LORD CHIEF JUSTICE
OF ENGLAND AND WALES

ISSUES IN CRIMINAL JUSTICE – MURDER

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Introduction

"The law governing homicide in England and Wales is a rickety structure set upon shaky foundations." So said the Law Commission in the Report that they issued in November last year proposing reform to the law of murder, manslaughter and infanticide. Ten years ago Lord Mustill, in the course of a judgment, commented "the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning" [1]. It is high time that it was reformed. Previous attempts at reformation have failed. Will the Law Commission's current attempt be any more successful?

I hope that it will, but I am not over-optimistic. The law of murder is a political hot potato and legislative slots tend to go to legislation that appears to have more immediate practical implications.
The merits of the reforms proposed are that they will rationalise this highly unsatisfactory area of our law, but it would not be right to think that they would have no practical benefits. For a start they would reduce the frequency with which the House of Lords is troubled with appeals. They might also increase the proportion of cases disposed of by pleas of guilty rather than lengthy and expensive trials.

Why is it that this area of our law has given rise to so many problems? First of all because it is one of the few areas of our common law that has not been codified. Murder remains a common law offence, although Parliament has been nibbling at the edges. And because murder is such a serious offence it has been the subject of frequent sorties to the House of Lords, where their Lordships have not hesitated to attempt to improve the law – and more often than not succeeded in making confusion more confounded. Time and again they have differed from the considered conclusions of those who have gone before them, and all too often they have been unable to agree among themselves. Our criminal legal system is at its

[1] Attorney- General's Reference (No.3 of 1994) [1998] AC 245 at 250

least attractive when it sees the highest judges in the land unable to agree on the elements of the most serious offence.
As I said, part of the problem is that murder is such a serious offence. It carries a unique stigma and a unique sentence – mandatory life imprisonment. I said that murder is a political hot potato and that is why altering the mandatory life sentence is not on the agenda. The terms of reference laid down by the Government for the Law Commission's review required it to make recommendations that "take account of the continuing existence of the life sentence for murder". This required the Law Commission to consider this topic with one hand tied behind its back.

Of course, when the mandatory life sentence is imposed on a man who has been convicted of murder it does not mean that he will go to prison for life.
Most 'lifers' are released on licence after they have served a period of imprisonment on the recommendation of the Parole Board. They are, however, subject to recall to serve the rest of their sentence if they breach the terms of the licence. How long they serve before being considered for release is now determined by the judge who sentences them. He has to specify a minimum term-of tariff-which the defendant must serve before being considered for release.
In fixing the minimum term the judges have to apply guidance laid down in the Criminal Justice Act 2003. The effect of that Act has been in many cases almost to double the length of time that those convicted of murder will stay in prison. In thirty years' time the prisons are going to be full of geriatric lifers.

The length of sentences imposed by judges is supposed to reflect the seriousness of the offence. The seriousness of the offence depends upon two factors. The culpability of the offender and the consequences of the offence. So far as the latter is concerned, it is easy to see why the consequences of murder weigh so heavily in the scale when it comes to the penalty.

So far as culpability is concerned, it was always a requirement of our common law that the offence of murder required that the killing be committed 'with malice aforethought'. 'Malice aforethought' – that sinister phrase reflects what the man in the street understands about murder. He believes that murder is killing someone on purpose.

The offence is, of course, much wider than that.

You are guilty of murder if you intended to kill or cause 'grievous bodily harm' to your victim. What does 'grievous bodily harm' mean? You will not be surprised to hear that the courts have spent a lot of time discussing that question. Grievous bodily harm means really serious injury, but really serious injury is not in law as serious as all that. It certainly need not be life threatening.

The result of this is, to quote from the same speech of Lord Mustill, that it is "possible to commit a murder not only without wishing the death of the victim but without the least thought that this might be the result of the assault[2]"

Because murder is such a serious offence and has such serious consequences, the judges and, more recently, Parliament have developed partial defences to a charge of murder.
These apply in special circumstances where, although the defendant intended to kill, the culpability involved in having that intention is mitigated.

The first of these partial defences arises when the defendant kills as a result of provocation. The second is where the defendant is suffering from abnormality of mind that substantially diminishes his responsibility for his actions. These are partial defences in that they result in the defendant being convicted, not of murder but of manslaughter.

The fact that so much depends on the state of mind of the defendant has given rise to further problems, for the courts have had to define, with some precision, the test of the relevant state of mind that makes you liable for murder, or alternatively reduces your offence to manslaughter. What constitutes 'intention'; and what constitutes 'provocation'? The Law Lords have considered these questions again and again, giving different answers each time, so that our law has been in a continuous state of flux.

What particularly is wrong with the law at the moment that calls for legislation? First, it remains in a state of flux. By way of example I shall trace the law on intent, and then go on to tell you about recent developments in relation to the law of provocation, in which I have played a part. Secondly, and perhaps more seriously, the current law does not ensure that the most culpable offences of homicide are classified as murder and the less serious as manslaughter.

