

## **Gillon v HMA:**

### **Provocation, Proportionality and the Ordinary Person**

#### **Provocation and the Mens Rea for Murder**

In *Gillon v HMA* [http:// www.scotcourts.gov.uk/opinions](http://www.scotcourts.gov.uk/opinions) a bench of five judges convened to consider whether in regard to provocation by violence generally there is a rule of law requiring a reasonably proportionate relationship between the provocative conduct and the reaction of the accused and, if not, by what standard should the conduct of the accused be considered? Counsel for the appellant argued that the correct approach was to be found in the opinion of the Lord Justice General in *Drury v HM Advocate* 2001 S.C.C.R. 583.

Prior to the decision in *Drury*, the definition of murder offered by Macdonald (Criminal Law (5<sup>th</sup> edition 1948 at p. 89) was widely accepted. This definition provided that “[m]urder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences.” The Lord Justice General in *Drury* considered that this definition was incomplete because it did not account for cases that involve issues such as self-defence or provocation. Accordingly, he was of the view that “[t]he definition of murder in the direction is somewhat elliptical because it does not describe the relevant intention. In truth, just as the recklessness has to be wicked so also must the intention be wicked.” (paragraph 11). He went on to explain that “[s]aying that the perpetrator ‘wickedly’ intends to kill is just a shorthand way of referring to what Hume (vol. I, p. 254) describes as the murderer’s ‘wicked and mischievous purpose’ in contradistinction to ‘those motives of necessity, duty, or allowable infirmity, which may serve to justify or excuse’ the deliberate taking of life.” (p. 589 of the opinion). The Lord Justice General disapproved of the approach to provocation in which it may be seen as acting as “some kind of laissez-passer” that allows an accused to escape a charge of murder only to be convicted of culpable homicide. On this basis, the Lord Justice General considered that the terminology of provocation “reducing murder to culpable homicide” is misleading. (paragraph 17). He held that it was incorrect for the jury to conclude that, absent provocation, the accused would have been guilty of murder, and only at that stage to consider provocation. The correct approach was to take the evidence relating to provocation as being one of the factors which the jury should taken into account in performing their general task of determining the accused’s state of mind at the time when he killed his victim. (paragraph 17).

This approach, which blurs the boundary between the offence of murder and provocation has been criticised elsewhere (James Chalmers, *Collapsing the Structure of Criminal Law*, SLT 2001 241) but it can also be criticised by reference to the historical evolution of provocation and the law on homicide. The development of the doctrine of provocation was always bound up with the evolution of the law of homicide. In medieval times benefit of clergy was the catalyst in the emergence of the distinction between murder and manslaughter. This exemption was claimed by accused persons who successfully demonstrated their status as members of the clergy. It operated to allow defendants to escape liability under the secular law and the imposition of the death penalty for the unlawful killing of another. In 1512 benefit of

clergy was removed by statute from homicides carried out with malice aforethought. (Hen 8, c2 (1512)). The denial of benefit of clergy in respect of homicides carried out with malice aforethought had the effect of creating a distinction between that type of killing, which became known as murder, and killings lacking malice aforethought, which became known as manslaughter. By the late 16<sup>th</sup> century, a legal fiction known as implied malice operated to give effect to a policy of treating cases of intentional killing as murder despite the absence of literal premeditation. Killings carried out in hot blood were excluded from the doctrine. These killings could provide a valid rebuttal of the presumption of malice under the doctrine. To rebut the presumption, the accused had to show that the killing was caused by some provocation on the part of the deceased and not as a result of any malice aforethought or premeditation on his part. The doctrine of implied malice laid the modern foundation for the law of provocation. In 1604 an act was passed which provided that killings done “on the sudden” were to be known as “chance-medley” killings and these types of killings were considered to lack the requisite malice aforethought for murder and therefore did not attract the death penalty. Although the law was subsequently refined, the early 17<sup>th</sup> century witnessed the emergence of provocation as mitigatory plea in which murder gives way to culpable homicide.

The older view of provocation as going to rebut the mens rea of murder has resurfaced on occasion. In *R v Welsh* ((1869) 11 Cox CC 336 at 338) Keating J held that it was for the accused to show “sufficient provocation...because it tends to negative the malice [aforethought].” However, the modern approach is typified by cases such as *AG for Ceylon v Perera* ([1953] AC 200 at 206) where Lord Goddard speaking on behalf of the Privy Council held that “[t]he defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation.” By contrast with the Lord Justice General’s approach in *Drury* which resembles the older view of provocation as going to the mens rea for murder, the modern approach is to treat these killings as a partial defence or a mitigatory plea capable of reducing a charge of murder to one of culpable homicide.

