivalent.

8.5 This incongruity indicates the difficult nature of the concepts involved. The New Zealand Law Commission expressly rejected the notion of a diminished responsibility partial defence on the basis that it was too problematic to define successfully. In reaching this conclusion they allude specifically to the current English law defence and the way in which they believe this has not and would not be satisfactorily remedied by the alternatives they consider.[3] They adopt the position that the issue of diminished capacity is one better dealt with at the

[1] See Para 5.1.

[2] Homicide is not a crime at federal level, therefore discussion in Part V on the law of provocation focuses on eight rather than nine jurisdictions.

[3] New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73, May 2001, para 137.

sentencing stage, and simultaneously recommend the replacement of the mandatory life sentence for murder with sentencing discretion.[4]

8.6 Of those countries that have incorporated a partial defence of diminished responsibility, there is no one consistent formulation. The terminology used varies in focus from the comprehension of the accused as to the nature and quality of his or her actions, to the control he or she was able to exert over his or her actions, to whether the effect of the impairment is sufficient to reduce murder to manslaughter. Of the countries with the partial defence only Scotland is currently considering reform. This is also the only jurisdiction where the defence is based entirely on common law.

8.7 Those countries without the defence address the issue of mental incapacity short of insanity in a variety of ways. Ireland has extended the concept of insanity to incorporate 'volitional insanity'.[5] In contrast Canada and New Zealand allow evidence of mental disorder short of insanity to be introduced to support a contention of no intent. Of the six jurisdictions without the defence, four have expressly rejected or are not considering any reform to introduce it.[6] Of the remaining two, one (Ireland) is currently considering a Bill to incorporate it, and the other (Australia: Victoria) is undertaking a general review of homicide.

8.8 To differing extents, all of the jurisdictions considered recognise the issue of the non-insane mentally disordered killer. Whether this is expressly addressed in statute or whether it is subsumed within other categories of defences varies significantly. Despite the relative incongruity, only three of the jurisdictions are currently considering reforms. Whether this is indicative of a general contentment with the present status of the law in the remaining jurisdictions, or a recognition that there is no viable formulation of the diminished responsibility defence, as decided by the New Zealand Law Commission, is unclear.

[4] *Ibid*, paras 137-151.

[5] This concept covers certain serious mental diseases which do not prevent an accused from understanding the nature and quality of an act, but which may still prevent him or her from exercising a free volition as to whether he should or should not do that act. See Appendix C, Irish Law Reform Commission, paras 10 – 12.

[6] Canada, India, New Zealand and South Africa.

COMPARATIVE TABLE OF THOSE COUNTRIES WITH A DEFENCE OF DIMINISHED RESPONSIBILITY

	NATURE AND EFFECT OF DEFENCE	BASIS	BURDEN OF PROOF	JUDICIAL ROLE	PROPOSED REFORMS	SENTENCING REGIME
AUSTRALIAN CAPITAL TERRITORY[1]	Partial, reducing murder to manslaughter. The defence in essence mirrors the English provision, and is derived from it.[2]	Statute.[3]	Party seeking to establish it, therefore normally the accused. The standard of proof is on a balance of probabilities.[4]	It is for the court to determine whether there is sufficient evidence at law to permit the jury to find diminished responsibility and therefore whether the matter should be left to them. Importantly, the judge should direct the jury to consider the defence when there is sufficient evidence of it, even if it is not raised by the parties.[5]	None.	Murder is punishable by imprisonment for life.[6]

[1] Diminished responsibility is a defence to murder in four of the nine Australian jurisdictions. All those jurisdictions are considered in this table. Victoria, which does not have the defence, is considered in the ensuing table for purposes of comparison. Whilst the defence is not generally a matter for the Commonwealth jurisdiction, it is recognised under s 13 of the Defence Force Disciplinary Act 1982 (Cth), but only applies to crimes committed by military personnel that would otherwise be murder.

[2] See Appendix A, S Yeo, para 3.2.

[3] Crimes Act 1900 (ACT), s 14, as inserted by the Crimes (Amendment) No 2 Act 1990 (ACT).

[4] See Appendix A, S Yeo, para 3.30.

[5] See Appendix A, S Yeo, para 3.31.

[6] Crimes Act 1900 (ACT), s 12(2).

AUSTRALIA **NEW SOUTH WALES**	Partial, reducing murder to manslaughter. Nature of impairment: capacity reduced so far that unable to "understand events… judge whether the … actions were right or wrong, or to control himself or herself".[7] Cause can be any "underlying condition".[8] Effect of impairment must be "…to warrant liability for murder being reduced to manslaughter."[9]	Statute.[10]	As above.	As above.	The Crimes Amendment (Diminished Responsibility) Act 1997 partially implemented the proposals of the New South Wales Law Reform Commission contained in Report 82.[11] There are no further proposals to reform at present.	Discretionary life sentence for murder.[12]

[7] See Appendix A, S Yeo, para 3.4.

[8] *Ibid*.

[9] *Ibid*.

[10] Crimes Act 1900 (NSW), s 23A, as inserted by the Crimes and Other Acts (Amendment) Act 1974, and amended by the Crimes Amendment (Diminished Responsibility) Act 1997 (NSW).

[11] New South Wales Law Reform Commission *Report 82 (1997) Partial Defences to Murder: Diminished Responsibility*, Recommendation 4.

[12] Crimes Act 1900 (NSW), s 19A; Crimes (Sentencing Procedure) Act 1999 (NSW), s 21(1).

AUSTRALIA **NORTHERN TERRITORY**	Partial, reducing murder to manslaughter. Impairment of capacity to "understand what he is doing…to control his actions…to know that he ought not to do the act".[13] No reference to causes of impairment.	Statute.[14]	As above.	As above.	None.	Mandatory life sentence for murder.[15]
AUSTRALIA **QUEENSLAND**	Partial, reducing murder to manslaughter. Requires an impairment of capacity to "understand what he is doing, …to control his actions, … to know that he ought not to do the act or make the omission"[16] Causes mirror the English definition.	Statute.[17]	As above.	As above.	None.	Mandatory life sentence for murder.[18]

[13] Criminal Code Act 1983 (NT), schedule 1, s 37.

[14] Criminal Code Act 1983 (NT), schedule 1, s 37.

[15] Criminal Code Act 1983 (NT), schedule 1, s 164.

[16] See Appendix A, S Yeo, para 3.3.

[17] Criminal Code 1899 (Qld), s 304 A.

[18] Criminal Code 1899 (Qld), s 305.

SCOTLAND	Partial, reducing murder to culpable homicide.[19] Requires impairment of the ability of the accused, as compared with a normal person, to determine or control his acts. [20] This focuses on the component aspect of control as opposed to the overarching issue of mental responsibility preferred in the English concept.[21]	Common law.[22]	Party seeking to establish it, therefore normally the accused. If pleaded by the accused, then standard of proof is on a balance of probabilities.[23] The Scottish Law Commission has recommended that the burden on the accused be reduced from the current legal burden to a merely evidential one.[24]	It is for the court to determine whether there is sufficient evidence at law to permit the jury to find diminished responsibility If it is concluded that there is not sufficient evidence, the defence should be withdrawn from the jury.[25]	The Scottish Law Commission has recently issued a discussion paper on this area of law. The proposal shifts the focus to whether the accused's condition is such as to "justify a conviction for culpable homicide instead of a conviction of murder."[26] The exclusion of psychopathic personality disorder from the *Galbraith* formula is raised as an area potentially requiring reconsideration and clarification.[27] The issue of diminished responsibility is also addressed in clause 38 of	Mandatory life sentence for murder.[28]

[19] It must be shown that "at the relevant time, the accused was suffering from an abnormality of mind which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts." *Galbraith v HM Advocate (No 2)* 2002 JC 1, para 54. See Appendix E, J Chalmers, C Gane, F Leverick, p 158.

[20] The current Scottish formulation was a broadening of the earlier definition which required the accused's condition to be bordering on insanity, *HM Advocate v Savage* 1923 JC 49.

[21] See however, 'Proposed Reforms', n 26.

[22] Origin in *Alexander Dingwall* (1867) 5 Irvine 466. See Appendix E, J Chalmers, C Gane, F Leverick, p 153.

					the Draft Criminal Code for Scotland produced under the auspices of the Scottish Law Commission. The definition used differs from that proposed in the later discussion paper but it is noted that "it would be a simple matter to amend this Bill to incorporate such changes".[29]	

[23] *Lindsay v HM Advocate* 1997 JC 19. See Appendix E, J Chalmers, C Gane, F Leverick, p 165.

[24] Scottish Law Commission, *Discussion Paper No 122 on Insanity and Diminished Responsibility*, January 2003, para 5.35.

[25] *Galbraith v HM Advocate (No 2)* 2002 JC 1, para 54. See Appendix E, J Chalmers, C Gane, F Leverick, p 165.

[26] Scottish Law Commission *Discussion Paper No 122 on Insanity and Diminished Responsibility*, January 2003, Recommendation 17.

[27] See Appendix E, J Chalmers, C Gane, F Leverick, p 167.

[28] Murder (Abolition of Death Penalty) Act 1965, s 1(1).

[29] E Clive, P Ferguson, C Gane, A McCall Smith, *A Draft Criminal Code for Scotland with Commentary*, September 2003, p 88.

COMPARATIVE TABLE OF THOSE COUNTRIES WITHOUT A DEFENCE OF DIMINISHED RESPONSIBILITY

	INCLUSION OF COMPARABLE CONCEPTS IN DOMESTIC LAW	**PROPOSED REFORMS**
AUSTRALIA **(VICTORIA)**	The defence of mental impairment was introduced in 1997[30] and is comparable to the defence of insanity in English law. It extends only to mental conditions that affect the accused's understanding of the nature, quality or wrongfulness of the conduct. A finding of not-guilty by reason of mental impairment permits discretionary disposal. There is no lesser degree of mental impairment recognised as a defence in Victorian law.[31]	The former Law Reform Commission of Victoria decided in 1990 not to recommend the introduction of a defence of diminished responsibility.[32] The proposed Model Criminal Code also decided to exclude the defence.[33] The present Victorian Law Reform Commission is currently undertaking a review of the law pertaining to homicide, including the potential introduction of a defence of diminished responsibility.[34]

[30] Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, s 20, available at www.dms.dpc.vic.gov.au/ (accessed: 22 September 2003).

[31] See further, Victorian Law Reform Commission *Defences to Homicide: Issues Paper*, 31st March 2002, available at http://www.lawreform.vic.gov.au/ (accessed: 22 September 2003). A discussion paper is expected during 2003.

[32] Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report No. 34 (1990), p 53.

[33] Model Criminal Code Officers Committee of the Standing Committee of Attorney's General, *Chapter 5: Fatal Offences Against the Person*, Discussion Paper (1998), available at http://www.aic.gov.au/links/mcc.html (accessed: 22 September 2003).

[34] Victorian Law Reform Commission *Defences to Homicide: Issues Paper*, 31st March 2002, available at http://www.lawreform.vic.gov.au/ (accessed: 22 September 2003). A discussion paper is expected during 2003.

CANADA	The defence of mental disorder applies to those persons who would also generally fall within the English law definition of insanity.[35] However, "evidence of mental disorder that does not satisfy the legal tests for the mental disorder defence may be used to raise[…] a reasonable doubt as to whether the defendant had the specific intent required for murder"[36] The effect of a plea of mental disorder, if the facts are established, is a finding of "not criminally responsible on account of mental disorder".[37]	There is little real support for reforming the to include a defence of diminished responsibility.[38] There are proposals in relation to provocation, and in particular the objective or subjective nature of the test. These may potentially affect some defendants who currently fall within the English law concept of diminished responsibility.[39]
INDIA	Provocation has always been held to include cumulative provocation,[40] which could potentially be applicable to certain situations pleaded as falling within the English defence of diminished responsibility. A significant example is Battered Woman Syndrome where the act may be committed without the sufficient temporal nexus for a plea of provocation to be entered, but where provocation is cumulative.	None.

[35] Canadian Criminal Code, Part I, s 16, available at http://laws.justice.gc.ca/en/C-46/ (accessed: 22 September 2003).

[36] See Appendix B, D Ives, pp 73, 97.

[37] Canadian Criminal Code, s 672.34.

[38] See Appendix B, D Ives, p 97.

[39] See Appendix B, D Ives, pp 81 – 84.

[40] See Appendix A, S Yeo, para 2.7.

IRELAND	The M'Naghten rules were originally the basis of the defence of insanity in Irish law. However the definition of the concept was extended in the 1960's and 1970's. It currently includes "certain serious mental diseases" which do not prevent an accused from understanding the nature and quality of an act, but which may still prevent him from "exercising a free volition as to whether he should or should not do that act."[41] This concept is now referred to as 'volitional insanity'. Subsequently, it has been judicially stated that "It seems … impossible that … there could exist side by side with what is now the law in this country concerning a defence of insanity a defence of diminished responsibility… "[42] Where insanity is established the accused is found 'guilty but insane' and detained in the Central Mental Hospital.[43]	The Criminal Law (Insanity) Bill 2002,[44] clause 5 establishes a defence applicable to cases where the accused suffers from a mental disorder insufficient to establish insanity but nonetheless, "was such as to diminish substantially his or her responsibility for the act". The new defence would have the same effect as in English law, reducing the offence to manslaughter. The burden of proof remains on the defendant.

[41] See Appendix C, Irish Law Reform Commission, paras 10 – 12; *The People (Attorney General) v Hayes*, unreported, 30 November 1967; *Doyle v Wicklow County Council* [1974] IR 55.

[42] *The People (Director of Public Prosecutions) v O'Mahony* [1985] IR 517, at p 523.

[43] Trial of Lunatics Act 1883, s 2 (1).

[44] http://www.irlgov.ie/bills28/bills/2002/4402/default.htm (accessed: 19 September 2003).

NEW ZEALAND	Attempts to create a common law doctrine of diminished responsibility have been expressly rejected.[45] Where an accused is suffering from an illness that may have affected his or her response or judgement, evidence may be adduced to demonstrate that the necessary intent for murder had not been formulated.[46] In addition, mental illness was held to have played a significant part in a case of provocation and at sentencing, similarities to diminished responsibility were noted.[47] The full scope of this potential extension is yet to be considered, but may well extend to factors similar to those within the English law concept of diminished responsibility.[48]	The New Zealand Law Commission rejected the proposal to introduce a defence of diminished responsibility in a report that focused on the particular situation of battered defendants.[49] The defence was felt to be too difficult to define. The matter was considered to be one better dealt with at the sentencing stage. The Commission is simultaneously proposing the abolition of the mandatory life sentence for murder.
SOUTH AFRICA	South Africa operates two sets of defences applicable in cases of murder; pathological incapacity and non-pathological incapacity. Pathological incapacity defences include mental illness/defect (formerly known as insanity) and a lesser concept of a mental condition, short of clinical insanity, which intervenes to prevent intent being formed. Not guilty by reason of mental illness/defect results in being detained indefinitely as a State's President patient. The lesser defence, short of clinical insanity, leads to a conviction for culpable homicide, and thus operates in a comparable way to the English defence of diminished responsibility.	None.

[45] See Appendix D, W Brookbanks, paras 66 – 8.

[46] See Appendix D, W Brookbanks, paras 67.

[47] *Ashton* [1989] 2 NZLR 166.

[48] See Appendix D, W Brookbanks, paras 69 – 71.

[49] See Appendix D, W Brookbanks, paras 75.

[50] See Appendix F, J Burchell, pp 208 – 210.

	Non-pathological incapacity defences include provocation, intoxication, emotional stress and youth. The consequence of a successful plea is complete acquittal. The effect of the broad interpretation of non-pathological incapacity and the effect that the defence has is such that the use of pathological incapacity defences is considerably reduced. Unless there is overwhelming evidence of insanity, the preferable plea would be non-pathological incapacity, circumventing the need for and use of the lesser pathological defence. Diminished responsibility may also be offered as a mitigating factor at the time of sentencing. However, there is already considerable breadth in the area of sentencing due to the interpretation of the "substantial and compelling reasons" to depart from minimum sentences in legislation.[50]	

PART IX
EXCESSIVE USE OF FORCE IN SELF-DEFENCE

THE DEVELOPMENT OF THE CURRENT LAW

Self-defence

9.1 Self-defence, at common law, provides a complete defence to any charge of fatal or non-fatal violence. A person (D) whose conduct and state of mind falls within the parameters of the defence does not act unlawfully and so is not guilty of any offence. Conversely, a person whose conduct and/or state of mind does not fall within the defence acts unlawfully and therefore stands to be convicted.

9.2 The basis of the present common law of self-defence is that D has a complete defence to a charge of assault (of whatever seriousness, including murder) if two requirements are met. The first is that D performs the external element of such an offence in defence of himself or herself, or another, from what he perceives as an actual or imminent unlawful assault. The second is that the steps that he takes are reasonable in the circumstances as D believes them to be. Thus, D is to be judged on the facts as he or she believes them to be.[1] The question of whether the force used was reasonable in those circumstances is, however, an objective one to be answered by the jury. The tests were succinctly described in *Orwino*[2] as "a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be."

9.3 If the force used is more than is objectively reasonable in the circumstances as D believed them to be, then D will not be able to successfully use the defence of self-defence. This is so even if D believed that the force deployed *was* reasonable. Thus D may be convicted for what can be characterised as a mistake in his judgment of what the law permits. In this sense, the defence is "all or nothing". If successful the verdict will be an acquittal but if not it must be a conviction. This obvious result is unproblematic where the offence charged is non-fatal violence; the court has discretion in its powers of sentencing to reflect the facts of the case. The position is different where the offence charged is murder due to the existence of the mandatory life sentence. Whilst the alternative offence of manslaughter is available where the "partial defences" of provocation and diminished responsibility succeed, the law does not presently allow for a partial defence where excessive force in self-defence has been used. It is the possibility of developing such a partial defence that we examine in this chapter.

[1] *Gladstone Williams* (1984) 78 Cr App R 276 (CA), where it was held that if a defendant was labouring under a mistake of fact as to the circumstances when he committed an alleged offence, he was to be judged according to his mistaken view of the facts regardless of whether his mistake was reasonable or unreasonable. The reasonableness or otherwise of the defendant's belief was only material to the question of whether the belief was in fact held by the defendant at all.

See also, *Beckford* [1988] AC 130 (PC).

[2] *Owino* [1995] Crim LR 743, 743, citing *Scarlett* [1993] 4 All ER 629.

Excessive force in self-defence

9.4 That self-defence operates in the same "all or nothing" manner for murder, as it does for other offences, has indisputably been the position since the decision of the Privy Council in *Palmer.*[3] In that case the issue for the court was whether, on a charge of murder, there was a rule of law which required the jury to be directed that D should be found guilty of manslaughter if they concluded that D may have acted in self-defence but were sure that he used more than reasonable force. The Privy Council concluded that there was no such rule.[4] The speech of Lord Morris of Borth-y-Gest set out what has come to be regarded as the classic exposition of the law of self-defence; a person who is attacked may defend him or herself but may only do what is reasonably necessary, which is a matter for the jury to decide.[5]

9.5 This decision of the Privy Council was reached after a detailed consideration of English authority. It included consideration of a number of nineteenth century cases which were cited as support for the contention that there was such a rule.[6] In addition, detailed consideration was given to the judgment of the High Court of Australia in *Howe*[7] which was cited by the appellant in support of the proposition that there was a partial defence of excessive use of force in self-defence. Thus, the decision in *Palmer* was based on a full consideration of domestic and comparative authority.

9.6 The apparent harshness of the conclusion that, in cases of murder, self-defence is an "all or nothing" defence and that there is no partial defence was, however, mitigated by two important elements in the exposition of the defence in that case. The first is expressed in the passage set out below. This passage has invariably provided the basis of guidance given by trial judges to the jury on the approach to take where the circumstances, or the inability of defendant to explain himself, deny the jury a fully reasoned account for what happened.

> If there had been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken.[8]

[3] [1971] AC 814.

[4] *Ibid*, at p 824.

[5] *Ibid*, at p 831-832.

[6] *Ibid*, at p 824-826. It is worthy of note that a number of these authorities predated the drafting of the Indian Penal code which provides for a partial defence to murder of excessive use of force in self-defence. We consider this below. It may be that the author of the code believed that such a provision reflected the then state of the common law. If so, the Privy Council, after detailed examination, does not appear to have shared that view.

[7] (1958) 100 CLR 448.

[8] *Palmer* [1971] AC 814, 832.

The second demonstrates how, notwithstanding the "all or nothing" nature of the defence, facts which fall short of substantiating self-defence may, nonetheless, form the basis for a conviction for manslaughter:

> The defence of self-defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view were possible that the intent necessary to constitute the crime of murder was lacking then that matter would be left to the jury.[9]

This decision was followed in *McInnes*[10] where the Court of Appeal expressed itself in the following terms:

> [I]f a plea of self-defence fails for the reason stated, it affords the accused no protection at all. But it is important to stress that the facts on which the plea of self-defence is unsuccessfully sought to be based may nevertheless serve the defendant in good stead. They may, for example, go to show that he may have acted under provocation or that although acting unlawfully, he may have lacked the intent to kill or cause serious bodily harm, and in that way render the proper verdict one of manslaughter.[11]

9.7 In practice, the first passage from *Palmer* constitutes, from D's perspective, a generous direction to the jury by inviting them to take a liberal approach to the interpretation of the objective test. A jury which conscientiously applied such an approach would be slow to convict D where they were of the view that the acts in question were undertaken in self-defence and may have been an instinctive response to the perceived level of risk. It would only be possible for such a jury to convict if it was sure that the level of violence used instinctively was utterly disproportionate to the level of risk perceived by D.

9.8 These two passages in *Palmer* may be thought to undermine the suggestion that the present "all or nothing" law of self-defence is too restrictive. They also diminish the power of the argument, which is sometimes advanced, that in the absence of the recognition of any partial defence of excessive force in self-defence, there is an inconsistency between self-defence and provocation. That argument runs as follows: If D acts in self-defence but uses excessive force he or she will be convicted of murder. Conversely, D may use the same amount of force and successfully rely on provocation as a partial defence. One author has opined:

> It is hard to see why the law affords greater protection to those who kill in response to insults than to those who do so while protecting their homes.[12]

[9] *Ibid*, at p 832.

[10] *McInnes* [1971] 1 WLR 1600.

[11] *Ibid*, at p 1608, *per* Edmund Davies LJ.

[12] M Watson, "Excessive force in self-defence" (2000) 104 Criminal Lawyer 5 at p 6.

This argument does not consider the position in *Palmer* where if the jury concludes that D acted honestly and instinctively the overwhelming probability is that they will acquit. The likelihood of conviction only increases if D so overreacts that the jury concludes he or she was acting unreasonably or (which is more likely) if the jury rejects D's claim to have been acting in self-defence. In either case, a partial defence of provocation or diminished responsibility is potentially available.

9.9 The combination of these two ameliorating passages means that the absence of a partial defence of excessive force in self-defence is, in practice, less of a problem than it might initially appear to be.

The decision in *Clegg*[13]

9.10 The question of a partial defence of excessive use of force in self-defence was again raised in the case of *Clegg*. The defendant was a British soldier who, whilst on patrol in Northern Ireland, opened fire on the occupants of a stolen car which had failed to stop at a checkpoint. He was charged with the murder of the rear-seat passenger who was hit by a bullet fired from the appellant's rifle. His evidence was that he thought that the life of a colleague on the other side of the road was in danger and he fired three shots at the windscreen and a fourth shot at the side of the car as it was passing. The trial Judge found as a fact that the fourth shot had been fired after the car had passed. Thus, unlike the other three shots, it could not have been fired in self-defence. Accordingly he was convicted of murder. The certified question for the House of Lords was:

> Where a soldier or police officer in the course of his duty kills a person by firing a shot with the intention of killing or seriously wounding a person and the firing is in self-defence or in defence of another person, or in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large, but constitutes force which is excessive and unreasonable in the circumstances, is he guilty of manslaughter and not murder?[14]

It was held, applying the principle established in *Palmer,* that a plea of self-defence could not reduce a culpable homicide from murder to manslaughter where a plea of self-defence to a charge of murder had failed because the force used was excessive and unreasonable. It followed that a soldier or police officer who, in the course of his duty, killed a person by firing a shot which constituted the use of excessive and unreasonable force in self-defence was guilty of murder, not manslaughter. One of the reasons for rejecting such a change in the law was that their Lordships were of the view that the reduction of what would otherwise be murder to manslaughter in a particular class of case was essentially a matter for decision by the legislature.[15]

[13] [1995] 1 AC 482 (HL).

