Summer Vol. 72 No. 2 (2021)

NORTHERN IRELAND

LEGAL QUARTERLY

NORTHERN IRELAND
LEGAL QUARTERLY

JOURNAL INFORMATION

The *Northern Ireland Legal Quarterly* is a leading peer-reviewed journal that provides an international forum for articles, commentaries and notes in all areas of legal scholarship and across a range of methodologies including doctrinal, theoretical and socio-legal. The journal regularly publishes special issues within this broad remit.

Established in 1936, the journal has a history and rich vein of legal scholarship, combining distinct publications on the law of Northern Ireland, and prominence within the School of Law at Queen's University Belfast, with leading contributions to the discussion and shaping of law across the common law world and further afield. The School of Law at Queen's University Belfast took over the publication of the journal from SLS Legal Publications (NI) Ltd in 2008, where it has since been published quarterly. The journal became an online-only publication in January 2017.

ISSN 2514-4936 (online) 0029-3105 (print)

AVAILABILITY AND ARCHIVES

The *Northern Ireland Legal Quarterly* is committed to making its contents widely available, to broaden our readership base. At least one article per issue is made available on an open access basis and may be published in advance. All articles become available on an open access basis on our website one year after publication.

All contributions to the journal become available on HeinOnline one year after publication (with issues going back to its launch in 1936) and LexisNexis three months after publication (with issues from 2019). The journal's contents appears on a growing range of indexing and abstracting services.

Since 2018 the journal's contents is promoted via social media and the Contributors' Blog.

In the summer of 2020, we expanded the reach and use of the *Northern Ireland Legal Quarterly* by adding 17 more years of content to the journal's existing archives. These now go back to 1999 (volume 50) and are widely accessed by our readership. Visit our Archive pages for further details.

SUBMISSIONS

The journal welcomes submissions of articles, commentaries, notes and book reviews on a rolling basis. Please see our 'For Authors' section for further details.

If you have any queries about the suitability of your article for the journal or if you have an idea for a special issue, please contact the Chief Editor Dr Mark Flear. For the contribution of commentaries and notes, please contact Dr David Capper. For book reviews, contact Dr Clayton Ó Néill.

SUBSCRIPTIONS

Subscriptions pay for a minimum of three months of exclusive access to the journal's latest contents (and up to one year for those who do not have access to LexisNexis).

NORTHERN IRELAND
LEGAL QUARTERLY

Summer Vol. 72 No. 2 (2021)

Special Issue:
Domestic and Comparative Perspectives on Loss of Self-control and Diminished Responsibility as Partial Defences to Murder: A 10-year Review of the Coroners and Justice Act 2009 Reform Framework

Guest Editors:
Alan Reed, Nicola Wake and Bethany Simpson

Contents

Commentaries and Notes

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 161–170
Article DOI: 10.53386/nilq.v72i2.930

Introduction

'Domestic and comparative perspectives on loss of self-control and diminished responsibility as partial defences to murder: a 10-year review of the Coroners and Justice Act 2009 reform framework'

Alan Reed

Northumbria University

Nicola Wake

Northumbria University

Bethany Simpson*

Northumbria University
Correspondence email: alan.reed@northumbria.ac.uk

INTRODUCTION

The time is ripe for a review of partial defences to murder within a domestic and comparative contextualisation. For a long time the issues of loss of control (formerly transmogrified as provocation) and diminished responsibility have plagued the legal system of England and Wales,[1] and further jurisdictions beyond. The desire to treat individuals in circumstances at the borders of human endurance or capacity in a compassionate manner conflicted with the high moral threshold against condoning acts of homicide, even if only by reducing the available sentencing framework from the mandatory life sentence for murder. One needs to remember that cases of voluntary manslaughter, because of loss of control and diminished responsibility, are instances where the offence definitional elements of murder are

* The editors owe a debt of gratitude to Mark Flear, Chief Editor of the Northern Ireland Legal Quarterly, and Marie Selwood for their invaluable editorial assistance and guidance, and Sean Mennim for his assistance in preparing the special issue.