### ***Gillon as a Sequel to Drury***

The accused in *Drury* claimed that he had reacted to the discovery of sexual infidelity. In paragraph 25 the Lord Justice General highlighted that Scots law admitted sexual infidelity as an exception to the general rule that provocation applied only where the accused had been substantially assaulted. In paragraph 28 he said that it was wrong for the trial judge in sexual infidelity cases to direct the jury that they had to consider whether the degree of violence used by the accused was or was not grossly disproportionate to the provocation, when they were actually incommensurable. In paragraph 32 he held that the correct approach was whether “the accused has reacted to provocation in a way in which no ordinary man or woman would have been liable to react, a jury can rightly conclude that he acted with that wickedness that justifies a conviction for murder.”

Counsel for the appellant in *Gillon* considered that the issues for consideration could be regarded “as a sequel” (para. 6). to the decision in *Drury*. On this basis, he argued

that where provocation was put in issue, the test was simply whether the accused had the mens rea necessary for murder. Consequently, the trial judge misdirected the jury. He ought to have directed them that evidence relating to provocation, and the proportionality between provocation and retaliation in particular, were simply factors which the jury should take into account in performing their general task of determining whether the appellant had a wicked intent to kill or was wickedly reckless as to the consequences at the time when he killed the victim. (para 4). In deciding this issue the question should be asked whether the accused acted in the circumstances as an ordinary man would have done. On this basis, the test of reasonable proportionality applied in case such as (*Robertson v HM Advocate* 1994 S.C.C.R. 589) would not disappear completely from the process of reaching of a decision as to provocation but that it would not be the main focus for discussion.

This approach, counsel argued, would improve the law in three respects. First, it would have the advantage of making the ordinary man test universal in all cases of provocation thereby introducing greater coherence and clarity to the law. Instead of there being two criteria applicable to two different situations mentioned, there would be but one. Second, he pointed to the inherent difficulty in applying the reasonably proportionate relationship test to a situation where one person had offered ex hypothesi non-fatal violence as provocation, but had subsequently been killed by the person provoked. Finally, he noted that the approach would be consistent with the analysis of provocation given by the Lord Justice General in *Drury*.

The Court's response in relation to the first argument was that while the use of the ordinary man test was understandable in cases of provocation based upon the discovery of sexual infidelity, the test of reasonable proportionality is well established and well understood. The court considered that it did not pose any practical difficulties and that it might be thought to have been adopted as a more robust and more readily understandable way of applying, if not the same, at least a similar standard to that which would be applied if the test of an ordinary or reasonable man were to be selected. On balance, the court considered that the ordinary man test was not inconsistent with the test of reasonable proportionality and in view of the disadvantages exposed by other jurisdictions with the use of the ordinary man test (some of which we will consider below), the court was not persuaded by counsel's first argument.

The court considered that counsel's second argument was "fallacious" in that it proceeded upon the making of a comparison involving the consequences of the violence used in retaliation, as opposed to its nature and extent which is what the reasonably proportionate relationship test requires to be considered. (p.18).

In response to counsel's third argument, the court considered that while the Lord Justice General's analysis in *Drury* involved a departure from the more traditional formulations of the nature of provocation, the judges held that they had no reason to disagree with his approach to the underlying mens rea involved in murder and culpable homicide, as it relates to a plea of provocation (paragraph 24 of the opinion). However, the court also approved the Lord Justice General's approach to the plea, which was to insist on certain criteria, which must be satisfied as a matter of policy before provocation can be recognised. It noted that the Lord Justice General applied the ordinary man test in the case of provocation based upon sexual infidelity but that

he did not consider it necessary to imbue him with any special characteristics as this argument was not made on the facts.