The history of intent

I propose to start by tracing the history of our law in relation to intent. The mental element or *mens rea* required to make a killing murder was for centuries described as 'malice aforethought'. This is a common law concept. Its first statutory recognition came in the Parliament Roll as long ago as 1389.

Broadly speaking, unlawful killing with malice aforethought is murder; unlawful killing without malice aforethought is manslaughter. But malice aforethought has always been an obscure and problematic concept.
In 1883 Stephen described it as 'a phrase which is never used except to mislead or be explained away'[3]. And as late as 1975 Lord Hailsham added the plea 'the sooner the phrase is consigned to the limbo of legal history the better for precision and lucidity in the interpretation of our criminal law'. He pointed out that by the beginning of the century the phrase had come by judicial interpretation to cover a number of states of mind 'which

[2] Ibid at 250
[3] History of the Criminal Law of England, vol III, page 83

rendered guilty of murder men and women whose conviction of a capital offence would not be acceptable today even by the most convinced adherents of the death penalty'[4].

Until the decision in Woolmington v DPP in 1935[5] there was a presumption that anyone who killed intended to do so. The burden was on the defendant to prove circumstances of 'excuse, justification or extenuation'[6]. There were also two species of 'constructive malice', both historical relics from the time of strict liability.

The first arose where the defendant killed an officer of justice while resisting or opposing that officer in the execution of his duty; the second was where the defendant killed another by an act of violence done in the course of or in the furtherance of a felony involving violence.
In either case the defendant was deemed to have malice aforethought, whether or not he foresaw, or should reasonably have foreseen, that his conduct would endanger life.

Both species of constructive malice were abolished by the Homicide Act 1957. That Act did not codify the law of murder, but it set out to rationalise and simplify the elements of the common law offence. Lord Hailsham during the argument in *Hyam* commented 'I do not think it will assist the House to go back to Stephen. The law develops. The best place to begin is 1957. The law had a fresh start then'[7].

The new Act was, indeed, only a start.
Since 1957 the House of Lords has had cause to consider the mental element of the crime of murder on numerous occasions. Forty years on Lord Steyn was to remark that none of them satisfactorily settled the law.

Although the 1957 Act abolished constructive malice, it left intact the common law concepts of express and implied malice. Express malice has never caused a difficulty. It exists where the defendant intends to kill. Implied malice arose in the case of acts of recklessness which had a high probability of causing death or serious bodily harm. The precise circumstances in which such acts amounted to murder have received consideration in an extensive and conflicting body of jurisprudence.

The starting point is the Court of Appeal's decision in *Vickers* in 1957[8]. This was the first decision after the Homicide Act came into force. A burglar had punched and kicked an elderly woman householder who came upon him as he was going about his burglary. She died from these blows. The judge summed up on the basis that if the appellant had intentionally caused the woman grievous bodily harm he had shown malice and was guilty of murder. As for grievous bodily harm, he stated 'that it need not be permanent, but it must be serious…..if it is such as seriously and grievously to interfere with the health or comfort of the victim it is grievous bodily harm'[9]. This direction was challenged on appeal, but Lord

[4] Hyam v DPP [1975] AC 55, 67
[5] ([1935] AC 462)
[6] Stephen's Digest of Criminal Law (1877), art 230
[7] Hyam v DPP [1975] AC 55 at 59
[8] [1957] 2 QB 664
[9] Ibid, p.672

Goddard CJ was having none of it. The original members of the Court of Appeal could not agree, so he replaced them with a five-man court who all proved to be of the same mind – that is they agreed with Lord Goddard. These included Devlin J.

In giving the judgment of the Court Lord Goddard said this: 'Malice aforethought is a term of art. It has always been defined in English law as either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied, where, by a voluntary act, the accused intended to cause grievous bodily harm…he cannot say that he only intended to cause a certain degree of harm'[10].

This was later described as the 'classical definition of the law of murder'[11]: killing with intent either to kill or to cause grievous bodily harm.
Note that there was no reference to foresight of consequences or the degree of certainty as to that which had to be foreseen. It was not long before these considerations entered the picture and muddied the water.

DPP v Smith[12] was heard by the House of Lords in June 1960. It was a famous case. I was reading law at Cambridge at the time and went up to listen to a day of the argument. Jim Smith was driving a car in the back of which was a sack of stolen scaffold clips. He stopped at a road junction and a police constable, with whom he happened to be on friendly terms, came up to him and told him to pull over. Instead of doing so he drove away, with the constable clinging desperately to the window, until he was thrown off under the wheels of a car going in the other direction and killed. Smith drove round the corner, dumped the sacks, and then drove back. On being told that the policeman had been killed he admitted to being the driver of the car and said, "I knew the man. I wouldn't do that for the world. I only wanted to shake him off."
He was convicted of capital murder, for killing a police constable still carried the death penalty. He appealed successfully to the Court of Appeal. The Court ruled that the trial judge had erred in directing the jury that a man 'must be presumed to intend the natural consequences of his acts'.
The judge should have directed the jury that if they were not sure that the defendant actually intended to kill or to cause grievous bodily harm they should acquit him of murder and convict him only of manslaughter.