1 For discussion see Alan Norrie, 'The Coroners and Justice Act: partial defences to murder: loss of control' [2010] Criminal Law Review 275; Ronnie Mackay, 'The Coroners and Justice Act: partial defences to murder: the new diminished responsibility plea' [2010] Criminal Law Review 290.

established (*actus reus* and *mens rea* comportational ingredients), but the application of the mandatory life sentence appears too draconian in comparison to the blameworthiness of the defendant's act. A partial defence to murder predicated on loss of control or diminished responsibility can be applied in bespoke circumstances as a concession to human frailty, uniquely and transformatively altering the very nature of the crime. The inconsistency in the case law, however, between the subjective and objective interpretation of the prongs of loss of control, and appropriate interpretative standardisation, provoked considerable controversy within prior provocation law.[2] The benign conspiracy, which previously applied under extant law between prosecution, courts and medical experts in diminished responsibility scenarios,[3] and the ensuing high acceptance rate for plea bargains presented substantive and theoretical challenges. In many respects reform was inevitable, but dissonant and often vituperative discourse was presented on the legitimate pathway to follow.

This special issue consequentially focuses upon the reform framework enshrined within sections 52–56 of the Coroners and Justice Act 2009, effective in law from 4 October 2010, which fundamentally altered the landscape applicable to partial defences to murder: provocation was abrogated to be replaced by loss of control;[4] a high threshold standardisation was applied to consideration of loss of control with restrictive qualifying triggers shifting evaluation from compassionate emotional excuse of the actor to imperfect justification of the act; controversially, sexual infidelity killings were apparently excluded in line with revenge/honour killings;[5] and, contrary to explicit Law Commission requirements,[6] a root and branch reform of diminished responsibility occurred.[7] As such, it is apposite to review this new landscape after 10 years of implementation in a domestic and comparative setting. The contributing authors are pre-eminent

2 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004). See, for example, *R v Duffy* [1949] 1 All ER 932; *R v Ahluwalia* [1992] 4 All ER 889; *R v Doughty* [1986] Crim LR 625 (CA Crim Div); *R v Humphreys* [1995] All ER 100 (CA); *Morgan Smith* [2000] 4 All ER 289, [2001] 1 AV 146 (HL); *AG for Jersey v Holley* [2005] 2 AC 580.

3 Ronnie Mackay, 'The abnormality of mind factor in diminished responsibility' [1999] Crim LR 117. See also *R v Lloyd* [1967] 1 QB 175; *R v Byrne* [1960] 2 QB 296; *R v Dietchmann* [2003] 1 AC 1209; *R v Tandy* [1989] 1 WLR 350 (CA); cf *R v Wood* [2008] EWCA Crim 1305 (CA).

4 Homicide Act 1957, s 3 (repealed).

5 Coroners and Justice Act 2009, s 55(6)(c).

6 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com Report No 304, 2006).

7 Homicide Act 1957, s 2 (repealed).

world-leading criminal justice academics in the United Kingdom, Australia and the United States. The collection, as a whole, addresses whether the reforms to loss of control and diminished responsibility contained in the Coroners and Justice Act 2009 have cathartically and adventitiously cured ills of prior law. Has statutory remediation proved a panacea, or simply a Pandora's Box? An overarching theme is further optimal reforms that need to be made to advance homicide laws that are fair, just and transparent and meet the aims of legitimacy, appropriate culpability gradations and blameworthiness thresholds for inculpation.

More specifically, the special issue itself, and the respective article contributions, are set out as follows. The initial articles focus on the contextualisation of pre-Coroners and Justice Act 2009 concerns, the bigger picture of the remedial legislation itself, and how, from both a practitioner and academic perspective, new appellate determinations have uniquely interpreted statutory reform – often in a counter-intuitive and counter-normative fashion. The debate is then extended to analyse and critique the confusion that has been engendered over the last decade on specific partial defences to murder concerns: illustratively encompassing fear of serious violence; coercive control (uniquely and significantly evaluated herein as a 'defence' not an offence); and co-morbidity within diminished responsibility. These significant and important areas of homicide law have received very limited and insufficient academic consideration in the literature, and novel empirical research is presented on the impact of statutory reform(s). In the final part of the special issue, novel alternative pathways are presented via a comparative extirpation of alternative legal systems, notably Australia and the United States where topical developments *vis-à-vis* voluntary manslaughter are appraised and contextualised within the domestic laws, and new contemporary solutions adduced *de novo*. In a novel and innovative manner, the special issue originally and significantly extends debate in this arena. New insights are provided that will help to shape further reforms and present pathways for new initiatives within criminal justice. Commentaries from two recent Court of Appeal cases pertaining to the repealed partial defence of diminished responsibility are also provided, and a book review.

