

Provocation: the fall (and rise) of objectivity

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This article reviews the recent turbulent history of the partial defence of provocation. It assesses the current state of the law, the continuing dissatisfaction among the judiciary and academic commentators, and goes on to consider the current proposals for reform from the Law Commission. In an attempt to retain the reader's attention, it takes the form of a (wholly imagined) exchange between a professor and student. Any similarity to any living person is wholly coincidental.....

Keen first year law student: Excuse me, can the Court of Appeal set aside a House of Lords decision as to the proper construction of a statute?

Impatient Professor: Of course not! The hallowed rules of precedent mean that the only court that can reverse a decision of the House is the House itself.² Why, their Lordships have only recently re-asserted this principle in emphatic terms.³ Do keep up!

Student: So why didn't the Court of Appeal in *R v James*; *R v Karimi*⁴ follow the House of Lords decision in *R v Morgan Smith*?⁵

Professor: Er...

Student: Perhaps it has something to do with the fact that the Privy Council in *Attorney General of Jersey v Holley*⁶ overruled *Morgan Smith*.

Professor: Tch! Everyone knows that the Privy Council can't overrule a House of Lords decision.

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2 See *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234

3 *Leeds City Council v Price* [2006] UKHL 10: "[The Practice Statement] was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle." Readers of this Journal will be familiar with the decision in *IH (R on the application of IH) v Secretary of State for the Home Department* [2004] 2 A.C. 253) in which the House of Lords endorsed the Court of Appeal's decision to "set aside" an earlier decision of the House of Lords, *R. v Oxford Regional Mental Health Tribunal Ex p. Secretary of State for the Home Department*, [1988] A.C. 120. This was on the basis that the inability of a Mental Health Review Tribunal to review a decision to

conditionally discharge a restricted patient gave rise to a breach of Article 5(4) of the European Convention on Human Rights. No discussion of the rules of precedent arose in the *IH* case and the constitutional basis for the Court of Appeal's decision is not entirely clear. The House of Lords in *Price* was very clear that certainty in the law "is best achieved by adhering, even in the Convention context, to our rules of precedent." *Price* did conceive of "very exceptional cases" where it may be appropriate for a lower court to set aside a House of Lords decision but the circumstances had to be "extreme" for this to be permissible and the normal approach would be to await determination of the matter by the House of Lords itself.

4 [2006] EWCA Crim 14.

5 [2001] 1 AC 146.

6 [2005] UKPC 23; [2005] 2 AC 580.

Student: I think it may be due to the fact there were 9 law lords sitting in *Holley*, all accepting that they were ruling not only on the law of Jersey but also that of England and Wales. Apparently 6 of them decided that *Morgan Smith* wrongly interpreted the Homicide Act 1957 and preferred the interpretation of the earlier Privy Council decision in the Hong Kong case of *Luc Thiet Thuan v R*.⁷

Professor: You mean to say you have actually read these cases to which you refer?

Student: Of course – haven't you?

Professor: I, er, well... Hey this isn't about me. I think it might be time for a bit of Socratic dialogue. If you know so much about this, perhaps you could enlighten the rest of the class. For starters, what part of the Homicide Act was under consideration?

Student: Oh that is easy. It is section 3 which deals with provocation, the partial defence to murder:

“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.”

All the recent cases related to the so-called second limb of provocation. If the jury is satisfied that the accused may have been provoked to lose his/her self control (the first limb) they must go on in applying the second limb to assess whether the reasonable man would also lose his self control. It is the second limb that has caused all of the problems.

Professor: What was it about the second limb that was controversial?

Student: Well it is all to do with the old objective / subjective conundrum, isn't it?

Professor: Go on...

Student: You know; the question of whether the reasonable man referred to in the statute should be an “objective” reasonable man or whether he should have some of the “subjective” characteristics of the accused.

Professor: What difference would it make?

Student: Assuming that the jury thought the accused had actually been provoked to lose his self control when he killed the victim then, if the subjective approach won through, the jury would take into account the accused's own characteristics when deciding if a reasonable man would do the same. In other words in assessing the reasonable man's standard of self control he would have the characteristics of the accused.

