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Loss of self-control as a defence: the key to replacing provocation

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Cases: [R. v Camplin \(Paul\) \[1978\] Q.B. 254 \(CA \(Crim Div\)\)](#)

[R. v Duffy \[1949\] 1 All E.R. 932 \(CCA\)](#)

***J. Crim. L. 118** *Keywords* Provocation; Loss of control; Partial defences to murder; Reform; Coroners and Justice Act 2009

The Coroners and Justice Act 2009 abolishes the common law partial defence of provocation and in its place introduces a new partial defence to murder of loss of control,¹ which can be attributed to fear as well as anger. This is the government's response to the Law Commission's 2006² Report which recommended not only reshaping the partial defences to murder, but also reforming the law of homicide as a whole. Regarded as the first step to reform in this area, this comment considers whether it is a step we needed to take.

The problem with provocation

Provocation has always had its place in English law as the recognition of human frailty, as passion aroused in the provoked killer takes away his ability to reason. It has a vast common law background of change and interpretation, and the defence as presented in the modern-day courtroom still shows aspects that appear outdated. Holten and Shute noted that the defence contains features 'not applicable to modern times'.³ It has always been the subject of criticism and proposals for reform, either as regards the oxymoronic objective standard of reasonableness or as to whether cumulative provocation should be accepted to make the defence more accessible for women who have suffered domestic violence. It is therefore unsurprising that the Law Commission has focused on this topic in recent years,⁴ suggesting some radical changes not only to defences to murder, but also to the structure of homicide itself. Indeed, most criminal law commentators have queried as to how much longer the law on provocation will need to be stretched to include worthy cases before it is finally realised that the defence needs to be cut from new cloth.

A Consultation Paper published in July 2008 recommended a new partial defence to murder with two limbs to replace provocation, still based on a loss of self-control with an objective measure, but recognising ***J. Crim. L. 119** that a defence is needed for situations not only arising from anger but also a fear of harm.⁵ This is an opinion found in many recent academic commentaries, in particular Horder, who recognises that both fear and anger can

equally undermine self-control.⁶ Wells has also noted that as battered women do not fit well with both the defence of provocation and the rules of diminished responsibility, a new defence may be in order.⁷ The subsequent Coroners and Justice Bill enjoyed Parliament's attention throughout 2009,⁸ and generated much support, the strongest being from groups supporting domestic abuse victims.

The need for acknowledging human frailty

Why do we protect those who have acted due to a loss of self-control? And how do we distinguish what incidents of loss of self-control establish a potential defence to murder? Dressler⁹ gives the sound explanation that we partially excuse those who had the capacity to control themselves, but lacked fair opportunity to do so. Traditionally, we have attributed the loss of self-control to a state of indignation or anger, quite possibly because these emotions spurn external signs of loss of self-control which are easily detectable, whereas emotions such as fear do not.¹⁰ Holten and Shute¹¹ have given some guidelines on what evidence might be apparent of a loss of self-control in a situation arising from fear rather than anger; mainly that the agent acts without having any concern for his long-term welfare, for example, giving no consideration to the fact that he might be caught and imprisoned. Holten and Shute also point out that a person might appear to be acting rationally, for example, by sharpening a knife or loading a gun, but this is merely to ensure he succeeds in his task, and this differs from an agent who puts on gloves to prevent finger prints on the murder weapon. It is only the latter that shows steps of premeditation, and the two must be distinguished, as the defence of loss of self-control is allowed only to set apart such killings from those which are calculated or arising from revenge.¹²

There are various aspects to the previous law on provocation which have often attracted academic commentary and criticism, many of ***J. Crim. L. 120** which will be remedied by the new law. Section 3 of the Homicide Act 1957 required the judge to leave the issue of provocation to the jury even if the objective element was not met:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury ...