[14] *Ibid,* at p 492.

[15] *Ibid,* at p 500, *per* Lord Lloyd of Berwick.

Criticism of the decision in *Clegg*

9.11 *Clegg* provoked a considerable amount of academic and public comment.[16] In the words of one commentator:

> Given that the Lords decided in any event to consider the issue of excessive self-defence, there was no convincing reason for their self-denying ordinance. [17]

It has also been observed that the perceived obstacle to reform of Parliament's having failed to make parallel provision in the Criminal Law Act 1967[18]

> overlooks the fact that, notwithstanding the title of the Act, the law stated in section 3 is primarily civil law. … It says nothing at all about defences to crime.[19]

Further, it is said that the moral culpability of a man who kills when he had an honest but unreasonable belief that the force used was proportional, falls below that associated with murder. The argument appears to be that though he has the mens rea for murder, in that he has the intention to kill or cause really serious bodily harm, he does not bear the same degree of moral culpability because he believes that he is acting in such a way that, if he were correct, would make his conduct lawful.[20]

The decision in *Martin (Anthony)*

9.12 The limitations of self-defence again received considerable public attention in the case of *Martin (Anthony)*.[21] Two burglars (F and B) entered the home of the appellant (M) by breaking a window on the ground floor. M was asleep on the third floor and was disturbed by the noise. At some point he armed himself with a pump-action shotgun. He asserted that he went downstairs towards where he had seen a light. Without giving any warning, he discharged the gun not less than three times. F was shot in both legs and B was shot in the legs and fatally shot in the back. B's body was left on the premises and found by a neighbour the following day. The prosecution case was that M, having been disturbed by the approach of burglars, had lain in wait for them and shot them at short range with the intention

[16] See for example, R Jerrard, "The plea of self-defence in murder: soldiers or police officers, no special case" (1995) 68 Police Journal 267 at p 269:

> It is a sad day for British Justice when we employ service men in dangerous situations and ask for perfection. One is reminded of the story of the lawyer who, taking a volume down from the shelf said, 'You know I think the policeman made a mistake in this case.' His colleague retorted, 'Maybe but he didn't have a law library available to him when he made his decision.' Terrorist gunmen *do* have a choice when they take arm.

[17] M Kaye, "Excessive force in self-defence after *R v Clegg*" (1997) 61 Journal of Criminal Law 448 at p 451.

[18] [1995] 1 AC 482, at p 500. See also para 9.18.

[19] M Kaye, "Excessive force in self-defence after *R v Clegg*" (1997) 61 Journal of Criminal Law 448 at p 451, citing J C Smith, "Comment on Clegg" [1995] Crim LR 418.

[20] *Ibid*, at p 452-3.

[21] *Martin (Anthony)* [2002] 2 WLR 1.

of killing or seriously injuring them. M's case was that, because of his past experience, he believed his house to be vulnerable to burglary and that the events of the night in question put him in genuine fear for his safety, so that the discharge of the gun was in lawful self-defence. M was convicted of murder. On appeal, he submitted, amongst other things, that fresh medical evidence showed him to be suffering from a paranoid personality disorder which could be classified as a mental abnormality within section 2 of the Homicide Act 1957. Further, he was suffering from depression at the time of the incident which exacerbated his paranoid condition. It was also submitted that this condition was relevant to his defence of self-defence and to whether he had used excessive force. The availability of a partial defence of excessive use of force in self-defence was not raised in the appeal.[22]

9.13 The appeal was allowed on the ground that the fresh evidence as to the appellant's mental state at the time of the killing was relevant and admissible on the issue of diminished responsibility. On that new evidence, the conviction for murder was quashed and a conviction for manslaughter on the grounds of diminished responsibility was substituted.

9.14 In so far as self-defence is concerned, the medical evidence before the court of appeal contained the following finding:

> [T]aking into account Mr Martin's mental characteristics at the time of the killing, Mr Martin would have perceived a much greater danger to his physical safety than the average person. Dr Joseph considered that Mr Martin honestly thought that he was in an extremely perilous situation and that he needed to take immediate defensive action to counter the attack he was under.[23]

The Court records, insofar as is relevant, that:

> [Defence Counsel] relied upon his medical evidence for different purposes: (a) to establish that the breaking into his house would be perceived by Mr Martin as being a greater threat to his safety [than] it would in the case of a normal person. If the jury accepted the expert evidence as to this, it would have made the jury more willing to accept Mr

[22] Although the issue of excessive force as a partial defence was not argued in *Martin (Anthony)*, the facts of the case have precipitated public calls for more generous laws on self-defence. In the particular context of a householder's right to defend his home and family, Dr Michael Watson has argued:

> It is generally accepted that England's prisons are full and that most burglars are unlikely to be reformed by incarceration in them. Few people would wish to live in a society in which firearms were routinely purchased for 'home defence'. But a disarmed society depends on an efficient and effective criminal justice system. If the state cannot fulfil its side of the bargain, its courts should not be too hard on those who (in the heat of the moment) use more force than may later seem reasonable. A strong case can be made for establishing a presumption that force used in self-defence- and defence of the home- is reasonable and lawful.
>
> "Self-defence and the Home" 167 Justice of the Peace 486 at p 488. (28 June 2003)

[23] *Martin (Anthony)* [2003] 1 QB 1, 14-15.

> Martin's evidence. It could also have influenced the jury's decision as to whether Mr Martin was acting reasonably in firing the gun as he did…[24]

9.15 Defence counsel cited *Smith (Morgan)*[25] in support of his contention that the medical evidence as to the defendant's mental characteristics should be admissible on the objective issue - whether the force was reasonable. The defence thus sought to import a concept from provocation into self-defence. The court refused, as a matter of principle, to permit this reasoning.[26]

9.16 In an *obiter dictum*, however, the Court of Appeal declined to close the door completely on the potential relevance, in exceptional circumstances, of a defendant's personal characteristics to the question of whether the force used was excessive:

> We would accept that the jury is entitled to take into account in relation to self-defence the physical characteristics of the defendant. However we would not agree that it is appropriate, except in exceptional circumstances which would make the evidence especially probative, in deciding whether excessive force has been used to take into account whether the defendant is suffering from some psychiatric condition.[27]

It is not clear in what type of case this passage might be of relevance given the case's clear ratio precluding the application of the *Smith (Morgan)* approach to self-defence.

PREVIOUS RECOMMENDATIONS FOR THE INTRODUCTION OF A PARTIAL DEFENCE OF EXCESSIVE USE OF FORCE IN SELF-DEFENCE

9.17 In 1980 the Criminal Law Revision Committee recommended the introduction into English law of a new partial defence to murder:

> We are of the opinion that where a defendant kills in a situation in which it is reasonable for some force to be used in self-defence but he uses excessive force, he should be liable to be convicted of manslaughter and not murder if, at the time of the act, he honestly believed that the force he used was reasonable in the circumstances. Furthermore, where a person has killed using excessive force in the prevention of crime in a situation in which it was reasonable for some force to be used and at the time of the act he honestly believed that the force he used was reasonable in the circumstances, we consider that he should not be convicted of murder but should be liable to be convicted of manslaughter.[28]

[24] *Ibid*, at p 15.

[25] *Smith (Morgan)* [2001] 1 AC 146, in which the issue was the evidence relevant to the objective question of loss of self-control in a case of provocation.

[26] *Martin (Anthony)* [2003] 1 QB 1, 16.

[27] *Ibid*, at p 16.

[28] Criminal Law Revision Committee, 14th Report, Offences against the Person (1980) Cmnd 7844, para 288.

A House of Lords Select Committee has also recommended that the law should be changed in order to encompass the above suggestion.[29] In 1989 the Law Commission followed suit and recommended in its Draft Criminal Law Code that the use of excessive force in self-defence should constitute a partial defence to murder. It provides:

> A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of the force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force in public and private defence), but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.[30]

9.18 As we have noted above, notwithstanding these authoritative recommendations for change in the law, the law as expressed in *Palmer* remains unaltered. In *Clegg*[31] the House of Lords declined to develop the law along the lines recommended without waiting for the legislature.[32] This approach to reform of the common law was consistent with the approach their Lordships have taken on other aspects of the law of murder. There had already been a similar self-denying ordinance in connection with the question of whether duress by threat could be a defence to a charge of murder. The decision in *Lynch* v *DPP for Northern Ireland*,[33] which appeared to raise that possibility, was overruled by the House of Lords in *Howe*.[34] In the case of developing the common law of self-defence there was a further reason to defer to the will of the legislature. Parliament had recently enacted section 3 of the Criminal Law Act 1967 which makes lawful the use of *reasonable* force in the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders. Lord Lloyd, in rejecting the suggestion that the common law of self-defence might be extended where the force used, though not in fact reasonable, was perceived by D to be so, pointed out that "Parliament [in enacting section 3] did not … see fit to create a qualified defence where the defendant uses excessive force in preventing crime."[35]

CRITICISMS OF THE LIMITATIONS OF THE LAW OF SELF-DEFENCE IN RELATION ABUSED WOMEN WHO KILL

9.19 The combination of subjective and objective tests required by the law of self-defence has been the source of complaints from commentators on the subject of battered women who kill. McColgan claims:

[29] Report of the Select Committee on Murder and Life Imprisonment, House of Lords Session 1988-89, HL Paper 78-1, at para 89.

[30] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, clause 59.

[31] [1995] 1 AC 482 (HL).

[32] *Ibid*, at p 500.

[33] [1975] AC 653, where the House of Lords held by a majority that the law of duress was available as a defence to a person charged with aiding and abetting murder.

[34] [1987] AC 417.

[35] [1995] 1 AC 482, 500.

> The relative scarcity of female killers has resulted in a paradigmatically male ideal model and this, together with the incompatibility of aggressive force with stereotypical femininity, means that the apparently gender-neutral concept of reasonableness is actually weighted against the female defendant.[36]

She develops her argument by stating that the proportionality requirement has emerged through cases concerning male defendants and that the necessity for parity between the level of attack and the level of defence is only justifiable in cases where the adversaries are of comparable strength. She claims that it operates unfairly where the assailant is male and the defender female, "[p]articularly where she knows from experience that an unarmed resistance by her to an unarmed attack by him may result in an escalation of that attack."[37] A parallel point relating to killing and gender is made by Susan Edwards who, citing research conducted on killings between 1987-1999, discloses significant differences between men and women who kill. She states that men who kill their female partners tend to do so by the use of bodily force whilst women who kill their male partners used knives in 83% of cases. Crucially, "legal outcomes show that where guns and knives are used a conviction for murder is more likely."[38] Such matters go directly to the issue of the reasonableness of the force which is deployed by D. If the force deployed by a female defendant is deemed excessive in relation to the harm threatened, then "neither s 3 Criminal Law Act nor the common law will assist her and she is liable to be convicted of murder."[39] McColgan concludes:

> In the context of self-defence, then, the male standards of necessity and proportionality … must be recognised and compensated for in the application of the self-defence standard to battered women who kill.
>
> The decision of the Court of Appeal in *Ahluwalia* establishes that battered women may be able to adduce expert evidence of the psychiatric effects of continued abuse, but a successful plea of self-defence requires the recognition that a battered woman's perceptions of danger may be affected by her situation, rather than that [the] situation has rendered her psychiatrically abnormal.[40]

9.20 Professor Celia Wells also concurs in the view that the established traditional construction of self-defence tends to prevent its use by battered women who kill:

> It is often suggested that the definition of self-defence precludes its application to women who kill since they typically do so when their assailants are asleep or have their backs to them. Self-defence assumes that the killing was necessary in order to resist immediate

[36] A McColgan, "In defence of battered women who kill" (1993) 13 Oxford Journal of Legal Studies 508 at p 515.

[37] *Ibid*, at p 520.

[38] S Edwards, "Injustice that puts a low price on a woman's life" The Times, 2 September 2003, Law Supplement, at p 5.

[39] A McColgan, "In defence of battered women who kill" (1993) 13 Oxford Journal of Legal Studies 508 at p 520.

[40] *Ibid*, at p 523.

> and deadly violence from the victim. Yet it can be seen that it is not so much the definition as the construction of this defence which prevents its use by women. Behind it lies an image, a stereotype, of isolated, one-to-one (man to man) violence. Domestic violence is outwith this paradigm.[41]

She argues that "[s]ubstantive reform should … contemplate a re-thinking of self-defence, and a radical shift in some of the ideas that underlie it."[42]

9.21 Her analysis is also consistent with concern over the requirement that there be an adequate trigger ie an attack or a perception of an imminent attack. This is a separate question to that of whether the force used is excessive. We address in Parts X and XII the question of whether we might construct a defence of "self-preservation" which does not depend on there being an actual or imminent attack.

9.22 It remains to be seen whether the obiter dictum in *Martin (Anthony)* referred to above may result in evidence of the fact of and effect of abuse being admitted on the question of whether the force used in self-defence was reasonable.[43] It might be argued that such cases give rise to "exceptional circumstances which would make the evidence especially probative."[44] Professor Wells observes that the law has progressed in Canada by the introduction of evidence of the effect of abuse on issues other than self-defence.[45] It is noteworthy, however, that in Canada, (where there is no partial defence of excessive use of force in self-defence,) feminist commentators are opposed to the inclusion of a specific partial defence of excessive force in self-defence. They consider it likely to lead to compromise verdicts of manslaughter where the defendant should properly have been acquitted on the basis of self-defence.[46] Further they believe that the very notion of self-defence is applied in gendered terms. Thus women who are violent will be seen as transgressing designated gender roles and the violence will thus be more readily thought to surpass the threshold of reasonableness.[47]

9.23 The counter-argument to the position adopted by Canadian feminist critics is that female defendants are still left with the practical problems attendant on self-

[41] C Wells, "Battered Woman Syndrome and defences to homicide: where now?" (1994) 14 Legal Studies 266 at p 272.

[42] *Ibid*, at p 273.

[43] See para 9.16. There are no reported cases on the issue of self-defence and battered women syndrome. Instead it has appeared in the context of diminished responsibility and provocation. See the comments of Lord Taylor CJ in *Ahluwalia* 96 Cr App R 133, 141, who stated that the reasonableness of the defendant's reactions fell to be considered in the light of the history of her marriage, the misconduct and ill treatment of the appellant by her husband.

[44] See para 9.16.

[45] C Wells, "Battered Woman Syndrome and defences to homicide: where now?" (1994) 14 Legal Studies 266 at p 273. In the Canadian Supreme Court case of *Lavallee v R* [1990] 1 SCR 852 it was clearly acknowledged that women's experiences were not reflected by the hypothetical construct of the "reasonable man," and the admission of expert evidence of battered women syndrome was proposed to counter this.

[46] Sheehy, "Women's Law of Self-defence", cited by D Ives, Appendix B, n 97.

[47] Canadian Association of Elizabeth Fry Societies, Response to the Department of Justice, Recommendation 21, cited by D Ives, Appendix B, n 98.

defence being a complete defence. The introduction of a partial defence, where excessive force has been used, would solve many such difficulties. Professor Wells has observed:

> As a win-or-lose option it encourages the use of partial defences of provocation and diminished responsibility when neither properly captures the nature of the dilemma in which battered women find themselves. A compromise move would be the development of a new partial defence to murder. This could be based on physical or psychological aspects, or self–preservation.[48]

The call for a defence based on notions of "self-preservation" has been echoed in other quarters.[49]

9.24 A partial defence of use of excessive force in self-defence might be thought to sit easily with the present defence of self-defence. The questions which arise are: whether there is much room for it to operate given the generous way in which the issue is summed up to juries; and whether it would distort outcomes given that it would create the possibility of a "compromise" verdict.

9.25 By contrast, the development of a partial defence of "self-preservation" or, as we would prefer to call it "the pre-emptive use of force in self-defence", which did not require there to be actual force or an imminent threat of force, would raise wholly different issues. This would be so whether or not it co-existed with a partial defence of excessive force in self-defence. As indicated above, we consider the possible creation of such a partial defence in detail in Part X and present an option for consideration in Part XII.

COMPARATIVE STUDIES

The Australian common law

9.26 The Australian common law has at various times developed such a partial defence and then abandoned it. In *Mckay*[50] the law recognised the partial defence of excessive force in self-defence. This was followed in the case of *Howe* where it was held:

[48] C Wells, "Battered Women Syndrome and defences to homicide: where now?" (1994) 14 Legal Studies 266 at p 275.

[49] See H Wistrich (Justice for Women), "Self-preservation defence" April 1997, Legal Action 9. It is not stated whether it is envisaged that such defence would be a partial or a complete defence. The defence would be based on a combination of evidence of a history of abuse, the failure, or lack, of effective intervention and the defendant's perception of the danger she faced through her evidence. The proposal for the new defence was presented to the Home Affairs Select Committee in 1993. One of the reasons it was rejected was because it was felt that a defence of self- preservation would imply that a killing was the result of a defendant making a rational choice. This would be a major departure from the partial defences of diminished responsibility and provocation which, respectively, focus on the defendant's impaired responsibility through mental abnormality and her loss of self control. Justice for Women argues that self-defence must either be made more adaptable to take account of the different ways people find to survive life-threatening situations or a new defence of self-preservation must be introduced.

[50] [1957] ALR 648.

> A person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self-defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more than what he honestly believed to be necessary in the circumstances, is guilty of manslaughter and not of murder. [51]

The defence was consistently applied until the Privy Council decision in *Palmer*.[52] The defence initially survived that decision. In *Viro*[53] the High Court unanimously held that Privy Council decisions, including past decisions, were no longer binding on the High Court. *Howe* was, therefore, followed and a partial defence to murder of excessive use of force in self-defence reconfirmed. The decision of the High Court in *Zecevic*[54] saw a *volte-face*. The Court re-examined each of the propositions which had been put forward in *Viro* in the light of difficulties which trial judges were encountering in expressing them in a way that was comprehensible to juries.[55] According to one commentator:

> The principal difficulty with [the formulation in *Viro*] was that it attempted to incorporate the substantive law of excessive self-defence and the law relating to burden of proof. This resulted in the use of double negatives which juries found difficult to follow.[56]

By a majority of five to two, excessive use of force in self-defence ceased to be a partial defence to murder in the common law of Australia. In fact, the various problems cited in *Zecevic* had already been referred to by the Privy Council in *Palmer*. It had criticised *Howe* as presenting too fine a distinction for juries to draw between what a reasonable person placed in the accused's situation would consider to be necessary force and what the accused honestly believed to be necessary force.[57]

[51] *Howe* (1958) 100 CLR 448, 471, quoting Smith J in *Bufalo* (1958) VR 363.

[52] *Palmer* [1971] AC 814.

[53] *Viro* (1978) 141 CLR 88.

[54] *Zecevic V DPP* [1986] VR 797 on appeal from the Victorian Full Court to the High Court of Australia (1987) 71 ALR 641.

[55] In particular the last two propositions in *Viro* (1978) 141 CLR 88, 147*:*

> If the jury is satisfied beyond reasonable doubt that more force [than was reasonably proportionate] was used then its verdict should be either manslaughter or murder, that depending on the answer to the final question for the jury - did the accused believe that the force used was reasonably proportionate to the danger which he believed he faced?
>
> If the jury is satisfied beyond reasonable doubt that the accused did not have such a belief the verdict will be murder. If it is not satisfied beyond reasonable doubt that the accused did not have that belief the verdict will be manslaughter.

[56] D Lanham, "Death of a qualified defence?" (1988) 104 LQR 239 at p 240.

[57] See *Palmer* [1971] AC 814, 831, where Morris LJ, having cited McKay, said:

> This proposition was quoted with approval by the High Court in Howe's case, 100 CLR 448. Taylor J, however, pointed out at p 467, that the proposition so formulated was not in any way limited to cases where it appears that the accused

9.27 *Zecevic* has been the subject of much academic criticism. Many academics, whilst recognising that the law, as postulated in *Viro,* needed simplification, have expressed sympathy with the view of the minority in *Zecevic:* that a person who uses excessive force to kill an assailant but who genuinely believes the action to be necessary in self-defence, is lacking mens rea for murder.[58] Further, as Professor Yeo points out, the South Australian formulation of excessive defence (outlined below) appears now to be working well in practice.[59] Advocates of the doctrine who are keen to see it introduced into English law cite the principle of the honestly held belief as a safeguard against nicety and complexity. Thus Smith and Hogan write;

> It is submitted that the soundness of this [recommendation of the CLRC for the introduction of the partial defence of excessive force] is not impaired by *Zecevic* or by *Clegg*. The Law Commission agrees and clause 59 of the Draft Code would implement the recommendation. The principle of *Gladstone Williams* - which has not yet been followed in Australia – removes some of the complexity from the law and it ought to be capable of being stated in a form readily comprehensible by juries.[60]

South Australia

9.28 South Australia has, by statute, re-introduced the plea of excessive force. The initial provision was enacted in 1991 but was found to be unworkable. According to Professor Yeo this lent support to the view of the majority in *Zecevic* that it was not possible to formulate a comprehensible version of the defence.[61]

9.29 The current formulation came into force in 1997. It takes the form of amendments to section 15 (1) of the Criminal Law Consolidation Act 1935 (SA), which applies to defending a person's life, and to section 15(A) of that Act, which applies to defence of property. The unamended statute gives rise to a complete defence to a charge of murder if two elements are satisfied. The first, subjective, requires only that D perceived a relevant threat. The second, objective, requires the response of D to be proportionate to the circumstances as he or she believed them to be.

9.30 The amendments create an additional partial defence of excessive use of force in self-defence which corresponds, in its reach, to the general defence. Thus the partial defence arises both where the accused has used excessive force to defend her or his life or bodily integrity or liberty[62] and in cases of excessive force in defence of property, or against criminal trespass to land or in the arrest of an offender. In the cases of defence of property as opposed to defence of the person, however, the partial defence is only available if D did not intend to cause death. According to Professor Yeo, the explanation for this restriction must be that no

> entertained an honest belief that the force used, though excessive on any reasonable view, was necessary.

[58] D Lanham, "Death of a qualified defence?" (1988) 104 LQR 239.

[59] Appendix A, S Yeo, p 64.

[60] J C Smith, *Smith and Hogan, Criminal Law* (10th ed 2002) p 287.

[61] Appendix A, S Yeo, p 56.

[62] S 15(2)-(3) Criminal Law Consolidation Act 1935 (SA).

interest in property or land is so valuable that its protection can warrant the intention to cause death.[63]

New South Wales

9.31 New South Wales re-introduced a partial defence by way of an amendment of section 421 of the Crimes Act 1900. This has only been in force since 2002 and has yet to be considered in any case law. The most noteworthy difference between section 421 and the South Australian legislation is that the New South Wales partial defence is unavailable where D has killed in defence of property, criminal trespass to land or when arresting an offender. [64]

India

9.32 Excessive use of force in self-defence has been a partial defence to murder in the Indian Penal code since its inception. It is an exception to section 300 which defines the offence of murder. Exception 2 provides:

> Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.[65]

This special form of defence depends on D acting in good faith in circumstances in which, if D were correct, he or she would have the right of private defence. What that right amounts to is to be found elsewhere in the code.

9.33 Every person has a right to defend her or his own person or that of another against any offence against the human body.[66] This right extends to defending one's own property or that of another against theft, robbery mischief, criminal trespass or attempts to commit these offences.[67] There is a general limitation that the accused must not inflict more harm than is necessary for the purpose of defence. This calls for an objective assessment of the necessity of the action taken by D. In addition, there is a specific limitation which calls for the existence of certain threats before a person is permitted to kill his or her assailant. The threats in question vary according to whether the accused was protecting the person or property. Section 100 provides that killing in protection of the person is only justified when it is necessary to repel an attack causing reasonable apprehension of death, grievous hurt, rape, gratification of unnatural lust, abduction or kidnapping.

