hypnotised as part of their treatment, had imagined the conduct they accused him of due to their altered perception of reality under hypnosis. It is not inconceivable that this argument would have been bolstered by answers elicited via defence questioning of the first complainant.

From the point of view of domestic law, the most important question is whether the Grand Chamber's decision gives the hearsay regime in the CJA 2003 a clean bill of health. In the opinion of this author, it does not. First, it is questionable whether s. 125 CJA 2003, which enables the court to stop proceedings if it considers the hearsay evidence "so unconvincing that a conviction would be unsafe", is enough to safeguard the second objective of the "sole or decisive" test of ensuring that the defendant has a true opportunity to challenge the evidence against him. The Court's reasoning implicitly accepts that even the reliance on *convincing* hearsay evidence may sometimes be *unfair*. English judges will in the future have to contemplate that possibility as a reason for staying a trial. Secondly, there is a real risk that, in admitting hearsay evidence pursuant to the guidance given in the CJA 2003, s 116(4)(b), which instructs the court to have regard to "any risk that its admission or exclusion will result in unfairness to any party", English judges might be tempted to play "the interests of the prosecution" off against the rights of defendants. But the rights the Convention guarantees to defendants are not private privileges. They signal that the *public* interest lies in prosecuting defendants in trials in which these rights are respected. Their curtailment may be necessary to protect the rights of others, such as vulnerable witnesses, but it ought not to be done simply to ease the prosecution's task. Nothing in the decision of the Grand Chamber supports the view that mere prosecutorial convenience may trump defendants' rights.

ANTJE DU BOIS-PEDAIN

KILLING THE UNFAITHFUL

SUPPOSE D finds his partner, V, having sexual intercourse with X. D loses self-control and kills V. Assuming he is to be convicted of a homicide offence, should D be convicted of murder, or manslaughter? Under the old law of provocation, if the reasonable man might similarly have lost self-control and killed V, D would be a manslaughterer (Homicide Act 1957, s. 3). This approach was considered by some to privilege male sexual possessiveness, and underplay V's sexual autonomy. For this reason (and others), provocation was abolished and

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replaced with a new partial defence of "loss of control", with effect from October 2010.

The Coroners and Justice Act 2009 sets out the requirements for "loss of control". The defendant must have lost self-control due to a "qualifying trigger" (ss. 54(1)(a)-(b)). The most relevant of these triggers, for present purposes, is "a thing or things done or said (or both) which … constituted circumstances of an extremely grave character, and … caused D to have a justifiable sense of being seriously wronged" (s. 55(4)). If a qualifying trigger exists, it must be asked whether "a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstance of D, might have reacted in the same or in a similar way" (s. 54(1)(c)). If yes, D is convicted of manslaughter (s. 54(7)). If no, D is – in the absence of other defences – a murderer.

Importantly, for D, "in determining whether a loss of self-control had a qualifying trigger … the fact that a thing done or said constituted sexual infidelity is to be disregarded" (s. 55(6)(c)). This seems clear: if D loses self-control and kills V *solely* because V had been unfaithful, then the trial judge should withdraw the "loss of control" defence. In the absence of other defences, D is a murderer.

The Court of Appeal's decision in the conjoined appeals in *R. v Clinton, Parker and Evans* [2012] EWCA Crim 2, [2012] 1 Cr. App. R. 26 demonstrates that things are rarely this simple. The court covered a lot of ground, as this was the first time the "loss of control" defence had come before it. For concerns of space, the sexual infidelity issue in the case of *Clinton* will be concentrated on here. Following a trial separation, the Defence case was that the defendant's wife eventually confessed to having affairs and recounted graphic details of her sexual encounters with other men. A heated argument ensued, during which the defendant's wife indicated that things would have been "easier" if the defendant had killed himself (as he had previously threatened to) and mocked his past failures to do so. The defendant felt "the walls and ceiling … close in", and killed his wife (at [75]).

Clinton certainly involves sexual infidelity as a trigger for the defendant's loss of control, but it is clear that various other putative qualifying triggers existed. The defendant argued, for instance, that the verbal taunts by his wife might be sufficient to ground the "loss of control" defence. The trial judge disagreed, because of the presence of sexual infidelity, and withdrew the "loss of control" defence from the jury. The Court of Appeal found this to be wrong: if the victim's unfaithfulness provides a *context* in which another qualifying trigger (*e.g.* the other taunts of which Clinton gave evidence) arises, the jury may take it into consideration. They may ask, for instance, whether the context of sexual infidelity makes the victim's taunts of an "extremely

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grave" character, which would give rise to the defendant's "justifiable sense of being seriously wronged" (at [39]). If satisfied that such a qualifying trigger exists, the *context* of sexual infidelity is also (because it is not excluded from consideration by the 2009 Act) relevant to the jury's deliberations about what another person of the defendant's age, sex, etc. would have done (at [31]). The trial judge had thus misdirected herself. The defendant's murder conviction was quashed and a retrial ordered.

