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Getting past the judge in cases of loss of control: *R v Goodwin*

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Despite having been under challenge for more than a quarter of a century, the conventional content of the traditional criminal law course continues to present its oddities. Recent statistics for England and Wales reveal that in the year up to September 2018 there were over half a million convictions for road traffic offences and over 70,000 convictions for theft.[1] In contrast, there were only 342 people even indicted for homicide in a similar period.[2] Yet road traffic offences do not tend to figure at all in the traditional criminal law course, while theft gets a week or a fortnight at most.[3] Homicide, in contrast, will often be dealt with over a number of weeks, with great attention being given to the details of murder and the different varieties of manslaughter. In particular, the defence of provocation and its successor, loss of control, have always featured prominently in this respect, despite the fact that few such cases come before the courts[4] and that prospective criminal lawyers are unlikely to encounter the defence in practice.[5]

That said, there are good reasons for the continuing academic interest in provocation and loss of control. In particular, the defence raises a number of important theoretical issues, most notably the relationship between justification and excuse,[6] the problem of gender bias[7] and the proper response of the law to emotion.[8] That said, the case of *Goodwin*,[9] which we are about to discuss, centres on a different issue altogether, namely the law of evidence and the functions of judge and jury in a case where loss of control

1 *Criminal Justice Statistics Quarterly Update December 2018* <www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2018>.

2 Office of National Statistics, *Homicide in England and Wales* (7 February 2019) <www.ons.gov.uk> (figures for year ended March 2018).

3 This sort of criticism is not new: see Peter Alldridge, 'What's Wrong with the Traditional Criminal Law Course?' (1990) 10 Legal Studies 38.

4 Going back to the statistics cited above (n 2), the 342 indictments for homicide resulted in 161 convictions for murder and a mere 91 for manslaughter of any variety.

5 This is especially so in Northern Ireland, where a mere 27 homicides were recorded by the police in the year leading up to July 2018 – see PSNI Recorded Crime Statistics, July 2019, Table 1 <https://psni.police.uk>.

6 See, for instance, Joshua Dressler, 'Provocation: Partial Justification or Partial Excuse?' (1988) 51 Modern Law Review 467.

7 See, for instance, Kate Fitz-Gibbon, *Homicide, Law Reform, Gender and the Provocation Defence* (Springer 2014).

8 See, for instance, Victoria Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1996) Yale Law Journal 106.

9 *Goodwin (Anthony Gerard)* [2018] EWCA Crim 2287; [2018] 4 WLR 165.

is raised. In order to understand the case, it is necessary for us to explore its legal and historical context.

Evidential and probative burdens

As a general rule, an accused person tried on indictment (D) who wishes to rely on one of the standard criminal law defences has two evidential hurdles to surmount; in effect, D must 'get past' both the judge and the jury.[10] In relation to the judge, D has the so-called 'evidential burden' or 'burden of production';[11] the judge must decide whether there is sufficient evidence in the case to suggest that the defence might apply. If there is, the defence has to be put to the jury; if not, not. In cases where there is enough evidence to satisfy the evidential burden, then the jury should allow the defence unless convinced beyond reasonable doubt that it is not made out on the facts; this is known as the 'probative burden' and lies on the prosecution. Though there are some exceptions to this, most notably in relation to insanity and diminished responsibility, this general rule holds good for the majority of defences. In effect, the role of the judge is to act as gatekeeper, his or her task being to filter out any defences for which, as they say, no proper foundation has been laid.

The evidential burden in cases of provocation

However, prior to 2009 there was a qualified exception to this in relation to the old defence of provocation. The elements of this required not only that D was provoked to lose his or her self-control (the so-called subjective element), but also that a 'reasonable man' would have acted in the same way (the objective element).[12] However, the judge's role in relation to this was considerably restricted by virtue of section 3 of the Homicide Act 1957 in England and Wales, the corresponding provision for Northern Ireland being section 7 of the Criminal Justice Act (NI) 1966. These both read as follows:

> 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; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

The effect of this was to provide that, if there was any evidence that D had been provoked to lose his or her self-control, the defence had to be left to the jury.[13] In effect, the judge's role as gatekeeper was confined to the subjective element; the defence could not be withdrawn from the jury even in cases where it could not be suggested that any reasonable person could possibly have acted as the defendant did.[14]

As is well known, this was considered one of the least satisfactory aspects of the defence. Taken together with the requirement of a 'sudden and temporary' loss of self-control,[15] the lack of judicial control in relation to the objective requirement led to the

10 Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, Oxford University Press 2010) 229–31.

11 Roberts and Zuckerman (n 10) 228.

12 *Duffy* [1949] 1 All ER 932 (Devlin J); *Lee Chun-Chuen v R* [1963] AC 220 at 231 (Lord Devlin).

13 Nor was there any requirement that the defence be raised by D; see Sean Doran, 'Alternative Defences: The Invisible Burden on the Trial Judge' [1991] Criminal Law Review 878.