9.34 Killing in respect of protection of property is justified only when it is necessary to repel a robbery, housebreaking by night, mischief by fire committed on a human

[63] Appendix A, S Yeo, p 58.

[64] *Ibid*, at p 60.

[65] *Ibid*, at p 61.

[66] S 97(1), cited in S Yeo, *Unrestrained killings and the law: A comparative analysis of the laws of provocation and excessive self-defence in India, England and Australia* (1998) p 119.

[67] *Ibid*.

dwelling, or theft, mischief, or house trespass in circumstances which caused reasonable apprehension that death or grievous hurt would be the consequence if the right of defence were not exercised.

9.35 If the killing is not found to be committed in order to repel such threats the general plea of self-defence fails. It also fails if the killing is found not to be reasonably necessary. In either event the question will arise of whether exception 2, which has the effect of reducing the charge of murder to a finding of culpable homicide, is made out.

9.36 Professor Yeo has criticised what appears to be the practice of the Supreme Court of simply paying lip service to the requirements of exception 2 by assuming that a defendant should have the benefit of the exception without actually considering whether the accused had honestly believed that the killing was necessary in the circumstances.[68]

Ireland

9.37 Whilst the courts in Ireland have recognised a partial defence of excessive force in self-defence, the status of the concept remains uncertain. In *Dwyer*[69] the certified question was:

> Where a person subjected to a violent and felonious attack, endeavours by way of self-defence, to prevent the consummation of that attack by force, but in doing so exercises more force than is necessary but no more than he honestly believes to be necessary in the circumstances, whether such person is guilty of manslaughter and not murder.

The question was answered in the affirmative, thus recognising the plea of excessive self-defence. Reliance was placed on *Howe*[70] as opposed to *Palmer*.[71] The scope of the decision is unclear. It is not clear what is meant by "violent and felonious attack" other than that it applies to threats of death or serious personal violence.[72] There is also uncertainty as to whether *Dwyer* applies when D uses unnecessary, or disproportionate, force or both. It has been claimed that the reference to necessity in the certified question means that proportionality is irrelevant. *Dwyer* was endorsed in *Clarke*[73] where it was stated that the defence was available where the force used by D was beyond that which was reasonable in the circumstances but no more than D honestly believed was reasonable. The Court relied on the Privy Council decision in *Palmer* as establishing the parameters of the defence. There is no other appellate jurisprudence.

[68] S Yeo, *Unrestrained killings and the law: A comparative analysis of the laws of provocation and excessive self-defence in India, England and Australia* (1998) p 133.

[69] *The People (Attorney General) v Dwyer* [1972] IR 416.

[70] [1971] AC 814.

[71] (1958) 100 CLR 448.

[72] F McAuley, "Excessive Defence in Irish Law", in S Yeo, *Partial Excuses to Murder* (1990) pp 196-7.

[73] *The People (Director of Public Prosecutions) v Clarke* [1994] 3 IR 289.

9.38 There is also uncertainty whether the provisions of the Non Fatal Offences against the Person Act 1997 (which codified the law as to legitimate defence and abolished any defence available under common law in respect of the use of force) apply to homicide offences so as to undermine the common law partial defence to murder.[74]

Canada

9.39 In Canada there is no statutory provision in the criminal code that provides for a qualified defence of the use of excessive force in self-defence. A qualified common law defence was recognised at one point. It was rejected in *Faid* for a number of reasons.[75] It was said that there was no room to recognise a common law defence of excessive force because the law was comprehensively set out in the Criminal Code. The court pointed out that, as there was no agreement about the principle underlying the defence, it would complicate the task of trial judges in instructing juries on the law. Finally it was said that it would encourage compromise verdicts of manslaughter.

THE OPTIONS FOR REFORM

9.40 In Part XII we examine in detail the options for reform. There is, potentially, a broader and a narrower form of this defence. Within each form of the defence, there are two variants.

9.41 The broader form of the partial defence is where the D faces a threat of violence but not one of sufficient immediacy to make it lawful to use force in self-defence. This would be a partial defence of "pre-emptive self-defence" or "self preservation".[76]

9.42 The narrower form would only apply where the D faced a perceived threat of violence of sufficient immediacy to justify the use of some degree of force, but not the degree of force in fact used.

9.43 The variants within each form of the partial defence are whether the defence should:

(1) apply to force used in protection of the person or property or for the prevention of crime; or

(2) be limited to force used for the protection of the person.

[74] Appendix C, Irish Law Reform Commission, p 117.

[75] [1983] 1 SCR 265.

[76] We address this option in detail in Part X

PART X
ABUSED WOMEN WHO KILL

INTRODUCTION

10.1 In this Part we address whether the law adequately accommodates an abused woman who kills her abusive partner. We consider whether she can rely on a complete or partial defence to murder in situations where the killing does not follow immediately after the provocative conduct of the deceased, or in situations where she may not have lost self-control at the time of the killing.

10.2 This Part is structured as follows: (i) we discuss the relevance of 'battered woman syndrome' to abused women who kill; (ii) we summarise the defences available in the jurisdictions of Australia, Canada, Ireland, New Zealand, Scotland and South Africa; (iii) we set out the case law in relation to abused women who kill; (iv) we analyse the shortcomings of the defences of provocation, diminished responsibility and self-defence as a legal response to the cases of abused women who kill; (v) we draw conclusions on the adequacy of English law in relation to abused women who kill; and (vi) we consider possible reform options.

'BATTERED WOMAN SYNDROME'

Walker's theory

10.3 The term 'battered woman syndrome' is based on the clinical observations of Lenore Walker.[1] It is used to describe a characteristic pattern of psychological and behavioural responses by a woman to severe abuse inflicted upon her by her partner. It does not attempt to explain why domestic violence occurs. Rather it focuses on the psychology of the woman explaining why she may respond differently from traditional expectations.

10.4 'Battered woman syndrome' is not a legal defence to a charge of murder. However, the concept has been useful in explaining the perceptions of an abused woman and the reasonableness of the force she has used against her abusive partner. The concept may also help to explain why her reactions lack immediacy within the traditional model of self-defence.[2] Walker's research has been of particular value in relation to the defence of provocation by highlighting the need to recognise that women who kill their abusers may not fit into the classic response of a sudden and temporary loss of self-control of the sort described by Devlin J and approved by Lord Goddard CJ in *Duffy*.[3] Expert evidence of the characteristic reactions of abused women can reinforce the conclusion that fear or anger led to the loss of

[1] L E Walker, *The Battered Woman Syndrome* (2nd ed 1999); *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989).

[2] B F Bartal, "Battered Wife Syndrome Evidence: The Australian Experience" in J Vagg and T Newburn (eds) British Criminology Conference: Selected Proceedings Vol 1. Emerging Themes in Criminology (1998) http://britsoccrim.org/bccsp/vol01/VOL01_08.HTM at p 4 of 12 (accessed 04/06/03).

[3] [1949] 1 All ER 932.

self-control and can help explain why an abused woman may appear calm rather than enraged during and after the killing of her abusive partner.

10.5 The "cycle theory of violence" and "learned helplessness" are the two main components of Walker's theory.[4]

The cycle theory of violence

10.6 The "cycle theory of violence" describes the typical course of violent behaviour in a relationship in a repeating three-phase pattern. Due to the recurring nature of the cycle the victim is able to identify behaviour of the abuser which signals the beginning of the cycle. As a result the victim becomes hypersensitive to such behaviour and further anticipated violent attacks. The three phases are:

(1) THE TENSION BUILDING STAGE

During this stage, the tension gradually escalates and minor battering incidents are likely to occur. The abuse during this phase is likely to be of a verbal or minor physical nature. The woman responds by trying to appease her abuser in the hope of preventing the abuse from escalating. Although she may succeed temporarily, the tension usually escalates until she can no longer control her abuser. At this point the second phase begins.

(2) THE ACUTE BATTERING INCIDENT

The second stage is characterised by a "barrage of verbal and physical aggression". Although this stage does not last as long as the first stage, the tension and abuse continue to escalate to such an extent until there is an 'uncontrollable discharge of tensions'.

(3) KINDNESS AND CONTRITE LOVING BEHAVIOUR

During this stage the abuser behaves in a "charming and loving manner". The abuser begs for forgiveness, tries to assist the victim, showers her with gifts and promises that it will not happen again. This phase raises the victim's hopes that the cycle will not repeat itself and that the abuser will change.

Learned helplessness

10.7 The second element of Walker's theory helps to answer a question often asked in legal proceedings: why did the abused woman not leave or, if she did leave, why did she resume the relationship?[5] Walker based her initial conclusions on the results of experiments by psychologist Martin Seligman. These experiments involved a series of tests carried out on caged dogs. They showed that dogs that were subjected to inescapable abuse (or abuse which was perceived by the dogs to be inescapable)

[4] L E Walker, *The Battered Woman Syndrome* (2nd ed 1999) at pp 43 -73.

[5] A McColgan, "In Defence of Battered Woman Who Kill" (1993) 13 Oxford Journal of Legal Studies 508; M A Buda & T L Butler "The Battered Wife Syndrome: A Backdoor Assault on Domestic Violence" (1984/85) 23 Journal of Family Law: University of Louisville 359.

respond with extreme passivity and display an inability to act effectively. Seligman labelled this response "learned helplessness". Walker has applied this theory of learned helplessness to the concept of the "battered woman".

10.8 Walker suggests that a woman who is subject to abuse for a period of time often develops a sense of helplessness regarding her situation. She feels helpless to change her situation and comes to believe that no matter what she does, or how she responds, it will not change the situation she is in. A destructive psychological spiral is established. The beatings lead to lowered self-esteem and learned helplessness, which in turn make her unable to escape. An abused woman perceives that she has no option but to submit to abuse since she has no other alternatives or means of escape open to her.

Criticisms of Walker's theory of 'battered woman syndrome'

10.9 Although the concept of 'battered woman syndrome' has been widely used in legal proceedings on behalf of abused women who kill their abusive partners, especially in the United States, its credibility has been challenged by many.[6] Not all abused women suffer from 'battered woman syndrome'. Indeed, emphasis on 'battered woman syndrome' may have obscured the fact that abused women may suffer from other difficulties, such as depression, anxiety, substance misuse or post traumatic stress disorder.

10.10 On the other hand, Leader-Elliot points out that, by focussing on the psychiatric health of the abused woman, the circumstances surrounding her actions are ignored. He refers to the term 'battered woman syndrome' as an "unhappy hybrid" and argues that the assumption that the choice to stay in the relationship is a pathological one, or a consequence of a mental disorder, masks the brute reality of domestic violence. He is critical of Walker's use of the dog experiments to illustrate the effect of oppressive cruelty in the home. As the women in Walker's survey did not suffer from a psychological disorder he questions whether there is such a syndrome. Leader-Elliot also argues that Walker's emphasis on individual pathology reinforces existing prejudices that women face and encourages the common tendency to blame the victims of domestic violence for masochism.[7]

10.11 "Learned helplessness" has also been labelled "traumatic bonding". This theory draws on similarities in the relationships, respectively, between hostages and captors, abusive cult leaders and their followers, abused children and their parents, and abused women and their partners. It is based on the work of psychologists Dutton and Painter. There are two features common to these relationships: the

[6] See, for example, J Blackman, *Intimate Violence: A Study of Injustice* (1989); A Browne, *When Battered Women Kill* (1987); D Bricker, "Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners" (1993) 58 Brooklyn Law Review 1379.

[7] I Leader-Elliot, "Battered but not Beaten: Women who Kill in Self-Defence" (1993) 15 Sydney Law Review 403.

first is the extreme dependency created by the power imbalance in the relationship; the second is the intermittent nature of the abuse.[8]

10.12 Walker's theory has been criticised for reinforcing negative stereotypes of women as helpless and irrational. 'Battered woman syndrome' fails to address the social, political and economic dimensions of abusive relationships. It tends to underestimate the importance of a number of factors or obstacles, which make it difficult for an abused woman to leave the abusive relationship.

10.13 These factors include a lack of economic and/or other resources, adequate social welfare and low-cost housing, a fear of retaliation, and a fear of losing children in custody disputes.[9] Other factors include the desire and need to provide children with a father in the home, shame and embarrassment, and denial of the severity of abuse.[10] There might also be strong religious or cultural pressures not to leave the abusive partner. In view of the multiplicity of circumstances affecting a woman's ability to leave an abusive relationship, 'battered woman syndrome' cannot offer a complete explanation in all these cases. It has been argued therefore that the focus should be on the situation in which the woman was placed and what it is about her circumstances, which caused her to kill her abuser. In this way her actions may be seen as rational, necessary and reasonable.[11]

10.14 Nicholson and Sanghvi have highlighted the wider implications of perpetuating the idea that the experiences of abused women should be categorised as "learned helplessness":

> Battered women do not ask for, nor consent to, violence. On the contrary, they frequently seek help in escaping it. And the response from state institutions in particular tends to be woefully inadequate. Furthermore, it is socialisation and the lack of socio-economic alternatives for women, rather than "learned helplessness" which makes leaving violent men so difficult. All of this is pushed under the carpet by the syndrome, which focuses on the personality and problems of individual defendants, thereby suggesting that the solution lies with therapy rather than social change.[12]

10.15 Nicolson and Sanghvi also argue that, whether due to Walker's theory itself or the way in which it tends to be used, it fails to address the relevant legal issues raised by the provocation defence. They assert that whereas 'battered woman syndrome'

[8] D Dutton and S L Painter, "Traumatic Bonding: The Development of Emotional Attachments in Battered Women and other Relationships of Intermittent Abuse" 6 Victimology 139 (1981) especially at pp 146–152.

[9] A McColgan, "In Defence of Battered Woman Who Kill" (1993) 13 Oxford Journal of Legal Studies 508 at pp 516–517.

[10] M R Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation" (1991) 90 Michigan Law Review 1.

[11] B F Bartal, "Battered Wife Syndrome Evidence: The Australian Experience" in J Vagg and T Newburn (eds) British Criminology Conference: Selected Proceedings Vol 1. Emerging Themes in Criminology (1998) http://britsoccrim.org/bccsp/vol01/VOL01_08.HTM at p 4 of 12 (accessed 04/06/03).

[12] D Nicholson and R Sanghvi, "Battered Women and Provocation: The Implications of *R v Ahluwali"* [1993] Crim LR 728 at pp 735–736.

is useful in explaining the reasonableness of the general behaviour of abused women, it is not well suited to establishing the reasonableness of an abused woman killing in provocation, nor that the killing took place during a sudden loss of self-control. The syndrome is associated with despair, anxiety and fear, yet provocation requires evidence of loss of self-control.[13]

10.16 Paragraph 10.11 above referred to the parallels between hostage situations and the relationships of domination, unpredictability, and violence in which abused women find themselves trapped. Many abused women learn that if they attempt to leave, they will be followed and forced to return, to face even greater hostility and more serious violence.[14]

10.17 Even where an abused woman has been able to leave the relationship, evidence shows that women are at the greatest risk of being killed at the point of leaving or after leaving an abusive partner. Women's Aid recently commissioned a study of women's experiences of domestic violence. This research found that 76% of the 161 separated women in the sample suffered post-separation violence.[15]

10.18 Finally, there is no reference in Walker's research to whether 'battered woman syndrome' also applies to same sex relationships.[16] Because 'battered woman syndrome' relies on stereotypes for its insights, once expert testimony has exhausted these stereotypes, the syndrome offers no explanation as to why violence occurs in same-sex relationships[17] or why same-sex partners have difficulty in leaving the relationship.[18]

[13] *Ibid*, at p 734.

[14] In discussions with the Law Commission, psychiatrists have commented that in many cases of abused women it is not just a matter of the abuse inflicted upon her by her partner, it is often a case of the man's wish to exercise total control and dominance over the woman. He effectively walls her off by separating her from other sources of influence. If an abused woman feels she is absolutely controlled by the man, she will honestly believe that if he is awake she can never escape.

[15] C Humphreys and R Thiara, *Routes to Safety: Protection issues facing abused women and children and the role of outreach services*, Women's Aid Federation of England (2002) p 12. See also, S Lees "Marital rape and marital murder" in J Hamner and N Itzin (eds) *Home Truths about Domestic Violence: Feminist Influences on Policy and Practice: A Reader* (2000) at p 57.

[16] C J Simone, "'Kill(er) Man was a Battered Wife': The Application of Battered Woman Syndrome to Homosexual Defendants" (1997) 19 Sydney Law Review 230.

[17] *The Queen v McEwen* (unreported, Supreme Court of Western Australia, trial before Murray J on 18-25 April 1995 and sentencing before Walsh J on 18 March 1996), is the first case in Australia where 'battered woman syndrome' was raised by a homosexual man. Robert McEwen was charged with the murder of his lover and partner. At his trial he was depicted as a "battered wife" after suffering emotional and social abuse, threats and intimidation and economic deprivation for fourteen years. Mr McEwen pleaded guilty to manslaughter rather than murder on the basis of provocation, and had his sentence mitigated on the basis of 'battered woman syndrome'.

[18] D Bricker, "Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners" (1993) 58 Brooklyn Law Review 1379.

THE POSITION IN AUSTRALIA, CANADA, IRELAND, NEW ZEALAND, SCOTLAND AND SOUTH AFRICA

10.19 This section draws exclusively on the contents of appendices A to F which discuss in detail the defences of provocation, diminished responsibility and excessive force in self-defence in Australia, Canada, Ireland, New Zealand, Scotland and South Africa. It offers a summary of the applicability, in those jurisdictions, of such defences to abused women who kill.

Australia

Provocation

10.20 The defence has been criticised for operating primarily to excuse male anger and violence toward women. It has also been accused of bias against female defendants because many elements of the defence have developed in response to patterns of male aggression. Lately, the Australian courts and legislatures have sought to redress this by removing the requirement of suddenness as well as the need for a triggering incident and by recognising cumulative provocation. Expert evidence of 'battered woman syndrome' has been admitted in order to inform juries of the heightened perception of the sense of danger and of the helplessness of these women. These changes have enabled the defence to operate in favour of an abused woman whose anger has intensified rather than diminished with time. They also contextualise the provocative incident by reference to the history of long standing physical, mental and emotional abuse suffered by the female defendant at the hands of her partner. These changes persuaded the Victorian Law Reform Commission to conclude that female patterns of behaviour are now sufficiently accommodated by the defence.[19]

10.21 In its 1997 Report on Provocation, the New South Wales Law Reform Commission proposed a reformulation of the defence but, like the current law, it still hinged on the concept of actual loss of self-control. It acknowledged that the reformulated defence would continue to be inapplicable to women who killed in cold blood out of self-preservation or to save their children from further abuse.[20] The Commission noted the suggestion that the most appropriate defence for battered women who kill was self-defence but, unfortunately, a review of the law of self-defence lay outside its terms of reference.

10.22 The Model Criminal Code Officers Committee has argued that the structure of the defence is inherently gender biased because it operates partially to excuse homicidal acts on the basis of loss of self-control. It has recommended the abolition of the defence and has used the theory of 'battered woman syndrome' to support its view:

> The defendant, who in such cases often kills her partner after years of abuse, may adopt a method of killing that is undoubtedly premeditated, but is actuated by no less psychological stress and

[19] See generally, Victorian Law Reform Commission, *Defences to Homicide: Issues Paper*, 31 March 2002.

[20] New South Wales Law Reform Commission, *Report 83, Partial Defences to Murder: Provocation and Infanticide* (1997) paras 2.145 - 2.146.

> trauma than persons who kill in response to an immediate provocation. Any argument that it is murder for a battered woman driven to desperation to kill her partner but only manslaughter for a man to do the same after discovering her committing adultery is offensive to common sense.[21]

10.23 In apparent support of the view of the Model Criminal Code Officers Committee, the Tasmanian legislature abolished the defence of provocation to murder in May 2003. The legislature believed that provocation could be adequately considered as a factor in sentencing since the mandatory sentence of life imprisonment for murder had been removed in that jurisdiction. One of the reasons given by the Minister for Justice for abolishing the defence was that the defence was not designed for women and that it is not an appropriate defence for those who fall into the 'battered women syndrome'.

Diminished responsibility

10.24 In Australia, diminished responsibility exists as a partial defence to murder. The defence requires the defendant to prove that, at the time of the killing, he or she was operating under an abnormality of mind stemming from a specified cause which so substantially impaired her criminal responsibility as to warrant reducing the offence of murder to manslaughter. The defence was introduced by legislation into the Australian Capital Territory, New South Wales, Queensland and the Northern Territory because it was thought that an accused whose criminal responsibility is diminished on account of some mental dysfunction, should avoid the mandatory sentence of life imprisonment imposed at the time for murder. No other Australian jurisdiction recognises the defence.

10.25 The Victorian Law Reform Commission has questioned whether it was appropriate to claim that abused women who kill do so as a result of an "abnormality of mind", or whether it would be better to create a new defence to cover such circumstances.[22] Professor Yeo suggests that, arguably, the plea of self-defence is to be preferred for concentrating on the external elements leading to the abused woman's disturbed condition and recognising that she may have killed out of self-preservation rather than as a result of a disturbed mind.[23]

Excessive force in self-defence

10.26 South Australia and New South Wales are the only Australian jurisdictions that currently recognise the partial defence to murder of excessive defence. We considered the position in Australia in some detail in Part IX.

[21] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper, Draft Model Criminal Code: Chapter 5. Fatal Offences against the Person* (1998) p 91.

[22] Victorian Law Reform Commission, *Issues Paper on Homicide* (2002) para 7.32.

[23] See Appendix A, S Yeo, para 3.35.

Canada

Provocation

10.27 The provocation defence in Canada has four elements: (i) a wrongful act or insult; (ii) an ordinary person would be deprived of the power of self-control by that act or insult; (iii) the defendant was actually provoked by the act or insult: and (iv) the wrongful act or insult and the defendant's response to it were both sudden. There is no proportionality requirement associated with the defence. The defence has been extensively criticised, in particular by feminist legal scholars and advocacy organisations, who argue that the type of anger privileged by the provocation defence is tailored to male violence, rather than female violence. It is therefore a concession to male infirmity, not human frailty.

Diminished responsibility

10.28 There is no defence of diminished responsibility in Canada. It is felt that there is no need for the defence given the expansive scope of the mental disorder defence in Canada, which is concerned with whether the defendant had the necessary mens rea to be convicted of murder.

Excessive force in self-defence

10.29 There is no statutory provision in Canada for a defence of the use of excessive force in self-defence. A qualified common law defence was recognised at one point. However, it was rejected in the case of *Faid.*[24]

Ireland

Provocation

10.30 The Law Reform Commission of Ireland has recently examined the law of provocation.[25] It has observed that the requirements of immediacy and gravity may present difficulties for a defendant who has been subjected to cumulative provocation.[26]

Diminished responsibility

10.31 There is no defence of diminished responsibility in Ireland. A Bill was introduced in 2002 which provides for the defence, but it has not yet been enacted.

[24] [1983] 1 SCR 265.

[25] The Law Reform Commission of Ireland, *Consultation Paper on Homicide: The Plea of Provocation*, 29 October 2003.

[26] In respect of abused women who kill, there is evidence that the Irish courts are willing to admit evidence of cumulative provocation. See *People (DPP) v O'Donoghue*, The Irish Times, 16-20 March 1992, *People (DPP) v Bell*, The Irish Times, 14 November 2000.

Excessive force in self-defence

10.32 In the case of *Dwyer*[27] the Irish Supreme Court recognised the plea of excessive force in self-defence. However, the dearth of subsequent case law has left the concept undeveloped.