Therefore, if evidence is presented during the trial that there was provocative conduct and a loss of self-control, the jury should be directed on this even if it would be absurd to say that they would find a reasonable person would have acted as the defendant did. A duty was even imposed on counsel on both sides to make the judge aware that evidence of provocation was present.¹³ The judge may have been certain that no reasonable jury would return a manslaughter verdict on grounds of provocation, but should the requirements of the subjective element be met the issue of whether to direct the jury on this was no longer at his discretion.¹⁴ The jury were to be given the opportunity to decide on the objective element. What kind of evidence was sufficient to give rise to the duty of the judge to leave provocation to the jury? Russell LJ commented in *R v Rossiter* :¹⁵

We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling on

it.

The Law Commission proposed that this duty be removed unless the judge considers there to be evidence on which the jury may accept the plea, thus empowering the judge to withdraw the defence if his belief is to the contrary. This proposal was incorporated into the Coroners and Justice Act. No longer will the jury be asked to consider the defence of provocation based on a 'speculative possibility' that there had been some conduct amounting to provocation.¹⁶ The logic of this is that the judge is better equipped to speculate on these matters, but will this lead to opening the floodgates for appeals on misdirection?

Before the 1957 Act the judge had been entitled to withdraw provocation if his thoughts were that a reasonable man would not have acted as the defendant did. It seems as though the government have taken a step back rather than forward in developing the law in this area, by reverting the law back to its original state before it was altered by the 1957 Act.¹⁷ This has been a current theme with provocation. For **J. Crim. L. 121* example, in 2005, the judgment in *R v Holley*¹⁸ succeeded in quashing developments of case law over the previous decade with regard to characteristics attributed to the reasonable man, reverting the law to a fixed capacity for self-control and not a variable standard as had previously been applied following the decision in *R v Smith (Morgan)*.¹⁹ The decision in *Holley* reinstated a defence which was limited to the literal words of the Homicide Act 1957,²⁰ giving no scope for interpretation. It also appeared that *Holley* had yet again put battered women outside the jurisdiction of the provocation defence, but given those defendants who possessed a quick temper a ready excuse as long as they could claim some manner of wrongdoing or felt injustice. These seemingly unjust results had made the law even more desperate for reform.

Solving the problem

Many had recommended change in this vague and outdated area of the law, and it was even speculated that the Law Commission might have recommended abolishing provocation altogether in its 2006 Report had it been given the scope to reflect on the mandatory life sentence.²¹ In fact, Ormerod has suggested that the very purpose of provocation's existence at all might have been to 'unshackle the judge from imposing the mandatory sentence'.²² In the responses to the Consultation Paper, it was noted that some academics had concurred that the problem with the law is not the partial defences to murder, but the mandatory life sentence, and abolishing this would be a much simpler route.²³

As mentioned earlier, the government has chosen to provide a remedy by reforming defences to murder rather than homicide as a whole, which was recommended by the Law Commission. The Commission suggested a new three-tier structure similar to that adopted in the USA, and the failure to take on board this radical overhaul by the government was deemed by Dennis 'a sad fate for a good proposal'.²⁴ Indeed, it was noted during the debate on the Coroners and Justice Bill that it was a disappointment not to see a full reform to the law on homicide.²⁵

This lacklustre attitude which meant shying away from the full reform of homicide is not the

only criticism of the new law. While some responses to the Consultation Paper accused the government of pandering to pressure groups, others have been more critical of the sexual infidelity exclusion built into the new defence,²⁶ including Lord Phillips, **J. Crim. L. 122* who is quoted saying he felt 'uneasy' about this exclusion.²⁷ The new law is also without any provision demanding evidence of seeking help from the authorities prior to the killing, and the absence of such a requirement is deemed problematic, as it allows the defence to be raised without any real evidence that the person killing from fear of serious harm had no other option. Leigh voices such concerns,²⁸ and this was also noted in the responses to the consultation,²⁹ where there was apprehension that the defence could be open to abuse without such a requirement. However, it could be said that previous unsuccessful attempts to seek help from authorities could do nothing but put defendants in a favourable light, as it would show that they tried other avenues to safeguard themselves and were left in a position where they lacked no choice but to carry out their own attempt at self-preservation. Therefore leaving this requirement out of the equation when determining the constraints of the new defence seems less than troubling. There is also the notion put forward by many domestic violence help groups, and also noted by Wells,³⁰ that often the assertion that women have such opportunity as to leave an abusive relationship or call the police is untrue.

