



Partial defences to murder: changed landscape and nomenclature

Rudi Fortson QC*

Correspondence email: r.fortson@qmul.ac.uk.

ABSTRACT

The reformed partial defences to murder, enacted under the Coroners and Justice Act 2009, reflect Parliament's attempt to align those defences with modern social norms and medical experience whilst retaining the existing definition of 'murder', being an offence that attracts a mandatory fixed sentence of imprisonment or detention. However, Parliament departed from the recommendations of the Law Commission in important respects and the appellate courts have added their 'voice' to the scope of the partial defences. This article, which is written from a practitioner's perspective, discusses the existing law and considers the extent to which, since 2009, the aims of policy-makers and law-makers have been fulfilled or have fallen short of expectations. The author contends that the reforms did not go far enough, that the term 'diminished responsibility' is no longer apt, that rules relating to 'loss of control' are unnecessarily complex and unsatisfactory, and that expert opinion evidence remains problematic.

Key words: murder; partial defences; diminished responsibility; provocation; loss of control; reforms; expert opinion evidence; Law Commission.

INTRODUCTION: THE ROLE OF THE PARTIAL DEFENCES IN THE CONTEXT OF THE OFFENCE OF MURDER

The offence of 'murder', which exists at common law, is defined in modern times as the unlawful killing of a human being under the Queen's peace by a person of sound mind with intent to kill or to cause grievous bodily harm.¹ The ambit of the offence, which carries a mandatory sentence of life imprisonment,² is considerably widened

* Barrister, 25 Bedford Row, London; and Visiting Professor of Law at Queen Mary University of London.

1 The definition of murder provided by Coke was 'Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in *rerum natura* under the king's peace, with malice aforethought, either expressed by the party or implied by law ...': Co 3 Inst 47.

2 The abolition of the death penalty for murder was a more gradual affair than is often appreciated. Initially, a distinction was drawn between 'capital' and 'non-capital' cases of murder (HA 1957). From 1965, the death penalty was suspended for five years, becoming permanent in December 1969 by way of a resolution passed by Parliament (Murder (Abolition of Death Penalty) Act 1965).

by the fact that the fault element is satisfied merely by an intention to cause grievous bodily harm. Other than a ‘whole life sentence’, a judge will set the minimum term of imprisonment *which the offender must serve* before he or she may be released following a direction from the Parole Board.³

To avoid the consequences that would ordinarily flow from the definition of ‘murder’⁴ in cases that merit compassionate consideration, two *partial* defences exist that reduce the offence to one of manslaughter. The trial court is then empowered to impose a sentence that is ‘at large’ rather than fixed, and the defendant avoids being labelled a ‘murderer’.⁵ Whereas the origins of the (old) partial defence of ‘provocation’⁶ extend as far back as the seventeenth century,⁷ the partial defence of ‘diminished responsibility’ was enacted (in England) under section 2 of the Homicide Act 1957 (HA 1957).⁸

The Coroners and Justice Act 2009 (CAJA 2009) replaced ‘provocation’ with the partial defence of ‘loss of control’ (sections 54–56) and the elements of ‘diminished responsibility’ were reworked (sections 52, 53) albeit that the word ‘responsibility’ no longer features in the statutory definition.⁹

Crucial to our understanding of each partial defence is the fact that neither defence arises until the prosecution has proved (or the accused

3 See s 322, Sentencing Act 2020.

4 See Law Commission, *Partial Defences to Murder: Consultation Paper* (Law Com CP No 173, 2003) para 7.8.

5 The Law Commission for England and Wales noted that some commentators have contended that the partial defences are anomalous because, but for successfully pleading a partial defence, a defendant’s criminal responsibility would have been for ‘murder’ and thus these defences ‘owe their existence solely to the respective mandatory sentencing regimes, which have always existed for murder’: *Partial Defences to Murder: Final Report* (Law Com No 290, 2004) para 5.19.

6 Repealed (by s 56(1), CAJA, and, by s 56(2), s 3 of the HA 1957) and s 7 of the Criminal Justice Act (Northern Ireland) 1966 ceased to have effect. Now replaced with the partial defence of ‘loss of control’ (ss 54–55, CAJA 2009).

7 Jeremy Horder, *Provocation and Responsibility* (Oxford University Press 1992) 6–9; Law Commission (n 4 above) 27.

8 HA 1957, s 2 (as originally enacted) provided: ‘(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.’ Sections 2(2)–(4) remain unchanged.

9 Section 2, Homicide Act 1957 (as amended) provides:

(1) A person (‘D’) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which— (a) arose from a recognised medical condition, (b) substantially impaired D’s ability to do one or more of the things

admits) that he or she killed a person with the requisite intent for murder.¹⁰ By this stage, any issue as to the accused's fitness to plead ought to have been resolved (applying the *Pritchard* criteria)¹¹ and the defences of insanity,¹² automatism¹³ and intoxication (to the extent that the defendant did not form the requisite intent for murder) will not (or will no longer) be in play.

'Culpability' and 'criminal responsibility'

The above considerations are highly material when discussing the notions of 'criminal responsibility' and 'culpability'. Helen Howard has argued that criminal responsibility 'will generally require a link to moral blameworthiness/culpability, especially when considering *mala in se*¹⁴ crimes such as murder/manslaughter'.¹⁵ Howard makes

mentioned in subsection (1A), and (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are— (a) to understand the nature of D's conduct; (b) to form a rational judgment; (c) to exercise self-control.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

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

10 *Foye* [2013] EWCA Crim 475. For this reason, the defence may be reluctant to plead before the jury that D lacked *mens rea* or, in the alternative, that a partial defence ought to succeed.

11 *Pritchard* (1836) 7 C & P 303; and see *Robertson* (1968) 52 Cr App R 690; [1968] 1 WLR 1767.

12 *M'Naghten Rules*, 2 and 3; 10 Cl&Fin, 210; '(1) The defendant must be found not guilty by reason of insanity if, because of a disease of the mind, he did not know the nature and quality of his act; or, (2) even if he did know the nature and quality of his act, he must be acquitted if, because of a disease of the mind, he did not know it was "wrong".' See David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* 16th edn (Oxford University Press 2021) 307.

13 That is to say, where the accused's actions are disassociated from his or her conscious mind.

14 That is to say something that is inherently 'wrong' or 'evil'.

15 Helen Howard, 'Diminished responsibility, culpability and moral agency' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Cambridge Scholars Publishing 2015) 318–338.

a compelling case for distinguishing between ‘responsibility’ (as the attribution of the defendant’s act or actions) and ‘culpability’ as the level of the offender’s blameworthiness.¹⁶ She adds that moral blameworthiness ‘presupposes that D is a rational moral agent who has sufficient understanding of his acts and deserves moral blame’¹⁷ and that ‘without moral agency there can be no culpability; without culpability there should be no criminal responsibility’.¹⁸

From the perspective of a criminal law practitioner, there are a number of difficulties about this analysis (commendably reasoned as it is). First, the notion of moral blameworthiness is unlikely to be a legal concept. Morality is a vague expression rooted in beliefs that will often not be universally or even generally accepted. Similarly, the notion of ‘moral agency’ is not a legal concept, although a person’s capacity for rational thought and to distinguish between ‘right’ and ‘wrong’ do feature in the structure and application of certain legal principles.¹⁹ The reality is that legal rules, reinforced by penal (criminal) sanctions for non-compliance, often have policy, strategic or administrative objectives such as installing or using a television receiver without a licence²⁰ (unless exempted).²¹ No full moral agency need be established in respect of that offence and yet, in law, the offender is ‘culpable’ and ‘responsible’ for the breach.²²

As the Law Commission pointed out,²³ the frequent reference (by commentators) to ‘culpability’ is problematic because, traditionally, ‘English law has employed the concept of *mens rea* (in conjunction with *actus reus*), and in particular the distinction between intention and subjective recklessness, as a means of assessing culpability and labelling conduct.’²⁴

16 Ibid 320

17 Ibid 321.

18 Ibid 321.

19 There is, for example, an irrebuttable presumption in English law that a person who is under the age of 10 cannot be guilty of a criminal offence (see Children and Young Persons Act 1933, s 50). However, by s 34 of the Crime and Disorder Act 1998, the rebuttable presumption that a child aged 10 or over is incapable of committing an offence was abolished (see also *JTB* [2009] UKHL 20; [2009] 1 AC 1310).