The prosecution appealed to the House of Lords. The Lord Chancellor, Viscount Kilmuir, presided. The Committee also included Lord Goddard, now in retirement in his eighties, and Lord Denning, who, surprisingly, concurred with the other Law Lords. They allowed the appeal. Giving the only speech Lord Kilmuir held, in effect, that a man must be presumed to intend the natural consequences of his actions. This is the way he put it: '…the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result.

[10] Ibid, p. 670
[11] DPP v Hyam [1975] AC 55 at 68
[12] [1961] AC 290

The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result'[13].

So Smith was convicted, although it was plain as a pikestaff that he had not had any intention of killing the police constable. There was widespread criticism of this decision, giving rise to an extensive body of literature, here and in the Commonwealth. It was not supported by the Law Commission and not followed by the High Court of Australia. Parliament did not think much of it either. It enacted section 8 of the Criminal Justice Act 1967, which provided:

'A court or jury, in determining whether a person has committed an offence – (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing inferences from the evidence as appear proper in the circumstances'.

In 1987 Lord Ackner was sitting as one of five judicial members of the Privy Council in *Frankland v R*[14]. This was an appeal from the Isle of Man, where the common law test had not been altered by statute. The appellant had tied an elderly man to his bed and left him, where 48 hours later he had died. His defence was that he had not intended to kill him but to immobilise him for a bit.

The jury were directed, in accordance with *Smith*, to convict him if a reasonable man would have realised that his victim was likely to die or suffer grievous bodily harm. They duly convicted him. When he appealed the Privy Council ought, according to the law of precedent, to have followed the decision in *Smith*. They declined to do so. Lord Ackner said:

'Their Lordships...have concluded that the decision in *DPP v Smith* insofar as it laid down an objective test of intent in the crime of murder did not accurately represent the English common law'[15].

It is not often that you find the Privy Council saying that the House of Lords got it wrong. We shall find a rather more dramatic example of this when we come to look at provocation.

Following, Smith the House of Lords returned to the mental element in the law of murder in 1974 in *Hyam v DPP*[16], this time with the Lord Chancellor Lord Hailsham in the chair and with the towering intellect of Lord Diplock strengthening the Committee.

The appellant's boyfriend got engaged to another woman. She went to that woman's house, poured petrol through her letter box and stuffed a burning newspaper after it. The woman escaped when the house caught fire, but her two daughters were overcome by the fumes and

[13] Ibid, p.327
[14] Frankland v The Queen [1987] AC 576
[15] Ibid, at 594
[16] [1975] AC 55

died. The appellant said that she had only meant to frighten the woman into leaving the neighbourhood.
Ackner J directed the jury that they should not convict her of murder unless she had the intention to kill or cause grievous bodily harm to those in the house and went on to say that, if she knew that it was highly probable that death or grievous bodily harm would result from her actions, that was enough to constitute the necessary intent, even if her motive had only been to frighten.

This direction survived appeal both to the Court of Appeal and to the House of Lords. But the Law Lords split 3/2. The majority held that a person who knowingly exposed someone to the risk of death or grievous bodily harm would be guilty of murder if death resulted, regardless of whether he wished to bring about that result. Thus foresight of consequences was equated with intention. 'Grievous bodily harm' was 'really serious harm', which could include injuries which would not normally be expected to endanger life. The majority were not, however, agreed as to the precise test of the foresight that was to be equated with intent. One said you had to foresee that death or serious harm was 'probable' another 'highly probable' and another spoke of foreseeing 'a really serious risk' of it.

The minority, of which Lord Diplock was one, agreed that foresight of consequences could be equated with intent, but held that the 1967 Act entitled the House to redefine the intent necessary for murder. They did so as 'intent to kill or to cause injury likely to result in death'.

None of this made life much easier for the poor judge who had to sum up to a jury. Lord Kilbrandon made the following powerful observation:
'Since no homicides are now punishable with death, these many hours and days have been occupied in trying to adjust a definition of that which has no content. There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment'[17].
I would make these comments on that simple, and possibly beguiling suggestion. First, it would call for the abolition of the mandatory life penalty for murder, which has never been politically acceptable.
Secondly, it would transfer to the judges the task that at present falls on the jury of deciding into which grade of seriousness of homicide the facts of a particular case fall. In the subsequent case of *Cunningham*[18] Lord Hailsham said this of Lord Kilbrandon's suggestion: 'I can see both the danger and the difficulty in this for the judiciary…I doubt whether in practice they would relish the responsibility with greater enthusiasm than that with which Parliament would be eager to entrust them with it'[19]. How right he was.