14 As in *Johnson* [1989] 1 WLR 740 (self-induced provocation); *Doughty* (1986) 83 Cr App R 319 (crying baby).

15 *Duffy* (n 12).

apparent[16] paradox whereby the defence might be denied to an abused woman who killed her partner,[17] but had to be left to the jury in relation to a father who killed his crying baby.[18]

Loss of control

This paradox, together with other defects in the defence,[19] led to section 54 of the Coroners and Justice Act 2009, the effect of which was to abolish the old common law defence and replace it with the new defence of loss of control, as set out in section 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.

Like provocation, this has both a subjective and an objective element, the obvious difference being that, whereas previously anything 'done' or 'said' could amount to provocation, there now had to be a 'qualifying trigger', namely either a fear of serious violence on D's part or something said or done which constituted circumstances of an 'extremely grave character' and caused D to have 'a justifiable sense of being seriously wronged'.[20] However, the key question for our purposes is to what extent the Act altered the evidential position as set out in the Homicide Act 1957 and in the Criminal Justice Act (NI) 1966. Is the judge's role as gatekeeper still restricted, or is it now easier for the defence to be withdrawn from the jury in hopeless cases? This is what the case of *Goodwin* is all about.

The facts of *Goodwin*

The facts of the case were depressingly commonplace; D had killed the victim (V) with a hammer in the course of a drunken quarrel.[21] D's main defence was self-defence, on the basis that V had attacked him with the hammer without warning, and that in fear of his life he (D) had grabbed hold of the hammer and struck V.[22] However, D's counsel also requested that the judge direct the jury to consider loss of control.[23] This, however, the judge refused to do, saying that, though there was sufficient evidence to raise an issue with respect to loss of self-control on D's part, there was no evidence either that the loss of self-control had a qualifying trigger, or that a person with a normal degree of tolerance and self-restraint would have acted in the same way.[24] An appeal was then lodged by D.

16 'Apparent', because the issues were not the same. Allowing the defence to go to the jury, as in *Doughty* (n 14), did not imply that it had any chance of success.

17 *Thornton* (1993) 96 Cr App R 112; *Ahluwahlia* (1993) 96 Cr App R 133.

18 *Doughty* (n 14).

19 Ministry of Justice, *Murder, Manslaughter, and Infanticide: Proposals for Reform of the Law* (Consultation Paper CP19/08, 2008).

20 Coroners and Justice Act 2009, s 55(2) and (4).

21 *Goodwin* (n 8) paras 3–11.

22 Ibid para 12.

23 Ibid para 20.

24 Ibid paras 24–28.

The law in *Goodwin*

As we have seen, the judge's ruling would not have been allowable under the old law, under which, if there was sufficient evidence to raise the issue that D had been provoked to lose self-control, the objective test was to be left to the jury to decide.[25] But was the position any different under the Coroners and Justice Act 2009? The Court of Appeal held that it most certainly was, and that the judge now had to consider all three elements of the defence in deciding whether to leave the case to the jury.

The judgment of the court was delivered by Davis LJ, who began by setting out the relevant statutory framework.[26] The key provisions here are set out in section 54 of the 2009 Act and read as follows:

> (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.
>
> (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.

Having discussed the facts of the case and the submissions of the parties, Davis LJ proceeded to set out a list of 11 factors which he said, albeit not exhaustive, should be borne in mind in cases of this sort.[27] Central to our discussion are the eighth, ninth and tenth of these, which are as follows:

> (8) The statutory defence of loss of control is significantly differently [*sic*] from and more restrictive than the previous defence of provocation which it has entirely superseded.
>
> (9) Perhaps in consequence of all the foregoing, 'a much more vigorous evaluation' on the part of the trial judge is called for than might have been the case under the previous law of provocation.
>
> (10) The statutory components of the defence are to be appraised sequentially and separately.

Davis LJ went on to say that there was no room under the new law for what might be called a 'defensive' summing-up, in which the judge would simply leave the defence to the jury to avoid generating a possible ground of appeal.[28] This would go completely against the scheme and wording of the statute. A trial judge should not clutter up a jury's deliberations by inviting them to consider issues which do not arise on the evidence. Turning to the case in hand, the conclusion of the court was that the evidence of loss of control by D was scanty to say the least,[29] and that, while there might have been sufficient evidence to go to the jury on the second issue (the qualifying trigger),[30] there was nothing to indicate that a person of D's sex and age, with a normal degree of tolerance and self-

25 Homicide Act 1957, s 3, above.

26 *Goodwin* (n 8) para 2.

27 Ibid para 33; see *Gurpinar* [2015] EWCA Crim 178; *Jovan* [2017] EWCA Crim 1359.

28 *Goodwin* (n 8) para 35.

29 Ibid, paras 41–42. Particular emphasis here was placed on the fact that D himself had not raised the issue, which seems to indicate that 'invisible burden' cases of the sort discussed above (n 13) will be less common in the future: see commentary by Laird at [2019] Criminal Law Review 348.

30 *Goodwin* (n 8) paras 44–45.

restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.[31] On this basis the appeal was dismissed and D's conviction for murder upheld.[32]

The effect of *Goodwin*

On the basis of this, there is no doubt that getting past the judge in cases of loss of control will be much harder than it was in cases of provocation. However, what is of interest for our purposes is the nature of the exercise required of the judge in cases of this sort. What precisely is it that the judge now has to decide?