20 Communications Act 2003, s 363.

21 SI 2004/692.

22 Interestingly, the Sentencing Council has issued sentencing guidelines, in respect of ‘TV licence evasion’ where culpability performs a key role.

23 Law Commission (n 5 above) para 5.19.

24 There are very few criminal offences in English law that do not possess a fault element of some kind.

DIMINISHED RESPONSIBILITY

Diminished responsibility: a misnomer

Howard rightly poses the question as to what is 'diminished?', contending that neither the defendant's moral agency nor his or her criminal responsibility can be diminished, 'whereas levels of culpability may vary dramatically'.²⁵ She convincingly argues that it is the 'level of blameworthiness that is reduced, and not their responsibility for the act'.²⁶ However, what must be stressed is that diminished responsibility and loss of control exist as *partial* defences *precisely because* D has been found responsible for unlawfully killing a person (eg not in self-defence) with the requisite intent for murder. Culpability is diminished with 'shades' of culpability being reflected in the range of sentences available for manslaughter. The Law Commission was alive to the argument that it is capacity or culpability, rather than 'responsibility' that can be enhanced or diminished. The Commission did not regard the argument as raising a purely semantic issue.²⁷

It is therefore a matter of regret (at least to this commentator) that Parliament, when revising section 2 HA 1957, did not abandon the term 'diminished responsibility' completely. In the construction of statutory provisions, the courts will look to the wording of the provision in question and they will approach, with care, headings and side-notes in legislation as an aid to construction.²⁸ Although the expression 'diminished responsibility' appears as a heading, Parliament's decision not to include the word 'responsibility' in the definition of the defence must have been deliberate (largely following the analysis of the Law Commission).²⁹ This is in marked contrast to the pre-existing definition in respect of which the

25 Howard (n 15 above) 321.

26 Ibid 323.

27 Law Commission, *A New Homicide Act for England and Wales? Consultation Paper* (Law Com CP No 177, 2005) para 6.36–37.

28 Consider *R v Montila and others* [2004] UKHL 50: '34. The question then is whether headings and side notes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. But it is another matter to be required by a rule of law to disregard them altogether. One cannot ignore the fact that the headings and side notes are included on the face of the Bill throughout its passage through the Legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject, of course, to the fact that they are unamendable, they ought to be open to consideration as part of the enactment when it reaches the statute book.'

29 Ministry of Justice, *Consultation Paper: Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (CP 19/08, 2008) paras 41–55.

defendant was required to prove substantial impairment of his 'mental responsibility' by reason of an 'abnormality of mind' (eg *Byrne*)³⁰ that had been 'induced by disease or injury' (eg *Sanderson*).³¹

A sound basis for dispensing with the notion of 'mental responsibility' was – as the Law Commission remarked – that there were two conflicting views about it. The first³² was that the expression 'mental responsibility' had a 'strong ethico-legal connotation', 'equivalent to culpability', and that the issue was a matter for the jury and not for doctors. The alternative view focused on the word 'mental' as describing 'responsibility',³³ which required the court 'to consider the general health of the defendant's mind' and that this was the domain of psychiatry.³⁴ The Law Commission (in 2003) postulated five formulations of 'diminished responsibility' (if the defence were to be retained) none of which included the word 'responsibility'.³⁵

By the date of publication of its 2004 report,³⁶ the Commission decided that 'for the time being', and pending any full consideration of the offence of murder, section 2 HA 1957 'should remain unreformed'. It felt that its recommendations in respect of 'provocation' would meet a concern that certain defendants were 'forced to adopt the partial defence of diminished responsibility when the true defence was that they acted out of fear of future violence'.³⁷ However, the Commission remarked that the original formulation of 'diminished responsibility' could be improved by (among other things) deleting the reference to 'substantial impairment of responsibility'.³⁸ In 2005, as part of a proposed package of reforms to the structure of homicide offences, the Commission again recommended a revised partial defence to murder (reducing 'first-degree murder'³⁹ to 'second-degree murder')⁴⁰ that did

30 [1960] 2 QB 396.

31 (1994) 98 Cr App R 325.

32 Law Commission (n 4 above) para 7.62.

33 Ibid para 7.62–7.63.

34 Ibid para 7.63,

35 Ibid para 12.74.

36 Law Commission (n 5 above) para 5.86.

37 Ibid para 5.86.

38 Ibid para 5.95: 'A person, who would otherwise be guilty of murder, is not guilty of murder but of manslaughter if, at the time of the act or omission causing death, (1) that person's capacity to: (a) understand events; or (b) judge whether his actions were right or wrong; or (c) control himself, was substantially impaired by an abnormality of mental functioning arising from an underlying condition and (2) the abnormality was a significant cause of the defendant's conduct in carrying out or taking part in the killing. "Underlying condition" means a pre-existing mental or physiological condition other than of a transitory kind.'

39 Law Commission (n 27 above) paras 6.20, 6.22, 6.33.

40 Ibid para 6.22.

not include 'responsibility' as one of its elements.⁴¹ With hindsight, it would have been preferable had the Commission proposed dispensing with the expression 'diminished responsibility' altogether.

In the event, a revised offence structure for homicide did not form part of the Coroners and Justice Bill (2009)⁴² and the Government decided not to extend the definition of diminished responsibility to include 'developmental immaturity'.⁴³ The then Parliamentary Under-Secretary of State for Justice voiced the Government's belief that the revised definition would not 'change the numbers enormously; it is really just a clarification of the way in which that defence works'.⁴⁴ This has proved to have been over-optimistic. In fact, as we shall see, fewer pleas of manslaughter on the grounds of D's diminished responsibility have been accepted by prosecutors (on a plea of guilty to manslaughter) or by the jury (in a contested trial of the issue).

Diminished responsibility: psychiatric in nature or posing moral questions?

The revised partial defence 'no longer involves a moral question'.⁴⁵ This is because the focus of the court's enquiry is (now) on whether, at the moment of the killing, D experienced an 'abnormality of mental functioning' (section 2(1)) arising from a 'recognised medical condition' (section 2(1)(a)) that 'substantially impaired D's ability' (section 2(1)(b)) to do any of the things mentioned in section 2(1A). In *Foy*,⁴⁶ the Court of Appeal remarked that the partial defence is,

41 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 5.112, 7.36 and 9.20: '(a) a person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to: (i) understand the nature of his or her conduct; or (ii) form a rational judgement; or (iii) control him or herself, was substantially impaired by an abnormality of mental functioning arising from a recognised medical condition, developmental immaturity in a defendant under the age of eighteen, or a combination of both; and (b) the abnormality, the developmental immaturity, or the combination of both provides an explanation for the defendant's conduct in carrying out or taking part in the killing.' This wording differs from that recommended in the Law Commission's 2004 report (n 5 above). See also R D Mackay, 'The new diminished responsibility rule' [2010] Criminal Law Review 290.

42 'The wider recommendations in the Law Commission's report may be considered at a later stage of the review.'

43 Ministry of Justice (n 29 above) para 54.

44 *Hansard*, HC General Committee 3 February 2009, col 8.

45 Rudi Fortson, 'The modern partial defence of diminished responsibility' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 21 at 25.