[17] Ibid, p. 98
[18] R v Cunningham [1982] AC 566
[19] ([1982] AC 566, at 580

I am now going to show you how the House of Lords has tempered the effect of *Hyam*, a decision from which[20] they reluctantly decided that they could not depart.

Moloney[21] was a very sad case. The appellant and his step-father, of whom he was very fond, were larking around with shotguns after both had been drinking heavily. The appellant shot and killed his step-father at point blank range.
The judge directed the jury that "a man intends the consequences of his voluntary act…when he foresees that it will probably happen, whether he desires it or not"[22]. They found the appellant guilty of murder. In the House of Lords his appeal was allowed. Giving the only speech Lord Bridge said that the different statements about foresight in *Hyam* were giving rise to difficulties. He said that 'the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent'[23] later referring to foreseeing something as 'a moral certainty'[24].

He then laid down some guidelines that discouraged a judge from referring to foresight at all but advised that when this was necessary the judge should direct the jury to ask themselves, 'First, was death or really serious injury…a natural consequence of the defendant's act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act?'[25] You may think that that was a test that was likely to give rise to further problems, and sure enough it did.
In *Hancock*[26], and we have now reached 1986, two miners who were on strike had pushed a block of concrete over a three lane highway. It landed on a taxi carrying a blackleg miner to work and killed the driver. Their evidence was that they had not wanted to strike the car, but simply to block the road and cause a fright. The judge gave the jury Lord Bridge's direction in *Moloney* and they convicted. The Court of Appeal allowed an appeal and the House of Lords, with Lord Scarman in the chair, held that they were right to do so. Lord Scarman held that Lord Bridge's formula was likely to mislead. Rather than speak of foresight of 'natural consequences' the jury should be told to speak of foresight of 'probability'.

He continued, 'They also require an explanation that the greater the probability of a consequence, the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended'[27]. Well I wonder how helpful you think that was as a direction to the jury.

It needed Lord Lane CJ to bring some clarity into the arena, which he did in *Nedrick*[28]. This was another case of a defendant who had poured paraffin through a letter box and set a house on fire, but who said that he had not intended to kill those inside it. Lord Lane held that in

[20] in *Cunningham*, ibid
[21] R v Moloney [1985] AC 905
[22] [1985] AC 905, at 917
[23] Ibid, p.925
[24] Ibid, p.926
[25] Ibid, p.929
[26] R v Hancock [1986] AC 455
[27] ([1986] AC 455, at 473
[28] R v Nedrick [1985] 1 WLR 1025

most cases it would be enough simply to direct the jury that they had to be satisfied that the defendant intended to kill or to do serious bodily harm.

He added: "Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or really serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case"[29].

Here at last was a direction that a jury could understand. That did not stop the prosecution, 12 years later in *Woollin*[30], suggesting to the House of Lords that Lord Scarman's direction was to be preferred. This suggestion received short shrift.
Lord Steyn remarked that Lord Lane's direction was simple and clear. It had given rise to no difficulties. It was pitched at the right level of foresight. Trial judges ought to continue to use it.

They have continued to do so. The direction is, however, only one as to how the jury should approach the evidence. It is not a rule of law that, if the jury are satisfied that the defendant knew that death or serious bodily harm was a virtual certainty as a result of his actions they must convict him of murder. Some, including Professor Smith, have expressed the view that it would be more satisfactory if this was a rule of law.

Equally it remains the case that a defendant who intended to cause a serious injury that was not apparently life-threatening will be guilty of murder if, contrary to what he expected or intended, the injury results in the death of the victim.

In restricting intention in the law of murder to subjective intent, the House of Lords had removed the injustice under which a defendant could be convicted of murder in circumstances where, although he should have foreseen the consequences of his act he did not in fact do so. They have, however, removed from the scope of murder conduct which most people think should be within it.

That is deliberately taking action that the defendant knows will put life at risk although he does not intend to kill and death is not a virtually certain result of his conduct. The example usually given is that of the terrorist who places a bomb and then gives a warning that he has done so. Under the current law, if the intended explosion results in death, the defendant will be guilty of manslaughter rather than murder.

Reform

I now propose to outline the reforms proposed by the Law Commission[31], with particular reference to the problem areas that I have been dealing with so far.
They recommend a new Homicide Act that would divide homicide into three categories, instead of the two categories of murder and manslaughter that currently exist.

[29] [1986] 1 WLR 1025, at 1028
[30] [1999] 1 AC 82
[31] "Murder, Manslaughter and Infanticide" November 2006, Law Com No 304

The first category would be ‘first degree murder’. Only this category would carry the mandatory life sentence. It would be restricted to killings where the defendant intended to kill, or intended to cause really serious injury and was aware that his conduct involved a serious risk of causing death.