This decision is problematic for two reasons. First, given the heated circumstances in which killings usually take place, it might not be clear what triggered the defendant's loss of self-control: was the victim's infidelity a context for the defendant's loss of control, or the cause of it? This will not always be obvious, and trial judges might encounter difficulty in determining whether to withdraw the "loss of control" defence or, alternatively, let it go to the jury in case there are putative qualifying triggers not based *solely* upon evidence of the victim's sexual infidelity.

Secondly, if the partial defence is to be considered by the jury, it is artificial (and conceptually very difficult) for them to exclude consideration of the victim's unfaithfulness at some stages of their deliberations and then to draw upon that same evidence at other points. Things will only get more complicated where other defences are relied upon. In *Clinton*, for instance, the defendant also ran the defence of diminished responsibility. Here, evidence of his wife's sexual infidelity is not excluded from consideration. The jury is liable to get very confused regarding when sexual infidelity is, and is not, relevant, in cases such as *Clinton*. This is unfortunate, as the 2009 Act's reforms were meant to simplify and modernise the law on partial defences to murder.

It is worth emphasising, in this regard, that the Court of Appeal's judgment included many criticisms of the drafting of the 2009 Act. The court saw its role not as interpreting that statute's provision for sexual infidelity cases, but instead suggested it was "required to make sense of" it (at [26]). Lord Judge C.J. also pointed out that the sexual infidelity exception has the potential to "produce surprising results" (at [2]) and "anomalies" (at [20]). These are fair points, as is the Court of Appeal's recognition that interpreting the concept of "sexual infidelity" (which is undefined in the 2009 Act) is a complicated matter (see, particularly, [17]–[19], [25]–[27]). Who owes whom sexual fidelity? Can, as the 2009 Act suggests, words really constitute sexual infidelity? The decision in *Clinton, Parker and Evans* does not answer these questions definitively. Indeed, the conjoined appeals raise various other questions about "loss of control" – such as what it means to act out of a "considered desire for revenge" (2009 Act, s. 54(4), considered at

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[128]–[131]), which are not resolved in any detail. All these questions will no doubt have to be wrestled over in future appeals. Very much remains unclear following the Court of Appeal's decision.

What is apparent from *Clinton, Parker and Evans* is that the Court of Appeal did not think the sexual infidelity exception was drafted well, or with the real world in mind. This is problematic because the court makes clear that, in its opinion, the history of the "loss of control" defence does not provide useful interpretative guidance. The Law Commission's proposals, which led to the 2009 Act's reforms, differ too much from the eventual legislation to be helpful (at [3]). In fact, the Law Commission did not explicitly exclude sexual infidelity as a "qualifying trigger" in its proposals. It thought trial judges would necessarily withdraw the defence from the jury where sexual infidelity was the only "provocation" offered by the victim or, alternatively, that juries would not find that the defence was made out in those circumstances (*Partial Defences to Murder* (Law Com. No. 290, 2004), para. [3.145]; *Murder, Manslaughter and Infanticide* (Law Com. No. 304, 2006), para. [5.65]). The sexual infidelity exception appeared in the Government's Bill. Unfortunately, however, the legislative debates over the 2009 Act also failed to point the court in a clear direction (at [4]). The judges thus felt very much on their own. This is a sorry state for an aspect of the law on "loss of control" to be in, barely a year after it entered into force. And, as noted above, there are hints in Lord Judge C.J.'s opinion that other features of the 2009 Act might cause difficulties in the future. *Clinton, Parker and Evans* is thus no doubt the first of many appellate decisions on this partial defence. *Plus ça change, plus c'est la même chose*?

FINDLAY STARK

LIABILITY UNDER THE HUMAN RIGHTS ACT 1998: THE DUTY TO PROTECT LIFE, INDIRECT VICTIMS AND DAMAGES

IN *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 W.L.R. 381 the Supreme Court held: (1) that the Human Rights Act 1998 ("HRA") imposes a duty on public hospitals to take operational measures to protect the life of a voluntary psychiatric patient where the hospital is aware of a real and immediate risk of suicide; and (2) if that patient commits suicide consequent upon the hospital's breach of duty, the deceased's parents may recover HRA damages for their non-pecuniary loss.

Melanie Rabone had a history of attempting suicide. After her most recent attempt she agreed to informal admission to Stepping Hill

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