NEW INSIGHTS AND PATHWAYS TO REFORM

In the opening article of the special issue, the reformed partial defences to murder are examined from a unique practitioner's perspective. Rudi Fortson provides the contextualised backdrop of the reformed pleas of loss of control and diminished responsibility enacted by the Coroners and Justice Act 2009 and considers the extent to which the

aims of policy-makers and law-makers have been addressed since the 2009 reforms were enacted.[8] In particular, Fortson addresses the Law Commission's analysis of the pre-existing partial defences, its aims and subsequent recommendations for reform[9] with reference to the Government's response to such as it transpired through the framing of the Coroners and Justice Act 2009. Focusing on the broader implications of the Act, Fortson contends that Parliament's departure from key recommendations of the Law Commission in enacting the Coroners and Justice Act 2009 has resulted in unnecessarily complex homicide law that has created myriad problems in practice, none more so than when experts are called on to give opinion evidence.[10]

Analysis of the 2009 reforms is developed further with regard to the repealed section 3 Homicide Act 1957 defence, 'loss of control', by John J Child, Hans S Crombag and G R Sullivan.[11] The interpretation and application of the partial defence during its first decade in force is examined, with particular focus on the true import and purport of the subjective 'loss of self-control' criterion, its legal and scientific[12] meaning, as well as theoretical purpose. A broad contextualisation of fundamental issues appurtenant to loss of control pre- and post-

8 Rudi Fortson QC expands on his previous contributions in this area which examine the likely impact of the reforms under the Coroners and Justice Act 2009. Through first-hand experience, Fortson comments on the interpretation and application of the new partial defences within the courts over the last decade in order to evaluate the true effect of the reforms.

9 Law Commission (n 2 above); Law Commission (n 6 above); Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (Consultation Paper CP 19/08, 2008).

10 See *R v Dowds* [2012] EWCA Crim 281; *R v Golds* [2016] UKSC 61; *R v Foy* [2020] EWCA Crim 270.

11 The authors provide unique interdisciplinary perspectives pertaining to the specific requirement of 'loss of self-control' within the repealed loss of control defence where issues still persist despite calls for its rejection as a defining element during the initial review of provocation.

12 Research in psychology and neuroscience is utilised in order to investigate whether experts in these fields could assist with the interpretation of 'loss of self-control'. See B Libet et al, 'Time of conscious intention to act in relation to onset of cerebral activity (readiness-potential): the unconscious initiation of a freely voluntary act' (1983) 106 Brain 623; C S Soon et al, 'Predicting free choices for abstract intentions' (2013) 110 Proceedings of the National Academy of Sciences 6217; A Roskies, 'Neuroscientific challenges to free will and responsibility' (2006) 10 Trends in Cognitive Sciences 419.

Coroners and Justice Act 2009 reforms are expertly critiqued.[13] Particular weight is afforded to the absence of a statutory definition of 'loss of self-control', the varying levels of control, and the inadequate dealing with questions of self-control at the liability stage, as opposed to the post-conviction (sentencing) stage where they would be more effectively addressed. The authors identify myriad aspirations for reform, including abolishing the mandatory life sentence for murder and the partial defences, before discussing avenues of interpretation, primarily via the courts, in light of the current political stance on mandatory sentences for murder.

