Analysis

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Murder through the Looking Glass: *Gillon v HM Advocate*

A. *DRURY* AND ITS DISCONTENTS

It is probably safe to regard *Drury v HM Advocate*,[1] a Full Bench decision on the operation of provocation (particularly in cases of provocation by infidelity), as the most controversial judicial decision on Scots criminal law of recent years.[2]

Although the decision was directly concerned with provocation, the criticism it received did not, for the most part, focus on its consequences for that plea.[3] Instead, it was concerned with the court's analysis of the offence of murder. According to the Lord Justice-General (Rodger), who delivered the leading opinion, provocation operates by negating the *mens rea* of murder. That *mens rea* was formerly, according to the long-accepted "Macdonald" definition, either an intention to kill, or "wicked recklessness".[4] However, according to Lord Rodger, that definition was incomplete: "just as the recklessness has to be wicked so also must the intention be wicked".[5] The existence of provocation would mean that the accused's action "though culpable, was not wicked",[6] with the consequence that he should be convicted of culpable homicide rather than murder.

Regardless of the criteria which might be set out for a plea of provocation, that analysis of its operation is controversial for a number of interconnected reasons. First,

1 2001 SLT 1013.

2 In addition to Sir Gerald Gordon's commentary on the case at 2001 SCCR 618, the decision has been the subject of three critical articles: J Chalmers, "Collapsing the structure of criminal law" 2001 SLT (News) 241; M G A Christie, "The coherence of Scots criminal law: some aspects of *Drury v HM Advocate*" 2002 JR 273; F Leverick, "Mistake in self-defence after *Drury*" 2001 JR 35. Critical comment can also be found in V Tadros, "The structure of defences in Scots criminal law" (2003) 7 EdinLR 60 at 71; V Tadros, *Criminal Responsibility* (2005) 104; P R Ferguson, "Codifying criminal law (1): A critique of Scots criminal law" [2004] Crim LR 49 at 52; C H W Gane, C N Stoddart and J Chalmers, *A Casebook on Scottish Criminal Law*, 3rd edn (2001) para 10.21. Oddly, it appears that the only academic defence of *Drury* is be found in a paper on South African law written to assist the (English) Law Commission in its review of partial defences to murder: J Burchell, "Paper on provocation, diminished responsibility and the use of excessive force in self-defence in South African Law", in Law Commission, *Partial Defences to Murder* (Consultation Paper No 173, Appendices, 2003) 184 at 208 (available at *http://www.lawcom.gov.uk/docs/cp173apps.pdf*).

3 The critical response has, however, been invoked in support of a proposed review of the law of provocation: Scottish Law Commission, *Seventh Programme of Law Reform* (Scot Law Com No 198 (2005)) para 2.48.

4 J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 5th edn, by J Walker and D J Stevenson (1948) 89.

5 2001 SLT 1013 at para 11.

6 At para 18.

it is based on a fallacious assumption: that is, that the definition of a criminal offence should set out *conclusive* conditions of liability. That is simply not how offences and defences operate in Scots law. Instead, an offence definition sets out sufficient conditions of liability, but it is open to the accused to plead a valid defence to avoid conviction. For that reason, defences – that is, defences "proper" – may be differentiated from simple denials of *actus reus* or *mens rea*, as in *Jamieson v HM Advocate,* where the Lord Justice-General (Hope) distinguished between a denial of *mens rea* and a "substantive defence".[7]

That separation of offence and defence was reaffirmed by the appeal court shortly after *Drury* when, in *Lord Advocate's Reference (No 1 of 2000),*[8] it was made clear that defences such as necessity did not negate any "malice" in the *mens rea* of malicious mischief. Instead, the *actus reus* and *mens rea* of that offence would be established if it were shown that there had been "intentional or reckless destruction of the property of another … in the knowledge that the destructive conduct complained of was carried out with complete disregard for, or indifference to, the property or possessory rights of another".[9] A successful plea of necessity might nevertheless result in an acquittal, but without any question of *mens rea* being negated.[10]

All this, of course, might be regarded as rather harmless wordplay, with its worst consequence being potential confusion – why, for example, might provocation negate "wickedness" in "wicked intent", but not "evilness" in "evil intent" (the *mens rea* of assault)?[11] Its potential consequences, however, are rather more serious than that, and two main objections were raised to the *Drury* analysis.