46 [2020] EWCA Crim 270.

in its fundamental elements, ‘essentially psychiatric in nature’ (per Davies LJ, at [67]). The point could be made that this was largely the case under the original wording of section 2 given that, in *Cox*,⁴⁷ the Court of Appeal desired to say (‘not at all for the first time’) that there were cases where, on a charge of murder, it was ‘perfectly proper’ to accept a plea to manslaughter on the grounds of D’s diminished responsibility ‘where the medical evidence is plainly to this effect’.⁴⁸ Under revised section 2 HA, there is even greater emphasis on medical diagnosis and the psychiatric assessment of D’s thinking processes and actions. Accordingly, as Ormerod and Laird have pointed out, the revised definition of diminished responsibility ‘leaves less moral elbow room for the jury and is arguably harder for D to prove’.⁴⁹ But, does this mean that there is no room at all for the moral question of whether D had the ability to form a rational judgment as to whether an act is right or wrong? If the answer is in the negative, then this marks a shift from the pre-existing position when, in *Byrne*,⁵⁰ Lord Parker CJ contrasted ‘abnormality of mind’ with the expression ‘defect of reason’ for the purposes of the *M’Naghten Rules*.⁵¹ He held that an ‘abnormality of mind’ was wide enough to cover ‘the mind’s activities in all its aspects’ including ‘the ability to form a rational judgment *whether an act is right or wrong...*’ (emphasis added).

Although section 2 HA 1957 is not framed in language that requires the court to answer a moral question, it is arguable that the scope of section 2(1A)(a) (ability to understand the nature of D’s conduct) and section 2(1A)(b) (ability to form a rational judgment) is sufficiently wide to encompass the case of a defendant who killed, with the requisite *mens rea* for murder, but who did not know that the act of killing was ‘wrong’. Interestingly, in *Conroy*,⁵² the Court of Appeal had little doubt that, in a usual case, one element of the defendant’s ability to form a rational judgment (section 2(1A)(b)) would be whether an act is right or wrong, but that the HA 1957 is not confined to such a scenario (at [33]). One notes that although rationality is an explicit element of section 2(1A)(b), it is not expressed to be an element of section 2(1A)(a) or section 2(1A)(c). However, although it is possible to confine section 2(1A)(a) to D’s understanding of his actions in the context of their circumstances and consequences, it would not strain the language of that provision unduly (it is submitted) to hold that it encompasses D’s *normative* understanding of his conduct including D’s appreciation (or

47 [1968] 1 WLR 308

48 *R v Cox* [1968] 1 WLR 308, 310 G/H.

49 Ormerod and Laird (n 12 above) 572.

50 *R v Byrne* [1960] 2 QB 396.

51 *M’Naghten* (1843) 8 ER 718; (1843) 10 Cl & F 200, 210.

52 [2017] EWCA Crim 81.

the lack of it) that his/her act was ‘wrong’. Nevertheless, the question would remain essentially psychiatric in nature (being concerned with D’s thought processes) rather than a mere moral question.

As for the ambit of section 2(1A)(b), much may turn on what is meant by ‘rational’ (see the sub-heading, ‘Rationality’).

Diminished responsibility: a diminishing partial defence?

A survey undertaken by Mackay and Mitchell⁵³ in 2017 found that the number of diminished responsibility pleas, accepted by the jury and by the prosecution, fell after revised section 2 HA 1957 came into force.⁵⁴ The survey involved very low numbers, but data supplied by the Office for National Statistics (ONS) appears to support their findings (see table below).⁵⁵

All persons convicted of homicide (England and Wales) – ONS data (Table 23)											
	Apr 08 – Mar 09	Apr 09 – Mar 10	Apr 10 – Mar 11	Apr 11 – Mar 12	Apr 12 – Mar 13	Apr 13 – Mar 14	Apr 14 – Mar 15	Apr 15 – Mar 16	Apr 16 – Mar 17	Apr 17 – Mar 18	Apr 18 – Mar 19
Murder	344	328	337	312	304	331	233	253	224	233	178
<i>Sec 2 Manslaughter</i>	36	28	27	31	28	37	28	25	18	14	10
Other Manslaughter	208	184	163	130	133	152	131	107	169	117	61
Infanticide	1	0	2	1	2	3	0	0	1	0	1
Total	589	540	529	474	467	523	392	385	412	364	250
% cases as DR	10.47	8.54	8.01	9.94	9.21	11.18	12.02	9.88	8.04	6.01	5.62

Hallett has suggested that the results reported by Mackay and Mitchell affect the relative weight given to psychiatric evidence and, by implication, ‘the extent to which [diminished responsibility] is in practice a purely psychiatric question’.⁵⁶ The first part of that statement accords with

53 R Mackay and B Mitchell, ‘The new diminished responsibility plea in operation: some initial findings’ [2017] Criminal Law Review 18.

54 See *Robinson v State of Trinidad and Tobago* [2015] UKPC 34, where the Privy Council said (at [29]): ‘Since 1962 it has been the plainly accepted practice in England and Wales to accept pleas of guilty to manslaughter by reason of diminished responsibility where, on careful analysis, it is plain to the Crown that that is the right outcome. When in 2004 the Law Commission reviewed the law of diminished responsibility, research undertaken for it by Professor Mackay demonstrated that in a four-year sample period something like 90% of diminished responsibility outcomes were the result of acceptance of a plea, with no jury trial: *Partial Defences to murder* (Law Com No 290) appendix B. It remains of great importance that pleas are accepted only in cases where it is proper to do so.’

55 The responsibility for the compilation of the table is the author’s alone.

56 Nicholas Hallett, ‘Psychiatric evidence in diminished responsibility’ (2018) 82(6) Journal of Criminal Law 442, 444.

the experience of this commentator, but it would be going too far (it is submitted) to imply that diminished responsibility is still fundamentally a defence of reduced moral responsibility.⁵⁷ There are other possible reasons for fewer section 2 manslaughter pleas being accepted.

First, psychiatrists often disagree over one or more elements of the definition. Such disagreements are likely to be as unsettling to the tribunal of fact as they are to the parties to the proceedings. Disagreements may engender the perception that the diagnosis of psychiatric conditions and the assessment of their causative effects do not constitute a precise science, and that psychiatric opinion is too open-textured to be relied upon for its accuracy. In any event, there appears (in recent years) to be greater willingness on the part of judges and juries to critically evaluate medical evidence and psychiatric opinion (consider *R v Walls*;⁵⁸ albeit in the context of unfitness to plead). The conclusions of psychiatric experts, even if agreed, may not have the cogency and weight that is contended for by the parties to the proceedings (consider *Walton v The Queen*).⁵⁹ The jury, in *R v Golds*,⁶⁰ rejected the unanimous evidence of three experts, two for the defence and one for the Crown, who testified that the elements of the partial defence were present.⁶¹ Similarly, the Court of Appeal will not be slow to evaluate medical opinion and to draw its own conclusions in respect of one or more elements of the partial defence of diminished responsibility: consider *R v Foy*.⁶² The jury may reject information on which expert opinion has been based (for example, information furnished by the defendant that is largely or entirely self-serving): consider, *Elfinger*.⁶³

However, psychiatrists have reason to complain that elements of the revised (and original) definition of diminished responsibility involve concepts that lie outside the field of psychiatry. For example, Hallett has pointed out that the term ‘rational’ is not a psychiatric term and that

57 Ibid 445.

58 [2011] EWCA Crim 443. At para 38, the Court of Appeal said (per Thomas LJ): ‘It is our understanding that there has been a significant increase in the number of cases where the issue of unfitness is raised. In the light of the considerations we have set out in the preceding paragraphs, we consider that, save in clear cases, a court must rigorously examine evidence of psychiatrists adduced before them and then subject that evidence to careful analysis against the *Pritchard* criteria as interpreted in *Podola*. Save in cases where the unfitness is clear, the fact that psychiatrists agree is not enough, as this case demonstrates; a court would be failing in its duty to both the public and a defendant if it did not rigorously examine the evidence and reach its own conclusion.’

59 [1978] AC 788.

60 [2016] UKSC 61.

61 Ormerod and Laird (n 12 above) 571, fn 220.

62 [2020] EWCA Crim 270.

63 [2001] EWCA Crim 1855.

the question of whether D had the ability to form a rational judgment (section 2(1A)(b)) is not one which psychiatry can answer, not least because rationality has philosophical and social dimensions.⁶⁴ But, if psychiatry cannot assist, then the jury has little choice but to make its own assessment of the defendant's thinking process (albeit informed, if at all, by expert opinion).

Issues of legal principle may also have contributed to the falling number of section 2 pleas being accepted. Three such issues are discussed below.