So, for example, in *Luc Thiet Thian* the accused had brain damage; in *Morgan Smith*, he had severe depression; in *Holley* he was an alcoholic; in *James* the accused had an unspecified psychiatric condition that impaired his ability to control himself; in *Karimi*, he had post-traumatic stress disorder. If the subjective approach was applied, the jury would assess the standard of self control of the reasonable man with brain damage, with depression, with alcoholism etc.

⁷ [1997] AC 131.

Professor: Is that really tenable? Some conditions are surely incompatible with the concept of reasonableness as commonly understood. How, for example, would the jury assess the reasonable response of an accused suffering from schizophrenia?⁸

Student: With great difficulty I guess! Indeed, advocates of the subjective approach have suggested that courts should not refer to the reasonable man at all. As Lord Hoffman stated in *Morgan Smith*:

*“In my opinion, therefore, 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 ... The jury must think that 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. ... In deciding what should count as a sufficient excuse they have to apply what they consider to be appropriate standards of behaviour.”*⁹

Thus the jury would be assessing whether, in light of the accused’s characteristics, including any mental disorder, the response to the provocation should properly be excused in part. As Lord Clyde put it, “whether the defendant exercised the degree of self-control to be expected of someone in his situation”.¹⁰ The advocates of this approach felt that it would not remove the objective nature of the test but it would accommodate the accused’s individual characteristics:

*“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.”*¹¹

Critics of the subjective approach point out that it enables the accused to be judged not by the uniform standard indicated by the statute but by his own standard. Lord Hobhouse in *Morgan Smith* was searing in his criticism of the subjective approach:

*“... this approach requires the accused to be judged by his own reduced powers of self-control, 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. By introducing a variable standard of self-control it subverts the moral basis of the defence, and is ultimately incompatible with a requirement that the accused must not only have lost his self-control but have been provoked to lose it; for if anything will do this requirement is illusory. It is also manifestly inconsistent with the terms of section 3. It makes it unnecessary for the jury to answer the question which section 3 requires to be left to them, viz, whether the provocation was enough to make a reasonable man do as the accused did. It becomes sufficient that it made the accused react as he did. It substitutes for the requirement 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 a different requirement by reference to the effect which it actually had on the accused. These tests are in truth no tests at all.”*¹²

Professor: Okay – what about the objective approach?

Student: If the objective approach prevailed, then the jury would assess the reasonableness of the accused’s response to the provocation by reference to a reasonable man of ordinary fortitude. They

8 For discussion of the conceptual difficulties inherent in the objective standard see Alan Norrie, “From Criminal Law to Legal Theory: the Mysterious Case of the Reasonable Glue-Sniffer” (2002) 65(4) M.L.R. 538.

10 *Ibid.* at page 155

11 *Ibid.* per Lord Clyde at page 179

12 *Ibid.* at page 208.

9 *Op. cit.* at page 173

would not be told about the accused's peculiar characteristics insofar as they might affect his ability to control himself.

Professor: So on the objective approach, the accused's own characteristics are irrelevant?

Student: Hmm. Not entirely. Even on the objective approach the accused's characteristics are relevant to the *gravity* of the provocation. It is readily accepted that any particular idiosyncrasy of the accused should be taken into account insofar as it might have made the provocative conduct worse.¹³ In part this is a consequence of the 1957 Act expanding the definition of what could amount to provocative conduct to include things said in addition to things done. If words could suffice, then it followed that verbal provocation directed at a particular characteristic of the accused should be taken into account by the jury in determining the reasonableness of the response. As Lord Diplock put it in *R v Camplin*,¹⁴ the gravity of the provocation could depend on, "the particular characteristics or circumstances of the person to whom a taunt or insult is addressed."¹⁵

Professor: Let us be clear about this – on the objective approach if I have, say, epilepsy and someone taunts me about it to the point where I stab him to death, the jury can take account of my condition in deciding how reasonable it was for me to be provoked but not in deciding whether I exercised reasonable self restraint?