Against this backdrop the court held that it perceived “no necessary connection” (p. 22) between the Lord Justice General’s treatment of the criterion by which provocation, taking the form of the discovery of sexual infidelity, ought to be evaluated and his earlier analysis of the mens rea involved in murder and culpable homicide, as it relates to a plea of provocation. It held that “[w]hatever view one may take about his analysis of mens rea, it does not lead necessarily to a conclusion on the question of the criterion that should be adopted for use in the assessment of a plea of provocation, either in the context of sexual infidelity, or violence, as the basis of the plea.” (paragraph 30). In other words, the court considered that “the tribunal of fact, in cases where provocation is pled, requires to apply some appropriate criterion to assess the plea, quite distinct from any jurisprudential theory relating to mens rea in such cases.” (p. 22)

The court then went on to consider whether there were any reasons of public policy, or expediency, to justify applying the ordinary person test in cases of provocation by violence. The court noted that the test for provocation in England was a two-fold test involving a subjective test and an objective test. Devlin J’s direction to the jury in *R v Duffy* ([1949] 1 All E.R. 932) has been treated as a classic direction to the jury: “[p]rovocation 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.” In view of the difficulties with the application of the reasonable man test in England the court held that the introduction of the concept of the ordinary man, as a criterion by reference to which provocation in Scots law might be judged, save where it had been considered necessary, as in *Drury v HMA*, would be most unwise. (p. 26)

The court acknowledged the inconsistencies resulting from the policy limitations in provocation. In particular, it referred to Lord Nimmo Smith’s opinion in *Drury* where he acknowledged that grave insults may be no less provocative than relatively minor insults and that Hume’s description of the infidelity exception as being a “peculiar case” was still apt. From a modern perspective, he acknowledged that although a woman may kill while provoked, most often it is a man who is the killer and a woman who is the victim. (paragraph 38). Given the difficulties acknowledged by the courts in Scotland with the application of the reasonable man in England, we will now go on to consider this test.

### ***The Reasonable Man Test.***

Prior to the introduction of section 3 of the Homicide Act 1957 words could not constitute provocation and the reasonable man or the ordinary person was an impersonal fiction, to which no special characteristics of the accused were attributed. The Homicide Act changed the common law in three key areas. First, it changed what could count as provocative behaviour in law. Prior to 1957 the English common law, like modern Scots law, restrictively limited what could be considered as provocative behaviour to some form of violent act as well as certain objectively defined legal categories. Since the passing of the Act, this limitation has been lifted so that now

things said alone, regardless of categories, may be sufficient provocation, if the jury is of the opinion that they could have provoked a reasonable man. Second, the importance of the reasonable relationship rule has been diminished. It is now an issue, which the jury, rather than the judge, has to decide. Whereas previously an English judge could direct a jury that "[f]ists may be answered with fists but not with a deadly weapon," (*R v Duffy* at p. 933) now it is the jury which decides whether the answer with a deadly weapon could in fact be the act of a reasonable man. The third change dovetails with the more lenient interpretation as to what can count as provocation. Whereas previously the judge instructed the jury as to the characteristics of the reasonable man, who, prior to 1957 was normal in mind as well as body, in the wake of the Act it is the jury rather than the judge, which determines these relevant characteristics.

Despite being retained by the '57 act, the reasonable man test has changed almost beyond recognition in the past thirty years. This change is due, in part, to the fact that the judiciary's power to dictate to the jury what the characteristics of the reasonable offender were but it is due primarily to the inclusion of insulting words. Together these changes have resulted in a move towards the subjective even when applying the objective test. Thus, the law post '57 has witnessed a move away from case-bound typical fact situations, which were objectively determined, towards a consideration of how the verbal provocation affected the particular person to whom it was addressed. Such an assessment, by definition, involves a personal inquiry accounting for the reason why the particular individual was insulted. In order to come to terms with this personal dimension, it became necessary for the English courts to look beyond the objective requirement and to take into account the particular characteristic of the accused, which was the object of the provocation.

The full effect of the impact of the reasonable man on English law can be seen in two recent decisions. In *R v Smith (Morgan)* ([2001] 1 A.C. 146) the defendant had relied on the defence of provocation and had adduced psychiatric evidence of a mental condition which had had the effect of reducing his power of self-control below that of an ordinary person. The House of Lords by a majority of three to two held that in determining under section 3 of the 1957 Act whether provocation was enough to make a reasonable man do what the defendant did, the jury was required to ask whether the degree of self-control exercised by the defendant was that which reasonable people with his characteristics would have exercised; that all the particular characteristics of the defendant were to be taken into account in deciding both whether he was in fact provoked and whether the objective element of provocation was satisfied; that the question for the jury was whether the circumstances were such as to make loss of self-control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter. In *Attorney General for Jersey v Holley* ([2005] 2 A.C. 580) the decision in *R v Smith (Morgan)* was disapproved. The defendant relied on the defence of provocation under Article 4 of the Homicide (Jersey) Law 1986. At trial, he adduced expert medical evidence to the effect that his alcoholism was a disease and a characteristic of which the jury should take into account when assessing his loss of self-control. On appeal the Court of Appeal of Jersey concluded that the disease of chronic alcoholism, unlike drunkenness, which afforded no defence, was the type of characteristic that the jury could have taken into account when determining whether his loss of self-control was excusable. The Privy Council by a majority of six to three disagreed with this approach and held that