New Zealand

Provocation

10.33 'Battered woman syndrome' and its effects were acknowledged by the New Zealand Court of Appeal in the case of *Oakes*.[28] It explained that the heightened awareness of, or sensitivity to, threats or threatening behaviour, which is a feature of the syndrome, may be a relevant "characteristic" in light of which the accused's response is to be judged. Although the defence of provocation has been applied in cases of abused women who kill, its application has been inconsistent, largely because of the requirement for loss of self-control[29] and the uncertainty surrounding the scope of mental characteristics.

10.34 In May 2001, the New Zealand Law Commission produced a Report on how the law applies to battered defendants who commit criminal offences as a reaction to domestic violence inflicted on them by their partner.[30] The terms of reference of the project covered the defences of duress, necessity, and self-preservation in addition to self-defence, provocation and diminished responsibility. The Commission was concerned to ask whether they apply equitably to battered defendants. In relation to the partial defence of provocation, the Commission recommended its abolition and replacement with a sentencing discretion for murder.

Diminished responsibility

10.35 There is no defence of diminished responsibility in New Zealand. The Law Commission in its Report recommended against its adoption. It was influenced by the fact that it is a concept which is difficult to define with clarity, and it considered that the factors giving rise to diminished responsibility were better considered at the sentencing stage. Additionally, the Commission was of the opinion that diminished responsibility is not of particular relevance for the

[27] *The People (AG) v Dwyer* [1972] IR 416. *Dwyer* involves an extreme set of facts: the victims had gone in search of a fight, the defendant was attacked and had reasonable cause to fear for his life and the life of his friend, and the defendant was armed.

[28] [1995] 2 NZLR 673 (CA).

[29] New Zealand courts have held that "smouldering resentment", where in one case provocation given two weeks earlier was "revived" by a subsequent event, may be enough to amount to subjective evidence of loss of self-control (*Taaka* [1982] 2 NZLR 198). On the other hand, where there has been a substantial time lapse between the last identified provocative act and the killing, the defence may be precluded as the accused must have remained "in a continuous state of hot blood" or "remained in a state of uncontrolled anger throughout that period" (*Mita* [1996] 1 NZLR 95*)*. Similarly, any evidence that at any time between the alleged act of provocation and the killing the defendant regained his composure, will normally be fatal to the defence. (*Erutoe* [1990] 2 NZLR 28, 35).

[30] New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, *Report 73*, May 2001.

majority of battered defendants. It referred to the opinion of forensic psychiatrists that, while domestic violence may lead to a range of psychological responses in the victim, it does not generally cause the victim to develop abnormality of mind to the degree required by the defence of diminished responsibility.

Excessive force in self-defence

10.36 A defence of excessive force in self-defence has never been part of New Zealand law. The New Zealand Law Commission has recently considered the feasibility of a partial defence of excessive force in self-defence, with particular reference to battered women. In its subsequent report, the Commission acknowledged the strength of the arguments in support of excessive self-defence as a partial defence and commented that, of all the partial defences considered, this was the one they would most favour introducing into New Zealand law. The Commission observed that a plea of excessive defence more closely reflected the experiences of battered women who had killed their violent partners. This was because the "link between self-defence and excessive self-defence means it is more appropriate to the circumstances that are typical of the cases involving battered defendants than provocation or diminished responsibility".[31] Additionally, being closely aligned with the elements of self-defence, it would not involve completely new concepts. However, in the final analysis, the Commission declined to recommend its adoption on the basis that it would be inconsistent with the Commission's preference which was: not to retain or introduce partial defences but rather to rely on a sentencing discretion for murder to accommodate the diverse situations in which lesser degrees of culpability should be recognised.[32]

Scotland

Provocation

10.37 The defence of provocation in Scots law comprises three elements: (i) provocative conduct - this must consist of violence or infidelity; (ii) a loss of self-control which must have followed on immediately from the provocation; and (iii) an objective ingredient - the accused's reaction to the provocation must be such as might have been expected from an ordinary person. Most significantly for abused women who kill, the defence appears to exclude the possibility of cumulative provocation. There is evidence to suggest that those cases where women have killed their partners against a backdrop of sustained domestic violence ie cumulative provocation, are dealt with by way of prosecutorial discretion. This means that, in such cases, the Crown Office is willing to accept a plea of culpable homicide in circumstances that would otherwise amount to murder. In this way, although by no means formally recognised in law, killing in response to sustained domestic violence sometimes operates as an unofficial partial defence to murder in Scotland.[33]

[31] New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, *Report 73* (2001) para 67.

[32] See Appendix A, S Yeo, para 4.28.

[33] See Appendix E, J Chalmers, C Gane, F Leverick, p 181-183.

Diminished responsibility

10.38 The defence of diminished responsibility in Scotland reduces murder to culpable homicide if at the relevant time the accused was suffering from an abnormality of mind that substantially impaired the ability of the defendant, as compared with a normal person, to determine or control his acts.

Excessive force in self-defence

10.39 Excessive force in self-defence does not operate as a partial defence to murder in Scots law.

South Africa

Provocation

10.40 The South African model of provocation is radically different from the English law model. Effectively, the defence operates as an excusing condition where the fault of the defendant is reduced because of his or her reduced criminal capacity.

Diminished responsibility

10.41 Diminished responsibility usually means a finding of mental deficiency that does not amount to legal insanity. The concept of diminished responsibility appears not to be invoked much in practice, probably due to the fact that the concept of incapacity has been given a broad meaning and applies to both pathological incapacity (insanity) and non-pathological incapacity (conditions short of insanity affecting the accused's capacity, for instance emotional stress).

Excessive force in self-defence

10.42 The current approach to exceeding the bounds of private defence in South Africa is summarised in the case of *Ngomane*.[34] The defendant was not convicted of murder but found guilty of the lesser offence of culpable homicide – the unlawful, negligent, killing of another person – because "he ought to have realised that he was acting too precipitately and using excessive force and that, by stabbing the deceased with such a lethal weapon on the upper part of his body, he might unnecessarily kill him."

THE CASE LAW IN RELATION TO ABUSED WOMEN WHO KILL

Duffy

10.43 The starting point for discussion in English law is the case of *Duffy*. The defendant over a period of time had been subject to brutal treatment from her husband. On the night of the incident, there had been quarrels and physical fights. The defendant wished to take her daughter away but her husband prevented her from doing so. She then left for a short while and returned with a hatchet and a hammer. While her husband was in bed, she struck him with both weapons. Her defence was that she acted under provocation. The jury found her guilty of

[34] 1979 (3) SA 859 (A).

murder. In dismissing her appeal, Lord Goddard CJ approved the "classic direction" given to the jury by Devlin J:

> Provocation is some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a *sudden and temporary loss of self-control*, rendering the accused so subject to passion as to make him or her for the moment not the master of his mind.[35]

10.44 The 1990s saw a change in the way that the courts treated women who had killed their violent or abusive partners. In the cases of *Thornton (No. 2)*[36] and *Ahluwalia*,[37] the Court of Appeal confirmed that there must be a "sudden and temporary loss of self-control" as set out in *Duffy* above. Both cases recognised, however, that provocation is not ruled out as a matter of law either because the provocative conduct has extended over a long period or because there was a delayed reaction. From these Court of Appeal decisions, it appears that the loss of control, which must be "sudden", need not be "immediate".[38]

10.45 The application of the objective test has also been the subject of scrutiny as it applies in cases where abused women have killed. Under section 3 of the 1957 Act the jury can "take into account everything both done and said" which has an impact on the loss of control claimed by the defendant.[39] In both *Thornton (No. 2)* and *Ahluwalia* the whole course of marital discord endured by the respective defendants was admitted as evidence relevant both to the gravity of the provocation and the impact it would have had upon the self-control of a reasonable person.

Ahluwalia

10.46 In 1989 the defendant, after suffering many years of violence and abuse from her husband, threw petrol into his bedroom and set it alight. Her husband sustained serious injuries and burns and after six days he died.

10.47 There was a long history of violence and abuse suffered by the defendant at the hands of her husband. He had, during the ten years of their arranged marriage, subjected her to repeated and severe physical, sexual and emotional violence. He had assaulted her whilst she was pregnant, threatened to kill her and once tried to run her over. He started an affair two months before his death and had taunted the appellant with it. Despite this, the defendant begged her husband to stay with her.

[35] [1949] 1 All ER 932, 932. (emphasis added) The common law rule set out by Devlin J has been modified by section 3 of the Homicide Act 1957. In effect, section 3 does not create or codify the common law defence. Nothing is said about the outcome of a successful plea of provocation or about the burden of proof. However, the two restrictions on the availability of the defence at common law are now expressly removed. First, provocation can now take the form of "anything said or done", and second, it is now up to the jury to decide "whether the provocation was enough to make a reasonable man do as he did."

[36] [1996] 1 WLR 1174.

[37] [1992] 4 All ER 889, 898.

[38] *Smith and Hogan, Criminal Law* (10th ed 2002) p 368.

[39] See Part IV for a full analysis.

On the evening prior to his death the defendant tried to talk to her husband about their relationship but he refused and indicated that it was over. He demanded £200 from her for a bill and threatened to beat her if she did not produce it by the morning. He then began to iron and threatened that if she did not leave him alone he would burn her face with the iron. The defendant went to bed but could not sleep. She got up, went downstairs and collected a bucket of petrol (which she had bought a few days earlier), a lit candle, an oven glove for self-protection and a stick. She went to her husband's bedroom, threw in some petrol, lit the stick from the candle and tossed it into the room.

10.48 At her trial for murder, the defendant neither gave evidence nor adduced any medical evidence on her behalf. Her case was that she had only intended to inflict pain on the deceased, not seriously to harm him. Provocation was a second line of defence with reliance being placed upon the whole violent history of the marriage, as well as the events leading up to the night in question. On provocation, the judge directed the jury in accordance with the definition in *Duffy*. The jury returned a verdict of murder. In the subsequent appeal, it was argued that following the enactment of section 3 of the Homicide Act 1957 the direction given in *Duffy* was now wrong. Alternatively, it was argued that the defence of diminished responsibility, not put forward at the trial, was open to the appellant on the facts of the case.

10.49 The defendant's ground of appeal on the judge's direction to the jury on provocation was unsuccessful. Lord Taylor CJ held that the trial judge's reference to "sudden and temporary loss of self-control" was correct in law; and that there was no suggestion to the jury that they should or might reject her defence of provocation because her action did not immediately follow the deceased's provocative act or words.[40]

10.50 On the ground of diminished responsibility, the Court of Appeal referred to a medical report, which was available before the trial, that expressed the opinion that the defendant was suffering from endogenous depression at the time of the killing. The court noted that this is termed by some experts as a "major depressive disorder".[41] The appeal was allowed on the basis of this evidence.

Humphreys[42]

10.51 In 1985 the defendant, then aged 17, was living with the deceased who was 33 years old. Their relationship was tempestuous and, although he lived off her earnings as a prostitute, he was often jealous and beat her on a number of occasions. On the night in question, the defendant cut her wrists out of fear that the deceased, who was drunk, would beat her and force her to have sexual intercourse with him and possibly others. On his return, the deceased taunted her that she had not made a very good job of slashing her wrists, whereupon the appellant stabbed and killed him with a kitchen knife.

[40] [1992] 4 All ER 889, 896.

[41] *Ibid*, at p 900.

[42] [1995] 4 All ER 1008.

10.52 A psychiatrist gave evidence to the effect that the accused suffered from an abnormal personality with explosive and attention-seeking traits and immaturity. The judge directed the jury that in considering how a reasonable person might have reacted to the provocation that she had received they should ignore any particular excitability that she may have had. She was convicted of murder. Although initially it refused leave to appeal, in 1995 the court granted leave on the basis of new grounds of appeal relating to the judge's direction to the jury.

10.53 The Court of Appeal accepted the submission that the judge ought to have left to the jury's deliberation her attention-seeking trait and immaturity (but not in itself her excitability trait, since that connoted only that she lacked normal self-control) as eligible for attribution to the reasonable woman.

10.54 It also held that the summing up was defective in that a mere recital of the history of the relationship between the defendant and the deceased without any analysis or guidance was insufficient. The appeal therefore succeeded on two grounds, and a verdict of manslaughter was substituted for that of murder.

Thornton (No. 2)[43]

10.55 The defendant and the deceased married in 1988. The deceased had been violent towards the defendant prior to that marriage when they both lived together. The violence had briefly ceased at a time when the deceased went through rehabilitation for his drink problem and it was in that period when the couple had married. However, the deceased soon returned to drinking heavily and he again became violent towards the appellant. In 1989, between June 10 and 13, there were violent scenes and the police were called in on a number of occasions. The defendant's evidence at the trial was that on the evening of June 13 her husband came home drunk and lay on the couch. He told the defendant to get out. She left, but later returned and found her husband still inert on the couch. She attempted to persuade him to come to bed, but he threatened to kill her and called her a whore. She went to the kitchen and picked up a large kitchen knife with the intention of protecting herself if he became violent. He threatened to kill her again. She stabbed him once fatally.

10.56 In 1990 the defendant was convicted of the murder of her husband. In 1999 she was granted leave to appeal on the basis of further medical evidence and its potential impact on the defence of provocation. The defendant at her trial had not relied on this defence, although it was left to the jury by the judge.

10.57 The appeal was based on two characteristics which the defendant was said to have possessed at the relevant time. The first was a personality disorder and the second was the effect of the deceased's continued abuse over a period of time upon her mental make-up ('battered woman syndrome'). It was argued that these characteristics impacted on her reaction to the stress of the events at the time of the killing.

10.58 The Court of Appeal rejected an argument that the words "sudden and temporary" were no longer appropriate. The court held that, even if a defendant

[43] [1996] 1 WLR 1174.

were suffering from 'battered woman syndrome', she could not succeed in relying on provocation unless the jury considered she suffered or may have suffered a sudden and temporary loss of self-control at the time of the killing.[44] The court held that the judge had correctly directed the jury that there were two relevant questions for consideration: first, whether the provocative conduct in fact caused the defendant to lose her self-control; and second, whether the provocative conduct would have caused a reasonable person with the defendant's characteristics to have lost her self-control as the defendant did.

10.59 The court recognised that 'battered woman syndrome' might be relevant as it could form an important background to whatever triggered the actus reus. A jury might more readily find there was a sudden loss of control triggered by even a minor incident if the defendant had endured abuse over a period, on the "last straw" basis. Additionally, depending on the medical evidence, the syndrome may have affected the defendant's personality so as to constitute a significant characteristic relevant to the second question the jury had to consider in regard to provocation.[45]

10.60 The court held that the fresh evidence cast doubt on the jury's guilty verdict and quashed the conviction.[46]

Hobson[47]

10.61 In 1992, the defendant stabbed her abusive and alcoholic partner to death during an argument. At her trial for murder she gave evidence to the effect that she had armed herself with a knife in order to defend herself and had no intention of killing the deceased. The police gave evidence that the defendant had on thirty previous occasions reported the deceased's violence towards her and on four occasions made formal complaints. In summing up the judge left the defence of provocation, as well as self-defence, for consideration by the jury. The defendant was convicted of murder. In an appeal against conviction, she argued, on the basis of medical reports not available at the trial, that at the time of the killing she was suffering from 'battered woman syndrome', which was capable of giving rise to the defence of diminished responsibility.

10.62 Allowing the appeal and ordering a retrial, the Court of Appeal held that it was a matter of significance that 'battered woman syndrome' was not part of the Classification of Mental Diseases until 1994;[48] and that, having considered the material in the psychiatric reports, the verdict could not be regarded as safe.[49]

[44] *Ibid*, at p 1181.

[45] *Ibid*, at pp 1181-1182.

[46] *Ibid*, at p 1183.

[47] [1998] 1 Cr App R 31.

[48] The American Psychiatric Association expanded its definition of post traumatic stress disorder to include battered woman's syndrome in 1994. See the Diagnostic and Statistical Manual of Mental Disorders (4th ed 1994).

[49] [1998] 1 Cr App R 31, 35.

Smith (Josephine)[50]

10.63 In 1992, the defendant shot and killed her husband while he was asleep. Her case was that she was suffering from a depressive illness, giving rise to a defence of diminished responsibility. The defendant and others gave evidence that she had been subjected to ill treatment on a regular basis over a long period of time. This ill treatment included infliction of bruises, humiliating sexual demands and threats to their children. The defendant's medical records showed that she had a long-standing history of anxiety and depression. In 1993 she was convicted of murder. On appeal in 2002, it was argued on her behalf that developments in the law of provocation and further evidence showed that the conviction was unsafe.

10.64 There were four grounds of appeal. Two related to the summing up; first, that the judge was wrong in restricting the jury's attention to the events immediately surrounding the killing, rather than inviting it to consider the history of potentially provocative conduct and second, that the judge failed to give the jury an analysis of what conduct was capable of amounting to provocation and how the jury should approach the issue. The third and fourth grounds of appeal related to fresh medical evidence.

10.65 The Court of Appeal held that the conviction of murder was unsafe. Although the judge in his summing up directed the jury to consider all the circumstances, including the appellant's medical history, panic attacks and depression, he had done so only in the context of diminished responsibility. In relation to provocation, the judge had focused only on the arguments that occurred on the day of the killing. This, the Court of Appeal held, may have misled the jury to conclude that the defendant's medical history, although relevant to diminished responsibility, was not relevant to provocation.

10.66 In accordance with the judgment of the House of Lords in *Smith* (*Morgan)*,[51] her particular characteristics were to be taken into account by the jury in considering whether a reasonable person might have acted as she did. This must be taken to have been the law at the time of the defendant's trial.

THE SHORTCOMINGS OF THE DEFENCES OF PROVOCATION, DIMINISHED RESPONSIBILITY AND SELF-DEFENCE AS A LEGAL RESPONSE TO THE CASES OF ABUSED WOMEN WHO KILL

Provocation

10.67 Although section 3 of the Homicide Act 1957 abolished the common law rules as to what can or cannot amount to provocation,[52] the subjective question remains unchanged - did the defendant kill whilst having lost self-control as a result of something said or done by another? If that condition is satisfied, the jury must go

[50] Unreported Court of Appeal, Criminal Division, 4 November 2002.

[51] [2001] 1 AC 146. Discussed in Part IV paras 4.69 – 4.140.

[52] *Camplin* [1978] AC 705.

on to consider the objective element, how a reasonable person would have responded.[53]

10.68 As discussed above, in 1993 the Court of Appeal in *Ahluwalia* made the law of provocation more amenable to abused women who kill by holding, although *obiter*, that a "cooling time" between the provocative act of the deceased and the killing was no longer an absolute legal bar to the defence.

10.69 Despite this progress, the requirement of a "sudden and temporary loss of self-control" will continue to pose problems for abused women who kill in an outwardly calm manner.[54] Although the courts have given a generous interpretation to this element of the defence,[55] in *Ahluwalia* Lord Taylor CJ, emphasised that the phrase "sudden and temporary loss of self-control" encapsulates an essential ingredient of the defence of provocation.[56]

10.70 Lord Taylor noted in *Ahluwalia* that the interval between the provocative conduct and the defendant's reaction was important since it could afford an opportunity for the defendant to regain self-control. A lengthy time interval may indicate that the subsequent attack may have been planned or based on motives such as revenge or punishment. Lord Taylor did, however, recognise that this type of indication depends entirely on the facts of the individual case.[57]

10.71 The Court of Appeal in *Thornton (No. 2)* confirmed this approach and held that a defendant suffering from 'battered woman syndrome' cannot rely on provocation unless there was a "sudden and temporary loss of control" at the time of the killing.[58] This insistence upon a loss of self-control has been criticised.[59]

10.72 There is no avoiding the fact that section 3 is explicit on the point that there must be a loss of self-control. Consequently, in cases of 'battered woman syndrome', juries are faced with an unenviable and difficult task. They may well empathise with the sufferings of the defendant at the hands of the deceased. At the same time, they may hear evidence of planning and deliberation by the defendant. Such contradiction encourages a "sympathy lottery" rather than equal treatment of defendants.[60]

[53] See Part IV for a full analysis.

[54] D Nicolson and R Sanghvi, "More Justice for Battered Women" (1995) 145 NLJ 1122.

[55] See *Baille* [1995] Crim LR 739; *Pearson* [1992] Crim LR 193.

[56] [1992] 4 All ER 889, 895.

[57] *Ibid*, at pp 895-896.

[58] [1996] 1 WLR 1174.

[59] K O'Donovan, "Defences for Battered Women who Kill" (1991) 18 J Law and Soc 219; D Nicholson, "Telling Tales: Gender Discrimination Gender Construction and Battered Women who Kill" (1995) 3 Feminist Leg Stud 185; A McColgan, "In Defence of Battered Women who Kill" (1993) 130 J Law and Soc 508; C Wells, "Battered Women Syndrome and Defences to Homicide: Where Now?" (1994) 14 Legal Studies 266.

[60] A P Simester and G R Sullivan, *Criminal Law Theory and Doctrine* (2nd ed 2003) p 347.

10.73 Where there is no evidence to indicate that she acted as a result of a "sudden and temporary loss of self-control", the abused woman who kills may still be entitled to rely upon the partial defence of diminished responsibility.

Diminished Responsibility

10.74 Professors Simester and Sullivan have commented that, in relation to the law of diminished responsibility, the gap between articulated judicial decisions and day-to-day practice can be a wide one.[61] Many cases involving a plea of diminished responsibility will not result in a contested trial. Not infrequently, faced with the prospect of expert testimony, the prosecution will indicate that it is prepared to accept a plea of not guilty to murder but guilty of manslaughter on the ground of diminished responsibility. In this manner, many killings induced by abusive relationships may be recorded as manslaughter. Thus the defence of diminished responsibility provides a pragmatic solution to ameliorating what may otherwise be an unduly harsh position.

10.75 The scarcity of cases before the appellate courts not only means that there is little opportunity for the legal issues involved to be addressed, but also that the accused is reliant upon prosecutorial discretion. The potential for inconsistency in approaches is obvious. Moreover, the law ought to be able to define with clarity where the boundaries to murder and manslaughter lie. It is wrong to abdicate this responsibility to a prosecutor's discretion.

10.76 Diminished responsibility may provide the legal basis for dealing with cases of cumulative provocation where the defendant's actions were preceded by planning and deliberation.[62] The defendant may claim that, having been subjected to a long course of cruel and abusive behaviour, she was experiencing grave distress or depression which amounted to a mental abnormality which substantially diminished her responsibility for her actions.

10.77 In *Ahluwalia*, although the defence of provocation was rejected, the defendant's appeal was allowed on the grounds that diminished responsibility had not been raised at her trial despite medical evidence suggesting that she was suffering from an abnormality of mind (endogenous depression) when the offence was committed. In *Thornton (No.2)* the defendant relied on the defence of provocation but at the retrial the case was decided on diminished responsibility. In *Hobson* the defence successfully relied on diminished responsibility on appeal. The burden of proof in the defence of diminished responsibility, on a balance of probabilities, lies with the defendant. It requires medical evidence that the defendant was afflicted with some condition falling within the terms of section 2 of the 1957 Act.[63] There appears to be some inconsistency in the willingness of psychiatrists to testify on the diagnosis of the defendant's mental health. Some experts may be uncomfortable with classifying as an "abnormality of mind" what essentially may be ordinary

[61] *Ibid*, at p 587.

[62] *Ahluwalia* [1992] 4 All ER 889; *Thornton* [1996] 1 WLR 1174; *Hobson* [1998] 1 Cr App R 31.

[63] *Dix* (1982) 74 Cr App R 306, 311(CA). The Court spoke of medical testimony being "a practical necessity if that defence is to begin to run at all".

reactions to a highly stressful situation such as an abusive and violent relationship. This element of arbitrariness is far from ideal.

10.78 Some theorists are critical of reliance on diminished responsibility as it shifts the focus from the deceased's violence to the woman's state of mind. This, in effect, pathologises a woman's actions and implies that had her mental faculties not been impaired she would have continued to be a "happy punch bag".[64] There is the further irony that the more robust the defendant is the less likely it is that she will succeed on a defence of diminished responsibility. In some cases, the success of the defence may depend upon the strength or weakness of a woman's character rather than the circumstances.