Student: Exactly – they would hear evidence of your epilepsy when deciding how aggrieved you would be by the taunts. This would clearly have some impact on the reasonableness of your response. However, they would have to put out of their mind any impact your epilepsy might have on your ability to control yourself. They should measure your response against their understanding of how the ordinary person who did not have epilepsy would react. Lord Devlin in *Camplin* suggested the following judicial direction:

*"He should ... explain to them that the reasonable man referred to in the question is a person having the powers 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."*¹⁶

Professor: Wait a moment, you said earlier it was a "reasonable man" but now it is a person of the age and sex of the accused. They are personal characteristics.

Student: Yes, I suppose they are. It could be argued that they are exceptions to the reasonableness, test but Lord Nicholls in *Holley* argued they were no such thing:

*"The powers of self-control possessed by ordinary people vary according to their age and, more doubtfully, their sex. These features are to be contrasted with abnormalities, that is, features not found in a person having ordinary powers of self-control. The former are relevant when identifying and applying the objective standard of self-control, the latter are not."*¹⁷

Professor: Doesn't the objective approach mean that many people would be incapable of satisfying the standard expected precisely because they are not "normal"?

Student: Yes. Lord Nicholls acknowledged as much in *Holley*. He said that using the objective test, "...may mean the defendant is assessed against a standard of self-control he cannot attain ... Inherent

¹³ *R v Morhall* [1996] AC 90.

¹⁴ [1978] AC 705.

¹⁵ *Ibid.* at page 717.

¹⁶ *Ibid.* at page 718.

¹⁷ *Op. cit.* at paragraph 13, emphasis in original.

in the use of this prescribed standard as a uniform standard applicable to all defendants is the possibility that an individual defendant may be temperamentally unable to achieve this standard.”¹⁸

Professor: Right, you have dawdled long enough. What did the cases decide then?

Student: In chronological order:

1997 – *Luc Thiet Thuan* – Privy Council – objective

2000 – *Morgan Smith* – House of Lords – subjective¹⁹

2005 – *Holley* – Privy Council – objective

2006 – *James; Karimi* – Court of Appeal – objective²⁰

Professor: How did we get into this position in the first place? You said a moment ago that *Camplin*²¹ established an objective test including a jury direction that referred to “ordinary” powers of self control. Did *Morgan Smith* overrule *Camplin*?

Student: No. Bizarrely, despite adopting diametrically opposing views, both the majority and minority in *Morgan Smith* claimed to be following the principles enunciated in *Camplin*. The majority took the view that Lord Diplock’s speech in that case was not clearly indicative of a wholly objective approach. Lord Hoffman argued that the references to the sex and age of the accused were illustrative only and not intended to limit the relevant characteristics. Moreover, it was argued that Lord Diplock had made no clear distinction between characteristics affecting the gravity of the provocation and those affecting the accused’s powers of self control. Essentially their Lordships in the majority employed a creative interpretation of the *Camplin* approach in order to fit with their view as to the principles underpinning the law and the needs of justice.

This was a judgement reaching to the fundamentals of criminal liability. The majority was concerned not just with practical difficulties with an objective test but with a perceived incoherence in the strict doctrine that sidelined the concept of capacity for self-control when considering provocation. Their Lordships were concerned that the law imposed a straightjacket which required a strict demarcation between the respective defences to murder which was not warranted by reality:

18 *Ibid.* at paragraph 12. This has formed the basis of some of the criticism of the objective approach: “It is to be remembered that the House of Lords in *R v G* [2003] UKHL 50 recently expressed grave concern about the potential for injustice when objective standards are employed, and thus in that case a significant step away from the application of objective recklessness was taken. In this context, a return to objectivity, albeit in a different area of criminal law, seems incongruous.” Neil Martin, “Continuing Problems with Provocation”, *N.L.J.* 2005, 155 (7192), 1363.

19 There were a number of Court of Appeal decisions preceding *Morgan Smith* which rejected the approach of the Privy Council in *Luc Thiet Thuan*. These included *R v Campbell* [1997] 1 Cr App R 199 and *R v Parker* (unreported; 25 February 1997. Subsequently *Morgan Smith* was applied in a number of Court of Appeal decisions including: *R v Kimber* (No.1), 2000 WL 1918494 *R v Lowe* [2003] EWCA Crim 677; *R v Miah* [2003] EWCA Crim 3713; *R v Rowland* [2003]

EWCA Crim 3636; *R v Smith* 2000 WL 33122433; *R v Farnell* [2005] EWCA Crim 1021; *R v McCandless* [2001] N.I. 86.