Article 4 required a jury, in determining whether the provocation was enough to make a reasonable man do as the defendant did, to assess the gravity of the provocation by reference to his particular characteristics, but to judge his loss of self-control by applying a uniform objective standard of the degree of self-control to be expected of an ordinary person of the defendant's age and sex with ordinary powers of self-control. This standard was an objective standard and accordingly the defendant's disease of alcoholism was not to be taken into account in the jury's determination of whether his loss of self-control satisfied Article 4.

Although the Scottish courts have resisted tracking the approach of the English courts in relation to the determination and application of the ordinary man's characteristics, Lord Justice General (Rodger) engaged with the debate to some extent in the context of the law on coercion in *Cochrane v HM Advocate* (2001 S.C.C.R. 655). On appeal, counsel argued that the sheriff should have directed the jury to consider what level of resistance to the threats could reasonably have been expected of the appellant, as a highly compliant individual, with a low I.Q., bordering on mental handicap. The Lord Justice General held that the jury ought to be directed to envisage a person of reasonable firmness, which is an "essential characteristic." (p. 667) The Lord Justice General followed the same general policy of the law as the courts in *Holley* when he held that what is reasonably required of ordinary people will depend on their age, sex, physical handicap but not a vulnerability which is self-induced by taking drink or drugs or by glue-sniffing. On this basis the Lord Justice General held that mental characteristics, such as those in *R v Smith (Morgan)*, which reduced an accused's capacity for self-control would not be considered.

Like many reformers who have considered the law on provocation, Lord Hoffmann in *Smith* acknowledged that the concept has serious "logical and moral flaws". (p.159) In that case he considered the work of Dr. Horder (*Provocation and Responsibility*. Oxford: Clarendon Press, 1992) who traced the influences of the man of honour on the doctrine in the late 17<sup>th</sup> and early 18<sup>th</sup> centuries. It is to this work, which we will now turn in an attempt to understand original influence on the doctrine together with the different conceptions of anger underlying the development of the doctrine.

### **Honour and the Original Four Categories of Provocation.**

Historians have traced the influence of the concept of honour on English morality and politics from medieval times up until the late nineteenth century. (Andrew, *The Code of Honour and its Critics*, *Social History*, 5(3) 1980, p. 409-34). This concept of honour was propagated by honour theorists who advised men on how best to live as men of honour. During the early modern period, some honour theorists drew a distinction between what was called "acquired honour" and "natural honour." (Kelso, *The Doctrine of the English Gentleman in the 16<sup>th</sup> Century*, *Univ. of Illinois Studies in Language and Literature*, 1929, 14 (1-2). Acquired honour was honour in the Aristotelian sense of a reward for great deeds secured through the practice of virtue. It is the latter conception of honour, however, which is the more important for the purposes of this discussion of the man of honour. Horder defines the essence of natural honour as being premised on the good opinion of others founded in the assumption that the person honoured by the good opinion was morally worthy of such esteem and respect. (1992, p. 26)

Those men who took their natural honour seriously were called men of honour. A failure to treat a man of honour with the requisite respect was considered an affront meriting retaliation. Retaliation served to demonstrate that a man was not cowardly and so the man of honour was not expected to retaliate reluctantly but was positively expected to resent the affront and to retaliate in anger. So precise was this code of honour that honour theorists set out what kind of angry retaliation was appropriate for a particular kind of affront. Romei prescribed that: “[T]hey...that intreate of Combate...have set it down for a certaine rule that injury in words is taken away by the injury of deed, and that a lie is falsified with a boxe on the eare, or any blow with what else thing soever, they alleging this proposition for a maine, unto which no answer can be made, that one injury, by another greater than that is taken away, and that the injury of deeds is greater than that of words. (Romei, *The Courtier's Academie*, 1597, p. 151). In other words it was incumbent upon the man of honour to retaliate in a particular way once natural honour was offended. A failure to retaliate was in itself viewed as a dishonourable act and a failure of virtue. This applied, not only to oneself, but also to those deemed to fall within one's protection.