Out with the old, in with the new

Section 54 of the Coroners and Justice Act 2009 states:

Partial defence to murder: loss of control

54-- (1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if--

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3) In subsection (1)(c) the reference to 'the circumstances of D' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

**J. Crim. L. 123* (6) For the purposes of subsection (5), sufficient evidence is adduced to

raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

(8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it.³¹

A first glance at these provisions gives the impression of a defence which tries to make good from the precedents established over the past 20 years, whilst continuing with the essence of the defence of provocation--loss of self-control and an acknowledgement of human frailty. The new defence of loss of control appears to be an extension of the common law defence of provocation (which is abolished under s. 56 of the 2009 Act), including all the relevant milestones made in the courtroom. The scope of the provocative act remains much the same, with things done, things said, or a combination of these being accepted as capable of amounting to provocation by the deceased.³² However, the objective and subjective elements are enhanced and shaped into a much more detailed and precise ruling of when the defence should succeed and when it should fail.

Losing the 'sudden' requirement

Section 3 of the Homicide Act 1957 required the defendant to have experienced a loss of self-control. It did not state that this must be sudden, but this was considered to be good law following the decision in *R v Duffy*.³³ The 2009 Act has removed the need for the loss of self-control to be sudden, which is a welcome development. Section 3 of the 1957 Act did not provide what the loss of self-control should be attributed to. However, it appears that loss of self-control is and has been most easily associated with the emotion of anger, when someone simply 'snaps'. This has certainly been conveyed in the courtroom, and this has made it very difficult for anyone acting from any other emotion to show evidence that his actions were due to losing self-control. Under the 2009 Act the loss of self-control must be due to at least one of two 'qualifying' triggers in order for the defence to succeed. The loss of self-control must be attributed to a fear of serious violence (s. 55(3)) or circumstances of extremely grave character which cause a justifiable sense of being wronged (s. 55(4)(a) and (b)).³⁴ The problem one might foresee with these provisions is that they group together a defence attributed to fear with a defence in which the defendant has likely acted out of anger. Nevertheless, the fact that the law now recognises that emotions other than anger can amount to a loss of self-control can be regarded as a step **J. Crim. L. 124* in the right direction, particularly for battered women who kill their abusers.

Loss of self-control and the reasonable man

Possibly the most intriguing elements to the new Act are those surrounding the objective element. Again, the Homicide Act 1957 requires only taking into account everything done or said to the effect which it would have on a reasonable man. This is very vague and is

therefore the reason why judges have found it difficult to portray this 'reasonable man' to the jury. In the case of *DPP v Camplin*,³⁵ the trial judge referred to the reasonable person as being 'like an elephant', in that he is hard to describe but easy to recognise. An interesting analogy, but one which is unhelpful to a jury wondering whether this fictional person should be the same age, sex, race or other characteristic as the defendant. The cases where this issue has been specifically dealt with are stacked high and inconsistent. *Camplin* attributed the defendant's age and sex to the reasonable person, whilst *Smith (Morgan)*³⁶ allowed characteristics personal to the defendant to be taken into account, not only in affecting the gravity of the provocation but also in assessing his capacity for self-control. This was then overruled by *Holley*,³⁷ albeit only a Privy Council decision, but considered good law, where it was decided that the capacity for self-control should be fixed and not variable; therefore such characteristics could only be taken into account when considering the gravity of provocation.

