applies to individual cases, whose precise facts have to be ascertained, while the latter applies to classes of case identifiable in advance, and therefore more obviously qualifies as an unacceptable "immunity"? We shall have to wait and see.

The real question, and it is indeed a question of public policy, is whether an individual should be compensated for the negligent failure of a public authority to protect his interests. On this matter there are currently major divergences of opinion within and between courts in England. ECHR's expansive decision will gratify those who believe that *everyone* should pay for any foreseeable harm to which their unreasonable conduct has contributed, just as if we had enacted article 1382 of the French Code civil. Nor is it surprising that it should be a court of human rights which implies that this is, or should be, our law, for article 1382 is a product of natural law, of which the view that people's rights must be the same everywhere is the late twentieth century version. Nevertheless, it is unwise to endorse a dubious arrogation of power just because one approves of its use in a particular instance: power once conceded can be used for less agreeable purposes. Nations should decide for themselves whether public funds should be directed to victims of past malfunction in public services or used to reduce the number of such malfunctions in the future. It is true that national legal systems are vouchsafed a "margin of appreciation", but the margin is clearly narrowing as the page of text is filled up with extensive glosses on Article 6(1) of the Convention. In any case to answer this question in terms of "human rights" is frankly absurd.

TONY WEIR

DEFINING PROVOCATION

WHEN a defendant is charged with murder and wishes to rely on the defence of provocation, two conditions need to be satisfied. First, the provocation must have caused the defendant to lose his or her self-control suddenly and temporarily. This is the subjective condition. Secondly, the provocation must be such that the reasonable person might have reacted to it in the same way as the defendant. This is the objective condition. This condition is, however, qualified, since it is possible to imbue the reasonable person with relevant characteristics of the defendant, to see whether a reasonable person with such characteristics might have killed had he or she been provoked. Although this qualification of the objective test has been recognised for some time, it has become a matter of recent controversy as to when a particular characteristic of the defendant can be considered to be relevant and what the rationale of this qualification of the

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objective test actually is. Two distinct lines of authority can be identified. According to the first line, a characteristic can, generally, only be relevant if it affects the gravity of the provocation: *Camplin* [1978] A.C. 705 (H.L.). So, for example, if the provocation relates to the defendant's characteristic then it can be considered to be relevant, because the reasonable person would be more likely to have lost self-control if he or she had such a characteristic: *Morhall* [1996] A.C. 90 (H.L.), *Luc Thiet Thuan* [1997] A.C. 131 (P.C.). This line of authority does, however, recognise an exception to the general principle, namely that the reasonable person can be imbued with the defendant's age or gender, not because these characteristics affected the gravity of the provocation, but because they are characteristics which may affect the defendant's ability to exercise self-control: *Camplin*. But these are the only characteristics which can be taken into account for this reason. According to the second line of authority, however, any characteristic can be treated as relevant simply because it affects the defendant's ability to exercise self-control. This has been recognised in six recent decisions of the Court of Appeal, where the reasonable person was imbued with a wide variety of characteristics, such as battered woman syndrome (*Thornton (No. 2)* [1996] 1 W.L.R. 1174) and attention-seeking (*Humphreys* [1995] 4 All ER. 1008), simply because such characteristics affected the defendant's ability to exercise self-control.

In *Smith* [1998] 4 All E.R. 387 the Court of Appeal was required to choose between these two lines of authority. Smith had been arguing with his friend about some tools which he alleged that the friend had stolen. In the course of the argument Smith picked up a kitchen knife and stabbed the friend to death. Smith was charged with murder and pleaded, *inter alia,* that he had been provoked to kill the friend. It was a vital part of Smith's defence that he had been suffering from severe depression, which some expert medical witnesses suggested might have been a significant contributory factor in reducing his ability to exercise self-control. The crucial question, therefore, was whether this severe depression was a relevant characteristic with which the reasonable person could be imbued. The Court of Appeal held that a characteristic would be relevant whenever it affected the defendant's ability to exercise self-control, so affirming the second line of authority. It followed that, since the defendant's depression did affect his ability to exercise self-control, it was a relevant characteristic. Since the Crown had not discharged its burden of proving that the defendant had not been provoked, the Court considered that the conviction for murder was unsafe. A conviction for manslaughter was substituted for which Smith received seven years' imprisonment.