Shifting focus towards the reforms to diminished responsibility under section 52 of the Coroners and Justice Act 2009, the third article provides a new perspective on the operational constituents of mental condition defences. Here, Ronnie Mackay re-evaluates the persistent 'official line' that the changes to the plea were merely ones of 'clarification' and 'modernisation'.[14] The requirements of section 2 of the Homicide Act 1957, as repealed by the Coroners and Justice Act 2009,[15] are examined in the context of an original empirical study into the operation of the new plea, undertaken by Mackay and Barry Mitchell,[16] which comparatively analyses new plea cases and cases

13 For further discussion of the issues pre-reform, see G R Sullivan, 'Anger and excuse: reassessing provocation' (1993) 13(3) Oxford Journal of Legal Studies 380; Donald J Nicolson and Rohit Sanghvi, 'Battered women and provocation: the implications of *R v Ahluwalia*' [1993] Crim LR 78; Law Commission (n 2 above). For discussion of issues post-reform see Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011).

14 Ronnie Mackay has been at the academic forefront of a wider academic debate as to whether the reforms to diminished responsibility as a partial defence to murder contained within s 52 of the Coroners and Justice Act 2009 were needed at all. A benevolent conspiracy pragmatically applied between prosecution and defence to accept a lesser plea of manslaughter, and consequentially avoid inculpation for murder, arguably where justice demanded. An important consequential question is whether reform has been adventitious in this arena in terms of culpability standardisations and plea arrangements.

15 For further discussion, see Mackay (n 1 above); Ronnie Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] Criminal Law Review 18; Rudi Fortson, 'The modern partial defence of diminished responsibility' in Reed and Bohlander (n 13 above); Louise Kennefick, 'Introducing a new diminished responsibility defence for England and Wales' (2011) 74 Modern Law Review 750; Matthew Gibson, 'Diminished responsibility in Golds and beyond: insights and implications' [2017] Criminal Law Review 543; Ronnie Mackay, 'The impairment factors in the new diminished responsibility plea' [2018] Criminal Law Review 462; and, for a comparative perspective and critique, see Nicola Wake, 'Recognising acute intoxication as diminished responsibility: a comparative analysis' (2012) 76 Journal of Criminal Law 71.

16 See Mackay and Mitchell (n 15 above).

dealt with under the former plea. The data produced by the study highlights the operational changes which have taken place over the last decade which challenge the validity of the 'official line' and suggest that the reformed section 2 plea has resulted in regrettable unintended consequences, including an increase in convictions for murder.

Additional novel empirical research is presented by Susan Edwards, pertaining to the inclusion of 'fear of serious violence' as a qualifying trigger for 'loss of self-control' voluntary manslaughter in section 55(3) of the Coroners and Justice Act 2009.[17] This important specific issue has received very limited prior academic consideration,[18] and the author provides unique empirical analysis. Edwards reviews the impact of the reforms introduced under sections 54–56, including their limitations and expansions, and explores the statutory interpretation of these provisions,[19] before offering a provisional assessment of the impact of section 55(3) via the analysis of Home Office data sets over a five-year period. It was anticipated that the development under section 55(3) would be an important step in recognising the situation of a woman who, in fearing a partner's violence, control and abuse, kills to preserve her own life.[20] However, as Edwards discusses, masculinist

17 This inclusion is of particular significance as it was the first time the emotion of fear, which has received little to no recognition within the criminal law defence framework, was acknowledged in statute. Despite obfuscated transparency on the operation of homicide defences and the impact of s 55(3) over the last decade, the author presents unique empirical analysis of several data sets which provides an invaluable insight into the use of the defence in practice. See discussion in Caroline Criado Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (Vintage 2020).

18 Susan Edwards herself has provided much of the broader academic commentary in this area: S S M Edwards, 'Recognising the role of the emotion of fear in offences and defences' (2019) 83(6) Journal of Criminal Law 450–472; S S M Edwards, 'Loss of self-control: when his anger is worth more than her fear' in Reed and Bohlander (n 13 above) 79–96; S S M Edwards, 'Anger and fear as justifiable preludes for loss of self-control' (2010) 74(3) Journal of Criminal Law 223–241.