The second category, ‘second degree murder’, would embrace some killings currently classed as murder and some currently classed as manslaughter, namely:

(i) killings where the defendant intended to cause really serious injury but was not aware that his conduct involved a serious risk of causing death;
(ii) killings where the defendant intended to cause injury or fear or risk of injury and was aware that his conduct involved a serious risk of causing death;
(iii) killings subject to a successful plea of provocation, diminished responsibility or killing pursuant to a suicide pact.

The sentence for second degree murder would be discretionary, subject to guidelines, and the maximum sentence would be life imprisonment.

The third category, ‘manslaughter’, would embrace:

(i) killing by gross negligence;
(ii) killing through the commission of a criminal act intended to cause injury;
(iii) killing through the commission of a criminal act which the defendant was aware involved a serious risk of causing injury.

Here also the sentence would be at large with a maximum of life imprisonment.

The Law Commission said that the object of their proposed reforms was to rationalise the general law of homicide; to produce a comprehensible and fair legal structure that non-lawyers can understand and accept. I think that their proposals go a long way to achieving that end.

Their room for manoeuvre was, as I said, restricted by the requirement to preserve the mandatory life sentence, but they have restricted that sentence to the cases that are likely to be the most serious – deliberate killing or causing serious harm knowing that this may result in death. This is likely to be the kind of harm that is obviously life-threatening. The epithet ‘murder’, albeit second degree murder, is applied to all other intentional killings, notwithstanding that under the current law provocation or diminished responsibility would reduce them to manslaughter.

It is also applied to other situations where death is caused by particularly culpable wrongdoing. Manslaughter is reserved for wrongful, but unintentional killing in circumstances where the culpability will not normally be such as to deserve the epithet of murder.

How about intention? The Commission has recommended that ‘intention’ be codified as follows:

(1) A person should be taken to intend a result if he or she acts in order to bring it about’.
(2) In cases where the judge believes that justice may not be done unless an expanded understanding of intention is given, the jury should be directed as follows: an intention to

bring about a result may be found if it is shown that the defendant thought that the result was a virtually certain consequence of his or her action.

I am happy with a definition of intention that embraces both acting in order to bring something about and acting knowing that the result is a virtually certain consequence of one's actions. That is essentially Lord Lane's direction. I am not so happy with the suggestion that the statute should direct that the latter definition should only be given if the judge thinks this necessary to prevent the risk of injustice. That is something that I would have thought could more happily form part of Judicial Studies Board guidance than a statutory restriction.

Provocation

I now want to turn to another problem area in the law of murder: provocation.

'The doctrine of provocation has always been described as a concession to human frailty and the law illustrates Kant's dictum that, from the crooked timber of humanity nothing straight can be made'. So said Lord Hoffman in the case of *Smith (Morgan)*[32]. The doctrine of provocation in the law of murder is an anomaly. In crimes of violence which result in injury short of death the fact that the defendant was provoked does not affect the nature of the offence of which he is guilty. It is merely a matter to be taken into account in determining his penalty. The same could be the case in respect of the crime of murder were it not for the fact that murder carries a mandatory life sentence.

Provocation reduces murder to manslaughter, which does not carry a mandatory life sentence, although the judge can impose one if he thinks the offence deserves it.

The consequence is that a large number of cases are fought where there is no doubt about the defendant's guilt and the only issue is whether the offence was murder or manslaughter.

The classic definition of provocation has always been said to be that of Devlin J in *R v Duffy*. I quote:

'Provocation is some act or series of acts, done by the dead man to the accused, which would cause in any reasonable man 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'[33].

I have never thought this a very satisfactory definition. If any reasonable man *would* lose his self control, then I question why this should attract criminal responsibility at all. The better definition would have started by saying that provocation is something that *might* cause a reasonable man to lose his self control.

The unhappy pattern of judicial disagreement seen in the law on intention is repeated in the case of provocation. No single definition has sufficed to deal with the variety of circumstances in which defendants have claimed that they were provoked to lose their self-control.

[32] [2001] 1AC 146, at 159
[33] [1949] 1 All ER 932

Three years before *Duffy*, in *Holmes v DPP*[34], the appellant had hit his wife over the head with a hammer and then strangled her. He claimed that he had been provoked because she had confessed to sleeping with another man. This was not a very attractive plea as he then went off to his own mistress, telling her that his wife had gone away, which I suppose in one sense was true. The House of Lords held that as a matter of law 'a confession of adultery without more is never sufficient to reduce an offence which would otherwise have been murder to manslaughter' and that in no case could words alone, save in circumstances of a most extreme and exceptional character so reduce the crime'[35].
In *Bedder v DPP*[36] the defendant had the misfortune to be impotent. A prostitute jeered at him for that reason and he lost his temper and killed her. The House of Lords ruled that, when deciding whether a reasonable person might have reacted in this way you had to consider a reasonable potent person. Not one vested 'with the personal physical peculiarities of the accused'[37].