Horder argues that it was this conception of honour which informed the original four sets of circumstances which were regarded as provocative conduct by the law. Although law never fully endorsed the man of honour theory, these factual circumstances gradually came to receive judicial recognition and were eventually given the stamp of approval in the early eighteenth century landmark decision of *R v Mawgridge* (1707 Kel. 119). A killing in these circumstances was deemed to be the correct thing to do and law, therefore, treated the killing as being justified. One category of sufficient provocation was that which involved seeing a friend, relative, or master being attacked. In *Royley's Case* ((1612) Cro Jac 296) a father, who beat his son's attacker to death, was found guilty of manslaughter on the ground that the father was provoked at the sight of his son's blood.

The man of honour can be seen underlying a second category of provocation: where one man saw another unlawfully deprived of his liberty. In the case of *R v Hopkin Huggett* ((1666) Kel. 59). John Berry, the press master, was pressing men into Service for wars against the Dutch. This practice was greatly resented by those communities living near the ports from whom most of these men were taken. When Berry was passing through Smithfields, Huggett demanded that he display a warrant for this activity. Unhappy with Berry's response to the request, Huggett and his party drew upon their swords and attacked Berry and his party. Berry was killed in the ensuing fight by Huggett. It was held by eight of the twelve judges that this was a case of provocation.

The third category of provocation is that of the grossly insulting assault. Two examples of what in law amounted to such an assault can be seen in *Lanure's Case* (1642) I PC 455) and in *Buckner's Case* ((1641) Style 467). In the former case, the affront occurred when one pedestrian, took, at the expense of another, a position by the wall adjoining the street in order to avoid being splashed by passing coaches and to be protected by the overhang from waste which was, at the time, thrown from windows. In the latter case, the court held that if one is unlawfully and intentionally imprisoned in his own home, then the man of honour is not only not condemned but condoned for his act of killing.

The law was never willing to endorse totally the man of honour's perception of an affront. In *Mawgridge*, for example, Holt C.J. held that mere words or affronting gestures were not sufficient to reduce murder to manslaughter. By contrast, Mandeville wrote that the true man of honour was meant to "suffer no Affront, which is a term of Art for every Action designedly done to undervalue him." ( Mandeville, 1714, p. 180). Although the law was not prepared to allow for mitigation on the basis of mere insulting gestures it did recognise the importance of a deliberately insulting physical trespass. As we saw earlier, this legal differential treatment between the sufficiency of words and actions to constitute provocation still exists in Scots law today.

Finally the fourth category of sufficient provocation is that of catching a man in the act of adultery with one's wife. The first case to recognise this as being sufficient provocation was *Manning's Case*. ((1617) 1 Vent. 158). This view was reiterated almost one hundred years later in the crystallising case of *R v Mawgridge*. This one-hundred-year time lapse, far from altering the law's view of a killing upon catching a man in the act of adultery with one's wife rendered it even more emphatic. By 1707 the court in *Mawgridge* appears almost apologetic for the fact that the killing of another man on discovery of adultery did not amount to lawful killing but was still 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 the man, and adultery is the highest invasion of property...If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other. (p. 137).

As well as being expected to follow this code, which determined how the man of honour was expected to react in certain situations, the man of honour was also expected to feel and act on anger in an appropriate way. The philosophical conception of anger which influenced the evolution of the man of honour in the early days was Aristotle's conception of anger which Horder terms "anger as outrage." ( 1992 p. 42).

### **The Man of Honour, Anger as Outrage and Reason.**

According to this theory, following provocation the virtuous man of honour properly experienced anger internally, which was then correctly translated into an appropriate external response. This perfect balance was achieved through Aristotle's conception of the virtues and the controlling influence of reason. Aristotle connects the virtue "praotes" with the feeling of anger, which Horder translates as meaning "eventemperedness." (Horder, 1992 p. 44). Thus, this virtue meant that the man of honour could only be angered for the right reason, to the right extent, and at the right time, all of which regulatory influences were relative to him. Thus, the man of honour cannot on a whim become angry but has to discriminate between occasions, which warrant anger and those, which do not. Furthermore, anger has to be experienced to a particular degree. Any tendencies towards excesses of anger must be curtailed but correspondingly any tendencies "in the direction of gentleness and readiness to be reconciled" (Aristotle, EE 1222a 7-10, NE 1125b 30 and EE 1222b 1-3, cited by Horder, 1992, p. 45) must be overcome. The temporal regulation operates to lengthen

the time span during which anger may be experienced by the short-tempered and to shorten it for the bitter. Finally, the experience of anger must be judged by standards, which are "relative to us" (Aristotle, EE 1222a 7-10, NE 1125b 30, and EE 1222b1-3, cited by Horder, 1992, p. 45) which involves assessing both the character and occupation of the person experiencing anger.