19 See, generally, Susan S M Edwards, 'Abolishing provocation and reframing self-defence – the Law Commission's options for reform' [2004] Criminal Law Review 181; Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992); Carol Smart, *Feminism, and the Power of Law* (Routledge 1989); Jeremy Horder and Kate Fitzgibbon, 'Where sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing' (2015) 74(2) Cambridge Law Review 307.

20 Nicola Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77(5) Journal of Criminal Law 433; Janet Loveless, 'Domestic violence, coercion and duress' [2010] Criminal Law Review 93; Susan S M Edwards 'Descent into murder – provocation's stricture – the prognosis for women who kill men who abuse them' (2007) 71(4) Journal of Criminal Law 342.

legal concepts prevail and fear remains a contested emotion; further reform of the legal framework is needed in order to achieve a just law by incorporating women's experience of and defensive response to violence and control in their many forms.

Moving away from the exclusively domestic perspectives of the 2009 reform framework, Heather Douglas and Alan Reed, in their comparative article, analyse the operation of the loss of control defence through an Anglo-Australian lens.[21] The authors review the legislative reform of provocation in both England and Wales and Australia over the past 10 years, focusing on the defence in the context of an abused woman who kills her abuser.[22] Notably, one of the key challenges for law reform has been how to ensure homicide defences are not overly restrictive for abused women who kill their abuser, while at the same time ensuring that homicide defences are not overly expansive for domestic abusers who kill their partner.[23] The operation of the loss of control defence in England and Wales is critically examined alongside the most recent reforms to provocation in Queensland and New South Wales. The article concludes with optimal reformulation proposals to reflect a new comparative pathway for abusive partner and sexual infidelity killings.

The second Anglo-Australian comparative article in the special issue focuses on the issues that have arisen since the implementation of changes to the diminished responsibility defence under section 52 of the Coroners and Justice Act 2009. Through an Anglo-Australian framework, Thomas Crofts and Nicola Wake review each issue in turn and consider the impact on the operation of the partial defence in theory

21 In Australia, the provocation defence has been abolished in some states and significantly reformed in others.

22 See, generally, Aileen McColgan, 'In defence of battered women who kill' (1991) 18 Journal of Law and Society 219; Carol Withey, 'Loss of control: loss of opportunity' [2011] Criminal Law Review 263; Norrie (n 1 above); Vanessa Bettinson, 'Criminalising coercive control in domestic violence cases: should Scotland follow the path of England and Wales' [2016] Criminal Law Review 165; Susan S M Edwards, 'The strangulation of female partners' [2015] Criminal Law Review 12; Susan S M Edwards, 'Coercion and compulsion: re-imagining crimes and defences' [2016] Criminal Law Review 876; and Wake (n 20 above).

23 A significant further issue, discussed herein, is how dissonant criminal justice legal systems have responded to the dilemmatic choice where the coercee and abusee responds with fatal violence against their provoker. Where should the contours of criminalisation sit in terms of inculpation for homicide (or otherwise), and are further reforms needed in terms of culpability threshold gradations?

and in practice.[24] The medicalisation of the reformed defence in England and Wales is scrutinised with key criticisms outlined.[25] Crofts and Wake submit that the reformed defence stands in stark contrast to the approach under section 23A of the Crimes Act 1900 (New South Wales), where the legislation explicitly outlines the respective role of the medical expert and jurors and prohibits experts from commenting on whether murder ought to be reduced to manslaughter in such cases. Original insights are presented on co-morbidity and diminished responsibility, and novel Anglo-Australian reform pathways are presented.

A final important comparative perspective is provided by Vera Bergelson in her article which parses through the contours of the partial defence of provocation via an Anglo-American lens.[26] Bergelson compares the reformed version of provocation propagated by the Model Penal Code (MPC) with that suggested by the Law Commission for England and Wales. These versions of the defence are then compared with the new 'loss of self-control' defence under the Coroners and Justice Act 2009 in order to determine the governing rationales for

---

24 Thomas Crofts and Nicola Wake address significant concerns on inculpation and blameworthiness standardisations when co-morbidity coheres, within a contextualisation of diminished responsibility interwoven with other individual conditions. New insights are provided on Anglo-Australian reform optimality in this arena and particularised issues of concern created by the Coroners and Justice Act 2009 reforms.