Recognised medical conditions

Hallett suggests that whether a medical condition is a 'recognised' one⁶⁵ is a matter of law – not of psychiatry.⁶⁶ At first sight, this is a surprising claim because (as indicated by Home Office Circular 2010/13)⁶⁷ the Government envisaged that 'a recognised medical condition' would be a matter of medical practice: 'It was envisaged that when determining what constitutes a "recognised medical condition" practitioners would have recourse to existing accepting classificatory lists.'⁶⁸

However, in *R v Dowds*,⁶⁹ the Court of Appeal was troubled by the vast number of conditions listed in WHO ICD-10 and DSM-IV, and it sought to apply a 'brake' on the type of conditions that a jury may consider:

.... a great many conditions thus included for medical purposes raise important additional legal questions when one is seeking to invoke them in a forensic context. 'Intermittent explosive disorder', for example, may well be a medically useful description of something which underlies the vast majority of violent offending, but any suggestion that it could give rise to a defence, whether because it amounted to an impairment of mental functioning or otherwise, would, to say the least, demand extremely careful attention. In other words, the *medical classification begs the question whether the condition is simply a description of (often criminal) behaviour, or is capable of forming a defence to an allegation of such.* [31] (emphasis added)

The Court of Appeal was careful to say that it did not attempt to resolve 'the many questions which may arise as to other conditions listed in either ICD-10 or DSM-IV' (at [40]). Accordingly, such questions will have to be resolved on a case-by-case basis.

64 Hallett (n 56 above) 456.

65 Section 2(1)(a) HA 1957.

66 Hallett (n 56 above) 447.

67 Home Office Circular 2010/13, para 11.

68 The circular cites a passage by a government minister to this effect: *Hansard*, 3 March 2009, col 414.

69 *R v Dowds* [2012] EWCA Crim 281.

The medical condition asserted in *Dowds* was ‘acute intoxication’ (ICD-10, at F.10.0). The court held that ‘the re-formulation of the statutory conditions for diminished responsibility was not intended to reverse the well-established rule that voluntary acute intoxication is not capable of being relied upon to found diminished responsibility’ (per Hughes LJ).

That remains the law. The presence of a “recognised medical condition” is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility’.⁷⁰

The court was not prepared to accept that the revised wording of section 2 HA had altered the pre-existing law (or policy) in respect of voluntary intoxication in relation to diminished responsibility. Rules relating to voluntarily intoxication are of general application in the criminal law: noting *DPP v Majewski*,⁷¹ *R v Fenton*⁷² and *R v Dietschmann*.⁷³

Proving the ‘causation’ requirement

Section 2(1)(c) HA 1957 introduces a causation requirement into the defence of diminished responsibility, namely, that ‘[the abnormality] provides an explanation for D’s acts and omissions in doing or being a party to the killing’.

The Law Commission had recommended the inclusion of such a requirement,⁷⁴ framing it as an ‘explanation’ for D’s conduct in order to ensure that there is an appropriate connection between D’s ‘abnormality of mind’ and the killing. This would leave open the possibility ‘that other causes or explanations (like provocation) may be admitted to have been at work, without prejudicing the case for mitigation’.⁷⁵ The Commission’s stance was resisted by certain leading experts in this field such as Professor Ronnie Mackay. Although the Royal College of Psychiatrists did not object to the requirement, it

... cautioned against creating a situation in which experts might be called on to “demonstrate” causation on a scientific basis, rather than indicating, from an assessment of the nature of the abnormality, what its likely impact would be on thinking, emotion, volition, and so forth.⁷⁶

70 Ibid [40].

71 [1977] AC 443.

72 (1975) 61 Cr App R 261.

73 [2003] UKHL 10; [2003] 1 AC 1209; and see *R v Lindo* [2016] EWCA Crim 1940; *R v Joyce and Kay* [2017] EWCA Crim 647; *R v Brennan* [2015] 1 WLR 2060; *R v Wood* [2008] EWCA Crim 1305; *R v Foy* [2020] EWCA Crim 270.

74 Law Commission (n 41 above) para 5.112.

75 Ibid para 5.124.

76 Ibid para 5.117.

The Government supported a causation requirement on the grounds that the partial defence should not succeed where the defendant would have killed regardless of his/her medical condition.⁷⁷ Put that way, the proposition may seem reasonable. However, strictly speaking, the burden on the defendant is *not* to prove (on the balance of probabilities) that he or she would not have killed *but for* his or her medical condition, *but rather* that his or her condition ‘provides *an* explanation’, which need not be the *sole* explanation, for D having killed or being a party to the killing. In order for this element to be established, it is almost inevitable that a forensic psychiatrist will be drawn into attempting to demonstrate causation on reasoned, scientific grounds.

‘Substantial’ impairment of D’s ability

In *R v Golds*,⁷⁸ the UK Supreme Court held that the word ‘substantial’ in s 2(1)(b) HA 1957⁷⁹ means ‘important or weighty’ and that the word was not synonymous with ‘anything more than merely trivial impairments’.⁸⁰ Once the level of impairment has passed the trivial, whether it can properly be regarded as substantial will be a matter for the jury ‘aided ... by the experts’ exposition of the kind of impairment which the condition under consideration may have generated in the accused’.⁸¹ Crucially, there ought to be no occasion ‘for the jury to be distracted by debate about the meaning of the word’ (at [42]).

In respect of the original wording of section 2 HA 1957, the Law Commission had been of the opinion that it was sufficient in law that D’s mental condition was ‘more than trivial’, citing *Lloyd*.⁸² But, in *Lloyd*, the Court of Criminal Appeal approved the trial judge’s direction to the jury that although ‘substantial’ need not be total, it did not mean trivial or minimal: ‘it is something in between’.⁸³ Ormerod and Laird have opined that the Supreme Court’s judgment ‘was surprising given that Lord Judge CJ seemed to have adopted the more generous interpretation of ‘substantial’ as recently as 2010 in *Ramchurn*’.⁸⁴ They submit that there are a number of problems with the judgment in *Golds*:

First, the Supreme Court’s conclusion serves to narrow the defence, which has already been narrowed by its more medicalized recasting in 2009. Gibson argues that the judgment, ‘unduly compromises access

77 Home Office (n 67 above) paras 8 and 9.

78 [2016] UKSC 61; [2016] 1 WLR 5231.

79 HA 1957, s 2(1), as amended: ‘(b) substantially impaired D’s ability to do one or more of the things mentioned in subsection (1A)’.

80 [2016] UKSC 61; [2016] 1 WLR 5231 [39].

81 *R v Golds* [2016] UKSC 61 [41].

82 [1967] 1 QB 175; see Law Commission (n 4 above) para 7.69.

83 [1967] 1 QB 175, 176F.

84 [2010] EWCA Crim 194.

to diminished responsibility’.[fn270]⁸⁵ Limiting access to the partial defence could have harsh consequences ...⁸⁶

.... Secondly, it is not clear that the decision is faithful to its own premise. The Supreme Court suggests that ‘substantial’ is an ordinary English word and that the jury needs no assistance on how it ought to be interpreted, unless someone has suggested otherwise, in which case the jury is not simply to be told it is an ordinary English word but are to be given a further definition. If there is a technical definition that juries ought to adopt beyond the ‘ordinary English one’, why should every jury not hear it in all cases from the outset? Consequently, this may risk an inconsistent application of the law; some juries may receive an elaborate definition whereas others will not. Finally, the decision may generate more appeals. There is little to be lost in appealing a murder conviction in any event, but in light of the vagueness of the basic instruction to the jury—to draw the line of ‘substantially impaired’ according to degree—future appeals on this point are unavoidable.

Rationality

As consultees to the Law Commission’s project on partial defences to murder, Mr Justice Pitchers expressed his dislike of directions to the jury which ‘give an undue normative role to their decisions’, and Mr Justice Stanley Burnton (as he then was) disliked any definition that ‘involves the jury in a value judgment’.⁸⁷ Accordingly, juries were often *not* directed in terms that required them to act as moral barometers of a defendant’s mental responsibility for the killing to which he/she was a party, but to approach diminished responsibility from the perspective of ‘essentially seeking to ascertain whether at the time of the killing the defendant was suffering from a state of mind bordering on but not amounting to insanity’. The task was to be approached ‘in a broad common sense way’.⁸⁸ Although pragmatic, and had the virtue that juries were required to make an objective assessment of the defendant’s mental condition, it side-stepped what was at the heart

85 Fn 270 is a citation: ‘M Gibson, “Diminished Responsibility in Golds and Beyond: Insights and Implications” [2017] Crim LR 543.’