First, if, as Lord Rodger suggests, defences operate because they evidence a lack of *mens rea*, then that threatens to render defences entirely subjective, and strip them of any objective content. It has been a long-standing rule in Scots law that while defences such as self-defence may be founded on a mistake of fact, that mistake must be based on reasonable grounds.[12] Logically, however, the *Drury* analysis leaves no room for this requirement of reasonableness, because the accused's motive will be the same regardless of the reasonableness of his belief.[13] It might, of course, be argued that the requirement of reasonable grounds is unnecessary or inappropriate,[14] but it would be highly undesirable for such a significant change in the law – which may even be incompatible with the ECHR[15] – to be brought about in this inadvertent fashion.

7 1994 JC 88 at 92.

8 2001 JC 143.

9 At para 30 per Lord Prosser, giving the opinion of the court.

10 An analysis that has also been accepted by the House of Lords in *DPP for Northern Ireland v Lynch* [1975] AC 653 at 679-680 per Lord Wilberforce, and by the Canadian Supreme Court: see *R v Parent* [2001] 1 SCR 761 at para 6; *R v Kerr* [2004] 2 SCR 371 at para 28 per Bastarache J, para 93 per LeBel J.

11 See Chalmers (n 2) at 243.

12 See J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) ch 3.

13 See Chalmers (n 2); Leverick (n 2).

14 See R Singer, "The resurgence of *mens rea*: II – honest but unreasonable mistake of fact in self defense" (1986-1987) 28 *Boston College Law Review* 459 at 512. For the counter-argument, see Leverick (n 2); F Leverick, *Killing in Self-Defence* (2006) ch 9; A P Simester, "Mistakes in defence" (1992) 12 OJLS 295.

15 See F Leverick, "Is English self-defence law incompatible with article 2 of the ECHR?" [2002] Crim LR 347; Leverick, *Killing in Self-Defence* (n 14) ch 10.

Secondly, it was feared that the use of an overarching concept of "wickedness" to accommodate defences within the definition of murder threatened to render defences potentially limitless. This concern arose because, according to Lord Rodger, "evidence relating to provocation is simply one of the factors which the jury should take into account in performing their general task of determining the accused's state of mind at the time when he killed his victim".[16] So, Victor Tadros suggested, even if the formal criteria for provocation had not been made out, a jury might nonetheless be entitled to conclude that evidence of "quasi-provocation" meant that the accused's state of mind could not be described as "wicked", meaning that he should be acquitted of murder.[17] Michael Christie went further, suggesting tentatively that the *Drury* redefinition of murder might allow juries "to find an absence of 'wicked disposition' on as broad a basis as they may be permitted by the judge in a particular case",[18] which could, for example, provide a formal basis for a "mercy killer" or the survivor of a suicide pact to claim a partial defence.[19]

A further difficulty with *Drury* was that it did not leave the law of provocation in an entirely clear state. What *Drury* clearly established was that, in cases of provocation by infidelity, it was inappropriate to ask the jury to consider whether there was a reasonably proportionate relationship between the provocation and the accused's response, such a comparison being an "impossible balancing act".[20] Instead, the jury should be asked to consider whether the accused's reaction was such as might have been expected of the ordinary person.[21]

Drury did not, however, decide whether the requirement of a "reasonably proportionate relationship" was inappropriate in cases of provocation by violence, but left that question open for determination at a later date.[22] That requirement logically continued to apply – the decisions endorsing it remaining binding on trial judges[23] – but it was not clear whether the *Drury* court considered that the "ordinary person" requirement was *also* applicable to cases of provocation by violence. On one view, particularly as Lord Rodger had found support for that criterion in earlier authorities on provocation by violence,[24] the "ordinary person" criterion was of general application

16 *Drury v HM Advocate* 2001 SLT 1013 at para 17.