Self-defence

10.79 Self-defence is primarily a creation of common law and is summarised in Part IX. Currently the law involves two requirements: a belief in the *necessity* to use force at all, and whether the amount of force used was a *reasonable* response to the circumstances.

10.80 Force cannot be justified to prevent a crime or to defend against an attack unless it was a necessary and reasonable means of doing so. Therefore, if an abused woman is aware that a safe alternative to the use of force is available, ordinarily she should take it. Following the decision in *Julien*[65] this does not mean that an abused woman will lose the right to defend herself by remaining with her abuser. The question is simply whether the use of force by the defendant was reasonable: a failure to retreat is no more than a factor to be taken into account when determining the reasonableness of the defendant's conduct. The effective prevention of an attack may require use of force.[66] There is no requirement that the defendant must wait until the victim actually attacks before making a defensive response. It suffices that the victim's attack was imminent.

10.81 Research suggests that many abused women who kill their abusive partners do so in order to escape the threat of death or serious injury, whether or not the abuser is actually physically attacking them at the time of the killing. McColgan argues that in both situations a confrontation exists and that the traditional model of self-defence needs to take into account the position that an abused woman finds herself in:

> the objective question of whether the defendant's use of force was reasonable must be assessed in light of her circumstances, a recognition which is as valuable to the woman whose reaction is a product of months or years spent under a Damoclean sword of threatened violence, as it is to the man whose ability to rationally

[64] A McColgan, "In Defence of Battered Woman Who Kill" (1993), 13 Oxford Journal of Legal Studies 508.

[65] [1969] 1 WLR 839 (CA).

[66] "A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike" *Beckford v R* [1988] AC 130, 144, *per* Lord Griffiths.

> assess the measure of response required to a sudden attack is adversely affected by the unexpected nature of that attack.[67]

10.82 Because the defence depends on use of force being necessary to protect the person using it from an imminent attack, it is not available to an abused woman who kills her abuser when, for example, he is asleep.[68]

10.83 On the issue of reasonableness, in *Ahluwalia*, in relation to the partial defence of provocation, Lord Taylor CJ stated that the reasonableness of the defendant's reactions fell to be considered in light of the "history of her … marriage, the misconduct and ill-treatment of the appellant by her husband."[69] It has been suggested that this approach might be extended to the reasonableness requirement needed for self-defence. McColgan argues that the reasonableness of the defendant's conduct should not be considered in a vacuum. The cyclical occurrence of the abusive conduct and the defendant's apprehension of danger, as well as the lack of alternatives available to her, are vital to understanding the nature of the threat the defendant was under and the force she used.[70]

10.84 In the recent case of *Martin (Anthony)*, the Court of Appeal in an *obiter dictum* declined to close the door completely on the potential relevance, in exceptional circumstances, of a defendant's personal characteristics to the question whether force used was excessive.[71] It remains to be seen whether this might lead to the admission of evidence of the effect of abuse on the mind of the defendant in considering the reasonableness of the force used in cases where abused women kill their abusive partners.

CONCLUSIONS ON THE ADEQUACY OF ENGLISH LAW IN RELATION TO ABUSED WOMEN WHO KILL

10.85 We consider that the law does not always deal satisfactorily with abused women who kill, especially by comparison with the way in which it treats certain other types of killing. If a woman in an abusive relationship kills her partner in order to protect herself from further violence, she may have no defence to murder (under provocation, diminished responsibility or self-defence). She is therefore punished with life imprisonment in circumstances where such a sentence may be considered disproportionate to her culpability. But if her partner in a sudden rage kills her because she has been unfaithful, he may succeed in a defence of provocation and

[67] A McColgan, "In Defence of Battered Women Who Kill" (1993) 13 Oxford Journal of Legal Studies 508 at p 520.

[68] See J Dressler, "Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters" in S Shute and A P Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p 259. Dressler argues that 'battered woman syndrome' evidence should only play a limited role in self-defence cases. His thesis is that society should not justify non-confrontational killings, even of abusers, where the homicide is not necessary on the immediate occasion.

[69] [1992] 4 All ER 889, 898.

[70] A McColgan, "In Defence of Battered Woman Who Kill" (1993) 13 Oxford Journal of Legal Studies 508 at p 528.

[71] [2003] QB 1.

be convicted of the lesser offence of manslaughter, even though his culpability might well be considered to be greater.

10.86 In order to remove this unfairness, the law would have to be altered in one of two directions.

10.87 One approach would be to abolish the mandatory life sentence. A judge would then have discretion in sentencing a woman who has killed her abusive partner. However, unless the defence of provocation is also abolished, there would still be a real possibility of inequity between an abused woman who kills and that of a man who kills his partner in circumstances entitling him to the defence of provocation.

10.88 The other approach would be to extend the availability of a defence to murder to an abused woman who kills either by altering the boundaries of an existing defence or by creating a new defence.

10.89 Any reform of the law needs to be both principled and practicable, taking into account not only its application to cases of abused women who kill but also its wider potential effect.

OPTIONS FOR REFORM

10.90 The discussion which follows inevitably contains some overlap with, and repetition of, matters considered in earlier Parts dealing specifically with provocation, diminished responsibility and excessive use of force in self-defence.

Provocation

10.91 In Part IV we examined the problems of the law of provocation. In Part XII we consider the options of abolishing it or retaining it in a modified form. The defence does not truly reflect the circumstances of many abused women who kill. Even where, having suffered gross abuse from her partner and in fear of further violence, an abused woman kills that partner, she may be unable to rely on the defence of provocation because at the time of the killing she was not acting under the requisite loss of self-control.

10.92 In Part XII we consider whether the requirement of loss of self-control should be removed in any reformulated version of the defence, but there are powerful arguments against doing so. To extend provocation to planned killings would have wide and undesirable repercussions. In truth, provocation is a defence intended to apply to a defendant who acts with sudden violence in acute circumstances, whereas the abused woman who kills is generally responding to a chronic problem. Even if a clear and coherent defence of provocation can be reformulated, it is unlikely to be an appropriate defence for many abused women who kill.

Diminished responsibility

10.93 Some abused women who kill are suffering from abnormality of mind within section 2 of the 1957 Act, but many are not. It would not be right in principle to try to redefine an abnormality of mind defence to include people who are not suffering from a classified mental abnormality, not least because that would involve artificially pathologising the defendant.

A 'battered woman syndrome' defence

10.94 It is recognised that abused women may suffer from mental health difficulties, such as depression, anxiety and post traumatic stress disorder. However, from our research to date there appears to be no generally accepted medical position on 'battered woman syndrome'. It is not a diagnosis but an explanation of how some women are affected by being in an abusive relationship. We do not see that it is a concept that would satisfactorily form the basis of a specific defence. Furthermore, defences to murder ought to be based on principles of general application.

Pre-emptive use of force in self-defence or self-preservation

10.95 In Part IX we considered a possible partial defence of excessive use of force in self-defence. We addressed those situations in which some use of force in self-defence was lawful, but not the degree of force used. In law, force may only be used in defence of oneself or another in face of an actual attack or where an attack is honestly believed to be imminent. We now consider the case for and against a partial defence in circumstances where a person uses lethal force to prevent violence by another, but the feared violence is not sufficiently imminent to justify in law the use of force in self-defence. Some writers refer to this as self-preservation, but we prefer the term 'pre-emptive force in self-defence'.[72]

10.96 The requirement of a belief in imminent danger in order to justify use of force in self-defence contains some degree of flexibility. In the leading case of *Palmer*, Lord Morris of Borth-y-Gest said:

> If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment…[73]

10.97 In the case of *Kelly*, it was held that soldiers in Northern Ireland were entitled to shoot the driver of a vehicle (whom they had genuinely but mistakenly believed to be a terrorist) to stop him from escaping and to prevent him from committing future terrorist offences even though there was no suggestion that any such crime was imminent.[74]

10.98 In the context of the abused woman who kills, it is strongly arguable that what ultimately matters is not how immediate was the threat, but whether the abused woman had a fair and reasonable opportunity to do other than she did in meeting the threat.[75]

[72] Self-preservation conjures up wider situations, in particular those associated with a defence of necessity, which is not a defence to murder. See *Dudley and Stephens* (1884) 14 QBD 273.

[73] [1971] AC 814, 831.

[74] [1989] NI 341. The decision was upheld by the European Court of Human Rights. The Commission noted that there was a high probability that shots fired at the driver would kill him or inflict serious injury. See *Kelly v UK* (1993) 74 DR 139.

[75] This proposition is derived from Jeremy Horder's cogent argument. See, J Horder, "Killing the Passive Abuser: A Theoretical Defence" in S Shute and A P Simester (eds) *Criminal Law Theory: Doctrines of the General Part* (2002) at p 283.

10.99 This point can be illustrated by one of McColgan's examples, where someone is held hostage by terrorists who let him know, expressly or by implication, that he is to be seriously injured or killed within the next few days. It is unlikely that the courts would require him to wait until a weapon was actually raised to him before they allow him to use violence against his captors.[76] The significant feature of such a case, however, is that the victim is held against his or her will without access to outside help. We do not think that expansion of the concept of "imminent" to extend the reach of the *complete* defence of self-defence in cases such as *Kelly* would apply in cases of domestic violence where the abused partner may have access to external assistance.

10.100 We think that it would be wrong in principle for the law to permit the use of pre-emptive force in protection of oneself or another against a perceived threat if there are other means of protection available to the person concerned.

10.101 There is, nevertheless, a case to be considered for the introduction of a *partial* defence to murder in circumstances where the defendant kills another *in the honest belief that it is the only way to prevent grave future violence to him or herself*.

10.102 We would not envisage making it a requirement that the belief be reasonably held, because that would exclude an abused woman who acted in a moment of despair, when she herself might recognise afterwards that there were other ways in which she might have dealt with the situation.

10.103 We do not think that a woman who kills an abusive partner in such circumstances should face a mandatory life sentence. The introduction of such a partial defence would be one means of avoiding that outcome.

10.104 We have previously said that any changes to the defences to murder should accord with sound general principles. We do not think that the defence under consideration should be specifically limited to women in an abusive relationship. Consider, for example, the case of a member of a minority race who is the victim of repeated violence or threats of violence and who kills a perpetrator of that violence; or a school child who is the object of endless bullying and who, in despair, chooses to kill his tormentor rather than, as is sometimes the case, committing suicide.

10.105 There is also an argument that such a partial defence should extend to a person who kills another in the honest belief that it is the only effective way to prevent grave future violence to another person, at any rate if that other person is a close relative or (possibly) friend. A woman may be afraid to leave a violent partner more from fear of what he will do to her children than for herself. Or a son may kill his mother's violent partner (or help her to do so) in an honest belief that it is the only effective way to protect her from further grave violence. However, we would not wish to see such a defence available, for example, to vigilante groups.

10.106 There are serious arguments against any introduction of such a partial defence.

[76] A McColgan, "In Defence of Battered Women Who Kill" (1993) 13 Oxford Journal of Legal Studies 508, at p 518.

10.107 First, it is arguable that a better course would be to abolish the mandatory life sentence for murder than to create a new partial defence. This line of reasoning is linked with arguments about the future of the defence of provocation. If provocation and the mandatory sentence were both abolished, the introduction of a partial defence of the kind under consideration would be unnecessary and inappropriate.

10.108 Second, an important function of the criminal law is to recognise and assert certain societal standards. There is sound general policy behind the law's refusal to sanction the use of pre-emptive force in self-defence. To allow a partial defence to murder of pre-emptive force in self-defence could be seen as involving a relaxation of those standards at a time when violence in society is a grave concern. The availability of such a defence may send out the wrong signals. This might be of special concern in areas affected by racial and religious tensions. We would value the views of police and community leaders in these areas.

10.109 Third, it would be most undesirable if members of rival criminal gangs could rely upon such a defence. Although it would be possible to exclude from the defence a person who had acted unlawfully or unreasonably in putting himself or herself in the position of being exposed to threatened violence, such an exclusion could give rise to difficult evidential and definitional questions. For example, it could involve introducing evidence of bad character against the defendant, which would ordinarily be inadmissible and could be highly prejudicial to a fair trial of the main issues. There could also be difficult questions in relation to whether the defendant had acted unreasonably in his or her relationship with the deceased. This could particularly be so in the case of the woman who has failed to extract herself from the abusive situation for valid psychological or other reasons.

10.110 Another possible way of preventing the suggested defence being relied on by warring criminals would be to make it a requirement that the defendant's fear of future violence was based on a history of previous serious violence or abuse. But this would also have its difficulties. If a history of previous serious violence or abuse were to be a condition of the defence, rather than merely an evidential consideration, it would have to be suitably defined. Issues would arise, not only about the level of previous violence or abuse required, but also about whether it needs to have involved both (or either) of the defendant and the deceased. It could be over-restrictive if it is conditional upon the previous violence or abuse having been directed towards the defendant. Consider again the case of an abused woman's son who kills, or helps his mother to kill, her abuser. It could also be over-restrictive if the previous violence had to be shown to have come from the deceased. Consider the following examples:

(1) D is a shopkeeper. He is a member of an ethnic minority. He and his family have been victims of repeated racist verbal abuse and physical violence by a local gang but D cannot prove which of them carried out the serious attacks and police investigations are met with a wall of silence. Eventually, after receiving further anonymous threats to set fire to his shop at night (which D honestly believes will be carried out), D kills the gang leader.

(2) D is a woman who has experienced serious violence in the course of a previous abusive relationship. She enters a new relationship. She soon experiences the same escalating pattern of abuse from her new partner.

Although there has not yet been serious physical violence from him, one evening he arrives home drunk, accuses her of infidelity, tirades her with verbal abuse including threats to kill her and her children (which D honestly believes will be carried out) and then falls asleep. In despair (born of her experience during both relationships) she kills him.

10.111 In conclusion we would observe that the criminal law cannot be a panacea for the ills of society. Domestic violence is a grave social evil and women abused by their partners face problems of an extremely serious nature. These problems require solutions of a social/political nature including provision of safe refuges for women who are victims of domestic violence (and their children), financial support and child protection. We know that the Government and the family courts are deeply aware of and concerned about these problems. Abused women who deliberately kill their abusive partners are entitled to justice and compassion, but it does not necessarily follow that the only or the best way of achieving that result it to create a new defence.

10.112 In Part XII we present options for reform and invite consultees' views on these issues.

PART XI
PREVIOUS RECOMMENDATIONS FOR REFORM OF DIMINISHED RESPONSIBILITY AND PROVOCATION

11.1 In this Part we identify previous proposals which have been made, since the enactment of the Homicide Act 1957,[1] for reforming the two partial defences to murder. In doing this we have adopted for the most part a thematic approach. In addition, in relation to provocation, we refer briefly to the Parliamentary debate on clause 3 of the Homicide Bill as we believe that the content of the debate is helpful background in understanding why subsequent recommendations for reforming the law of provocation have been promulgated. The Parliamentary debate was in turn informed by the Royal Commission on Capital Punishment 1949 – 1953 Report.[2]

DIMINISHED RESPONSIBILITY

The Report[3] of the Committee[4] on Mentally Abnormal Offenders

11.2 The Butler Report, having considered the operation of section 2 of the 1957 Act, addressed the issue of whether the defence of diminished responsibility should be abolished.[5] The issue was not, however, considered in isolation. The relevant section is entitled "The case for abolition of diminished responsibility and of the mandatory life sentence".[6] The justification for linking abolition of the defence with abolition of the mandatory life-sentence was:

> Diminished responsibility is a special device for, as it were, untying the hands of the judge in murder cases. Although it has the *subsidiary advantage* of avoiding stigmatising as murderers certain individuals who may not be fully responsible for their actions, we think that the need for its continuance depends *essentially* on whether the fixed sentence of life imprisonment for murder is itself to remain.[7]

11.3 The Butler Report was expressing the view, therefore, that the continued existence of the diminished responsibility defence could be justified only if the mandatory life sentence were retained. As a logical aside, the Report rejected the suggestion

[1] In this Part referred to as "the 1957 Act".

[2] (1953) Cmd 8932; in this Part referred to as "The Royal Commission's Report".

[3] (1975) Cmnd 6244; in this Part referred to as "the Butler Report".

[4] In this Part referred to as "the Butler Committee".

[5] The Butler Report, at paras 19.8 - 19.13.

[6] *Ibid*, at p 244.

[7] *Ibid*, at para 19.8. (emphasis added)

that the defence should be extended to other offences, despite the fact that some witnesses who appeared before the Committee had urged that it should.[8]

11.4 The Butler Report concluded[9] that in principle the continuance of the mandatory life sentence was unwarranted. Accordingly, the preferred avenue of reform involved the abolition of both the mandatory life sentence and the defence of diminished responsibility. Mindful of the fact, however, that it had previously referred to the "subsidiary advantage" of the defence, the Butler Committee recommended that:

> the jury [should be] … empowered to return a verdict of murder (or manslaughter) by reason of extenuating circumstances, the extenuation being left undefined by law.[10]

11.5 The Butler Report did however acknowledge the possibility that, contrary to its wishes, the mandatory life sentence might be retained. In those circumstances, it proposed that:

> Section 2 of the Homicide Act [should be retained] in its essentials but [with] … an improvement in the wording.[11]

The recommendation as to "improvement in the wording" consisted of a proposal that the section should be reformulated in the following terms:

> Where a person kills or is a party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in section 4 of the Mental Health Act 1959 and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter.[12]

11.6 The implications of the reformulation were described in the following terms:

> By tying the section to the definition of mental disorder in the Mental Health Act the formula provides a firm base for the testifying psychiatrists to diagnose and comment on the defendant's mental state, whilst it leaves the jury to decide the degree of extenuation that the mental disorder merits. In theory the omission of the reference to the impairment of mental responsibility would slightly widen the defence but that would not … matter because if the judge thought that the disorder was not such as would justify either a medical disposal or a mitigated penalty disposal, it would still be open to him to give the life sentence.[13]

[8] The Butler Report, at para 19.9. The Royal Commission's Report had *contemplated* such a possibility – see para 413 of that Report.

[9] The Butler Report, at paras 19.12 - 19.13.

[10] *Ibid*, at para 19.16.

[11] *Ibid*, at para 19.17.

[12] *Ibid*.

[13] *Ibid*.

11.7 In addition to proposing, should the mandatory life sentence be retained, that there be a reformulation of section 2 the Butler Report also proposed that:

(1) the legal burden of proof should no longer be on the accused. Instead the burden should be no more than one of adducing evidence to raise the issue,[14] and

(2) it should be regarded as a proper practice for the prosecution, where it was in possession of evidence indicating that the defence could be made out, to charge manslaughter in the first instance rather than murder. If the defence, however, wished to resist evidence of mental disorder, the charge should be murder.[15]

11.8 The Butler Report's least favoured option for reform involved retaining the mandatory life sentence but abolishing the defence of diminished responsibility. The judge on a conviction of murder should have the discretion, where appropriate medical evidence was forthcoming, to make a hospital order or a probation order with a condition of psychiatric treatment in place of imposing the life sentence. He would still be able to impose a determinate sentence or to give a discharge.[16]

11.9 This option was articulated without enthusiasm:

> However, once the principle of a mandatory sentence is breached there is then no reason for preventing the full exercise of judicial discretion. Also the defendant, who may have been severely disordered at the time of the offence, may have recovered by the time of the trial, in which case a hospital order could not be made and a psychiatric probation order would be inappropriate.[17]

The Criminal Law Revision Committee[18]

11.10 In 1980 the CLRC published its Fourteenth Report.[19] The CLRC was divided as to whether the mandatory life sentence should be abolished. It concluded that it was not in a position to recommend any change.[20] It was not persuaded, therefore, that the option favoured by the Butler Report – abolition of both the mandatory life sentence and the defence of diminished responsibility – was the best way

[14] Para 19.18. The Butler Report proposed that where a defendant pleaded insanity he should no longer have to bear the legal burden and it was thought that the position should be the same for diminished responsibility.

[15] Para 19.19.

[16] The Butler Report, at para 19.20.

[17] *Ibid*.

[18] In this Part referred to as "the CLRC". The recommendations of the CLRC in relation to both diminished responsibility and provocation were made alongside a recommended change to the mens rea requirements of murder. The CLRC recommended (para 31) that the mens rea should consist either of an intention to kill or, where death was caused by an unlawful act, an intention to cause serious injury knowing that the act involved a risk of causing death.

[19] Offences against the Person (1980) Cmnd 7844.

[20] *Ibid*, at para 61.

forward. It favoured[21] retention of both the mandatory life sentence and the defence of diminished responsibility.[22] It did agree, however, with the Butler Report that the wording of section 2 was unsatisfactory and in need of rewording.[23]

11.11 The CLRC differed from the Butler Report, however, as to the form the rewording should take. After some hesitation it was persuaded that the definition of "mental disorder" in section 4 of the Mental Health Act 1959 was appropriate for the purposes of reformulating the wording of section 2.[24] The CLRC, however, preferred a formula which, instead of referring to mental disorder such as "to be an extenuating circumstance which ought to reduce the offence to manslaughter" required that it be:

> such as to be a *substantial enough reason* to reduce the offence to manslaughter.[25]

11.12 The reason for this proposed departure from the recommendation of the Butler Committee was that it was felt that the latter's proposed reformulation on this point was too *lax*.[26] It would necessarily involve the judge giving:

> some guidance to the jury as to what extenuating circumstances ought to reduce the offence, and in practice that means that the mental disorder has to be substantial enough to reduce the offence to manslaughter … [T]he definition should be tightened up so as to include that ingredient upon which the jury will have to be directed …[27]

[21] In the negative sense that, because it was divided, it felt unable to recommend any change.

[22] The CLRC did in fact consider whether the defence of diminished responsibility should be retained even if the mandatory life sentence *was* abolished. Again the Committee was divided. The majority were of the view (Cmnd 7844, at para 76) that the defence should be retained, the reason being that the jury's verdict, accepting or rejecting the defence, would assist the judge in sentencing. Further, if the defence was abolished there was a risk that the jury might be reluctant to convict of murder in a clear case of diminished responsibility. Rather than leaving the jury with a choice of convicting of murder or acquitting, it was to the public advantage to give them the choice of an intermediate verdict. Finally, a verdict of manslaughter on the ground of diminished responsibility, as opposed to murder, would better enable the public to understand and accept why a seemingly light sentence had been passed in a case where a human life had been taken.

[23] Offences against the Person (1980) Cmnd 7844, at para 92.

[24] *Ibid*. Initially, on this particular issue, the CLRC had expressed concern that the Butler Committee's rewording was too *restrictive* in that some offenders who would come within section 2 as originally enacted would fall outside the terms of the proposed reformulation, for example a depressed father who killed his severely handicapped subnormal child or a morbidly jealous person who killed his or her spouse. The concern of the CLRC was that such persons might not be considered to be suffering from a "mental disorder" for the purpose of the reformulated section.

[25] *Ibid*, para 93. (emphasis added)

[26] *Ibid*.

[27] *Ibid*. The CLRC also contemplated the formulation "the mental disorder was of such a degree as to be a substantial reason to reduce murder to manslaughter". This and a similar formulation, while not completely rejected, were considered to be less satisfactory formulations on the ground that it is not possible to measure degrees of mental disorder.

11.13 The CLRC also considered whether the defence should be available to a charge of attempted murder. It concluded that it should and if successfully pleaded should result in a conviction for attempted manslaughter.[28] At the same time, it recommended that diminished responsibility should not be extended to offences other than murder and attempted murder.[29]

11.14 The CLRC agreed with the Butler Committee that the defendant should bear no more than an evidential burden.[30] The CLRC pointed out that it was unusual for the burden of proof to be placed on the defendant in serious charges. In addition, the CLRC felt that juries were likely to be confused both by the difference between being sure and satisfied on a balance of probabilities and by "the different placings of the burden of proof for different offences".[31] The CLRC agreed with the Butler Committee that the burden of proof lies on the prosecution in relation to both insanity and diminished responsibility.