This seemed rather tough, and so thought Parliament, for in the Homicide Act 1957 it changed the law. Section 3 provided:

'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'.

This made 3 changes to the existing common law:

(1) It established that words alone could amount to provocation;
(2) It meant that the court could not rule that, as a matter of law, something was not capable of amounting to provocation. That question had to be left to the jury, however absurd the claim of provocation might appear.
(3) It meant that a judge could no longer dictate to a jury what were and were not the characteristics of a reasonable man.

You might not have deduced all of this from the wording of the section. It took the House of Lords under the presidency of Lord Diplock to interpret the Act in this way, in the case of *Camplin*[38]. There the defendant was a 15 year old boy. He killed a man by hitting him over the head with a chapati pan. The victim had forcibly buggered the boy and then laughed at him. The trial judge had directed the jury that they must consider what effect this would have had on a reasonable man, not a reasonable boy. The jury convicted the boy of murder. The Court of Appeal allowed his appeal and the House of Lords agreed.

[34] [1946] AC 588
[35] Lord Simon, ibid at 500
[36] [1954] 1WLR 1119
[37] per Lord Simonds at p.1122
[38] [1978] AC 705).

With his typical style Lord Diplock remarked that the 'reasonable man' was an 'apparently inapt expression, since powers of ratiocination bear no obvious relationship to powers of self-control'[39] . But he went on to hold that the reasonable man referred to should be explained by the judge to the jury as:
'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.'[40]

In 1995 this approach was taken rather further, I suspect, than Lord Diplock envisaged in the case of *Morhall*[41]. The victim had been criticising the defendant for being addicted to glue-sniffing and the defendant reacted by stabbing him to death. The House of Lords held that the question of provocation had to be considered by reference to the effect that it would have had on the reasonable person with the characteristic of being addicted to glue-sniffing.

Lord Goff presided over that case, as he did in the Privy Council a year later in *Luc Thiet Thuan*[42], an appeal from Hong Kong. The defendant adduced evidence that he suffered from brain damage causing him to be prone to respond to minor provocation by losing his self-control and acting explosively.

The judge ruled that this could not in law amount to provocation, and the defendant was convicted. Lord Goff, giving the judgment of the majority, held that the judge had been right. His cogent reasoning can be summarised by three short statements that I have taken from his lengthy and elegant opinion. 1) The 1957 Act retained the objective test by requiring that the jury should consider the effect that the alleged provocation would have had on a reasonable man. 2) The object of this test was to reduce the incidence of violence by preventing a person from relying on his own exceptional pugnacity or excitability as an excuse for the loss of self- control. 3) There was no basis upon which mental infirmity on the part of the defendant which had the effect of reducing his powers of self-control below that to be expected of an ordinary person should be attributed to the reasonable man for the purpose of the objective test in provocation. Of course, the point was made that abnormality of mind may, however, give rise to the partial defence of diminished responsibility.

This decision was in stark conflict with a number of decisions of the Court of Appeal, which had ruled that mental illness on the part of the defendant was a matter to which the jury could have regard when applying the test of provocation. The Court of Appeal, applying well-established principles in relation to precedent, ruled that it had to follow its own decisions. Thus it was that in the case of *R v Smith (Morgan)* [43] the Court allowed an appeal by the defendant. He had stabbed to death a man with whom he was arguing about the alleged theft of his carpentry tools. The trial judge had decided that the jury could not have regard to

[39] Ibid, p. 716
[40] Ibid, p. 718
[41] [1996] AC 90
[42] [1997] AC 131
[43] [2001] 1 AC 146

evidence that the defendant was suffering from clinical depression that reduced his self-control.

The Court of Appeal ruled that he was wrong. The case went to the House of Lords. The House, by a majority of three to two, held that *Luc Thiet Thuan* had been wrongly decided by the Privy Council because they had misunderstood what Lord Diplock had said in *Camplin.* Lord Hoffmann gave the leading speech. He said that the case afforded their Lordships the opportunity to make some 'serviceable improvements' to the law of provocation. After surveying the case law, he came to the conclusion that the 'rigid rule' that the same standards of behaviour are to be expected of everyone regardless of their individual psychological make up would 'sometimes have to yield to a more important principle, which is to do justice in the particular case'[44].

He held '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. They may instead find it more helpful to explain in simple language the principles of the doctrine of provocation. First, it requires that the accused should have killed while he had lost self-control and that something should have caused him to lose self-control. Secondly…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"[45]. Lord Hoffmann had in effect killed the reasonable man. Lord Slynn and Lord Clyde agreed. In powerful dissents Lord Hobhouse and Lord Millett expressed the view that Lord Goff had correctly interpreted the law in *Luc Thiet Thuan.*

Like the other case of *Smith* to which I referred when dealing with intention, this decision was the subject of a barrage of criticism. Lord Bingham, the Senior Law Lord, adopted an approach to this situation that was without precedent and that violated established principles of the law of precedent. An appeal in a provocation case came to the Privy Council from Jersey. It was called *Holley*[46]. Jersey had a statute with provisions in relation to provocation that were identical to those of the 1957 Act. The defendant suffered from the recognised medical condition of alcoholism. He had killed the victim when in drink. The trial judge directed the jury to ignore the effect of drink when considering provocation.