After the virtuous person experiences anger appropriately according to these tests, he then has to look to the further controlling influence of reason. Thus, the anger has to be filtered through reason before this passionate desire for retaliatory suffering can be realised. Reason, therefore, mediates the apparent injustice and the desire for retaliatory suffering so that the desire is not a reflex response to the simple perception of injustice and is no more than the apparent injustice. Horder defines reason as the ability to make "an accurate moral judgment of wrongdoing." (1992, p. 60). Thus, in the even-tempered person, it is only when a correct judgement of wrongdoing is made that the blood can be allowed to heat. The following desire for retaliatory suffering then accurately reflects the judgement of wrongdoing.

An accurate judgement of wrongdoing is thus translated by the virtuous man into a correct way of acting in anger. Just as the virtuous man must make a correct judgement of wrongdoing, so too must he make a correct moral judgement of the right amount of retaliation to inflict. Again reason plays a key role which allows the virtuous man to accurately translate the feeling of anger into an action which matches his response to the wrongdoing perpetrated by the wrongdoer.

According to Horder, the influence of this conception of anger on the law is evident in the case of *R v Mawgridge*. Mawgridge and Cope argued following an insult directed by Mawgridge against a woman friend the deceased, William Cope. Both men threw bottles at each other. Without allowing Cope time to draw his sword, Mawgridge ran Cope through. The question was whether Mawgridge murdered Cope or whether Cope's act of throwing the bottle at Mawgridge could be counted as being provocation sufficient to reduce murder to manslaughter. Holt C.J. held that this was not a case, which warranted provocation. The judge held that Mawgridge's act of throwing the bottle manifested a malicious design, which was further supported by Mawgridge's immediate action of drawing of his sword. Thus, Mawgridge neither experienced nor expressed anger appropriately.

### **The Reasonable Man, Anger as Loss of Self Control and Passion.**

Judges in the 19<sup>th</sup> century had to adapt the law to suit the needs of Victorian society. They changed the law in two ways. First, they generalised what had constituted sufficient provocation to the man of honour into a rule that whatever the alleged provocation, the response had to be reasonable. Thus, in *R v Kirkham* ((1837) 8 C & P. 115 at 119) Coleridge J told the jury that "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." It was not until the case of *R v Welsh* that the reasonable man as a test of appropriate response first appeared. In that case Keating J (at 339) held that provocation would be sufficient if it was "something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act." The second change was to shift the emphasis from the anger as outrage model which in general

terms justified a killing in certain cases to the anger as loss of self-control model which in general terms excused the killing.

This second conception of anger focuses more on the inner workings of the mind of the person provoked. It involves a new understanding of the law's analysis of both the feeling and the expression of anger. Central to this is a different understanding of the relationship between reason and the passions. On this view, reason is subjected to the controlling influence of passion. This changing relationship can be seen as early as the case of *R v Mawgridge* where, despite the predominant influence of the outrage model of anger, typically subjecting passion to reason, Holt C.J. considered that a man who found his wife in the act of committing adultery would be positively expected to react violently because "jealousy is the rage of a man." (p. 137).

Aristotle himself realised that not everybody experienced anger in the same way as the exemplary virtuous man. The "akrates," or the quick-tempered, because of their impetuosity, were disposed to mishearing reason and, therefore, making an excessive judgement of wrongdoing. Thus, the akrates became the norm in the eighteenth and nineteenth centuries. Instead of using such images as "reason [being] in the saddle," law came to adopt "the ungoverned storm metaphor." This new relationship was described in the *Walter's Case* as "the passions and the desires associated with them, such as the desire for retaliatory suffering, temporarily eclips[ing] the power of reason to control them and to hold sway within the soul unbridled or ungoverned. ((1688) 12 St. Tr. 113).