The Law Commission

11.15 Although the Law Commission had originally adhered to the view that if the mandatory life sentence was abolished[32] so too should the defence of diminished responsibility, by 1989 it was of the opinion that the defence (and also provocation) should be retained regardless of whether the mandatory sentence was retained.[33] The Commission had been persuaded that it would be wrong to treat diminished responsibility (and provocation) as simply questions of judicial sentencing discretion.[34]

11.16 In 1989 the Law Commission published a draft Criminal Code Bill together with Report and Commentary.[35] Clause 56 of the draft Bill adopted the CLRC's definition of diminished responsibility with one qualification which consisted of the substitution of "mental abnormality" for "mental disorder".

11.17 The Law Commission did not include any provision in the draft Criminal Code Bill in relation to incidence of the burden of proof. In its Memorandum to the House of Lords Select Committee on Murder and Life Imprisonment it did, however, state:

[28] *Ibid*, at para 98. Its reasons will be referred to when we consider its proposals in relation to the defence of provocation - see para 11.35.

[29] *Ibid*.

[30] *Ibid*, at para 94.

[31] *Ibid*.

[32] The Law Commission favoured the abolition of the mandatory life sentence – see *Minutes of Evidence taken before the Select Committee on Murder and Life Imprisonment* (HL Paper 20-vi), Session 1988-89, *Memorandum by the Law Commission*, para 9.16.

[33] *Ibid*, at para 7.3.

[34] *Ibid*. The stigmatisation argument was emphasised.

[35] Criminal Law: A Criminal Code for England and Wales, Volumes 1 and 2 (1989) Law Com No 177.

> We agree with the CLRC's recommendation that, as in the case of provocation, a defendant pleading diminished responsibility should only have to adduce enough evidence to raise the issue.[36]

11.18 In its Memorandum the Law Commission did not address the issue of whether the defence (or provocation) should be extended to attempted murder.

The House of Lords Select Committee on Murder and Life Imprisonment[37]

11.19 In its Report[38] the Select Committee, unlike the CLRC, recommended that the mandatory life sentence should be abolished. In agreement with the reasoning of the majority of the CLRC, however, it recommended that the defence of diminished responsibility should be retained regardless of whether or not the mandatory life sentence was retained.[39]

11.20 The Select Committee, acknowledging that "weighty criticism" had been made of the substance of the defence, stressed that consideration of the "technical problems" associated with the defence was outside its terms of reference. Accordingly, it confined itself to noting that the issues had been considered by the CLRC and that the recommendations of the CLRC had been incorporated by the Law Commission into the draft Criminal Code.[40]

Criticism of previous approaches to reform

11.21 Professor Mackay maintains that the approach adopted by all law reform bodies has failed to pose a fundamental question:

> what reform bodies have failed to address is whether it is desirable to retain a diminished responsibility plea in *any* form *irrespective of whether the mandatory penalty for murder is retained or abolished*. In this context, it is noteworthy that, while different jurisdictions rarely dispute the need for some form of insanity defence within the structure of criminal law excuses, there is not the same degree of consensus in relation to diminished responsibility.[41]

It should be pointed out that Professor Mackay's criticism overlooks the deliberations of both the CLRC and the Select Committee. Both bodies did consider whether the defence should be retained even if the mandatory life sentence was abolished. What is apparent, however, is that previous discussion has tended to assume that the case for the existence of a defence of diminished responsibility, whatever its form, is *self-evident so long as there is the mandatory life*

[36] *Minutes of Evidence taken before the Select Committee on Murder and Life Imprisonment* (HL Paper 20-vi), Session 1988-89, *Memorandum by the Law Commission*, para 7.6. Although the Law Commission was favouring a change in the law, the nature of the codification exercise did not permit it to include a clause to that effect in the draft Criminal Law Code.

[37] In this Part referred to as "the Select Committee".

[38] Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78—1).

[39] *Ibid*, at para 83.

[40] *Ibid*, at para 85.

[41] R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) p 204. (emphasis added)

sentence. It is because of this that discussion has focused on reforming the defence. In this sense, Professor Mackay is correct in suggesting that a fundamental question has been ignored.

PROVOCATION

The Homicide Bill 1957 – the Parliamentary debate

11.22 Clause 3 of the Bill was the subject of extensive debate in the course of its passage through Parliament. The focus of the debate centred on whether the "reasonable man" test should be incorporated into the statute. The appropriateness of the "reasonable man" test had previously been addressed in the Royal Commission's Report[42] which, after noting conflicting tendencies in the evolution of the law, stated:

> It is a fundamental principle of the criminal law that it should be based on a generally accepted standard of conduct applicable to all citizens alike, and it is important that this principle should not be infringed. Any departure from it might introduce a dangerous latitude into the law. Those idiosyncrasies of individual temperament or mentality that may make a man more easily provoked, or more violent to his response to provocation, ought not, therefore, to affect his liability to conviction, although they may justify mitigation of sentence. We think that this argument is in principle sound, at least so far as minor abnormalities of character are concerned. …
>
> Nevertheless we feel sympathy with the view which prompted the proposal that provocation should be judged by the standard of the accused. … The jury might fairly be required to apply the test of the "reasonable man" in assessing provocation if the judge were afterwards free to exercise his ordinary discretion and to consider whether the peculiar temperament or mentality of the accused justified mitigation of sentence. It is less easy to defend the application of a test in murder cases where the judge has no such discretion.
>
> We have no doubt that if the criterion of the "reasonable man" were strictly applied by the courts and the sentence of death was carried out in cases where it was so applied, it would be too harsh in its operation. In practice, however, the courts not infrequently give weight to factors personal to the prisoner in considering a plea of provocation and where there is a conviction of murder such factors were often taken into account by the Home Secretary and may often lead to commutation of the sentence. The application of this test does not therefore lead to any eventual miscarriage of justice. … In these circumstances we do not feel justified in recommending any change in the existing law".[43]

11.23 In the debate on the second reading of the Homicide Bill[44] and at the Committee stage[45] in the House of Commons and to a lesser extent on the second reading[46] and

[42] (1953) Cmd 8932.

[43] *Ibid*, at paras 143-145.

[44] Hansard (HC) 15 November 1956, vol 560, col 1164.

at the Committee stage[47] in the House of Lords, there was argument over the "reasonable man" test. In the House of Commons the opposition spokesman, Mr Greenwood MP, cited the case of a defendant who had fought as a partisan in Yugoslavia during World War II. After the war he came to England and killed a fellow countryman, a quisling, who had jeered at the fact that the defendant's family had been killed by the Germans. Mr Greenwood said:

> [The defendant] was hanged, the plea of provocation not being accepted. I should have thought that in such a case the test should not have been the affect of the jeers on a reasonable man but the effect of the jeers on a man in [the defendant's] tragic circumstances".[48]

11.24 He was supported by other MPs, including Mr Paget, who said that he hoped the clause would be amended so as "to provide that a man should be judged on the basis of who he is instead of on a fiction that he is somebody else."[49]

11.25 In Committee, Mr Greenwood moved to amend the clause to delete the word "reasonable". He argued that:

> Our contention is that it is quite arbitrary and unfair to take as the test the effect the provocation would have on a reasonable man. We say that the test ought to be the effect of the provocation upon that man, in those circumstances, and in the light of all the evidence which is available to the court.

11.26 He added:

> I think it is really monstrous that we should seek to apply to anybody in the position and condition of Ruth Ellis or the Yugoslav to whom I have referred a test which may be perfectly proper in the case of a reasonable man.[50]

11.27 The amendment, opposed by the Government, was defeated. The Attorney General, Sir Reginald Manningham-Buller, argued that the test of the "reasonable man" was essential and that to allow the jury to consider the effect of provocation on the individual concerned would be detrimental as it would enable the jury to take into account such factors as bad temper.[51] The Lord Chancellor subsequently

[45] Hansard (HC) 28 November 1956, vol 561, col 501.

[46] Hansard (HL) 21 February 1957, vol 201, col 1180.

[47] Hansard (HL) 7 March 1957, vol 202, col 372.

[48] Hansard (HC) 15 November 1956, vol 560, col 1164.

[49] Hansard (HC) 15 November 1956, vol 560, col 1240.

[50] Hansard (HC) 28 November 1956, vol 561, cols 501 – 502. The implication being that he thought that the Royal Commission's report had been too sanguine in its assessment that the application of the "reasonable man" test did not lead to miscarriages of justice.

[51] Hansard (HC) 28 November 1956, vol 561, col 504.

stated, in the House of Lords, that the "reasonable man" test was necessary in order to hold all citizens to a "generally accepted standard of conduct".[52]

11.28 A significant feature of the debate in both Houses was a lack of any awareness that there might be a meaningful distinction between taking account of a defendant's characteristics for the purpose of assessing the gravity of the provocation as opposed to taking account of them for the purpose of determining the standard of self-control.

The Criminal Law Revision Committee

11.29 In 1976 the CLRC published a Working Paper on Offences against the Person. It contained provisional proposals for reforming the defence of provocation. Having considered responses, it published in 1980 its Fourteenth Report,[53] by which time the House of Lords had delivered judgment in *Camplin*.[54]

11.30 The CLRC, having referred to the passage in *Camplin* in which Lord Diplock stated how the jury should be directed, commented:

> The decision in *Camplin* represents a substantial step in the direction of the reform which we proposed in our Working Paper. It does not go the whole way.[55]

The concluding enigmatic remark is best explained by the fact that the decision in *Camplin* reflected the statutory language (the "reasonable man") whereas what the CLRC had provisionally proposed was a test which discarded the concept. There is, however, another possible interpretation. In saying that *Camplin* "does not go the whole way" it is possible that the CLRC was interpreting the decision, and in particular the judgment of Lord Diplock, in the same way as the minority in *Smith (Morgan)*.[56] In other words the CLRC interpreted Lord Diplock as drawing a distinction between characteristics of the defendant which go to the gravity of the provocation and characteristics impacting on the standard of self-control to be expected. If that is correct *Camplin* "does not go the whole way" because in the opinion of the CLRC, in contrast to the opinion of the minority in *Smith (Morgan*), characteristics of the defendant *should* impact on the standard of self-control.

11.31 The principal recommendation of the CLRC, *confirming* what it had provisionally proposed in the Working Paper, was that:

> in place of the reasonable man test the test should be that provocation is a defence to murder if, *on the facts as they appeared to the defendant*, it can reasonably be regarded as a sufficient ground for the loss of self control leading the defendant to react against the

[52] Hansard (HL) 7 March 1957, vol 202, col 374.

[53] Offences against the Person (1980) Cmnd 7844.

[54] [1978] AC 705.

[55] Offences against the Person (1980) Cmnd 7844, at para 78.

[56] [2001] 1 AC 146.

> victim with a murderous intent. This formulation has some advantage over the present law in that it avoids reference to the entirely notional "reasonable man", directing the jury's attention to what they themselves consider reasonable – which has always been the real question.[57]

11.32 The CLRC further recommended that the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered.[58] It was of the view that, if its recommendations were accepted, there might be many more cases where a jury would return a verdict based on both provocation and diminished responsibility.[59]

11.33 Although, it is not free from doubt, the better view is that the CLRC, while wishing to discard the "reasonable man" test, was *not* advocating that in determining whether the defendant's loss of self-control was reasonable, the jury was entitled to take into account all the characteristics which were peculiar to the defendant. It is suggested that the phrase "on the facts as they appeared to the defendant" was intended to refer to the gravity of the provocation. This interpretation is supported by the wording of the relevant provision in the draft Criminal Law Code.[60]

11.34 The CLRC did not want to change the perceived rule that there can be no defence of provocation where the defendant's reaction is delayed, but it was of the view that previous provocations should be capable of being taken into account when assessing the gravity of the final provoking act or word.[61] It also recommended retention of the rule[62] that the provoker need not be the victim.[63]

11.35 The CLRC also recommended that the defence should be available where the charge was attempted murder.[64] In support of its recommendation it stated:

> if killing under provocation is a crime less than murder, it would look unjust to convict the unsuccessful attempter of an attempt to commit a greater crime. Suppose that a man finds his wife in bed with her lover and stabs both of them: the lover dies, but the wife survives. The verdict is guilty of the manslaughter of the lover (by reason of provocation). It would be strange if the verdict in respect of the wife had to be one of attempted murder.[65]

[57] Offences against the Person (1980) Cmnd 7844, at para 81 (emphasis added). As to the mens rea for murder which was recommended by the CLRC, see n 18.

[58] *Ibid*, at para 83.

[59] *Ibid*.

[60] See para 11.36.

[61] Offences against the Person (1980) Cmnd 7844, at para 84.

[62] *Davies* [1975] QB 691.

[63] Offences against the Person (1980) Cmnd 7844, at para 85.

[64] *Ibid*, at para 98.

[65] *Ibid*.

The CLRC concluded, however, that the defence should be confined to murder and attempted murder.

The Law Commission

11.36 The purpose of Clause 58 of the draft Criminal Code Bill was described in the Commentary as being to "give effect" to recommendations of the CLRC.[66] The Clause is illuminating, therefore, in so far as it sheds light on what the Law Commission understood the CLRC's recommendations to be. Clause 58 states that a person, who would be guilty of murder, is not guilty of murder if:

> (a) he acts when provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and
>
> (b) the provocation is, in all the circumstances (including any of his personal characteristics *that affect its gravity*) sufficient ground for the loss of self-control.[67]

11.37 The implication is clear. The Law Commission understood the CLRC to have recommended that the concept of the "reasonable man" be discarded and for personal characteristics of the defendant to be taken into account but only for the purpose of assessing the gravity of the provocation.

The Select Committee on Murder and Life Imprisonment

11.38 In its Report,[68] the Select Committee, as with diminished responsibility, recommended for the same reasons that the defence should be retained regardless of whether or not the mandatory life sentence was abolished. It noted that the "technical problems" relating to the defence had been considered by the CLRC and that its recommendations (including eliminating the concept of the reasonable man) had been incorporated by the Law Commission into the draft Criminal Code.[69]

[66] Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, vol 2, para 14.18. More precisely, to give effect to *particular* recommendations. Thus, the draft Criminal Code does not reflect the CLRC's recommendation in relation to extending the defence to attempted murder.

[67] *Ibid*, vol 1, at p 68. (emphasis added)

[68] Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78—1).

[69] *Ibid*, at para 85.

PART XII
OPTIONS FOR REFORM

INTRODUCTION

12.1 In Part I[1] we stated that we are not adopting our usual practice of setting out provisional proposals. Instead, in this Part we confine ourselves to identifying and considering various options for reform. We do, however, indicate those options which at the moment we believe are untenable. Otherwise, we endeavour to identify arguments for and against each option which are not necessarily mutually exclusive. Our terms of reference do not permit us to consider the option of extending the partial defences to offences other than murder. Accordingly we do not consider reforming attempted murder.

PROVOCATION

12.2 We do not believe that the law of provocation should remain as it is. We have examined the problems of the present law in detail in Part IV. They are deep and wide. The moral, theoretical and practical difficulties go beyond the "reasonable man" test. They begin with the meaning of provocation. There are also severe difficulties associated with the requirement that there must be a sudden and temporary loss of self-control.

12.3 As we said in Part I,[2] whatever view is taken about the merits of the decision of the majority in *Smith (Morgan*),[3] few would dispute Lord Hoffmann's statement that the law of provocation in its present form has "serious logical and moral flaws".[4] Nobody could study the recent decisions of the House of Lords, the Privy Council and the Court of Appeal, to which we have already referred,[5] without an increasing sense of confusion. The late Professor Sir John Smith concluded a penetrating commentary on *Smith (Morgan)* with the words "What a muddle!"[6]

12.4 The moral and theoretical difficulties might not be thought to matter if in practice the defence was functioning in a reasonably clear and satisfactory way, but it is not. The decisions of appellate courts, not only in this jurisdiction but in other common law countries, have shown how difficult courts have found it to make the law of provocation work satisfactorily in modern societies which are very different from those in which the defence first developed. In the light of that experience we are of the view that its defects are not curable by judicial development of the law.

1 Part I, para 1.5.

2 Part I, paras 1.21 – 1.22.

3 [2001] 1 AC 146.

4 *Ibid*, at p 159.

5 See Part IV.

6 [2000] Crim LR 1004 at p 1009.

12.5 **Do consultees agree:**

(1) that the law of provocation is unsatisfactory; and

(2) that its defects are beyond cure by judicial development of the law?

12.6 If so, the options are to abolish the defence or to retain it in a modified form. This involves moral considerations. It also involves practical and definitional issues. We consider whether a defence of provocation is not only morally sound but capable of satisfactory formulation. The Royal Commission on Capital Punishment described the defence as an attempt to reconcile the preservation of the fixed penalty for murder with a limited concession to human weakness, which suffered from the defects of a compromise.[7] Since then the defence has been the subject of repeated examination and continuous development, but, as we have observed, its present state is both unclear and unsatisfactory. The study of the subject in this and other common law jurisdictions causes us to have great doubt whether a satisfactory version of the defence can be devised. The New Zealand Law Commission recently concluded that it could not and therefore recommended its abolition as a defence.[8]

12.7 In the paragraphs which follow we begin by inviting consultees to consider the matter from a moral viewpoint. We then examine the alternatives of abolition and retention in a modified form, setting out arguments (moral and practical) for and against them. In discussing retention in a modified form, we look separately at the different elements or possible elements of the defence and consider various options. The object of the exercise is to see whether a version can be found which is coherent, sound in principle, workable in practice and would command public support. To this end we ask consultees a number of questions. We hope they will not feel unduly constrained by the form of those questions. **What we want to know overall is whether consultees favour abolition or retention and, if the latter, in what form.**

12.8 The arguments about the defence of provocation inevitably involve consideration of the mandatory sentence. We do not address wider arguments about the mandatory sentence, which would be outside our terms of reference, but it is impossible to consider the question (which is within our terms of reference) whether the defence of provocation should be abolished, without considering the mandatory sentence in that context. The same comment applies to the other partial defences or possible defences to murder which we have been asked to examine as part of this project.

12.9 We begin by inviting consultees to consider the matter from a moral viewpoint.

The moral viewpoint

12.10 Most legal systems grade homicide according to culpability. It is beyond our terms of reference to consider general questions about the definition of murder in

[7] Royal Commission on Capital Punishment 1949 – 1953 Report (1953) Cmd 8932 at para 144.

[8] See Part V, para 5.105.

English law and the boundary between murder and manslaughter. Here, we consider whether certain instances where a defendant kills with the intention required for murder should be regarded as having features which so reduce the defendant's moral culpability as to justify classifying the killing as a lesser offence than murder.

12.11 Two possible bases have been advanced for treating a killing under provocation as morally less reprehensible than murder. They have been referred to as justificatory and excusatory bases, and we adopt these terms for convenience.

12.12 The essence of the justificatory basis is that a killing should be regarded as morally less reprehensible than murder where the victim carries responsibility for making the defendant lose his or her temper. The essence of the excusatory basis is that the killing should be regarded as morally less reprehensible than murder where (with or without any blameworthiness on the part of the victim) the defendant was in such a state as not to be able to exercise self-control and therefore not fully responsible for his or her actions.

12.13 As to the justificatory basis, many would challenge the idea that in today's society the provocative behaviour of a victim should ever be regarded as partial justification for a defendant responding by killing with the intent required for murder. Such circumstances, however, might merit a high degree of mercy in the sentence. On this basis, provocation should not afford a defence but should be available as a mitigating factor in the passing of sentence.

12.14 The contrary argument is that a killing, even with the intent required for murder, induced by a loss of self-control aroused by provocative behaviour on the part of another such that an ordinary person might react in the same way, may be morally less culpable than an unprovoked killing and ought to be capable of being categorised as a lesser offence.

12.15 As to the excusatory basis, there is an obviously strong moral case for saying that those who commit crimes because they are suffering from recognised mental abnormalities should receive special treatment. It is not so obvious that this should require treating them as guilty of a lesser offence if, though suffering from mental abnormality, they have the mental capacity to be guilty of the crime charged. That point is more relevant to the discussion of diminished responsibility. However, many would deny that there is a moral basis for treating those who do not suffer from such abnormality, but who kill with the intent required for murder in loss of temper, as guilty of a lesser offence than murder merely because personal characteristics (whether congenital or acquired) made them prone to loss of temper.

12.16 The contrary argument is that those who kill with the intent for murder because of a loss of temper resulting from personality factors beyond their own control are morally less culpable than they would otherwise be and that such a killing should therefore be classified as a less serious offence than murder.

12.17 If the moral basis of a defence of provocation is the first ground (justificatory) it would follow that the defence ought to be confined accordingly. On such a moral basis the focus would be on the wrongful conduct of the victim which, by provoking the defendant, "justified" the defendant's outburst which led to the killing.

12.18 If the moral basis of a defence of provocation is the latter ground (excusatory), the ambit of the defence would be much broader. The term "provocation" implies blameworthiness on the part of the provoker. It may be a misleading name for the defence.

12.19 **Do consultees consider that, morally speaking:**

(1) a killing with the intent required for murder should be classified as murder notwithstanding any amount of provocation or loss of self-control; or

(2) there ought to be a partial defence, leading to a conviction for manslaughter, based:

(a) on the narrower (justificatory) ground; or

(b) on the broader (excusatory) ground?

12.20 We have posed the moral questions as succinctly as possible, but we are conscious that they can be developed much more fully. We now consider the options of abolition or retention in a modified form. We set out various possibilities and the arguments for and against them.

Abolition of the defence

12.21 Arguments for abolishing the partial defence follow.

(1) It is an anomaly because:

(a) it does not operate as a defence, complete or partial, to any offence other than murder;

(b) its existence as a partial defence to murder arose solely because of the mandatory death sentence (now the mandatory life sentence).

(2) It only comes into play if the defendant is proved to have committed the actus reus of murder together with the mens rea for murder. It is, therefore, in truth, no more than a mitigating factor which ought to go to sentence but cannot because of the mandatory life sentence.

(3) It is theoretically objectionable because the defendant is being convicted of an offence (manslaughter) despite having the mens rea of a greater offence (murder).

(4) It has elements both of partial justification and partial excuse and, as a result, is hopelessly compromised.

(5) It encourages a culture of "blaming the victim". The trial process focuses, sometimes to the acute distress of the deceased's family and friends, on the deceased's behaviour rather than that of the defendant.

(6) It results in victims' lives being undervalued because their killer is not labelled a murderer despite having the mens rea of murder.

(7) It places a premium on one particular emotion, namely anger, and (at least in its traditional form) one particular form of anger, namely *sudden* rage, which is often associated with jealousy. This in turn renders the defence gender biased as men are more likely than women to kill as a result of sudden rage and loss of self-control fuelled by jealousy. The emphasis is placed on partially excusing acts due to loss of self-control. This fails to recognise that women who kill their husbands or partners may do so out of desperation and as a response to anticipated, although not imminent, danger. The defence, therefore, operates as a concession not to human frailty but to the male temperament and, as a result, operates in a discriminatory manner. It serves to perpetuate male violence.

(8) It is capable of affording a partial defence to those who kill in anger but those who are induced to kill out of a more creditable emotion, for example compassion, may be unable, or at least have far greater difficulty, in establishing the defence.[9]

(9) These defects are not remediable by reform of the defence.[10]

12.22 Arguments against abolition of the partial defence are these.

(1) "In principle, there are significant moral distinctions between murder, killing upon provocation, and killing while suffering from diminished responsibility, and we should think hard before abandoning all hope of designing a law to capture those distinctions".[11]

(2) It is erroneous to focus exclusively on the mandatory life sentence as the justification for the partial defence. Even if the mandatory life sentence were abolished there is a requirement of "fair labelling". The defence of provocation serves a valuable function. It ensures that persons who, despite having the mens rea of murder, are less culpable because of provocation, do not suffer the stigma which attaches to a conviction for murder.[12] Any theoretical shortcomings are outweighed by the valuable function it performs.

(3) Abolition would result in a jury having either to convict or to acquit of murder. There would be a risk, even if the mandatory life sentence were abolished, that a jury, whose sympathy for the defendant is evoked by the circumstances of the killing, would be reluctant to convict, despite very strong evidence that the defendant killed with the mens rea for murder. The risk might be most acute in those cases where, in the absence of the

[9] See Part IV, paras 4.164 – 4.165.