The Coroners and Justice Act 2009 seeks to remedy this by giving a much more coherent explanation as to the reasonable person. Section 54(1)(c) refers to a person of the defendant's sex and age with a normal degree of tolerance and self-restraint who, in the same circumstances as the defendant found himself in, might have acted in the same way or a similar way. Section 54(3) allows the jury to consider all circumstances except those whose only relevance to the defendant's conduct is that they have a bearing on his general capacity for tolerance and self-constraint. Note the use of the word 'circumstances' in place of the previously used term 'characteristic'. This change in wording should be welcomed, particularly with regard to battered women who kill, as it is a move away from making such women seem as though they have a mental illness. 'Circumstances' suggests being able to consider prior abuse as an external element rather than having to try and deem it as a characteristic by internalising it as some kind of syndrome or character flaw.

***J. Crim. L. 125 The way forward**

As the new 'qualifying triggers' to loss of self-control are yet to be put to the test, the best way to establish if the 2009 Act will lead to justice in considering human imperfection may be to consider it in the light of previous leading cases. Consider *DPP v Camplin*,³⁸ where a boy of 15 was sexually assaulted and then taunted by his attacker. He killed his attacker by hitting him over the head with a heavy pan. Were the circumstances of extremely grave character, causing him to have a justifiable sense of being wronged? If so, his loss of self-control would be measured against that of a reasonable boy aged 15, and it is arguable whether a jury would likely accept that all elements to the new defence are met. The problem area with the trigger in s. 55(4)(a) is the meaning of the term 'extremely grave character'. The meaning of this term may differ depending on the life experience and culture of the defendant. With no guidelines included in the law to clarify which situations this might cover, how will the judge adequately direct the jury? The 2009 Act does not require consideration of religion and culture in determining what a reasonable person might do in the situation, and it is questionable whether these things could be considered under the term 'all other circumstances', as they are regarded more as personal attributes or characteristics. It may be that we are some way from clarification on how closely related 'characteristics' and 'circumstances' are.

As regards the fear of serious violence trigger (s. 55(3)), what would happen if the case of *Duffy*, a young woman frequently battered by the victim, were to be tried again today? With the suddenness element removed, opening up the possibility of cumulative provocation being considered, what would the decision be? Would it be that she lost her self-control due to a fear of serious violence, and a woman of similar age who had previously experienced many occasions of violence at the hands of the victim, might have acted the same way? It is submitted that under the new provisions the court would come to the latter conclusion, and the defendant would be convicted of manslaughter. This is not because the previous incidents had affected her capacity for self-restraint, as would negate such circumstances from being considered, but because she had the knowledge that the victim would act upon threats made and likely repeat his violent behaviour. There would almost certainly be the same outcome for the case of *R v Ahluwalia*,³⁹ a woman who killed her husband after years of physical and psychological abuse. Would any of these women meet the criteria for both qualifying triggers? It will be interesting to see if any kind of prolonged abuse--be it sexual, physical or emotional--will be deemed by the courts as circumstances of a grave character causing a justifiable sense of being wronged (s. 55(4)(b)).

The government's attempt to resolve the infamous provocation problem is a welcome change, but some areas are still without solution. There is now an outline of which emotions may trigger a loss of ***J. Crim. L. 126** self-control, but other dilemmas remain. What is a normal degree of tolerance and self-restraint? In fact, a better question to ask might be: *is* there a normal degree of tolerance and self-restraint? The 'extremely grave character' term will prove the most troublesome, causing no end of debate and nuisance for the courts in deciding what situations this might cover. The quandary of how competently the problem has been solved does not attach only to the wording of the Act, but the concept as a whole in light of a law which may prove more beneficial to women (with the acknowledgement of fear as a trigger), but possibly to the disadvantage of men (by the express exclusion of sexual infidelity). As we observe how case law develops in this area following the Coroners and Justice Act 2009, will we see more just results, or has the law gone from being biased for one gender to another? To coin a very clichéd phrase, only time will tell.