25 See generally, Edward Griew, 'The future of diminished responsibility' [1998] Criminal Law Review 75; Matthew Gibson, 'Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea' (2017) 81 Journal of Criminal Law 177; Oliver Quick and Celia Wells, 'Getting tough with defences' [2006] Criminal Law Review 117; and Andrew Hemming, 'It's time to abolish diminished responsibility: the coach and horses' defence through criminal liability for murder' (2008) 10 University of Notre Dame Australia Law Review 1–35.

26 Vera Bergelson's article extends the debate further in terms of the moral basis (or otherwise) for the defence of provocation, or, put differently, what makes intentional killing under provocation less reprehensible than murder? Is it a justificatory or excuse-based partial defence, and does this distinction matter in Anglo-American criminal law? The rationale for loss of control as a defence is deconstructed through an important comparative lens, and in terms of novel developments over the course of the last decade.

each version.[27] Bergelson stipulates that the comparative analysis serves three main goals: it helps to reveal the moral, logical and structural strengths and weaknesses of the different versions of the defence; it highlights the strong intrinsic presence of the justificatory component in the defence; and it contributes to the critical assessment of the attempts to reform the defence of provocation in Anglo-American jurisprudence. Bergelson concludes that the largely justificatory defence of provocation developed by the Law Commission (and to a lesser degree the 'loss of self-control' defence) is legally and morally preferable to the largely excusatory defence proposed by the MPC.

In addition to the special issue articles, two case commentaries provide insight into the interpretation and application of section 3 of the Homicide Act 1957 (repealed) at the stages of liability and sentencing. Bethany Simpson, in her commentary on the Court of Appeal judgment in *R v Foy (Nicholas)*,[28] considers the co-morbidity between substance-use disorders and psychiatric conditions and examines the legal ambiguities that arise in the context of voluntary intoxication, mental health and diminished responsibility. Sean Mennim provides a commentary on the Court of Appeal judgment in *R v Westwood (Thomas)*,[29] which reviews the range of possible disposals available to a sentencing judge under the Mental Health Act 1983 and earlier authorities on the correct approach to the exercise of application where an individual is found guilty of manslaughter by reason of diminished responsibility. The special issue culminates with a book review on the topic of criminal law pedagogy and the teaching of substantive criminal offences. Daniel Pascoe, in his appraisal of Kris Gledhill and Ben Livings' edited collection on *The Teaching of Criminal Law: The Pedagogical Imperatives*, questions whether typical pedagogical methods for teaching law are fit for purpose and emphasises the importance of pedagogical innovation.

---

27 For further evaluation and critique, see Vera Bergelson, 'Victims and perpetrators: an argument for comparative liability in criminal law' (2005) Buffalo Criminal Law Review 385; Victoria Nourse, 'Passion's progress: model law reform and the provocation defence' (1997) 106 Yale Law Journal 1331; Joshua Dressler, 'Rethinking heat of passion: a defence in search of a rationale' (1982) 73 Journal of Criminal Law and Criminology 442; Reed Griffith Fontaine, 'Adequate (non) provocation and heat of passion as an excuse not justification' (2009) University of Michigan Journal of Law Reform 27; and Carolyn B Ramsey, 'Provoking change-comparative insights on feminist homicide law reform' (2010) 100 Journal of Criminal Law and Criminology 55.

28 [2020] EWCA Crim 270.

29 [2020] EWCA Crim 598.

CONCLUSION

The Coroners and Justice Act 2009, sections 52–56 were prescribed as a legislative response to cure ills in extant law(s) over the ambit and parameters of partial defences to murder.[30] Unfortunately, rather than a panacea, the statutory reforms have opened a new Pandora's Box in terms of the opaque and uncertain operation of loss of control and diminished responsibility defences. This special issue, as well as deconstructing current issues from practitioner, academic and empirical perspectives, has striven to provide novel reform optionality, drawing lessons from international and comparative perspectives as to the most adventitious future pathways to follow. The work serves as a clarion call for change, in an arena that is still ripe for reform, and further reflection.