[10] On whether shortcomings of the defence *are* susceptible to reform see paras 12.27 – 12.67.

[11] Professor A Ashworth, "Commentary on *Weller*" [2003] Crim LR 724 at p 726.

[12] Given the stricter mens rea requirement of attempted murder, there is an argument that the stigma which attaches to a conviction for attempted murder is as great and that the defence also ought to apply to that offence.

partial defence, the defendant should be convicted of murder on the basis not of an intent to kill but an intent to inflict grievous bodily harm.[13]

The danger would be reduced, but not eliminated,[14] if the partial defence were confined to cases where the defendant intended to cause grievous bodily harm, but not to kill.

(4) If provocation and the mandatory life sentence were both abolished, there would be cases of murder where the judge might be of the view that, in the light of the nature and extent of the provocation endured by the defendant, a non-custodial sentence was justified, particularly if satisfied that the defendant intended no more than the infliction of grievous bodily harm.[15] A conviction for murder has traditionally involved an emphatic denunciation of the defendant. It is questionable whether the public would be receptive to the notion that those classified by the law as murderers should receive non-custodial sentences. The community is more likely to accept reduced sentences following conviction of manslaughter by a jury.

(5) Abolition of the defence without also abolishing the mandatory life sentence would expose more defendants to the mandatory life sentence in circumstances where their culpability was substantially reduced and where the life sentence is not necessary to protect society from the risk of future serious harm from the defendant. The defence is an acknowledgement that there are cases of unlawful killing which merit being viewed by the law with a degree of compassion and that a mark of a civilised society is a capacity to act compassionately.

(6) The theoretical objection that the defendant should not be convicted of a lesser offence if he or she has the mens rea of a more serious offence, is overstated. It ignores the distinction between the conception of criminal liability which views mens rea in terms of knowledge and foresight of consequences and the conception of criminal liability which views mens rea in terms of culpability. The provoked killer has mens rea in the former sense, but only a reduced form in the latter, because he or she is not completely to blame for the killing.

(7) Disputed issues of fact ought to be decided as far as is possible by juries. The defence of provocation is a means of involving the community, through the jury, in the process of determining the degree of an accused's culpability. If the defence and the mandatory life sentence were both abolished, it would be the judge, for the purposes of determining the

[13] There might be cases, however, where a jury would be sympathetic to the defendant even if satisfied that there was an intent *to kill*, for example, a woman who has suffered prolonged and severe physical and emotional abuse from her husband/partner.

[14] Para 12.56(2).

[15] Again, however, it is not inconceivable that a non-custodial sentence might be contemplated even where there was an intention to kill for example if the provocation endured by the defendant was considered to have been gross.

appropriate sentence, who would be the ultimate arbiter of these major issues of fact.[16]

12.23 We are of the opinion that a recommendation that the defence be abolished would necessarily incorporate a recommendation that the mandatory sentence be abolished, since the argument that provocation should be taken into account (as appropriate) in determining sentence rather than as a special defence necessarily implies that the sentence should not be fixed by law.

12.24 Against this view it might be argued that abolition of the defence of provocation would not necessitate abolition of the mandatory sentence because:

(1) just allowance for mitigating factors, including provocation, could be made within the mandatory sentence system by setting, where appropriate, a reduced "tariff period" (the minimum period of imprisonment which a person convicted of murder is required to serve before he or she may be released on licence); and

(2) those who kill in anger, with the intent required for murder, should never receive less than a life sentence; by contrast, those who kill in fear, but exercise force beyond the limits of lawful self-defence, should be entitled to a separate partial defence.

12.25 We see serious problems with both these arguments.

(1) Our terms of reference do not extend to a general examination of sentencing for manslaughter on the ground of provocation. However, there is a large (some would argue, too large) difference between (a) the maximum determinate sentence likely to be passed for manslaughter on the ground of provocation and (b) the minimum tariff period likely to be set on conviction for murder. Broadly speaking, the first is in the region of 7 years, which in many cases will result in an actual period of imprisonment of 5 years or less. Any person convicted of murder is likely to serve a term of imprisonment twice as long and probably longer. If provocation were abolished as a defence, but the mandatory sentence retained, tariff setting would have to be considered for a whole new range of killers.

(2) To make no significant allowance in sentence for the factors which, under present law, result in a verdict of manslaughter would in many cases be unjust. In exceptional circumstances these factors might even warrant a non-custodial sentence. Additionally, taking into account these factors to set an appropriate tariff period (perhaps, in some circumstances, as low as several months) might result in a person being sentenced to life imprisonment, but released after a significantly shorter period. This result may be viewed by some, particularly the general public, as defeating the purpose of a mandatory life sentence.

[16] Of course, it might be retorted that this is the role the judge already plays in the sentencing process.

(3) A new partial defence or defences of excessive or pre-emptive self-defence would cover some cases which presently result in conviction for manslaughter on the ground of provocation. However, these are not the only cases which may merit considerable compassion in sentencing. Consider the following examples.

(a) D, an Asian parent, returns home to find two white men raping D's fifteen-year-old daughter. On D's arrival the men run off. Angry and distraught, D gives immediate chase and fatally stabs one of them.

(b) D, a fifteen-year-old boy with a marked physical handicap, is persistently taunted by a group of youths about his handicap and is called offensive names. He tries to ignore them until one day he loses his temper and picks up a heavy stick. The group is delighted to have caused a reaction and the ringleader, V, jeers at him saying, "Go on – you haven't got the guts to use it". D lashes out at him with the stick, hitting him across the head with great force and causing a sub-dural haemorrhage from which V dies.

(c) D is a victim of persistent blackmail by B. B visits D in D's flat and demands immediate payment. D, incensed, gets a knife from the kitchen and stabs B from behind, killing him.[17]

(d) D's marriage is broken up when his wife is seduced by a wealthy adventurer, V. D is distraught. One day D hears V boasting in a pub of his sexual victories, including with Mrs D. D gets up to leave. V notices him and taunts him. D sees red, picks up a bottle and brings it down on V's head, causing a fractured skull from which V dies.

(e) D's teenage son falls into the hands of a heroin dealer. One day D returns to find the heroin dealer at his home. Enraged, D picks up a weapon and kills him.

None of these cases would fall within an extended version of self-defence. We do not believe that the general public would consider a sentence of life imprisonment to be appropriate in any of them.

(4) If the law were to impose a mandatory sentence which the jury did not believe to be fair, there would be serious risk that some juries would avoid the consequences by a legally perverse verdict. For example, a jury might return a verdict of manslaughter on the ground of lack of intent to cause death or grievous bodily harm, despite overwhelming evidence of intent. Alternatively, a jury may return a manslaughter verdict on the ground of diminished responsibility, taking an extremely broad view of what could

[17] These facts are based loosely on a recent case under the German Criminal Code: *Bundesgerichtshof* (1 StR 403/02, 12 February 2003) [2003] NJW 1955; see account in [2003] Sept European Current Law, para 101.

constitute abnormality of mind. This would tend to bring the law into disrepute.

(5) We know of no common law system where provocation has been abolished but a mandatory sentence of life imprisonment retained, nor of any law reform body which has made such a recommendation.

12.26 **Do consultees favour:**

(1) abolition of the defence of provocation, whether or not the mandatory sentence is abolished;

(2) abolition of the defence of provocation, conditional upon abolition of the mandatory sentence; or

(3) retention of the defence of provocation, whether or not the mandatory sentence is abolished?

What are their principal reasons?

Retention of the defence of provocation in a modified form

12.27 If the defence is to be retained in a modified form, its form should reflect its intended moral basis. It should also be capable of working in practice. In particular it should be defined in such a way that:

(1) juries can be given uncomplicated directions in terms which they will understand and find easy to apply;

(2) it leads to consistency in its application (within the margin of uncertainty which is inherent in any jury system); and

(3) it does not lead to frequent appeals.

12.28 It is convenient to consider the parameters of a possible reformed defence of provocation under the headings:

(1) the provocative matter;

(2) its effect on the defendant;

(3) the reasonableness of the defendant's response,

and then to consider possible limitations not already considered.

The provocative matter

12.29 If the moral basis of the defence is justificatory, that is, that the provoker is in part to blame for arousing the defendant's anger, the defence ought to be defined in such a way that this would form an integral part of it. An example is provided by section 232 of the Canadian Criminal Code, which requires that there must have been a wrongful act or insult.

12.30 If the basis of the defence is excusatory, there would be no need to confine it to cases where the defendant acted in response to wrongful or insulting conduct. The

defence could apply to a killing triggered by an act or occurrence which did not involve objectionable conduct on the part of another.

12.31 If the narrower approach is adopted, the question also arises whether the doctrine should be strictly limited to cases where the victim acted offensively towards the defendant or whether it should include cases where:

(1) the provoker's conduct was directed at someone closely related to the defendant;

(2) the defendant acted under a mistaken (perhaps reasonable) belief about the fact which, if true, would have amounted to provocation;

(3) the defendant accidentally killed someone other than the provoker.

12.32 **If provocation is to be retained in a modified form,**

(1) do consultees favour the narrower (justificatory) or broader (excusatory) approach to what may be considered provocation; and

(2) if the narrower, would they favour including within it any or all of cases in paragraph 12.31(1),(2) and (3) above?

Effect on the defendant – a sudden and temporary loss of self-control

12.33 At the time of the Homicide Act 1957[18] it was a requirement of the defence of provocation that the defendant killed the deceased in a sudden and temporary loss of self-control. If there was time for reflection between the provocation and the killing, the defence was negatived. This is no longer taken to be the law, but there still has to be, at least in theory, a sudden and temporary loss of self-control at the time of the killing. The law has become confused, and the problem is not solved by use of metaphors like "slow burn" reaction. There is a real problem reconciling a considered response with a sudden and temporary loss of self-control. If the defence of provocation is to be retained, it is therefore necessary to consider as a matter of principle whether it should require a loss of self-control and, if so, whether the loss of self-control should be required to be sudden and temporary.

LOSS OF SELF-CONTROL

12.34 An alternative approach to requiring a loss of self-control would be to require that the defendant acted under "extreme … emotional disturbance" (a phrase used in the Model Penal Code).[19]

12.35 Arguments for replacing the test of loss of self-control follow.

(1) If the defendant has truly lost his "self-control" the relevant defence might be thought to be lack of intent or automatism. What is envisaged, therefore, is something less than total loss of self-control. It must mean

[18] In this Part referred to as "the 1957 Act".

[19] American Law Institute, *Model Penal Code* (1985) clause 210.3(1)(b).

something less than irresistible impulse (itself a concept which raises profound philosophical, medical and practical difficulties) but how much less? The degree of loss of self-control required to satisfy the defence of provocation is uncertain and is not capable of being defined satisfactorily. Juries will be left with the assistance of nothing more than time-honoured metaphors such as "blood boiling". Such phrases may have worked (or been thought to work) in the past, when the concept was limited to immediate outbursts of rage, but are inapt to cater for cases of cumulative abuse resulting in delayed reaction.

(2) The problem of satisfactorily defining "loss of self-control" cannot be overcome by medical and/or psychological evidence. A person's capacity for self-control is a moral question and not one capable of being resolved by medical or psychological evidence.

(3) Acting under "extreme emotional disturbance" would reflect more accurately what the basis of the defence should be. The law should not favour those who suffer a sudden loss of temper over those victims of long term abuse who become progressively more stressed and whose emotional state becomes a compound of fear, anger and despair. Such a person may ultimately kill the abuser in a considered and controlled fashion, but nonetheless in a state of acute emotional stress.

12.36 Contrary arguments are as follows.

(1) Theoretical objections to the concept of loss of self-control disappear if it is recognised that it means something less than complete loss of control amounting to automatism.

(2) The concept of loss of self-control is a familiar one.

(3) Acting under " extreme emotional disturbance" is a formulation which could be given a very wide interpretation. Many, if not most, people who kill are in a heightened emotional state about something.

(4) The defence of provocation should not be available to people who carry out planned killings. Otherwise it would be potentially available, for example, to activists who kill over social issues such as abortion or animal rights, about which they may be passionate and obsessive.

12.37 **Should the concept of "loss of self-control" be retained or should it be replaced by a test of acting "under extreme emotional disturbance" or some similar phrase?**

SUDDEN AND TEMPORARY

12.38 If the concept of loss of control is retained, there is the further question whether the loss of control should have to be sudden and temporary. Although this is a separate question, the arguments are similar to the arguments about whether the concept of loss of self-control should be retained.

12.39 In particular, the argument for not requiring loss of self-control to be sudden is that such a requirement fails to make proper allowance for cases where a

prolonged history of abuse produces in its victim the progressive development of feelings of despair rather than a sudden, explosive loss of temper.

12.40 The counter argument is that if there is no requirement that the loss of control should be sudden, there is no satisfactory way of differentiating between a "provoked killing" and a "revenge killing". The way would therefore be open for revenge attacks, for example in the context of criminal vendettas, to be accommodated within the defence.

12.41 **If the concept of loss of self-control is retained, should there be a requirement that it should be "sudden and temporary"?**

The reasonableness of the defendant's response

12.42 Some have argued that the defence of provocation should not be limited by any form of objective standard. The arguments in favour of this approach have been expressed most cogently in the minority judgment of Murphy J in the Australian case of *Moffa*[20]

> The objective test is not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flash point, loss of self-control and capacity to kill under particular circumstances … . The same considerations apply to cultural sub-groups such as migrants. *The objective test should not be modified* by establishing different standards for different groups in society. This would result in unequal treatment. *The objective test should be discarded*. It has no place in a rational criminal jurisprudence.[21]

12.43 The test would result, if conscientiously applied, in a conviction of manslaughter in *every* case where there is a loss of self-control which has been caused by "provocation". The jury would have no normative role[22] and the verdict would in no way reflect the notion that the community, through the jury, is determining the degree of the defendant's culpability.

12.44 The result would be as expressed by Avory J in the course of argument in *Lesbini*:[23]

> It would seem to follow from your proposition that a bad-tempered man would be entitled to a verdict of manslaughter where a good-tempered one would be liable to be convicted of murder.[24]

[20] (1977) 138 CLR 601.

[21] *Ibid*, at pp 625–626. (emphasis added)

[22] Apart from determining whether the triggering event is, in the circumstances, "provocation".

[23] [1914] 3 KB 1116.

[24] *Ibid*, at p 1118.

Every "road rage" killing would be manslaughter. We believe that this would involve an unjustified lowering of standards. It is noticeable that in those countries which have moved closest to a subjective test – Ireland and South Africa – the results have led to considerable disquiet amongst the judiciary.

12.45 We do not believe this approach to be a tenable option and we are therefore not posing any question for consultees about it. However, if any consultees hold a contrary opinion, we would not wish to discourage them from expressing it and setting out their reasons for it.

12.46 Assuming that some form of objective standard would be required, we turn to the question what the test should be. We consider three possibilities based on:

(1) the approach of the majority in *Smith (Morgan)* (Option A);[25]

(2) the recommendations of the New South Wales Law Reform Commission (Option B);

(3) the approach of the minority in *Smith (Morgan)*(Option C).

THE APPROACH OF THE MAJORITY IN *SMITH (MORGAN)* (OPTION A)

12.47 To give proper effect to the views of the majority in *Smith (Morgan)* the test should not be framed in terms of "the reasonable man". The question for the jury should be whether the circumstances were such as to make the defendant's loss of self-control sufficiently excusable to reduce murder to manslaughter. In deciding that question the jury should take into account all the circumstances, including any characteristics of the defendant (permanent or temporary) affecting the degree of control which society can reasonably have expected of him. However, the jury should not treat defects of the defendant's character as an excuse for failing to exercise the degree of self-control that society expects people to exercise over their emotions.

NEW SOUTH WALES LAW REFORM COMMISSION[26] (OPTION B)

12.48 The test proposed by the New South Wales Law Reform Commission, insofar as it is relevant for our purposes, is whether,

> taking into account all the characteristics and circumstances of the accused, he or she should be excused for having so far lost self-control as to have formed an intention to kill or inflict grievous bodily …….as to warrant the reduction of murder to manslaughter.[27]

12.49 This approach leaves it to the jury to form a value judgement whether the defendant deserves to be convicted of murder or manslaughter, taking into account all of their characteristics and all the circumstances. This approach is not far removed from that of the majority in *Smith (Morgan)*. Indeed it may fairly be said

[25] [2001] 1 AC 146.

[26] New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide: Report 83* (1997) at para 2.81.

[27] *Ibid*, at para 2.82.

that it represents a logical extrapolation of the approach of the majority (if they had not needed to contend with the terms of section 3 of the 1957 Act).

THE APPROACH OF THE MINORITY IN *SMITH (MORGAN)* (OPTION C)

12.50 This approach maintains the test whether a person with ordinary powers of self-control might have acted as the defendant did. In assessing the gravity of the provocation, the jury is to take the defendant as he or she is. They must then consider whether that degree of provocation might have caused a person of the defendant's age and gender, and with the powers of self-control of an ordinary person, to have reacted as the defendant did.

12.51 Arguments for the view of the majority in *Smith (Morgan)* are that:

(1) the principle of doing justice in the particular case is a more important principle than that of setting the same standard of self-control for everyone;

(2) it is only by enabling the jury to take into account all the characteristics of the defendant (though leaving out of the account his defects of character) that the principle of doing justice in the particular case can be achieved;

(3) in particular, the law should take account of those characteristics of the defendant, particularly if they are not attributable to his or her failings or shortcomings, which reduce the extent of his or her capacity for self-control;

(4) the minority approach requires a jury to conduct a task, both artificial and complicated, of dividing the defendant's personality for the purpose of, on the one hand, determining the gravity of the provocation and, on the other, of determining the standard of self-control;[28] and

(5) it enables the jury to take into account characteristics of the defendant such as ethnicity and cultural background.

12.52 Arguments in favour of the approach of the New South Wales Law Reform Commission are that:

(1) it could be explained to a jury in simple and clear terms;

(2) it places with the jury, representing the community, the value judgement whether a particular defendant should be guilty of manslaughter or murder; and

(3) it avoids the complexity of the "reasonable man" or "ordinary person" test.

[28] In his dissenting judgment in *Rongonui* [2000] NZLR 385 Thomas J referred (at p 446) to the "glazed look" in the jurors' eyes when told that they must make the distinction; S Yeo, *Unrestrained Killings and the Law* (1998) pp 60–61 argues that the distinction is inconsistent with the opinion of behavioural scientists who maintain that the accused's personality cannot be dissected in the way envisaged by the distinction.

12.53 Arguments in favour of the minority view in *Smith (Morgan)* follow.

(1) The "reasonable man" test serves an important function, namely to set, as a matter of policy, a uniform standard of self-control which has to be complied with if the defence is to be successfully pleaded. This is in accordance with the approach of the criminal law which is, with limited exceptions, concerned to set uniform standards of behaviour for public policy reasons.

(2) By introducing a variable standard of self-control the majority view subverts the moral basis of the defence.

(3) Because the standard advocated by the majority is variable, the jury is left to decide the issue without reference to any meaningful principles or guidance. The jury will decide what they think the standard ought to be and as a result a jury will be deciding what is a question of law.

(4) The variable standard which represents the majority view reflects a misunderstanding and distortion of both the purpose of the defence and the notion of capacity. Apart from cases of recognised mental abnormality, the fact that a person finds it more difficult because of his or her particular personality than another to comply with the requirements of the law is not a good or sufficient reason for lowering the requirements of the law or reducing his or her criminal liability (although it may, like other personal matters, be a relevant factor in sentencing).

(5) A person's capacity for self-control is not a medical or psychological issue but a moral one. In truth no doctor can answer the question whether a person *can* control himself, except in extreme circumstances (such as sleepwalking) which would be classified in law as cases of automatism.

(6) English law already provides a widely interpreted partial defence of diminished responsibility which is designed to cater for those whose mental responsibility, through no fault of their own, is substantially impaired.

(7) Inclusion of characteristics such as ethnicity and culture encourages stereotyping without being based on any firm evidence that members of a particular ethnic, racial or cultural group respond in a particular way.

(8) A variable standard which entitles a jury to take into account the defendant's personal characteristics may mean that the jury will take into account characteristics or circumstances which may have given rise to racism, homophobia and religious intolerance.

(9) There is no obvious mechanism for preventing a jury from taking into account those characteristics which are considered "undesirable" and to be discouraged. To say simply that they should be left out of the equation because they are "defects of character" is no answer, because it begs the question: what is a defect of character? The problems associated with a

variable standard are compounded by the fact that the case law has in recent years diluted the requirement that there must have been "provocation" in the sense of conduct which is inherently provocative in character.[29]

(10) The version proposed by the New South Wales Law Reform Commission is undesirable for the reasons above. More particularly also:

(a) juries will still have to wrestle with the same underlying problems of balancing the demands of society against the frailties of an individual with unusual sensitivities, but without any guidance from the court (unless the courts develop guidelines in order to supplement the statutory test);

(b) it is an inherently vague test and is essentially circular because it makes the test of whether the defendant is in law guilty of murder depend on whether the jury decides that he ought to be convicted of murder; and

(c) juries would determine where the boundaries of murder and manslaughter lay on a case by case basis according to their own sympathies and prejudices.

(11) This view most closely reflects the provisions of A Draft Criminal Code for Scotland with Commentary[30] recently published under the auspices of the Scottish Law Commission.

Conclusion

12.54 All three options which we have considered present problems. They arise because the defence of provocation involves a clash between competing public interests. On the one hand there is the need to protect and respect human life – and therefore not to condone, even partially, the actions of those who kill through failure to control their emotions. On the other hand, people are sometimes provoked to kill in circumstances which call for a degree of compassion. Abolitionists consider that the difficult reconciliation is best achieved by abolishing the partial defence of provocation and replacing it with a sentencing discretion for murder.[31] In deciding whether it should be abolished or retained in a modified form, a critical consideration is whether a satisfactory solution other than abolition can be found.

12.55 **Do consultees consider any and, if so, which of the approaches of the majority in *Smith (Morgan)* (Option A), the New South Wales Law**

[29] *Doughty* (1986) 83 Cr App R 319; *Dryden* [1995] 4 All ER 987. If a baby's crying is capable of constituting "provocation" there would seem to be no human behaviour which is incapable of constituting "provocation", including conduct as diverse as homosexual advances and the audible and visual suffering and/or nagging of a person afflicted by a painful and terminal illness. Compare this, however, with *Cocker* [1989] Crim LR 740.

[30] (2003) clause 38(3) & (4); pp 89 – 91.

[31] This is the conclusion of the New Zealand Law Commission in *Some Criminal Defences with Particular Reference to Battered Defendants*: Report 73 (2001) at paras 118 & 120.

Reform Commission (Option B) and the minority in *Smith (Morgan)* (Option C) to be satisfactory, or do they have any alternative suggestion?

Other possible limits to a defence of provocation

Abolition of the defence where death results from an intention to kill

12.56 Arguments for adopting this option are that:

(1) there is a big difference between angry retaliation falling short of an intention to kill and a deliberate killing; a civilised society should not accept as part of its legal standards that a person of ordinary self-control might deliberately kill another person because of anger;

(2) juries are less likely to acquit a defendant out of sympathy where they have concluded that he killed with an intention to kill; and

(3) it would remove the anomaly that the defence is not available to a charge of attempted murder.

12.57 Arguments against adopting the option follow.

(1) It may accentuate the gender bias of the defence (because it is often easier to prove an intent to kill in the case of an abused woman who kills her partner than in the case of a woman who is killed by a possessive and jealous male in a sudden rage);

(2) The option wrongly assumes that there is *inevitably* a clear dividing line between the moral culpability of the defendant who kills with the intention to kill and the defendant who kills intending to cause grievous bodily harm;

(3) The option ignores the gravity of the provocation. The greater the severity of the provocation, the more likely it is that the response will consist of conduct accompanied by an intention to kill.