17 V Tadros, "The Scots law of murder", in Law Commission, *The Law of Murder: Overseas Comparative Studies* (2005) 6 (available at *http://www.lawcom.gov.uk/docs/comparative_studies.pdf*).

18 Christie (n 2) at 283. Christie does not offer this as his preferred interpretation of the case, but suggests that it is "not wholly excluded".

19 One might go even further and ask why a judge would be entitled to restrict the jury's discretion on this point at all. Could a jury simply be given an untrammelled power to convict of culpable homicide rather than murder on the basis that they did not consider the accused to have acted "wickedly"?

20 At para 10 per Lord Cameron of Lochbroom. Cf Law Reform Commission for Ireland, Consultation Paper on *Homicide: The Plea of Provocation* (LRC CP 27-2003, 2003), where the Commission advocates a proportionality test in all cases of provocation, including provocation by infidelity (paras 7.32-7.38).

21 2001 SLT 1013 at para 10 per Lord Cameron of Lochbroom, para 34 per Lord Justice-General Rodger, para 20 per Lord Johnston, para 7 per Lord Nimmo Smith, para 14 per Lord Mackay of Drumadoon.

22 At para 35 per Lord Justice-General Rodger.

23 Chalmers (n 2) at 244.

24 Particularly the leading case of *HM Advocate v Smith*, High Court at Glasgow, 27 February 1952, reported on appeal on another point 1952 JC 66. In *Drury* (para 33) Lord Rodger quoted from Lord Cooper's charge to the jury in that case and went on to say "…in substance Lord Cooper was telling the jury that, to be legally relevant, the provocation would have had to be such as to induce an ordinary

to all cases of provocation, with proportionality being a possible additional criterion in cases of provocation by violence.[25] Alternatively, *Drury* might have been read as establishing, at least for the time being, two separate defences of provocation – provocation by infidelity, where an "ordinary person" test was applicable, and provocation by violence, where a proportionality test applied[26] – an approach which finds support in the opinion of Lord Cameron of Lochbroom.[27] Against that background, it was not surprising that provocation by violence should become the subject of a further Full Bench decision.

B. *GILLON v HM ADVOCATE*

That decision is *Gillon v HM Advocate*.[28] Gillon was charged with (*inter alia*) murder and pled provocation. The trial judge directed the jury that they should consider whether the accused's response had been proportionate to the alleged provocation, but made no reference to an "ordinary person" criterion. On appeal, it was argued that it was inappropriate to apply a proportionality test in cases of provocation by violence, and that this requirement should be replaced by the test of the ordinary person. Although, as noted above, one interpretation of *Drury* was that it already required an ordinary person test to be applied to all types of provocation, both the parties and the court appear to have assumed that this was not the case.

Three main reasons were advanced for the proposed change: first, that it would make the law more coherent; secondly, that it was inherently difficult to apply a proportionality test where the accused had killed in response to *ex hypothesi* non-fatal violence; and, thirdly (the principal argument), that the proposed change would be consistent with the *Drury* analysis.[29]

The court rejected the first of these reasons, arguing that the "ordinary person" test is recognised in respect of provocation by infidelity because a proportionality test cannot be applied in such a case,[30] whereas it *is* possible to apply such a test in cases of provocation by violence. And, the court argued, the proportionality test is preferable because the "ordinary person" or "reasonable man" test has given rise to numerous problems in those jurisdictions where it has been adopted, because of the difficulties associated with deciding which of the characteristics of the accused may be attributed to the objective comparator.[31] For those reasons, it is preferable for the test *not* to be unified across the two types of provocation.