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1. Coroners and Justice Act 2009, ss 54-56. The Act received Royal Assent on 12 November 2009.
 2. Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. No. 304 (2006).
 3. R. Holten and S. Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27(1) OJLS 49.
 4. See Law Commission, *Partial Defences to Murder*, Law Com. No. 290 (2004) and Law Com. No. 304 (2006), above n. 2.
 5. Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, CP 19/08, July 2008, available at <http://www.justice.gov.uk/consultations/docs/murder-manslaughter-infanticide-consultation.pdf>, accessed 13 February 2010.

6. J. Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25 OJLS 123.
7. C. Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) 14(2) *Legal Studies* 266.
8. There were several heated debates on the clauses which provide for the new loss of control defence. For example, the removal of the word 'provocation', which Lord Hunt wanted to add in to the new law because it is 'long established and well understood', and would be an aid for juries: HC Deb, 26 October 2009, col. 1036.
9. J. Dressler, 'Provocation: Partial Justification or Partial Excuse?' (1988) 51(4) MLR 467.
10. Horder, above n. 6 at 129.
11. Holten and Shute, above n. 3 at 61.
12. D. Ormerod, *Smith & Hogan Criminal Law*, 12th edn (Oxford University Press: Oxford, 2008) 492.
13. *R v Cox* [1995] 2 Cr App R 513.
14. *R v Acott* [1996] 4 All ER 443; *R v Miao* [2003] EWCA Crim 3486.
15. [1992] 1 All ER 326 at 333.
16. *R v Miao* [2003] EWCA Crim 3486.
17. See Ministry of Justice, Summary of Responses to CP 19/08, para. 80, available at <http://www.justice.gov.uk/consultations/docs/murder-review-response.pdf>, accessed 13 February 2010. Respondents to the Consultation Paper were concerned that judges would be able to withdraw the defence from the jury on assessment of the evidence, when this had been a decision for the jury for over 50 years.
18. [2005] UKPC 23, [2005] 2 AC 580. In this case the defendant was a chronic alcoholic, but the Privy Council's decision was that being in an intoxicated state may not be attributed to the reasonable man in regards to capacity for self-control.
19. [2000] UKHL 49, [2000] 4 All ER 289.
20. As referred to above.
21. See H. Power, 'Provocation and Culture' [2006] Crim LR 871.
22. Ormerod, above n. 12 at 506.
23. Responses to the Consultation Paper 2008 at Para 19
24. I. Dennis, 'Editorial: Adjusting The Boundaries of Murder: Partial Defences and Complicity' [2008] Crim LR 829.
25. HC Deb, 18 May 2009, col. 1205.
26. Section 55(6)(c) of the Coroners and Justice Act 2009 states that sexual infidelity is to be disregarded as a qualifying trigger.
27. 'Law Lord Criticises Plan to Scrap Defence of Provocation for Men who Kill Wives', *The Times*, 7 November 2008.
28. See L. H. Leigh, 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law' (2008) 172 *Justice of the Peace and Local Government Law* 700. Leigh believes that seeking help previously from the authorities should be a relevant factor in determining when the defence is available.
29. Above n. 17 at para. 30.

- [30.](#) Wells, above n. 7.
- [31.](#) Coroners and Justice Act 2009, Part 2, Chapter 1.
- [32.](#) Ibid. s. 55(4).
- [33.](#) [1949] 1 All ER 932.
- [34.](#) Interestingly, *R v Humphreys* [1995] 4 All ER 1008 would likely have met the requirements of both the qualifying triggers.
- [35.](#) [1978] QB 254 at 258.
- [36.](#) [2000] UKHL 49, [2000] 4 All ER 289.
- [37.](#) [2005] UKPC 23, [2005] 3 All ER 371. See S. Edwards, 'Justice Devlin's Legacy: Duffy--A Battered Woman Caught in Time' [2009] Crim LR 851 where the issues surrounding the judgment in *Holley* are discussed, and why the constraints attached to provocation in that case would still see the defendant in *Duffy* ([1949] 1 All ER 932) convicted of murder if she were to be tried again today.
- [38.](#) [1978] AC 717.
- [39.](#) [1992] 4 All ER 889.