86 Ormerod and Laird (n 12 above) 558; and consider *R v Snelch* [2017] EWCA Crim 204.

87 Law Commission (n 5 above) para 5.55, fn 61. Mr Justice Pitchers and Mr Justice Stanley Burnton (as he then was) were consultees in respect of the Law Commission’s project.

88 *Walton v R* (1978) 66 Cr App R 25; [1978] 1 All ER 542, citing *R v Byrne* [1960] 2 QB 396, 404, where Lord Parker CJ said: ‘They indicate that such abnormality as “substantially impairs his mental responsibility” involves a mental state which in popular language (not that of the *M’Naghten Rules*) a jury would regard as amounting to partial insanity or being on the border-line of insanity.’

of the original section 2 HA 1957, namely, the normative issue of D's moral responsibility for the killing.

By contrast, and as we have seen, revised section 2(1) HA 1957 focuses on the defendant's *mental functioning* (section 2(1)) in respect of D's ability to *understand* the nature of his/her conduct, to form a *rational judgment*,⁸⁹ and to exercise *self-control* (section 2(1A)). Each of those things involve the defendant's ability to comprehend and to make choices in respect of his conduct at the moment that he killed P (or was a party to the killing), intending to kill or to cause grievous bodily harm.

Precisely what is meant by 'rational' for the purposes of section 2 HA (and, in particular, s 2(1A)(b)) has not received the analysis that is warranted from legal commentators or by the courts. The Cambridge English Dictionary defines 'rational' as 'based on clear thought and reason'. The Shorter Oxford English Dictionary (OED) provides three definitions: 'based on or in accordance with reason or logic'; 'able to think sensibly or logically'; and 'having the capacity to reason'. Although a course of conduct and the outcome of it might satisfy the first OED definition, the second refers to a person's *ability* to reason, while the third definition speaks of a person's capacity to reason.

The Law Commission opined (albeit in the context of rules relating to insanity and the *M'Naghten Rules*) that the idea of rationality 'must incorporate some notion of intelligibility', adding that it cannot be expressed purely in those terms for otherwise it would become 'simply a matter of whether it can be understood by others'.⁹⁰ It said that the capacity to be rational 'needs to be understood as encompassing all that goes on in the mind incorporating the interplay between the ability to think, to believe and to experience feelings'.⁹¹ Capacity is about *how* a person reaches a decision, not whether the decision

89 One notes that the Law Commission preferred the wording of what is now s 2(1A) (b) to the words 'to judge whether his actions were right or wrong' that had appeared in an early version of the Commission's proposed definition. See Law Commission (n 5 above) para 5.95. Thus, in Law Commission (n 41 above) para 5.112, fn 85, the Commission said: 'This wording replaces "judge whether his or her actions were right or wrong"'. The Royal College of Psychiatrists, whilst content for this phrase to appear, considered that 'form a rational judgement' was apt to cover cases the original phrase was not. An example might be one in which a deluded D killed someone he believed to be the reincarnation of Napoleon. D might realise that it is morally and legally wrong to take the law into one's own hands by killing, and yet be suffering from a substantially impaired capacity to form a rational judgment. Professor Mackay also cast doubt on the 'right/wrong' formula.

90 Law Commission, *Criminal Liability: Insanity and Automatism – Discussion Paper* (Law Com, 23 July 2013).

91 Ibid A.69.

itself may be judged to be rational'.⁹² It is submitted that there is much in those statements that is relevant to the defence of diminished responsibility notwithstanding that section 2 HA refers to 'ability' rather than 'capability' which may, in practice, be a distinction without a difference.

Judging 'rationality' by reference to the outcome of D's actions

It may be tempting for a tribunal of fact to determine whether a decision is rational by reference to the outcome of the defendant's actions. Where D stabs another person 50 times, albeit that the first five stab wounds would have been fatal, the inference might be drawn that the conduct was 'irrational'. Yet, D may assert that he acted as he did because he was taking no chances that P would survive after only being stabbed a few times. Would such an admission demonstrate 'rational judgment'? As Hallett and Howard have pointed out, if logic is the only criterion for rationality, then 'the person who kills his wife thinking that she has been possessed by aliens, is also rational'.⁹³ In *Blackman*, the court remarked, in passing, that a person with an adjustment disorder 'could plan and act with apparent rationality'.⁹⁴ But therein lies the problem: apparent rationality may not be rationality at all.

In *Conroy*, C strangled M and killed her. The trial judge directed the jury that:

In applying the expression 'rational judgement' to this case you are not asking yourselves whether the outcome of the defendant's thought processes was rational, namely the killing of Melissa, so that he could have sex with her, *on any view that was an irrational outcome*, you must ask yourselves whether the thought processes that led to that outcome were rational. *You must concentrate on the process and not the outcome of that process.*⁹⁵

The Crown had contended that no *outcome* that involves the killing of another person could be considered rational, absent self-defence or other lawful justification. The Court of Appeal disagreed:

Put like that, that is simply not sustainable as a general proposition; nor does it reflect the wording of the section. On the contrary, it is regrettably the case that many killings as an outcome, although obviously 'wrong', are all too 'rational': whether it be, for instance, in the form of a killing of a disliked wife in order to inherit her money or the gangland execution of a rival whose competition has proved unwelcome, and so on.⁹⁶

⁹² Ibid para 4.13, original emphasis.

⁹³ Howard (n 15 above) 318–338; Hallett (n 56 above) 453.

⁹⁴ *R v Blackman* [2017] EWCA Crim 190 [34].

⁹⁵ See *Conroy* (n 52 above) [27], emphasis added.

⁹⁶ Ibid [34].

The appellant submitted that the trial judge had wrongly separated the decision-making process from the outcome, whereas the jury should have been invited to look at the position as a whole.⁹⁷ The Court of Appeal was broadly in agreement with those submissions:⁹⁸

... while of course any jury will need in the light of the available psychiatric evidence to assess a defendant's thinking processes in the context of assessing his ability to form a rational judgment, it is likely to be over refined to divorce that consideration relating to a defendant's thinking processes from the actual outcome. Indeed, in some cases it may actually be extremely difficult to separate out the thought processes on the one hand from the 'outcome' on the other hand. In some cases it may well be that the two may be entirely enmeshed. In our view, there is a potential danger in a direction such as this straying beyond what is actually stated in section 2 itself. The elements of section 2 should so far as possible not be glossed in a summing up to the jury.⁹⁹

Lord Justice Davis, drawing on the facts of that case, illustrated why it might be artificial to compartmentalise the 'outcome' and a defendant's 'thinking process', and to treat them separately:

It has to be said that there is imprecision here in the judge's use of the word 'outcome'. On one view the outcome is simply the death of M. Another way perhaps of putting it is that the outcome is the act of killing M: which is not to be equated simply with her death. But the judge in fact added a yet further element, to the effect that the outcome was the killing of M 'so that he could have sex with her': which is hardly just an outcome but also an additional statement of what the appellant's motivation and intention was. But be that as it may, the judge having so stated, he then went on to say that 'on any view' this was an irrational 'outcome': and the jury were therefore to focus on the appellant's thought processes that had led to that outcome.¹⁰⁰

The court held that although the judge had told the jury (in effect) that the outcome need not be part of their deliberations (at [35]), the directions, read as a whole, did not devalue the word 'rational' in section 2 HA 1957. The judge had instructed the jury that the outcome was *irrational* – a statement that went beyond the medical evidence (at [37, 39]). To

97 Ibid [36].

98 Ibid [37].

99 Ibid [32], original emphasis. Mackay has opined that 'it is becoming clear that when considering [section 2(1A)(b)] the jury may have to consider that the "defendant's thinking process" and not to restrict their deliberations to "the actual outcome": Ronnie Mackay, 'The impairment factors in the new diminished responsibility plea' [2018] Criminal Law Review 462–471, 468, fn 101. This, indeed, is the point made by Davis LJ in *Conroy*: a defendant's thought processes and the outcome may be 'entirely enmeshed'.

