



## Criminal Law, Simester and Sullivan (updated 14.10.02)

### **Provocation and characteristics, Pages 347-35**

R v. Smith [2000] 4 All ER 289; [2000] 3 WLR 654; [2000] 1 Cr App R 31

The House of Lords has, at last, handed down its 3-2 majority decision in Smith. A major schism had arisen in the law of provocation. One line of authority, endorsed in the majority opinion of the Privy Council in *Luc Thiet-Thuan v. R* [1999] AC 131, held that the characteristics of D to be attributed to the 'reasonable man' were confined to age and gender when the issue was the degree of self-control to be required of D in the face of the provocation. Another line of authority, endorsed by Lord Steyn in his minority opinion in *Luc*, extended the category of admissible characteristics to such psychological conditions as depression, post-traumatic stress disorder, brain damage, etc. In *Smith*, majority of Law Lords (Lords Slynn, Hoffman, and Clyde) adopted the view of Lord Steyn: D's state of depression should have been considered by the jury when deciding whether a reasonable person would have done as D did by way of reaction to the taunts of V. V's taunt had not been directed as D's depression. This conclusion is vigorously contested in the dissenting speeches of Lords Hobhouse and Millet. As we shall see below, provocation may remain a turbulent, unsettled body of law.

Of the majority judgments, Lord Slynn's is the least wide-ranging. In essence, he considered that it would be forensically unworkable to draw any strict division between, on the one hand, characteristics admissible on the issue of the weight of the provocation and, on the other, characteristics allowable on the question of capacity for self control. Accordingly, he considered that when applying the reasonable man standard to the facts of the instant case, the jury should have been directed to consider how a reasonable man afflicted with D's state of depression would have reacted to the provocation.

Lords Hoffman and Clyde go further in reshaping the concepts and language used in this area of law. Neither judge considered it obligatory for trial judges to make any reference to the reasonable person when directing juries. They were both of the view that the nature of the extenuation at issue in provocation was best explained without reference to any such concept. Juries should be told that an acceptable standard of self-control was to be expected from everyone. No licence was to be given to persons with defective characters, such as the pugnacious, the unduly excitable, the short-tempered, or the morbidly jealous. On the other hand, the jury must consider any characteristic possessed by D that has a just bearing on his capacity to exercise self-control. It was accepted that this would not make for clear and coherent doctrine; yet a loss of clarity was thought to be an acceptable price of doing justice for defendants.

What is the difference between non-admissible defects of character and allowable characteristics? As Lord Slynn acknowledged, there are difficult borderline questions here. Of particular interest is Lord Hoffman's discussion of the Australian case of *Stingel v. The Queen* [1990] 171 CLR 312, where D had killed V, the boyfriend of his former partner, on witnessing, as he had supposed, their act of sexual intercourse.

Lord Hoffman agreed with the High Court of Australia that D's obsession with his former partner was not to be attributed to the reasonable person: "Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide. Indeed, but how do we distinguish conceptually between *Stingel* and a case such as *Dryden* [1995] 4 All ER 987, where D's obsessive personality (in matters relating to his land and his rights thereon) was deemed attributable to the reasonable person? All that may be safely gleaned from the judgments of Lords Hoffman and Clyde is that an admissible characteristic may be temporary or permanent, may fall short of any recognised medical disorder, but will not include the destabilising effects of drugs or alcohol and shortcomings of character. Further appellate litigation on the limits to be placed on attributable characteristics seems assured.

The dissenting judgements forcefully reject the majority position in terms of legal analysis and even more forcefully in terms of policy. In their view, unless characteristics relating to the capacity for self-control are confined to age and gender, the distinctiveness of the separate defences of provocation and diminished responsibility is undermined. Undoubtedly, persons with any form of mental instability who have lost self-control because of something said or done will find section 3 of the Homicide Act 1957 more receptive to their needs than section 2. Of particular note is the opinion of both dissentients to the effect that the majority judgments in *Smith* are incompatible with the earlier decision of the House of Lords in *Morhall* [1996] AC 90. If there is incompatibility then, of course, the majority view need not be followed in subsequent litigation.

Is *Morhall* conclusive authority against the majority position in *Smith*? The former case decided that an addiction to glue could be attributed to the reasonable person if D was provoked by taunts related to his addiction. *Smith* decides that D's state of clinical depression can be attributed to the reasonable person, when determining what degree of self-control should be shown, even though the provocation was unrelated to his state of depression. So *Smith* goes further than *Morhall*. But there was no argument in *Morhall* that D's addiction was relevant to questions of self-control and therefore no decision on the point, although there were strong dicta to the effect that age and gender were the only characteristics germane to the issue of required standards of self-control. Accordingly, there is no conflict of authority in the strict sense. On that view, trial judges should follow the majority in *Smith* as the authoritative word from the House of Lords on the vexed question of what characteristics are relevant to the standard of self-control required.

But how are trial judges to follow *Smith*? Recall that Lords Hoffman and Clyde recommended that trial judges eschew reference to the reasonable man in their directions. But without reference at all to the reasonable man, the decisive question that Parliament requires to be put - whether the provocation was enough to make a reasonable man do as he did - simply cannot be put. Moreover, Lord Slynn retains the reasonable man standard (the reasonable man afflicted, like *Smith*, with clinical depression (or whatever other characteristic at issue)). As a 3-2 majority decision, there is therefore no majority consensus in *Smith* for dropping all reference to the reasonable person standard. Judges would be well-advised to make reference to the standard in their directions, albeit with the gloss that the reasonable man is merely the ordinary person, an ordinary person attributed with those characteristics possessed by D which either bear on the sting of the provocation or bear on the degree of self-control fairly to be expected of D.