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A number of arguments can be identified to support this decision. First, and most importantly, this liberal interpretation of the objective condition makes it easier to establish the provocation defence, simply because the reasonable person would usually have reacted in the same way as the defendant if he or she possessed the same ability as the defendant to exercise self-control. It follows that there is greater scope for avoiding the mandatory life sentence for murder, this being an important practical function of the provocation defence. With growing recognition amongst the judiciary and beyond that the mandatory life sentence should be abolished, this interpretation of the provocation defence constitutes an important mechanism for the judiciary to be given a discretion when sentencing to ensure that the sentence fits the crime. Secondly, if the defendant is suffering from some mental impairment, it is only fair that this should be taken into account when considering the application of the provocation defence. It is simply not just that the defendant's conduct should be judged by reference to the standard of the reasonable person when, for reasons outside the control of the defendant, he or she is not capable of complying with the objective standard of self-control.

A number of arguments can, however, be identified which suggest that *Smith* was wrongly decided. First, and most importantly, the case is inconsistent with higher authority, namely decisions of the House of Lords in *Camplin* and *Morhall*, where it was clearly recognised that a characteristic of the defendant will only be relevant where it affects the gravity of the provocation, save where the characteristic is age or gender. In a regrettable example of selective quotation and misinterpretation of dicta, Potts J., speaking for the whole of the Court in *Smith*, concluded that the leading judgment of Lord Diplock in *Camplin* supported the approach of the Court of Appeal. This is simply wrong: [1978] A.C. 705, 717–718. The highly significant judgment of Lord Goff in *Morhall* is dismissed, even though that judgment contains dicta which plainly contradict the decision in *Smith*. Secondly, the approach of the Court of Appeal is inconsistent with the basic rationale of the objective condition, namely to identify a standard of self-control against which the defendant is to be judged and so ensure that the defendant cannot rely on the defence if he or she is exceptionally pugnacious or excitable: *Camplin* [1978] A.C. 705, 716 (Lord Diplock). Since the effect of the depression in *Smith* was to make the defendant similarly disinhibited, it should not have been treated as a relevant characteristic with which the reasonable person could be imbued. Thirdly, the effect of *Smith* is to water down the objective condition to such an extent that it all but disappears. But the objective

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condition is a vital part of the provocation defence since it is expressly recognised by section 3 of the Homicide Act 1957.

The Court of Appeal can be considered to have reached the wrong result, since the Court was bound by decisions of the House of Lords, but its reasons for doing so, namely to secure a just result, are entirely defensible. The House of Lords has given leave to appeal and it is to be hoped that the decision of the Court of Appeal is affirmed. This would require the qualification, rather than the overruling, of earlier decisions of the House of Lords and the rejection of a decision of the Privy Council. It would also require the identification of a new rationale for the objective condition of the provocation defence, one which is more consistent with the function of the defence as a mechanism whereby the law can exercise partial compassion for human infirmity. Although such a ruling would reduce the importance of the objective condition, it does not follow that the objective condition is effectively abolished—a result which would be contrary to section 3 of the Homicide Act 1957. This is because the jury would still be able to decide that a reasonable person endowed with the defendant's reduced capacity to exercise self-control would not have been provoked to such an extent that he or she would have killed the victim. If the House of Lords did affirm the Court of Appeal's decision, this would also provide certainty in a very important area of the criminal law and give greater scope for judges to reach the just result. It would also be a further nail in the coffin of the mandatory life sentence for murder.

GRAHAM VIRGO

GIFTS AND THE LAW OF THEFT

AN unscrupulous woman battened on to a somewhat simple-minded, wealthy man, and cajoled him into parting with large amounts of his recently acquired wealth. The gifts that he made to her were, it seems, perfectly valid ones. It is astonishing then to find that she was, according to the Court of Appeal in *Hinks* [1998] Crim.L.R. 904, properly convicted of theft. How did this apparently absurd result come about?

The House of Lords began to fillet the Theft Act 1968 in *Lawrence* v. *Metropolitan Police Commissioner* [1972] A.C. 626 where it was held that the fact that the "victim" had consented to transfer property might be relevant to the alleged thief's dishonesty; but it formed no part of the *actus reus* of the offence that (unlike the law of larceny which theft replaced) the taking (technically "appropriation") was without consent. The logical result of this holding was that,

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