The defendant was convicted of murder. The Jersey Court of Appeal allowed his appeal, holding that the effect of the disease of alcoholism was something to which the jury could properly have regard when considering the conduct to be expected of the reasonable man.

Nine Law Lords sat on the appeal to the Privy Council. None of them had sat in *Luc Thiet Thuan* and only Lord Hoffmann had been party to the decision in *Smith (Morgan).* By a majority of six to three they declined to follow *Smith (Morgan)* but followed instead the decision in *Luc Thiet Thuan.* This was contrary to statements of high authority that the Privy Council should follow decisions of the House of Lords. Furthermore, in a joint dissenting opinion, Lord Bingham and Lord Hoffmann were at pains to state that, although dissenting,

[44] Ibid, at 172
[45] Ibid, p.173
[46] Attorney General for Jersey v Holley [2005] UKPC 23, and [2005] 2 AC 580

they accepted that the effect of the majority decision was as stated in the first paragraph of the majority judgment.

That was: 'this appeal, being heard by an enlarged board of nine members is concerned to resolve the conflict and clarify definitively the present state of English law, and hence Jersey law, on this important subject'[47]. The 'reasonable man', killed by Lord Hoffman, had been restored to life.

In two appeals[48], heard together by the Court of Appeal, sitting five strong under my presidency, it was argued by the appellants that we were bound to follow *Smith (Morgan)* rather than *Holley*. There was indeed clear authority, including a statement by Lord Bingham, that the Court of Appeal was bound to follow the House of Lords, and even its own previous decisions, rather than the Privy Council. Nonetheless we decided to follow *Holley*, holding that the decision had varied the common law principles of precedent to the extent of the unique features of that case. The House of Lords refused permission to appeal from our decision, and I was not surprised.

So we are back to the position that psychiatric conditions that reduce self-control cannot be prayed in aid as a partial defence to murder unless they are so significant as to amount to diminished responsibility. This is not because this produces a just result. It does not. It is because, as held by the majority in *Holley*, the 1957 Act so plainly requires.

Reform

The Law Commission reviewed the law of provocation in a Report on Partial Defences to Murder published in 2004[49]. In its new Report it has reviewed its recommendations and repeats them. I am only going to set out the first part of what the Commission recommends, because it is that which bears on the concept of the 'reasonable man' that I have been exploring. They recommend that the defence should be reformed as follows:

'(1) Unlawful homicide that would otherwise be first degree murder should instead be second degree murder if:

(a) the defendant acted in response to:

(i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or

(ii) fear of serious violence towards the defendant or another; or

(iii) a combination of both (i) and (ii); and

[47] per Lord Nicholls, at p.588
[48] R v James, R v Karim [2006] QB 588
[49] Law Com No 290

(b) 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 in a similar way.

(2) In deciding whether 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, 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.

Thus the recommendation is that the effect of the decision in *Holley* should be plainly stated in the proposed statute. The difference is that there is no requirement that the defendant should have lost his self-control. Provocation could be a defence even where the killing was quite deliberate. This leaves in existence the apparent injustice that can arise where a defendant kills someone in circumstances where he is suffering from a mental condition that diminishes his self-control. In so far as there is an answer it lies in the partial defence of diminished responsibility.

The Law Commission has approached reform with the aim of making the law more rational and clearer. There is however another way of looking at the proposed reforms.

That is to ask how they will impact on the number of prosecutions that are disposed of, without the need for trial, by guilty pleas, and what such disposal will involve. Let me just explain the effect of guilty pleas, for it is not all that obvious.

Where a plea of guilty is entered, there is no trial. The judge has to decide the appropriate sentence having regard to the material facts. Those facts are very often agreed between the prosecution and defence. The judge does not have to accept that version of the facts. He can insist on what is called a *Newton* hearing.

That is, he can hear evidence in order to decide the basis on which he is going to sentence the defendant. This is, however, unusual. Normally the judge sentences on the basis of the agreed facts.

Defendants often offer to plead guilty to a lesser offence than the one with which they are charged. The prosecution then have to decide whether to accept such an offer and to drop the more serious charge.

In that case the judge is not in a position to insist that the more serious charge is pursued, although sometimes the prosecution seek the approval of the judge before accepting a plea to a lesser charge.

Often, indeed usually, in a case of homicide, there is no issue as to whether the defendant killed the victim. The issue is whether he intended to kill him or cause grievous bodily harm, or whether he was acting under provocation or diminished responsibility. The defendant raises these defences with the object of escaping a conviction for murder, with its mandatory life sentence, and being convicted instead of manslaughter. The prosecution are

very slow to accept a plea of guilty to manslaughter when a defendant is charged with murder, particularly when the defence is based on provocation.