100 *Conroy* (n 52 above) [35].

the extent that the judge misstated the position, it could have had no material impact on the outcome adverse to the defence (at [41]).

At first sight, the above might suggest that the partial defence based on section 2(1A)(b) is hard to prove and yet Mackay reports that this was the most frequently cited ability (86 reports of which 74 were positively expressed by psychiatrists). However, Mackay also states that the process by which conclusions are reached (by experts) will vary according to the way in which each expert approaches their task. The majority of positive reports were based on schizophrenia or psychosis. But those cases where the diminished responsibility plea failed were predominantly ones of personality disorder or depression 'leading to disagreement amongst the experts as to whether the section 2 requirements were satisfied'.¹⁰¹ Importantly, Mackay concludes that 'there is no suggestion that this particular ability [s 2(1A)(b)] is being "construed narrowly"'.¹⁰²

Concluding observations regarding diminished responsibility

It was not the Law Commission's aim that the revised definition of diminished responsibility should make the plea more difficult to establish (the burden of proof being on the defendant in any event). It found that public opinion, in 2003, broadly supported treating, in a tolerant way, those who kill because of serious mental abnormality 'so long as there is adequate protection against dangerous offenders'.¹⁰³ The Commission's aim was merely to improve the law and to make the definition of diminished responsibility 'clearer and better able to accommodate developments in expert diagnostic practice'.¹⁰⁴

101 Mackay (n 99 above).

102 Ibid, citing David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* 14th edn (Oxford University Press 2015) 615.

103 Law Commission (n 41 above) para 5.84.

104 Ibid para 5.107.

LOSS OF CONTROL

The Government deliberately framed sections 54¹⁰⁵ and 55¹⁰⁶ of the CAJA 2009 to '[raise] the threshold' so that 'only in exceptional circumstances' would words and conduct constitute a partial defence to

105 S 54, CAJA 2009 reads:

- (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* [emphasis added].
- (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.
- (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.

106 Section 55:

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
- (3) This subsection applies if D's loss of self-control was attributable to D's *fear of serious violence from V* against D or another identified person.
- (4) This subsection applies if D's loss of self-control was attributable to *a thing or things done or said (or both) which— (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged.*
- (5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

murder.¹⁰⁷ The Government had in mind cases such *R v Doughty*,¹⁰⁸ where D lost his temper and tried to silence a persistently crying baby by covering his head with cushions and kneeling on them.

In respect of the *Doughty* case, as far as we are concerned, it is not intended that this kind of case – unless it can fit into diminished responsibility – ought to count as provocation. We are trying to put the bar higher and not to bring it down.¹⁰⁹

Neither section 54 nor section 55 expressly limits the defence to cases that are ‘exceptional’. Indeed, by section 54(5) CAJA 2009, ‘if sufficient evidence is adduced to raise an issue’ with respect to the partial defence (loss of self-control (LoSC)) ‘the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not’. This appears to be generous to an accused, but a major obstacle is presented by the word ‘if’ – a word that features again in section 54(6), which provides that ‘sufficient evidence is adduced to raise an issue ... *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’ (emphasis added).

106 [cont]

- (6) In determining whether a loss of self-control had a qualifying trigger—
 (a) D’s fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence; (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence; (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.

- (7) In this section references to ‘D’ and ‘V’ are to be construed in accordance with section 54 [emphasis added].

107 Ministry of Justice (n 29 above) para 34: ‘We therefore want to provide a partial defence which has a much more limited application than the current partial defence of provocation. We propose to do this in the following ways: • By abolishing the existing partial defence of provocation and the term “provocation” itself which, it is clear from our discussions with stakeholders, carries negative connotations. Instead the Government proposes to introduce a new partial defence of killing in response to words and conduct which caused the defendant to have a justifiable sense of being seriously wronged. • By making clear once and for all – and on the face of the statute – that a partner having an affair does not of itself constitute such conduct for the purposes of the partial defence. • By raising the threshold. The Government proposes that words and conduct should be a partial defence to murder only in exceptional circumstances.’

108 (1986) 83 Cr App R 319.

109 Maria Eagle (Parliamentary Under-Secretary of State for Justice), Hansard, Public Bill Committee, Tuesday 3 February 2009, Q 11.

Role of the judge as a ‘gatekeeper’

The judge has a mandatory obligation under section 54(6) to decide whether or not the partial defence of LoSC is one which the jury may consider. Three conditions must exist for the defence to be available (section 54(1)):

- (a) D’s acts and omissions in doing or being a party to the killing resulted from D’s *loss of self-control*;¹¹⁰
- (b) the loss of self-control had a *qualifying trigger*, [that is to say, (i) attributable to D’s fear of serious violence from V against D or another identified person; or (ii) attributable to a thing or things done or said (or both) which (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged]; 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. (emphasis added)

In *R v Clinton*,¹¹¹ Lord Judge CJ stated that it was ‘inevitable that the components should be analysed *sequentially and separately*’ (at [9]; emphasis added). Similarly, in *Rejmanski and Gassman*,¹¹² the Court of Appeal remarked that the three elements are ‘distinct’ and ‘require separate consideration’. That said, the Lord Chief Justice emphasised (in *Clinton*) that ‘in many cases where there is a genuine loss of control, the remaining components are likely to arise for consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used’ (at [9]).

The trial judge must make a qualitative assessment of each element, notwithstanding that the third element arguably involves current community standards of tolerance or self-restraint – standards that may (or may not) be shared by the judge and jury. In *Jewell*,¹¹³ the Court of Appeal remarked (at least in the context of the first component):

... sufficiency of evidence is bound to suggest more than minimum evidence to establish the facts. *We struggle to see why it was impermissible for the judge to consider the quality and the weight of it, particularly given that he is adjured to analyse the whole of it*, as Daves sets out. (per Rafferty LJ at 51; emphasis added)

110 Emphasis added. See Susan S M Edwards, ‘Anger and fear as justifiable preludes for loss of self-control’ (2010) 74 Journal of Criminal Law 223.

111 [2012] EWCA Crim 2; [2012] 3 WLR 515; [2013] QB 1; [2012] 2 All ER 947; [2012] 1 Cr App R 26.

112 [2017] EWCA Crim 2061; and see the Case Comment, S Dickson and E Stuart-Cole, ‘Mentally relevant? When is a loss of control attributable to a mental condition? *R v Rejmanski (Bartosz)*; *R v Gassmann (Charice)*’ (2018) 82(2) Journal of Criminal Law 117.

113 [2014] EWCA Crim 414.

It is important to note that the judge's 'weather eye', in respect of the section 54 criteria, has as much to do with placing the partial defence of 'loss of control' before a jury, as it has to do with not doing so in appropriate cases. Thus, it was said in *R v Gurpinar*¹¹⁴ that the judge must consider whether to leave the defence to the jury even if the defendant has not raised the issue or had declined to give evidence: '[w]hatever the tactical decision made by the defence, it is the judge's duty to consider whether, on the whole of the evidence, the defence arises' (citing *Dawes*¹¹⁵ [53]).

The 'opinion' of the judge: what is required is judgment

In *Dawes*,¹¹⁶ Lord Judge CJ pointed out that the word 'opinion' (as it appears in section 54(6)) 'is not used in the sense that different judges may reasonably form different opinions about the way in which discretion should be exercised'. What is required 'is a judgment, which may be right or wrong':

52 ... As in any appeal to this court, the challenge will not succeed unless we decide, bearing in mind the advantages that the judge will have had from having heard the evidence, that the defence should have been left to the jury. If so, and it was not, the judgment was wrong, and the defence should have been left to the jury, the defendant was deprived of his entitlement to the jury's verdict. The conviction would be quashed and, in most cases of this kind, a new trial would almost certainly be ordered.