20 Prior to the *James/Karimi* cases, a number of Court of Appeal cases had suggested that *Holley* would be followed in due course. In *R v Van Dongen* [2005] EWCA Crim 1728 the Court of Appeal said, “We assume, but do not decide, because it is not necessary to do so, that *Holley*, a decision of the Privy Council, would be taken as binding in England and Wales.” In *R v Faqir Mohammed* [2005] EWCA Crim 1880 the Court of Appeal said, “Although *Holley* is a decision of the Privy Council and *Morgan Smith* a decision of the House of Lords, neither side has suggested that the law of England and Wales is other than as set out in the majority opinion set out in the majority opinion delivered by Lord Nicholls in *Holley* and we have no difficulty in proceeding on that basis.”

21 *Op. cit.*

“I think it is wrong to assume that there is a neat dichotomy between the ‘ordinary person’ contemplated by the law of provocation and the ‘abnormal person’ contemplated by the law of diminished responsibility...”²²

This ostensibly liberalising approach was heavily criticised outside the judicial arena as flawed in principle in that it conflated the idea of provocation as a partial excuse with the idea of diminished responsibility as a partial denial of responsibility:

“To offer an excuse ... is to attempt to provide a decent rational explanation for what one did. To deny responsibility, by contrast, is to assert that (because at the time one was not a sufficiently rational being) no rational explanation for what one did is called for. Defences in these two classes ... are not only different but incompatible. To make an excuse is not only not to deny one’s responsibility; it is positively to assert one’s responsibility. To deny one’s responsibility is not only not to make an excuse; it is to undermine any excuse one might have made. That is because one cannot claim to live up to rationality’s standards while also claiming that one should not be judged by rationality’s standards.”²³

In other words the two partial defences to murder ought to be conceptually and morally distinct but the subjective approach to provocation encouraged an unsustainable overlap between the defences. Nevertheless the idea of integrating the two defences has also had its proponents. For example, Mackay and Mitchell have argued strongly for the logic of the *Morgan Smith* decision to be recognised explicitly by the creation of a single defence which combined elements of provocation and diminished responsibility.²⁴

Professor: But to come back to the current state of the law, you are saying that the majority view in *Morgan Smith* has not prevailed and that the objective approach is now the correct test in English law?

Student: Yes.

Professor: And you say this is the case despite the decision coming from the Privy Council, which is not even binding on English courts and despite the House of Lords decision being only 5 years old?

Student: Just so. Professor Andrew Ashworth acknowledged it was a novel approach to the development of the law but the reality was that *Holley* now represented the law:

“Is Holley binding on English courts? There may be a purist strain of argument to the effect that it is not, since it concerns another legal system (that of Jersey). However, the reality is that nine Lords of Appeal in Ordinary sat in this case, and that for practical purposes it was intended to be equivalent of a sitting of the House of Lords. It is likely that anyone attempting to argue that Morgan Smith is still good law in England and Wales would receive short shrift.”²⁵

Professor: I don’t see what is wrong with being a purist, but putting that on one side, why did the Privy Council think the House of Lords had misunderstood provocation?

22 *Op. cit.* note 5, above at page 168 per Lord Hoffman.

23 Gardner and Macklem, “No Provocation Without Responsibility: A Reply to Mackay and Mitchell”, [2004] *Crim. L. R.* 212. See also Macklem and Gardner, “Compassion without respect? Nine fallacies in *R. v. Smith*” [2001] *Crim L. R.* 622

24 Mackay and Mitchell, “Provoking diminished responsibility: two pleas merging into one” [2003] *Crim L. R.* 745. See also Mackay and Mitchell, “Replacing Provocation: More on a Combined Plea” [2004] *Crim. L. R.* 218.