The court's reference to the difficulties encountered with the objective comparator

man to act in the way in which the accused acted. To put the same point in another way, the jury could conclude that, in stabbing the deceased, the accused had acted with the wickedness of a murderer if they considered that an ordinary man would not have reacted to the provocation in the same way." See also Lord Rodger's treatment of Hume (at para 31).

25 Gane, Stoddart & Chalmers, *Casebook* (n 2) para 10.42; Chalmers & Leverick, *Criminal Defences* (n 12) ch 10.

26 Christie (n 2) at 285; T H Jones and M G A Christie, *Criminal Law*, 3rd edn (2003) paras 9.62-9.63.

27 At para 10.

28 2006 SLT 799. The decision of the court was given by Lord Osborne.

29 At para 20.

30 At para 21.

31 At paras 21, 31-37.

elsewhere may not be a conclusive reason for rejecting such a test, for three reasons. First, it is arguable that the English courts have now satisfactorily resolved the issue.[32] Secondly, the difficulties the English courts have faced have arisen primarily in cases of non-violent provocation,[33] and it may be that the same problems would be unlikely to arise in Scotland, where provocation (the infidelity exception aside) can only be by violence and it is less likely to be necessary to have recourse to the accused's personal characteristics to explain his response to the provocation. Thirdly, it is not clear that a proportionality test wholly excludes consideration of the accused's personal characteristics. Consider, for example, the English case of *Uddin*,[34] where the defendant killed the victim after the latter had thrown a pigskin shoe at him. The significance of the assault lay in the defendant's religious beliefs, and it is difficult to see how any question of proportionality could be sensibly answered without having reference to that personal characteristic. Nevertheless, these are undeniably difficult questions, something which bolsters the *Gillon* court's conclusion that it would be highly undesirable to redefine the scope of provocation without a comprehensive review being first carried out.[35]

The court rejected the second reason for the proposed change (difficulty of application) in short order, observing that it is "a matter of common experience that death may be caused by quite modest violence".[36] While the court is clearly right to reject this argument, the line of reasoning is unconvincing. A person who intends only to engage in "quite modest violence" will lack the *mens rea* of murder and so will have no need of the provocation defence. Instead, the reason this argument should be rejected is that, while a proportionality test doubtless makes it difficult to run a successful plea of provocation, this *ought* to be the case. Intentional killings should not be readily excused, even partially. The fact that Scots law has adopted a relatively restrictive approach to the availability of the plea of provocation may well explain why its continued existence has proved far less controversial in this jurisdiction than elsewhere.[37]

C. WHAT IT MEANS TO BE WICKED

"There's glory for you!"
"I don't know what you mean by 'glory'," Alice said.
"I meant, 'there's a nice knock-down argument for you!'"
"But 'glory' doesn't mean 'a nice knock-down argument'," Alice objected.
"When *I* use a word," Humpty Dumpty said in a rather scornful tone,
"it means just what I choose it to mean – neither more nor less."

– Lewis Carroll, *Through The Looking Glass*

32 In *Attorney-General for Jersey v Holley* [2005] UKPC 23, and see *R v James* [2006] EWCA Crim 14.

33 See the leading cases of *R v Morhall* [1996] AC 90 (criticism of accused's glue-sniffing habit); *Luc Thiet Thuan v The Queen* [1997] AC 131 (taunting); *R v Smith (Morgan)* [2001] 1 AC 146 (allegation of theft); *Attorney-General for Jersey v Holley* [2005] UKPC 23 (derogatory comments).

34 *The Times*, 14 September 1929, discussed by A J Ashworth, "The doctrine of provocation" [1976] CLJ 292 at 300.