Horder argues that this second Aristotelian conception of anger accords with the modern law's understanding of the conception of anger underlying provocation in a number of different respects. Because of the temporary eclipse of reason, which yields to passion, the response to a real or imagined insult is immediate which leads to a hasty reaction, which is often an over-reaction. This flood of passion impels the person provoked to act on that anger. Horder argues that Hobbes' account of anger in action most closely resembles this conception of anger in action by the early modern law. (Hobbes, 1651, Lev. 61, cited by Horder, 1992, p. 79). Anger, according to Hobbes, is beyond the control of rationality or moral judgment. For him the desire for retaliatory suffering, which follows the judgment that one has been wronged, is aroused by a chain of physical reactions caused by the operation of an external object upon the senses which in turn causes a reaction in the brain or heart.

### ***Conclusion***

Although the *Drury* approach to the mens rea for murder and culpable homicide has not been referred to in subsequent cases (2002 JC 1), the court in *Gillon* did not disavow this approach. It held that whatever view one may take of the Lord Justice General's analysis of mens rea, it does not lead to a conclusion on the criterion that should be adopted for use in the assessment of the plea of provocation either in the context of sexual infidelity, or violence, as the basis of the plea and that there was "no necessary connection" between the Lord Justice General's use of the ordinary person standard in the context of discovery of sexual infidelity and his analysis of the mens rea involved in murder and culpable homicide, as it relates to a plea of provocation.

The court confirmed that the ordinary person was the correct test to be applied in cases of sexual infidelity but that the test for reasonable proportionality was the correct test in cases of provocation by violent assault. Apart from the obvious difficulty with having two tests for what constitutes a proportionate response in provocation, there is another conceptual difficulty. Using *Drury* as a gateway that allows provocation to be assessed as a matter of evidence as part of the mens rea for murder sits unhappily with a rule of law requiring reasonable proportionality. Correspondingly, it may be argued that there is in fact a direct connection between the use of the ordinary man test and an evidence-based test for the mens rea for murder.

Notwithstanding these difficulties, the requirement of reasonable proportionality still exists as a rule of law in cases of violent assault in Scotland. As we have seen here, this requirement comes from an age when an objective code of honour determined how the man of honour was expected to react in certain limited situations and how the conception of anger underpinning this code informed how the man of honour felt and experienced anger correctly. The application of a strict rule of law requiring reasonable proportionality in these cases was logical. As the law on sufficiency became more general and the standard became the reasonable man who had lost self-control, laying down as a matter of law a test for proportionality became more difficult to measure. Proportionality is now merely a matter to be considered in evidence when assessing the actions of the ordinary or reasonable man who lost self-control in all cases in England and in cases of adultery in Scotland.

There are other flaws with the operation of the doctrine. As Lord Nimmo Smith highlighted, although a woman may kill while provoked, most often it is a man who is the killer and a woman who is the victim. Detailed arguments as to the gendered nature of the law are beyond the scope of this particular piece but cases involving killings by women who have been subjected to long term abuse by male partners have gone some distance to unearthing some of the hidden gender in the development of provocation. This is most obvious both in relation to the lack of fit between the adultery exception and the reasonable proportionality requirement. The adultery exception was the preserve of the man of honour who was expected to retaliate at the invasion of his property and while modern domestic violence cases recognise the influence of the man of honour, the inappropriateness of applying the proportionality requirement in cases involving women been explained as being tantamount to sentencing women to murder by instalment. (*State v Gallegos* 719 P.2d. 1268 (NM 1986)).

The court in *Gillon* agreed with the expressions of opinion in other cases that the law on provocation is flawed to an extent beyond reform by the courts and that the law cannot be reformulated in isolation from a review of the law of homicide as a whole. The Irish Law Reform Commission is reforming the law on defences to criminal charges in a series of papers and its research on the reform of provocation was considered in the context of the law of homicide generally. (LRC CP 27-2003). The English Law Commission published a report on *Partial Defences to Murder* (Law Commission Report No. 290) and just recently published broader review in the form of a consultation paper that locates the partial defences already considered, together with the defence of duress and the plea of insanity, within a new three-tiered structure for homicide. (Law Commission Consultation Paper No. 177, “*A New Homicide Act for England and Wales?*”, 2005). The Scottish Law Commission is considering

reform of the law of provocation, self-defence, coercion and necessity in its seventh programme of law reform. It does seem that the time has come for a broader-based unified approach to reform of the law of homicide and its defences in Scotland and this is a matter that could be incorporated into the Scottish Law Reform Commission's seventh programme of law reform.