If there were a single offence of unlawful homicide and no mandatory life sentence, there would be many more pleas of guilty, leaving it to the judge to resolve the extent to which the facts of the particular case should affect the sentence.

This would be likely to result in a significant number of *Newton* hearings where the judge would have to resolve issues, such as whether the defendant had intended to kill, or acted under provocation and so on.

If the Commission's proposals are accepted, the function of assessing the seriousness of the offence of homicide will be shared between judge and jury. The jury will have to decide into which of the three categories the homicide fell. The judge will then have to decide the appropriate sentence having regard to his view of the particular facts of the case, insofar as these had not already been resolved by the jury's verdict. Where a life sentence is imposed, whether mandatory or discretionary, or an indeterminate sentence for the protection of the public, the judge will specify the period that the defendant will have to serve before being considered for release.

In general, the higher the category of offence, the more serious it is likely to be and the weightier the sentence. This will not always be the case however.

Whether more pleas of guilty are tendered than under the present law, and whether the prosecution will be prepared to accept pleas of guilty to less serious categories of homicide than those initially charged, is likely to depend in part upon the effect that being in one category or another is likely to have on the sentence. Some situations are particularly problematical. Take the all too common case of death being caused by a kick to the head in a drunken brawl. The issue is likely to be 'was there an intent to cause serious injury (second degree murder) or was there merely an intent to cause injury (manslaughter)?' I doubt this issue will often be one that it appears profitable to resolve by jury trial and a plea of guilty to manslaughter may be acceptable provided that it attracts a significant sentence.

These reflections underline the fact that the principles that govern sentencing are intimately interrelated with the Law Commission's proposals.

The Commission recognises this but the their terms of reference were not wide enough to enable them to do more than make some general proposals in relation to sentencing. They are not to be criticised for this. They had quite enough on their plate.

Thus, in addition to the mandatory life sentence for first degree murder, they recommended that a discretionary life sentence be open to the judge in the case of both second degree murder and manslaughter. There are at present statutory guidelines as to the starting point for fixing the minimum terms to be served in respect of the mandatory life sentences that are currently imposed for murder. The Commission envisages that there should be such guidelines in the case of both first and second degree murder. Thus, in relation to the latter category they recommend that there should be sentencing guidelines set down by Parliament as part of any reforms in order to ensure that sentences reflect the serious nature of the crime.

This is what they recommend in relation to minimum terms:

"(A11) We believe that the recommended starting points for minimum terms for the initial period of custody in murder cases, currently specified in the Criminal Justice Act 2003 for "public policy" cases (cases with aggravating factors), should automatically apply to second degree murder as well as to first degree murder.

(A12) The current starting point for sentencing an adult committing murder with, say, a firearm, is a life sentence with a minimum of thirty years initially in custody. This would remain the case for first degree murder. What if second degree murder is committed with a firearm? It must be kept in mind that, in broad terms, in any second degree murder case where the judge decides that the offender poses a significant risk of causing serious harm to the members of the public, the offender must receive a life sentence in any event. A substantial proportion of second degree murder cases are likely to be of this kind.

So, in the hypothetical case of second degree murder by firearm, guidelines could be introduced to indicate that the judge should still start by thinking in terms of a minimum of thirty years that would have to be served in custody.

(A13) The message that Parliament might wish to send would be undermined if the provisions for "public policy" cases were confined to cases of first degree murder. That someone who killed did not intend to kill but intended only serious injury, and was therefore guilty of second degree murder, need not necessarily be regarded as a mitigating factor when the killing in question was a gun slaying or was of a police officer on duty. In such cases the guidelines for sentencing in cases of second degree murder should be comparable to those applying to first degree murder cases.

I fear this will not do. The guidelines in their present form will not work if there are two categories of murder as the Commission recommends. This is because the guidelines are premised on the existence of an intention to kill.

If the intention is only to cause serious bodily harm, this is treated as mitigation. If there are to be statutory guidelines they will have to be re-written. If they are, this will, in my view, be no bad thing.

Sentencing is a major topic, and it is much too late in the day to embark on it. Let me simply say that I have reservations about the current guidelines. The gap between the 15 year starting point and the thirty year starting point is immense. It is the difference between a determinate sentence of thirty years and one of sixty years. If sentences are to be just, then the effect of mitigating and aggravating factors should be very significant, so that sentences fill the spectrum between those two starting points. I am not sure that in practice they do, and I believe that the starting points are having the effect of ratchetting up sentences in a manner that will be regretted many years hence.

If the Law Commission's proposals are implemented, then I hope that there will be a thorough rethink about the extent to which statutory guidelines are desirable.

It may be that a just and uniform approach to sentencing in this field is one better achieved with the help of guidance provided by the Court of Appeal and the Sentencing Guidelines Council.