25 Commentary, [2005] *Crim. L. R.* 966 at page 971.

Student: Well the interesting thing was that the majority in *Holley* did not actually say there was anything in principle wrong with the subjective approach in *Morgan Smith*. It was described as “one model which could be adopted in framing a law relating to provocation”.²⁶ The entire thrust of the majority’s attack on *Morgan Smith* was to do with the proper interpretation of the statute and the acceptable parameters of judicial interpretation. They believed the House of Lords had misconstrued section 3 of the Homicide Act 1957:

“However much the contrary is asserted, the majority view [in Morgan Smith] does represent a departure from the law as declared in section 3 of the Homicide Act 1957. It involves a significant relaxation of the uniform, objective standard adopted by Parliament. Under the statute the sufficiency of the provocation (“whether the provocation was enough to make a reasonable man do as [the defendant] did”) is to be judged by one standard, not a standard which varies from defendant to defendant. Whether the provocative act or words and the defendant’s response met the “ordinary person” standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable.”²⁷

This was based on the idea that the House of Lords in *R v Camplin*²⁸ had definitively addressed the implications of section 3 and had accurately identified an objective approach towards the standard of self control required as follows:

“It means an ordinary person of either sex, not exceptionally excitable or 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.”²⁹

This view was entrenched by reference to Lord Diplock’s “model direction” in that case:

“He should ... 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.”³⁰

The law of homicide was said by the majority in the Privy Council to be a “highly sensitive and highly controversial area of the criminal law” and that Parliament had altered the common law by virtue of the Homicide Act. It was “not open to judges now to change (‘develop’) the common law and thereby depart from the law as declared by Parliament.”³¹

The minority for its part emphasised the origins of the defence as a judicial response to the harshness of the law of murder:

“It was a humane concession to human infirmity and imperfection, acknowledgement ‘that by reason of the frailty of our nature we cannot always stand upright’... And the rationale of the provocation defence is still the consideration of justice which gave rise to it, that the law should ‘not require more from an imperfect creature than he can perform’.”³²

26 Per Lord Nicholls at paragraph 22.

27 *Ibid.*.

28 *Op. cit.*

29 *Ibid.* Per Lord Diplock at page 717.

30 *Ibid.* at page 718, cited by Lord Nicholls in *Holley* at paragraph 10; Lord Nicholls’ emphasis.

31 *Holley*, *op. cit.* at paragraph 22.

32 *Ibid.* per the joint dissenting opinion of Lords Bingham and Hoffman at paragraphs 44–45.

They agreed that the law relating to provocation required urgent review but so long as the defence was available it ought to be applied in line with the underlying rationale. The statute could and should be interpreted as requiring the jury to determine what matters to take into account in determining the reasonableness of the response and it was improper to undermine the jury's function by limiting the characteristics that could be considered. Lord Carswell agreed and added his concerns regarding the risk of confusing a jury:

*"I hold the very clear view that the dichotomy between the gravity of the provocation and the level of self-control in reaction cannot readily be made comprehensible to a jury by the directions fashioned by a judge with the greatest care and clarity ... The formula is not only opaque ... but even if it can be comprehended by an intelligent jury, they are more than likely to ask themselves how they can sensibly decide whether an ordinary person would have reacted as the defendant did if he would not have found the acts or words provocative in the first place."*³³

The minority view in *Holley* thus echoed the majority view in *Morgan Smith*. It reflected a determination to ensure the law of provocation did not demand a standard of control that was beyond the capacity of defendants to perform. Ultimately the majority thought that irrespective of the merits of the normative case for subjectivity, compliance with the statute required a return to objectivity.

Professor: So the subjective approach might be the right approach in principle but irrespective of this, the Privy Council thought the House of Lords' approach undermined the sovereignty of Parliament?

Student: Yes, that is a fair assessment. The matter has now been taken beyond argument by the Court of Appeal decision in *R v James; R v Karimi* which has endorsed the Privy Council decision as reflecting the law of England and Wales. I won't bother you with the constitutional acrobatics the Court had to perform in order to recognise the pre-eminence of the *Holley* precedent, but the Court did state:

*"It seems to us that this can only mean that they [the minority judges in Holley] accepted that the decision of the majority clarified definitively the present state of English law. ... While we do not believe that it has any relevance to the resolution of these appeals, we should record that this court finds the reasoning of the majority in Holley to be convincing."*³⁴

I ought to re-emphasise though that despite the majority of the Privy Council being neutral on the question of principle, numerous commentators have engaged in lengthy debate over the proper approach towards the question of the standard to be required in the defence of provocation.³⁵

Professor: Nevertheless, the law is now settled. Thank you for an adequate, if somewhat over simplistic, assessment ...