12.58 **If provocation is retained as a partial defence, would consultees favour excluding it in cases where the defendant kills the deceased with an intention to kill?**

Self-induced provocation

12.59 Self-induced provocation might be taken to refer to two different situations. In its narrower sense it would refer to a situation in which a defendant has formed a premeditated intent to kill or cause grievous bodily harm to the victim and incites provocation by the victim so as to provide an opportunity for attacking him or her. In that situation the "provocation" by the deceased will not in truth have been the cause of the fatal attack, which the defendant already intended. In a broader sense, self-induced provocation could also include a situation in which the defendant exposes himself or herself to the likelihood of provocation and then retaliates by killing the provoker. The conduct which exposes the defendant to the provocation might in itself be morally laudable (eg standing up for a victim of racism in a racially hostile environment), morally neutral or morally evil (eg blackmail).

12.60 We can see strong arguments for a rule of law precluding self-induced provocation in the narrower sense from affording a partial defence to murder, and we can see no good argument to the contrary.

12.61 To exclude from a defence of provocation all forms of conduct which might fall within the broader sense of self-induced provocation would in our view go too far. While there is much to be said, for example, in denying the defence to criminals whose unlawful activities expose them to the risk of provocation by others, we see considerable problems in trying to devise a rule of law which would differentiate satisfactorily between forms of self-induced provocation in the broader sense which should, and which should not, preclude a defence of provocation. The circumstances are too potentially variable for a clear and simple rule.

12.62 We are not putting any particular question to consultees on the topic of self-induced provocation, **but we would be interested in any observations by consultees who disagree with our comments on this subject.**

Burden of proof

12.63 Where the defence of provocation arises as an issue, the burden is on the prosecution to disprove it. By contrast the defendant bears the burden of proof if seeking to rely on the defence of diminished responsibility. Yet both provocation and diminished responsibility are relevant only if the prosecution has proved the actus reus and the mens rea of murder. The reason for the distinction is historic. When the defence of provocation emerged a defendant charged with murder could not give evidence.

12.64 The distinction can produce odd results as illustrated by *Smith (Morgan)*. In that case the deceased's denial that he had stolen the defendant's tools allegedly caused the defendant to react in an extreme fashion because of his mental state. The jury rejected the defence of diminished responsibility. Yet his conviction for murder was quashed because the prosecution might not have been able to disprove, on a proper direction, that anyone suffering from his mental condition might have behaved in the same way.

12.65 Under the present law where there is evidence on which the jury could conclude that the defendant killed the deceased as a result of loss of temper from things said or done (or a combination of things said and done) by another, the defence of provocation must be left to the jury. This is so even if the defence have not raised provocation and would prefer that it is not left to the jury, and even if no jury could sensibly conclude that a reasonable person would have acted as the defendant did.

12.66 If a defence of diminished responsibility is to succeed, medical evidence in support of it is a practical necessity. So in practical terms a defendant who wishes to rely on a defence of diminished responsibility would have in any event to bear an evidential burden of raising it. Two ways of harmonising the rules as to the burden of proof in relation to both defences would be to impose in both cases

(1) an evidential burden on the defendant but the legal burden on the prosecution; or

(2) a legal burden on the defendant.

12.67 **If the defence of provocation is to be retained, do consultees consider that:**

(1) the prosecution should continue to bear the legal burden of disproving the defence if there is any evidence of loss of self-control by the defendant;

(2) the defendant should bear the legal burden of proof;

(3) the defendant should bear an evidential burden;

(4) the judge should be obliged to leave provocation to the jury even if the defendant does not wish it to be left to the jury?

DIMINISHED RESPONSIBILITY

12.68 Diminished responsibility has presented some problems, but not on the same scale as provocation. With the expansion of provocation, the overlap between the two defences has increased to the extent that some have advocated that they should be joined into a common defence. We consider that issue below. The most difficult aspect of diminished responsibility is in differentiating between what is medical and non-medical. This is particularly so in relation to the requirement that the defendant's abnormality of mind must have "substantially impaired his mental responsibility" for killing (or being a party to the killing of) the deceased.

12.69 The key questions in relation to diminished responsibility are:

(1) whether it should be abolished; and

(2) if it is retained, whether it should be modified.

We address separately the possibility of merging provocation and diminished responsibility into one defence.

Abolition of the defence

12.70 Arguments for abolishing the partial defence are that:

(1) it is an anomaly because it does not operate as a defence, complete or partial, to any offence other than murder;

(2) it is an ill-defined compromise, made necessary by the combination of,

(a) the restrictions of the M'Naghten Rules; and

(b) the mandatory sentence;

(3) the variety of circumstances which may give rise to a defence of diminished responsibility should be taken into account as mitigating factors going to sentence and the mandatory sentence should be abolished;

(4) its existence as a partial defence is an encouragement to defendants who are legally insane to plead guilty to manslaughter when in truth they are not guilty of any offence (by reason of insanity); and

(5) the partial defence is open to manipulation, as is demonstrated by the way it has been applied to enable people who commit "mercy killings" and who do not in truth suffer from any significant mental abnormality to be convicted of manslaughter instead of murder.

12.71 Arguments against abolition are these.

(1) If it were abolished, the only defence to murder based on mental disorder would be that of insanity, which by virtue of the M'Naghten Rules is limited in scope and, in particular, is confined to cognitive features of the defendant's mind;

(2) Mentally disordered defendants who, although not legally insane, are not fully responsible for their conduct should not be labelled "murderer" since their culpability is diminished. They are not "fully" responsible. It follows that abolition of the mandatory life sentence would not, therefore, detract from the need for this partial defence;

(3) If defendants are pleading guilty on grounds of diminished responsibility when they ought to be pleading the defence of insanity, this can be addressed by removing the mandatory disposal which follows from a finding of insanity in murder cases;

(4) The defence has been generally satisfactory in practice. The fact that it is sometimes used in a benign way, with the consent of the prosecution, the defence and the court, in order to accommodate cases which on a strict interpretation may not fall within the ambit of the defence, is not a good or sufficient reason for abolishing the defence.

12.72 **Do consultees favour:**

(1) abolition of diminished responsibility, whether or not the mandatory sentence is abolished;

(2) abolition of diminished responsibility, conditional upon abolition of the mandatory sentence;

(3) retention of diminished responsibility, whether or not the mandatory sentence is abolished?

What are their principal reasons?

Retention of the defence of diminished responsibility

12.73 In Parts VII and XI we have referred to previous recommendations to re-word section 2 of the 1957 Act. We have also discussed a possible simplification of the last part of the definition in section 2 by introducing an explicitly causative test in place of the test whether it "substantially impaired his mental responsibility" for his conduct.

12.74 **If the defence of diminished responsibility is retained, do consultees favour:**

(1) the present wording of section 2 of the 1957 Act;

(2) the alternative formula proposed in the Butler Report:[32]

> **"Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983, that is, "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"] and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter";**[33]

(3) the version proposed by the Criminal Law Revision Committee:[34]

> **"Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983] and if, in the opinion of the jury,"**[35] **"the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter"**[36]

(4) the version proposed by the New South Wales Law Reform Commission:

> **"A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:**
>
> **(a) understand events; or**
>
> **(b) judge whether that person's actions were right or wrong; or**
>
> **(c) control himself or herself,**
>
> **was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.**

[32] Report of the Committee on Mentally Abnormal Offenders (1975) Cmnd 6244; in this Part referred to as "the Butler Report".

[33] *Ibid*, at para 19.17.

[34] Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980) Cmnd 7844.

[35] Replicating the beginning of recommendation of the Butler Report.

[36] Criminal Law Revision Committee, Fourteenth Report, Offences Against the Person (1980) Cmnd 7844, para 93. In Criminal Law: A Criminal Code for England and Wales (1989) Law Com No 177, the Law Commission (clause 56) adopted the Criminal Law Revision Committee's definition of diminished responsibility with the substitution of "mental abnormality" for "mental disorder", but the definition of those terms remained identical.

"Underlying condition" in this subsection means a pre-existing mental or physiological condition other than of a transitory kind";[37]

(5) a version proposed by Professor Mackay:[38]

"A defendant who would otherwise be guilty of murder is not guilty of murder if, at the time of the commission of the alleged offence, his mental functioning was so aberrant and affected his criminal behaviour to such a substantial degree that the offence ought to be reduced to one of manslaughter;"[39]

(6) an amended version which would provide:

"Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) and that abnormality of mind was a significant cause of his acts or omissions in doing or being a party to the killing";

(7) some other version?

Burden of proof

12.75 We have already referred to the difference in the burden of proof between provocation and diminished responsibility. The Butler Report and the Criminal Law Revision Committee both recommended that the defendant should bear no more than an evidential burden. The Law Commission took the same view in its memorandum to the House of Lords Select Committee on Murder and Life Imprisonment.

12.76 **Do consultees consider that the legal burden of proof in relation to diminished responsibility should remain on the defendant, or should the burden on the defendant be no more than one of adducing evidence to raise the issue?**

MERGER OF PROVOCATION AND DIMINISHED RESPONSIBILITY INTO A SINGLE PARTIAL DEFENCE

12.77 We have not, at this stage, attempted to draft a possible form of hybrid defence, but the suggestion has been made that the law ought to move in that direction and we would like to know the views of consultees.

[37] New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility: Report 82* (1997) para 3.43.

[38] R D Mackay, "Diminished Responsibility and Mentally Disordered Killers" in Professors A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (2000) 55.

[39] *Ibid*, at p 83.

12.78 In a draft article to be published in the Criminal Law Review, Professors R Mackay and B Mitchell have advocated such a hybrid partial defence.[40] They have drawn on the American Law Institute Model Penal Code which provides:

> [A] homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[41]

Professors Mackay and Mitchell suggest that, in the light of *Smith (Morgan*), it would be better formally to recognise that the distinction between provocation and diminished responsibility is no longer sustainable. They have remodelled the Model Penal Code provision as follows:

> A defendant who would otherwise be guilty of murder is not guilty of murder if, the jury considers that at the time of the commission of the offence, he was:
>
> (a) under the influence of extreme emotional disturbance and/or
>
> (b) suffering from unsoundness of mind
>
> either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter.[42]

12.79 These are arguments in favour of such an approach.

(1) As a result of the expansion of the defence of provocation, psychiatric evidence is now admitted in a way that makes it "virtually impossible to disentangle the issues of loss of self-control, abnormality of mind and substantial impairment of mental responsibility".[43]

(2) This practice has been given added impetus by the decision in *Smith (Morgan)* which permits mental abnormality to be taken into consideration when considering the standard of self-control to be expected of the defendant.

(3) The present state of the law of provocation and diminished responsibility is such that complex directions have to be given to a jury in cases where, as often happens, both defences are advanced. It would be much simpler if a composite direction could be given.

[40] R D Mackay and B J Mitchell, "Provoking Diminished Responsibility: Two Pleas Merging into One?" Crim LR (forthcoming in the November 2003 edition).

[41] American Law Institute, *Model Penal Code* (1985) clause 210.3(1)(b).

[42] R D Mackay and B J Mitchell, "Provoking Diminished Responsibility: Two Pleas Merging into One?" Crim LR (forthcoming in the November 2003 edition).

[43] R D Mackay, "Pleading Provocation and Diminished Responsibility Together" [1988] Crim LR 411, 421.

(4) Both defences are concerned with those who kill when in a disturbed state of mind by reason of external events, or internal abnormal mental processes, or a combination of the two.

(5) There is logic and justice in having a combined defence based on twin concepts of extreme emotional disturbance and abnormality of mind, with the jury being asked to decide whether either or both affected the behaviour of the defendant to such a degree that what would otherwise be murder ought to be reduced to manslaughter.

12.80 Arguments against a single partial defence follow.

(1) Diminished responsibility and provocation are fundamentally different defences with different rationales and different essential elements.

(2) Combining the two partial defences into a single partial defence would not reflect the ethical difference between them. The ethical distinction is that provocation is a partial *excuse* for wrongdoing while diminished responsibility consists of a partial *denial of responsibility*.

(3) The fact that a defendant, as a matter of law, may be convicted of manslaughter on grounds both of diminished responsibility and of provocation, while demonstrating that they are not mutually exclusive, is not in itself a reason for combining them into a single partial defence. It merely demonstrates that "a person with diminished responsibility may be provoked to lose his self-control and react in the same way as any one else".[44]

(4) The view of the majority in *Smith (Morgan)* is flawed because it accords insufficient recognition to the differences, as identified above, between the two partial defences.

(5) A single defence of the kind suggested would lack a clear boundary and be unacceptably wide.

12.81 **Do consultees favour the replacement of provocation and diminished responsibility by a single merged defence? If so do respondents prefer the Model Penal Code version, the Mackay and Mitchell reformulation, or some other formulation?**

A PARTIAL DEFENCE OF USE OF EXECESSIVE FORCE IN SELF-DEFENCE

12.82 There could be a broader and a narrower version of this potential defence and two variants of either of them. The broader would apply where the defendant faced a threat but not of sufficient immediacy to make it lawful to use force in self-defence. This would involve "pre-emptive (or anticipatory) self-defence" or "self-preservation". The narrower would apply where the defendant faced a threat of sufficient immediacy to justify the present use of some degree of force, but not the degree of force in fact used. The variants are that the defence might:

[44] *Smith (Morgan)* [2001] 1 AC 146, 206, *per* Lord Millett.

(1) apply to force used in protection of the person or property or for the prevention of crime; or

(2) be limited to force used for the protection of the person.

12.83 The possible options are presented below together with their advantages and disadvantages. We start with the narrowest.

Excessive use of force in defence of oneself or another in circumstances where the use of some force would be lawful (Option A)

12.84 The arguments in favour of treating a killing in such circumstances as manslaughter rather than murder are that:

(1) a person who kills while acting in an honest belief that he or she is acting in self-defence or in defence of another is morally less culpable than a person who kills in other circumstances;

(2) the absence of such a partial defence may result not only in harsh convictions but in over-sympathetic acquittals, because the jury is placed in an "all-or-nothing" predicament; and

(3) such a partial defence would remove the apparent anomaly that a person who uses excessive force in fear is guilty of murder, whereas a person who kills through loss of self-control in anger can put forward a defence of provocation.

12.85 Arguments against the introduction of such a defence are as follows.

(1) Partial defences which reduce murder to manslaughter are themselves anomalous and ought not to be extended.

(2) The introduction of such a partial defence would introduce unnecessary further complexity into the directions given to juries in murder trials.

(3) Its introduction is unnecessary because the *Palmer*[45] direction means that juries apply a (rightly) generous approach in considering whether the degree of force used by the defendant is reasonable. It is only in cases where the jury disbelieves the defendant's account or considers that the response was grossly disproportionate to the circumstances in which the defendant found him or herself that they will return a conviction of murder. In such circumstances it is appropriate that they do so.

(4) There is the danger that the existence of the partial defence might result in juries returning a verdict of manslaughter in cases where the defendant ought not to be convicted at all. In other words, juries might be tempted to opt for the middle ground, especially if their members were divided between convicting of murder and acquitting the defendant.

[45] [1971] AC 814.

(5) If the mandatory sentence for murder is abolished, the judge would be able to take into account that the defendant used excessive force in self-defence when passing sentence (as in the case of non-fatal offences of violence).

Extension of Option A to include use of excessive force in the protection of property or prevention of crime (Option B)

12.86 The argument in favour of this extension is that burglary of a person's house is a violation of a person's personal rights which may be just as frightening and disturbing as an offence against the person.

12.87 The contrary argument is that killing with intent to kill or to cause grievous bodily harm can never be justified merely for the protection of property, and therefore ought not to be a ground of defence whether total or partial.

Pre-emptive use of force in self-defence (Option C)

12.88 The case for introducing such a partial defence can be put at its strongest in relation to abused women who kill. It may also be available in other contexts in which there is serious violence or tormenting behaviour used repeatedly against those who are perceived to be vulnerable – for example: in school, or against isolated members of a ethnic minority within a particular community. Taking the abused woman as an example, it is by no means abnormal for a woman in such a relationship to feel powerless to break away and she may fear – with good cause – that any attempt to do so will expose her to serious further violence. Her state of mind is one not only of fear but of powerlessness. This combination can breed despair of ever finding a way to avoid further violence. Sometimes a woman in such a situation eventually chooses a moment when her partner is unable to offer resistance (eg because he is asleep) to kill him.

12.89 Some have argued that a woman who kills in such circumstances should have a full defence of self-defence. The scope of the doctrine of self-defence is strictly outside our terms of reference. We have, however, been asked to have particular regard to the question of domestic violence. We have considered in Part X whether the pre-emptive use of force in self-defence should be capable of providing a complete defence to a killing with the mens rea for murder in circumstances where there is no imminent[46] threat of violence and where the circumstances do not fall within the description of duress of circumstances.[47] In our view it should not.

12.90 The basis of the argument that a person who kills in such circumstances should be treated as guilty of manslaughter, rather than murder, is that there is reduced culpability in the case of people who kill in the belief that it is their only way of

[46] It is not necessary for us to discuss further in this context the meaning of "imminent".

[47] There is a separate issue whether the defence of duress should apply to murder. The Law Commission view that it should be has been expressed repeatedly. See eg Criminal Law Report on Defences of General Application (1977) Law Com No 83 at para 2.44; A Criminal Code for England and Wales (1989) Law Com No 177, vol 2, pp 229 – 231; Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218 at paras 31.8 and 35.10.

escape from a cycle of serious violence. They should not therefore be labelled as a murderer nor punished as such.

12.91 The partial defence may be so drawn as to require, as a precondition, a history of serious abuse and a belief in the inevitability of a future attack and in the unavailability of any effective alternative means of protection. In this way the reach of the defence may be kept in check whilst making it generally available to all who are the subject of intolerable abusive treatment in whatever context.

12.92 The arguments to the contrary are that:

(1) the reduced culpability of a person who kills in such circumstances should be reflected in the sentence passed rather than by creating a special partial defence; and

(2) such a partial defence would either be dangerously wide (being available, for example, to members of rival criminal gangs or paramilitaries) or it would have to be narrowed in some way to classes of specially vulnerable people, which would involve definitional problems and complexities.

Extension of Option C to include use of anticipatory force for the protection of property or the prevention of crime (Option D)

12.93 We are not aware of any argument in favour of a partial defence to murder which would extend that far, but we raise the matter in case there are those who think that it should.

12.94 **Do consultees:**

(1) favour the introduction of a partial defence of the use of excessive force in self-defence and/or a partial defence of pre-emptive use of force in self-defence;

(2) if so, do they favour option A, B, C or D;

(3) would their views be the same if:

(a) the mandatory sentence were abolished;

(b) the defence of provocation were abolished?

PART XIII
CONSULTATION QUESTIONS

We repeat below the questions which we have posed. It would be very helpful to us if consultees answered as many questions as possible. However, we would not want the length of the list to deter consultees from answering those questions which they consider to be the most crucial.

PROVOCATION

1. Do consultees agree:

   (1) that the law of provocation is unsatisfactory; and

   (2) that its defects are beyond cure by judicial development of the law? (paragraph 12.5)

The moral viewpoint

2. Do consultees consider that, morally speaking:

   (1) a killing with the intent required for murder should be classified as murder notwithstanding any amount of provocation or loss of self-control; or

   (2) there ought to be a partial defence, leading to a conviction for manslaughter, based:

      (a) on the narrower (justificatory) ground; or

      (b) on the broader (excusatory) ground? (paragraph 12.19)

Abolition of the defence

3. Do consultees favour:

   (1) abolition of the defence of provocation, whether or not the mandatory sentence is abolished;

   (2) abolition of the defence of provocation, conditional upon abolition of the mandatory sentence; or

   (3) retention of the defence of provocation, whether or not the mandatory sentence is abolished?

   What are their principal reasons? (paragraph 12.26)

Retention of the defence of provocation in a modified form

4. If provocation is to be retained in a modified form,

   (1) do consultees favour the narrower (justificatory) or broader (excusatory) approach to what may be considered provocation; and

(2) if the narrower, would they favour including within it any or all of cases in paragraph 12.31(1),(2) and (3) above? (paragraph 12.32)

5. Should the concept of "loss of self-control" be retained or should it be replaced by a test of acting "under extreme emotional disturbance" or some similar phrase? (paragraph 12.37)

6. If the concept of loss of self-control is retained, should there be a requirement that it should be "sudden and temporary"? (paragraph 12.41)

7. Do consultees consider any and, if so, which of the approaches of the majority in *Smith (Morgan)* (Option A), the New South Wales Law Reform Commission (Option B) and the minority in *Smith (Morgan)* (Option C) to be satisfactory, or do they have any alternative suggestions? (paragraph 12.55)

Other possible limits to a defence of provocation

8. If provocation is retained as a partial defence, would consultees favour excluding it in cases where the defendant kills the deceased with an intention to kill? (paragraph 12.58)

9. If the defence of provocation is to be retained, do consultees consider that:

(1) the prosecution should continue to bear the legal burden of disproving the defence if there is any evidence of loss of self-control by the defendant;

(2) the defendant should bear the legal burden of proof;

(3) the defendant should bear an evidential burden;

(4) the judge should be obliged to leave provocation to the jury even if the defendant does not wish it to be left to the jury? (paragraph 12.67)

DIMINISHED RESPONSIBILITY

Abolition of the defence

10. Do consultees favour:

(1) abolition of diminished responsibility, whether or not the mandatory sentence is abolished;

(2) abolition of diminished responsibility, conditional upon abolition of the mandatory sentence;

(3) retention of diminished responsibility, whether or not the mandatory sentence is abolished?

What are their principal reasons? (paragraph 12.72)

Retention of the defence of diminished responsibility

11. If the defence of diminished responsibility is retained, do consultees favour:

(1) the present wording of section 2 of the 1957 Act;

(2) the alternative formula proposed in the Butler Report:

> "Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983, that is, "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"] and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter";

(3) the version proposed by the Criminal Law Revision Committee:

> "Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section 1 of the Mental Health Act 1983] and if, in the opinion of the jury,"[1] "the mental disorder was such as to be a substantial enough reason to reduce the offence to manslaughter"

(4) the version proposed by the New South Wales Law Reform Commission:

> "A person, who would otherwise be guilty of murder, is not guilty of murder if, at the time of the act or omission causing death, that person's capacity to:
>
> (a) understand events; or
>
> (b) judge whether that person's actions were right or wrong; or
>
> (c) control himself or herself,
>
> was so substantially impaired by an abnormality of mental functioning arising from an underlying condition as to warrant reducing murder to manslaughter.
>
> 'Underlying condition' in this subsection means a pre-existing mental or physiological condition other than of a transitory kind";

(5) a version proposed by Professor Mackay:

> "A defendant who would otherwise be guilty of murder is not guilty of murder if, at the time of the commission of the alleged offence, his mental functioning was so aberrant and affected his criminal behaviour to such a substantial degree that the offence ought to be reduced to one of manslaughter;"

(6) an amended version which would provide:

> "Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from an abnormality of mind (whether arising from a condition of arrested or retarded

[1] Replicating the beginning of recommendation of the Butler Report.

development of mind or any inherent causes or induced by disease or injury) and that abnormality of mind was a significant cause of his acts or omissions in doing or being a party to the killing";

(7) some other version? (paragraph 12.74)

Burden of proof

12. Do consultees consider that the legal burden of proof in relation to diminished responsibility should remain on the defendant, or should the burden on the defendant be no more than one of adducing evidence to raise the issue? (paragraph 12.76)

MERGER OF PROVOCATION AND DIMINISHED RESPONSIBILITY INTO A SINGLE PARTIAL DEFENCE

13. Do consultees favour the replacement of provocation and diminished responsibility by a single merged defence? If so do respondents prefer the Model Penal Code version, the Mackay and Mitchell reformulation, or some other formulation? (paragraph 12.81)

A PARTIAL DEFENCE OF USE OF EXECESSIVE FORCE IN SELF-DEFENCE

14. Do consultees:

(1) favour the introduction of a partial defence of the use of excessive force in self-defence and/or a partial defence of pre-emptive use of force in self-defence;

(2) if so, do they favour option A, B, C or D;

(3) would their views be the same if:

(a) the mandatory sentence were abolished;

(b) the defence of provocation were abolished? (paragraph 12.94)