35 At para 38.

36 At para 22.

37 Chalmers & Leverick, *Criminal Defences* (n 12) para 10.01.

In rejecting the third reason for the proposed change (consistency with *Drury*), the *Gillon* court did not quibble with the *Drury* analysis of murder. Instead, the court opined that "[w]hile the Lord Justice General's analysis undoubtedly involved a departure from the more traditional formulations of the nature of provocation, we have 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".[38]

This is all very well, but the difficulty is that the *Gillon* court's analysis thereafter is barely reconcilable with the *Drury* analysis. The *Gillon* court concludes that, as a matter of policy, the law requires to develop criteria which must be satisfied before a plea of provocation can succeed, and that policy considerations dictate that the "ordinary person" test is undesirable. On the one hand, this policy-based approach is attractive, because it provides an answer to the concerns about the *Drury* analysis which were noted earlier. If policy-based restrictions can be placed on the availability of defences, then that seems to rule out acquittals on the basis of "quasi-provocation" evidencing a lack of *mens rea,* or acquittals on the basis of a "lack of wicked disposition" – despite the absence of any recognised defence – more generally. Furthermore, this implies that where a plea such as self-defence is founded on a mistake of fact, the courts may legitimately impose a criterion of reasonableness before that mistake can result in an acquittal.

On the other hand, the policy-based approach makes a mockery of the *Drury* analysis. In that case, Lord Rodger made it quite clear that the inclusion of "wicked" in the *mens rea* of murder was a reference to the accused's motive:[39]

> Saying that the perpetrator "wickedly" intends to kill is just a shorthand way of referring to what Hume (i, 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.

In unacknowledged contradiction to this, the *Gillon* court has rendered the term "wicked" technical and awkward: an accused who intends to kill will be regarded as "wicked" unless he satisfies the criteria for a recognised defence to murder. On this basis, for example, the accused who intends to kill in the mistaken belief that his life is in danger is "wicked" if his mistake is unreasonable, but is not "wicked" if it is reasonable. Humpty Dumpty would doubtless have approved of this manner of using words, but Alice would have rightly objected (and might have been rather confused by it if she had been serving as a juror).

D. CONCLUSION

For all the criticisms made in this note, there is much to applaud about *Gillon*. It heads off many of the potential problems created by the *Drury* analysis, and leaves Scots law with a clearer and more coherent account of the law of provocation than was previously the case. The law of murder, and of criminal defences, will operate much more sensibly as a result of *Gillon*, but the decision papers over the cracks left by *Drury* rather than getting to the heart of the problems which it created.

38 2006 SLT 799 at para 24.

39 *Drury v HM Advocate* 2001 SLT 1013 at para 11.

It would have been far better if the court had simply accepted that the much-criticised *Drury* analysis of murder was wrong, and unnecessary.[40] The court in *Drury*, it is submitted here, was seduced into drawing an unnecessary parallel between one form of the *mens rea* of murder – "wicked recklessness" – and intention. Wickedness in wicked recklessness is not, however, a shorthand way of referring to the accused's motivation. Instead, it is a recognition of the very high degree of recklessness which is required before the law will consider the accused's culpability as severe enough to be treated as equivalent to an intention to kill.[41] Because culpable homicide requires the accused to be aware of the risk which he is running[42] – "reckless" in the proper sense of the term – "wicked" is, in this context, used to distinguish those reckless killings which should be treated as murderous from those which are instead culpable homicide. Moving backwards to the pre-*Drury* definition of murder would have been quite a step forwards for the coherence of Scots criminal law, but it was one that the court in *Gillon* chose not to take.

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40 It is disappointing that no reference was made in *Gillon* to the extensive academic criticism of this analysis.

41 G H Gordon, *The Criminal Law of Scotland*, 3rd edn, by M G A Christie (2001) vol 2 para 23.19; Gordon (n 2) at 619. Cf *Scott v HM Advocate* 1996 JC 1 at 5 per Lord Justice-Clerk Ross.

42 *Transco Plc v HM Advocate* 2004 JC 29.