Student: Er, sorry, that is not quite the end of the story. One thing that united all of their Lordships in *Holley* was the fact that the law was now in something of a mess:

33 *Ibid.* at paragraph 73. The majority thought these fears were "exaggerated" (paragraph 26).

34 *Op. cit.* note 4 above at paragraphs 25–26.

35 See for example Professor JC Smith, commentary at [2000] *Crim. L. R.* 1004; Macklem and Gardner, "Compassion without respect? Nine fallacies in *R. v. Smith*" [2001] *Crim L. R.* 622; Alan Norrie, "The

structure of provocation" [2001] *C. L. P.* 307; Mackay and Mitchell, "Provoking diminished responsibility: two pleas merging into one" [2003] *Crim L. R.* 745; Gardner and Macklem, "No provocation without responsibility: A reply to Mackay and Mitchell" [2004] *Crim. L. R.* 212. Most, but not all of the comment is critical of the subjective approach.

“In expressing their conclusion above, their Lordships are not to be taken as accepting that the present state of the law is satisfactory. It is not. The widely held view is that the law relating to provocation is flawed to an extent beyond reform by the courts ... Their Lordships share this view.”³⁶

The Law Commission in its “Report on Partial Defences to Murder”³⁷ reviewed the rationale and operation of the provocation defence and made recommendations for reform. The proposal involved a new gender neutral partial defence for homicide committed in response to “gross provocation”, fear of serious violence or a combination of both. The requirement for the accused to have lost his/her self control was removed, although it would not apply where the accused acted out of considered desire for revenge. In respect of the standard of self control, the Commission preferred the approach of the minority in *Morgan Smith* (now supported by the majority in *Holley*) which, it noted, also accorded broadly with the law in Australia, Canada and New Zealand.³⁸ Thus the new defence would only be available if “a person of the defendant’s age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.”³⁹

In its consultation paper, “A New Homicide Act for England and Wales?”⁴⁰, the Law Commission provisionally proposed a new categorisation for murder whereby provocation would be a defence to first degree murder (where the accused intended to kill) and reduce this to second degree murder, not manslaughter. The principles would be the same as those outlined in the report on partial defences.⁴¹ The Commission rejected the notion advocated by Mackay and Mitchell of combining the defences of provocation and diminished responsibility.⁴²

The upshot is that we are likely in due course to see the fundamental review of the law of murder that has been widely called for. Whether this leads to a more coherent and workable defence of provocation remains to be seen.⁴³

Professor: Right. Time for lunch. I think we might do this again next week. Can you please prepare something on reform of insanity?

Student: Er...

36 *Per Lord Nicholls for the majority at paragraph 27. See also Lords Bingham and Hoffman at paragraph 44 and Lord Carswell at paragraph 77.*

37 *Report on Partial Defences to Murder (Law Com No 290) (2004) (Cm 6301).*

38 *Ibid. paragraph 3.110. See also paragraph 3.127: “The test under our proposal is not whether the defendant’s conduct was reasonable, but whether it was conduct which a person of ordinary temperament might have been driven to commit (not a bigot or a person with an unusually short fuse). We believe that a jury would be able to grasp and apply this idea in a common-sense way. Because the test is not whether the defendant’s conduct was reasonable, there is no illogicality in providing only a partial defence.”*

39 *Ibid. at paragraph 3.168, Principle 1. In Principle 2 the Commission went on to explain the objective element:*

“In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the defendant’s age and all the circumstances of the defendant other than matters whose only relevance to the defendant’s conduct is that they bear simply on his or her general capacity for self-control.”

40 *Law Commission Consultation Paper no. 177, A New Homicide Act for England and Wales? (2005)*

41 *Ibid. paragraphs 10.7 and 10.23.*

42 *Report on Partial Defences to Murder, op. cit. paragraph 3.166.*

43 *See for example, the criticism of the Law Commission’s proposals by Mackay and Mitchell, “But is this provocation? Some thoughts on the Law Commission’s report on Partial Defences to Murder” [2005] Crim. L. R. 43.*