In *R v Goodwin*,¹¹⁷ the Court of Appeal provided a list (not exhaustive) 'of the kinds of points that a trial judge ... will need to bear in mind':

(1) The required opinion is to be formed as a common sense judgment based on an analysis of all the evidence.

(2) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, then it is to be left the jury whether or not the issue had been expressly advanced as part of the defence case at trial.

(3) The appellate court will give due weight to the evaluation ('the opinion') of the trial judge, who will have had the considerable advantage of conducting the trial and hearing all the evidence and having the feel of the case. The appellate court 'will not readily interfere with that judgment'.

(4) However, that evaluation is not to be equated with an exercise of discretion such that the appellant court is only concerned with whether

114 [2015] EWCA Crim 178.

115 [2013] EWCA Crim 322; [2014] 1 WLR 947.

116 Ibid.

117 [2018] EWCA Crim 2287; [2018] 4 WLR 165.

the decision was within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as either being right or wrong: it is a 'yes' or 'no' matter.

(5) The 2009 Act is specific by section 54(5) and (6) that the evidence must be 'sufficient' to raise an issue. It is not enough if there is simply some evidence falling short of sufficient evidence.

(6) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.

(7) For the purpose of forming his or her opinion, the trial judge, whilst of course entitled to assess the quality and weight of the evidence, ordinarily should not reject evidence which the jury could reasonably accept. It must be recognised that a jury may accept the evidence which is most favourable to a defendant.

(8) The statutory defence of loss of control is significantly differently 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 rigorous evaluation' on the part of the trial judge is called for than might have been the case under the previous law of provocation.¹¹⁸

(10) The statutory components of the defence are to be appraised sequentially and separately; and

(11) And not least, each case is to be assessed by reference to its own particular facts and circumstances.

A trial judge should not 'clutter up' a jury's deliberations by inviting them to consider issues which do not arise on the evidence (*R v Skilton*¹¹⁹ at [35]).

The above demonstrates that the task of the judge and that of the parties to the proceedings, with regards to section 54(6), is not to be undertaken lightly. Although the judge's evaluation has to be appraised as either being right or wrong (point (4), above), the appellate court 'will not readily interfere with that judgment' (point (3), above).

Conceptual problems

Quite apart from procedural requirements under sections 54 and 55, which have given LoSC a more limited application than 'provocation'

118 Noting *R v Clinton* [2012] EWCA Crim 2 [2012]; 3 WLR 515; [2013] QB 1; [2012] 2 All ER 947; [2012] 1 Cr App R 26

119 [2014] EWCA Crim 154.

at common law,¹²⁰ each of the three elements under section 54(1)(a)–(c) has proved to be problematic.

As the Court of Appeal remarked in *R v Martin*,¹²¹ the starting point under the statutory provisions is to consider whether there was any evidence of LoSC. If there was not, then consideration of whether there was a ‘qualifying trigger’ falls away (see, to like effect, *R v Clinton*,¹²² and see *R v Barnsdale-Quean*).¹²³

At common law, provocation involved D experiencing ‘sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind’: *Duffy*.¹²⁴

However, for the purposes of sections 54 and 55 of the CAJA 2009, the notion of ‘loss of self-control’ is not defined beyond Parliament enacting that it does not matter whether or not the loss of control was sudden (section 54(2)). This is not apt (it is submitted) to describe the case of a person who reacts in a lethal way following a ‘slow burning’ set of circumstances,¹²⁵ and yet, it was with such a case in mind that section 54(2) was enacted.

In *R v Challen*,¹²⁶ C admitted killing her husband a few months before the partial defences were reformed under the CAJA 2009.¹²⁷ On the day of the killing, C realised that her husband was still seeing other women. She ‘flipped’ and hit the deceased with a hammer. She did not want anyone else to have him if she could not. The jury rejected diminished responsibility and provocation (old law).¹²⁸ The Court of Appeal quashed C’s conviction for murder and ordered a retrial on the basis of fresh evidence in respect of (i) coercive control and (ii) post-conviction diagnosis that C suffered from borderline personality disorder, a severe mood disorder, probably bipolar affective disorder, and that she had suffered from those disorders at the time of the killing. The court was not persuaded that the general theory of coercive control would have afforded C a ground of appeal had it stood alone, and that

120 Together with s 3 of the HA 1957 (repealed, s 178, sched 23, CAJA 2009).

121 [2017] EWCA Crim 1359 [48].

122 [2012] EWCA Crim 2; [2012] 3 WLR 515; [2013] QB 1; [2012] 2 All ER 947; [2012] 1 Cr App R 26; and see *R v Martin* [2017] EWCA Crim 1359 [53].

123 [2014] EWCA Crim 1418 [27].

124 [1949] 1 All ER 932, 932E. For a perspective on *Duffy*, see Susan Edwards: ‘Justice Devlin’s legacy: *Duffy* – a battered woman “caught” in time’ [2009] Criminal Law Review 851–869.

125 Consider *R v Mann* [2011] EWCA Crim 3292 – a case of common law ‘provocation’ together with s 3 of the HA 1957 (repealed, s 178, sched 23, CAJA 2009).

126 [2019] EWCA Crim 916; and see [2019] Crim LR 980–982.

127 Ss 52–56 of the CAJA 2009 came into force in England and Wales on 4 October 2010.

128 The defence ran diminished responsibility, but the judge left both partial defences to the jury.

it was in the context of the medical diagnosis that the theory may have been relevant. On such facts, the revised partial defences (had they been available) may have proved no less problematic than the old ones (albeit giving rise to different problems). As for LoSC, the three conditions in section 54 would have had to be confronted as well as the fact that ‘a thing done or said’, which constituted sexual infidelity, ‘is to be disregarded’ (section 55(6)(c), CAJA 2009).¹²⁹

In real life, LoSC is usually sudden. In other cases, an accused may have been very much in control, having killed in a calculated, planned manner. In the tragic case of *Francis Inglis*¹³⁰ – a case decided prior to the CAJA 2009 – T was a fit young man who suffered catastrophic head injuries following an accident. His mother, FI, tried to kill her son (T) by injecting him with heroin as he lay in his bed in hospital. FI was charged with attempted murder and granted bail subject to a condition that she should not visit T. A year later, she did so, killing T by injecting him with heroin. FI was convicted of attempting to murder her son and (after the judge concluded that there was no evidence on which to leave the partial defence of provocation to the jury) of murdering him. In dismissing FI’s appeal against conviction, the Court of Appeal held that, far from lacking or losing her self-control, she was ‘completely in control of herself’.

In 2019, it was reported in the media that Knight (Basildon Crown Court) had pleaded guilty to manslaughter (on the grounds of LoSC) and, after a trial, acquitted of the murder of his mother who had been diagnosed with Alzheimer’s and who had received end-of-life care in the days leading up to her death. According to the account relayed by Clough,¹³¹ Knight’s pleas to the care home for his mother to receive pain relief medication ‘had fallen on deaf ears’ and that he ‘knew when she was in pain from the way she looked at him’. Knight snapped, and he carried his mother through a fire door and threw her from the first-floor balcony, resulting in her death. His defence was that he had lost his self-control.¹³²

129 See Vanessa Bettinson, ‘Aligning partial defences to murder with the offence of coercive or controlling behaviour’ (2019) 83(1) *Journal of Crim Law* 71. Nicola Wake has argued that ‘The lessons learned in England and Wales ... strongly suggest that specific prohibitions needlessly complicate the partial defence and it is contended that s 55(6)(c) of the Coroners and Justice 2009 is irretrievably defective’ in Nicola Wake, ‘Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model’ (2013) *Journal of Crim Law* 512.

130 [2010] EWCA Crim 2637.

131 Amanda Clough, ‘Mercy killing, partial defences and charge decisions: 50 shades of grey’ (2020) 84(3) *Journal of Crim Law* 211.

132 ‘Son who pushed mum off Essex care home fire escape cleared of murder’ (*BBC News Online*, 2 August 2019).