The basic answer is, of course, given by section 54(4) and (5); the judge must decide whether 'sufficient evidence has been adduced to raise an issue', and this means asking whether evidence has been adduced on which, in his or her opinion, 'a jury, properly directed, could reasonably conclude that the defence might apply'. Now that the judge has to consider all three elements of the loss of control defence in this connection, how do these words apply in relation to each element?

The first element, a loss of self-control, presents no problems; what we have here is a pure issue of fact well within the traditional province of a jury. All that the judge has to consider here is whether there is any evidence in the case on which the jury could properly find that such a loss of self-control had taken place. Indeed, the situation here is more or less the same as it was under the old law, the only difference being that the loss of control need not be 'sudden'.[33]

The second element, the qualifying trigger, is more difficult. As far as the first possibility is concerned, namely a fear of serious violence on the part of D, this once again is a straightforward issue of fact. But what about the second possibility? As we have seen, this involves 'something said or done (or both) which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged'.[34] Obviously, whether something was 'said or done' and whether D had a 'sense of being seriously wronged' are simple issues of fact, but whether the circumstances were of an 'extremely grave' character and whether D's sense of being seriously wronged was 'justifiable' are matters which call for some degree of evaluation by the jury.[35] Of course, this is not an uncommon situation in the context of a criminal trial; rather, as Roberts and Zuckerman point out, it is a 'standard juridical technique'.[36] However, what is of interest in the present context is where the judge's role as gatekeeper fits into all this. In the words of section 54(5), what sort of evidence would be sufficient to raise an issue as to whether the circumstances were sufficiently 'grave', or whether the sense of being seriously wronged was sufficiently 'justifiable'? Is it simply a matter of the judge second-guessing what the jury might think, or is the judge expected to make his or her own evaluation in relation to the matter?

Similar questions arise in relation to the third element, namely whether 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. Does this involve a normative evaluation by the judge, or is it simply a matter of second-guessing

31 Ibid paras 46–47.

32 Ibid para 49.

33 Coroners and Justice Act 2009, s 54(2).

34 Ibid s 55(4).

35 Of course, this may itself involve some degree of fact-finding, most notably in relation to the context of the provoking words or deeds.

36 Roberts and Zuckerman (n 10) 133–36.

the jury? If the former, we are left with the same problem as we had in relation to the second qualifying trigger. If the latter, we again have to ask what evidence would be sufficient to raise the issue? The obvious answer would be to get a psychologist to testify as to how a normal person in D's situation might react. However, the Court of Appeal made it clear in relation to the old defence of provocation that such evidence was inadmissible,[37] and there is no reason to think that the 2009 Act has made any difference in relation to this.

The significance of *Goodwin*

In conclusion, it will be interesting to see how the principles set out by the Court of Appeal in *Goodwin* play out in practice. The question is by no means a purely academic one; whereas in the past many judges may have preferred to play safe and leave doubtful provocation defences to the jury, this is now something expressly discouraged, as *Goodwin* itself shows.[38] Nor is the problem confined to provocation and loss of control alone. As Roberts and Zuckerman point out, the orthodox approach in the law of evidence relies very heavily on the traditional distinction between questions of fact, which are for the jury, and questions of law, which are for the judge.[39] Furthermore, fact-finding is seen as a mere process of historical inquiry, in which questions of normative judgment have no place.[40] However, they go on to insist that this is an oversimplification; in their words, "'fact-finding" in criminal trials is a function of conceptual classification and normative evaluation *as well as* being a process of discovering the truth about historical events'.[41] Unfortunately, as *Goodwin* shows, the traditional mechanism of the criminal trial, including its allocation of functions between judge and jury by means of the rules regarding the burden and standard of proof, is ill-adapted to this insight. Until that mechanism can be adapted to take account of the realities of jury adjudication, it will never be possible to make complete sense of the law in this area.

37 *Turner* [1975] QB 834; R M Colman and R D Mackay, 'Legal Issues Surrounding the Admissibility of Expert Psychological and Psychiatric Testimony' <www2.le.ac.uk/departments/npb/people/amc/articles-pdfs/legaissu.pdf>.

38 *Goodwin* (n 8) para 35; and above (n 27).

39 Roberts and Zuckerman (n 10) 129–30.

40 Ibid 130. This is most obvious in relation to concepts such as dishonesty in theft and gross negligence in manslaughter, both of which call for normative evaluation on the part of the jury: see *Feely* [1973] QB 530 and *Adomako* [1995] 1 AC 171. However, these are not isolated instances; for instance, deciding whether someone has been reckless involves asking whether it was unreasonable for them to take the risk they took having regard to the circumstances: *G* [2004] 1 AC 1034 – and there are many other examples besides.

41 Roberts and Zuckerman (n 10) 135 (emphasis in original). Referring to the writings of Quine and others, they add that 'positivist fantasies of a realm of pristine facts hermetically sealed off against the corrupting influence of evaluation have been debunked many times'.