Clough has described this case as a ‘ground breaking’ and ‘revolutionary for mercy killing cases’. However, the reality is that *Knight* is not a case that has received analysis and discussion by an appellate court. The case cannot (yet) be treated as *binding authority* for the proposition that a person’s extreme pain and suffering, and lack of quality of life, constitutes ‘things done’ (query, by whom?) which ‘(a) constituted circumstances of an extremely grave character’ that ‘caused D to have a justifiable sense of being seriously wronged’. The case may well have turned on K’s account that his pleas for his mother to receive medication, having fallen on ‘deaf ears’, amounted to ‘things done’ (by the home), that caused him a sense of being seriously wronged, and that he ‘snapped’.

Until Parliament decides otherwise, the current law of LoSC, like the defence of provocation that preceded it, ‘recognises a distinction between the withdrawal of treatment supporting life, which, subject to stringent conditions, may be lawful, and the active termination of life, which is unlawful’ (*R v Inglis*, per Lord Judge CJ at [38]).

‘In the circumstances of D’

In *R v Foye*,¹³³ Hughes LJ remarked that it does not follow that everything which applies to one partial defence must also apply to the other. Diminished responsibility ‘depends on the *internal* mental condition of the defendant’ (emphasis added) whereas loss of control (ie under sections 54, 55) ‘depends on an objective judgment of [D’s] actions as a reaction to *external circumstances*’ (emphasis added). One might have thought that LoSC (whether in the context of diminished responsibility or loss of control) can only be explained and considered by reference to D’s internal mental condition. However, a complication is that the LoSC defence is subject to the requirement (under section 54(1)(c)) that ‘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’ (emphasis added). Furthermore, s 54(3) elaborates on that provision by stating that ‘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*’ (emphasis added).

In *Rejmanski*,¹³⁴ the Court of Appeal held (per Hallett LJ) that in assessing this element (section 54(1)(c) and 54(3)) the defendant is to be judged against the standard of a person with a normal degree, and not an abnormal degree, of tolerance and self-restraint:

¹³³ [2013] EWCA Crim 475.

¹³⁴ [2017] EWCA Crim 2061.

25. If, and in so far as, a personality disorder reduced the defendant's general capacity for tolerance or self-restraint, that would not be a relevant consideration. Moreover, it would not be a relevant consideration even if the personality disorder was one of the 'circumstances' of the defendant because it was relevant to the gravity of the trigger (for which, see *Wilcocks*).¹³⁵ Expert evidence about the impact of the disorder would be irrelevant and inadmissible on the issue of whether it would have reduced the capacity for tolerance and self-restraint of the hypothetical 'person of D's sex and age, with a normal degree of tolerance and self-restraint'.

26. Fourth, if a mental disorder has a relevance to the defendant's conduct other than a bearing on his general capacity for tolerance or self-restraint, it is not excluded by subsection (3), and the jury will be entitled to take it into account as one of the defendant's circumstances under s 54(1)(c). However, it is necessary to identify with some care how the mental disorder is said to be relevant as one of the defendant's circumstances. It must not be relied upon to undermine the principle that the conduct of the defendant is to be judged against 'normal' standards, rather than the abnormal standard of an individual defendant.

The court cited *R v Mcgrory*,¹³⁶ where it was held that the trial judge had been correct to direct the jury that they were to exclude from their consideration the evidence of a medical expert that the defendant's depression meant that she had a 'reduced ability to deal with taunting and to cope with those sorts of pressures compared to someone not suffering from depression'. In *R v Wilcocks*,¹³⁷ W had a personality disorder which affected W's ability to form a rational judgment. It was argued on his behalf that this was one of the 'circumstances' which was not excluded by section 54(3). The trial judge gave a direction to the jury that distinguished between a matter affecting general capacity and a matter affecting the gravity of the qualifying trigger. The Court of Appeal held that the direction accorded with section 54(3) CAJA 2009. In *R v Meanza*,¹³⁸ M suffered from paranoid schizophrenia and antisocial personality disorder. The Court of Appeal rejected an argument that the partial defence of loss of control should have been left to the jury. It held that M could have no 'justifiable sense of being seriously wronged' and that his mental conditions were 'excluded from account' in considering his circumstances under section 54(1)(c).

The cases cited above lend support to the view expressed by Hallett that the LoSC defence creates a legal fiction, whereby someone is treated as both normal and abnormal simultaneously.¹³⁹

135 [2016] EWCA Crim 2043; [2017] 1 Cr App R 23.

136 [2013] EWCA Crim 2336.

137 [2016] EWCA Crim 2043; [2017] 1 Cr App R 23.

138 [2017] EWCA Crim 445.

139 Hallett (n 56 above) 454.

The concept of loss of self-control

Many of the problems mentioned above arise by virtue of the Government's decision to retain the concept of 'loss of self-control,' which was contrary to the recommendations of the Law Commission for England and Wales that remarked that judges had 'struggled to interpret and apply this notion as a description of the necessary state of mind'¹⁴⁰ and that 'a positive requirement of loss of self-control was unnecessary and undesirable'.¹⁴¹

Sorral (who provides a philosopher's perspective) has argued powerfully that 'because we have some control over how we express our emotions, claims about loss of self-control are not really cases of loss of self-control'.¹⁴²

They are simply cases where people acted for various reasons: because they felt a sense of entitlement, or simply because they thought they would get away with it. Alternatively, a person might kill because she sees no other way out of a situation or to protect herself and/or her children from further violence. Moreover, these reasons for acting are assessable and may be found justifiable or not (266).

Sorral also contends that:

... [t]he fact that we have some choice in how we express emotions suggests that using violence is also a choice, based on assessment of the situation and on one's chances of success. It is therefore misleading to claim that the provoked, angry defendant lost his self-control, causing him to kill his victim. (265)

Similarly, it is also misleading to suggest that the abused woman, because of fear, lost her self-control, and this is what caused her to kill her abusive partner. Given what we know about domestic violence and its effects on victims, it is likely that the woman feels several conflicting and intense emotions, including fear of further violence against her or her children, anger and resentment at her abuser, desperation at her inability to leave the relationship, feelings of entrapment, and a desire to protect her children. These reasons are all rational ones, given the circumstances and suggest, as Susan Edwards puts it:

140 Law Commission (n 41 above), Project 6 of the Ninth Programme of Law Reform: Homicide, citing as examples (at para 5.17, fn 11), the contrast between the views of Devlin J in *Duffy* [1949] 1 All ER 932n, and of Lawton LJ in *Ibrams* (1982) 74 Cr App R 154 (both taking a narrow view of the requirement) and the views of Lord Lane CJ in *Ahluwalia* [1992] 4 All ER 859 (taking a broader view of the requirement).

141 Law Commission (n 41 above), Project 6 of the Ninth Programme of Law Reform: Homicide, para 5.19.

142 Sarah Sorral, 'Anger, provocation and loss of self-control: what does 'losing it' really mean?' (2019) 13 Criminal Law and Philosophy 247–269.

[the battered woman's] state of mind and manifestation of behaviour at the time of the killing are not a loss of self-control in the traditionally masculinist sense at all. Nor is she in the period before the killing in a state of anger. She is in a state of fearful contemplation.¹⁴³

To explain these killings as ones motivated by an irrational LoSC not only mischaracterises what occurs in these cases, but also fails to capture the complexity of various emotions and the cumulative effect they may have on an agent's state of mind and her reasons for acting.

To summarise: because we have some control over how we express our emotions, claims about LoSC are not really cases of LoSC. They are simply cases where people acted for various reasons: because they felt a sense of entitlement, or simply because they thought they would get away with it. Alternatively, a person might kill because she sees no other way out of a situation or to protect herself and/or her children from further violence. Moreover, these reasons for acting are assessable and may be found justifiable or not.

CONCLUDING REMARKS

The Law Commission's detailed and protracted work in this field, together with the recommendations that it has made in a number of papers, were designed to improve the law and to produce just outcomes. In the event, not all of the Commission's recommendations were accepted or implemented. The current law has attracted considerable criticism. Further reforms to the homicide laws are warranted.

¹⁴³ Susan S M Edwards, 'Loss of self-control: when his anger is worth more than her fear' in Reed and Bohlander (n 45 above) 79–97.