30 See Coroners and Justice Act 2009, Explanatory Notes [14], which states the overriding aims of the 2009 reforms were to 'establish more effective, transparent and responsive justice … by … updating parts of the criminal law to improve its clarity, fairness and effectiveness'. This alludes to the goals outlined by the Law Commission: 'to bring greater order, fairness and clarity to the law of homicide'. See Law Commission (n 6 above) [2.4].

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 171–199
Article DOI: 10.53386/nilq.v72i2.897

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] automatism[13] 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 licence[20] (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, C*onsultation 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 first[32] 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 extended 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 Mitchell[53] 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
Sec 2 Manslaughter	*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, *EIfinger*.[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' one[65] 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 1957[79] 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 Squelch* [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 54[105] and 55[106] 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 l*oss 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 *Dawes* 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]

Sorial (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).

Sorial 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 Sorial, '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.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 200–223
Article DOI: 10.53386/nilq.v72i2.564

Loss of control in the appeal courts

G R Sullivan

University College London

H S Crombag

University of Sussex

J J Child

University of Birmingham*

Correspondence email: g.sullivan@ucl.ac.uk

ABSTRACT

This article critiques the 'loss of self-control' requirement within the loss of control partial defence, investigating its meaning (legally and scientifically), as well as its theoretical purpose. We contend that the partial defence currently performs a curious and problematic role, promoting questions of self-control that are most effectively dealt with at a post-conviction stage (ie at sentencing) into questions for the liability stage. This could be (perhaps best) resolved through the abolition of the mandatory life sentence for murder and subsequent abolition of the partial defences, but it is accepted that the current political reality weighs heavily against this option. Looking for viable alternatives, we highlight the advantages of an approach that maximises discretion based on a full appraisal of potentially extenuating circumstances, before discussing how the current partial defence, including the requirement for a loss of self-control, should be interpreted to move the current law closer to this goal.

Keywords: self-control; diminished responsibility; loss of control; partial defences.

INTRODUCTION

The Coroners and Justice Act 2009, in sections 54, 55 and 56, abolished the partial defence of provocation, replacing it with the partial defence of 'loss of control'. The loss of control defence reduces what would otherwise be a conviction for murder to a conviction for

* G R Sullivan, Emeritus Professor of Law, UCL; H S Crombag, Senior Lecturer in Psychology and Neuroscience, University of Sussex; J J Child, Reader in Criminal Law, University of Birmingham. We would like to thank Professor Alan Reed, Dr Nicola Wake and Sean Mennim for putting this special issue together.

manslaughter.[1] In the briefest of terms (for the moment), to avail himself of this partial defence, the defendant (D) must produce evidence that at the time he killed his victim (V), he was reacting to something said or done which was of an extremely grave character that caused him to have a justifiable sense of being seriously wronged, or that V did something that caused D to fear serious violence from V against himself or another. Crucially, as a result of one (or a combination) of these *objective* triggers, D must provide evidence that at the time he killed V with intent to kill or cause serious bodily harm, he was in a mental state that amounted to a *subjective* loss of self-control.[2]

The loss of control defence, like its predecessor provocation, is tailored for persons of normal sensibility who have killed in stressful circumstances. Unlike raising diminished responsibility,[3] another partial defence to murder, D is not arguing that he has a 'recognised medical condition' and an associated defect of mental functioning that lessens his responsibility for killing V. Rather, the argument on D's behalf is that it is a reasonable possibility that a person of D's sex and age with a normal degree of tolerance and self-restraint and in the same circumstances of D might have reacted in the same or similar way.[4] The core requirement that D should have lost self-control at the time of killing V is therefore essentially non-technical: rather than being tied to a medical diagnosis (as with diminished responsibility), it is for the jury to decide on the evidence whether D's mental state at the time he killed V is suggestive of a loss of self-control.

Reviewing its first decade in force, this article provides some general evaluation of the loss of control defence; with particular focus on how the subjective requirement of losing self-control has been interpreted and applied. The first part begins with a brief discussion of the previous defence of provocation, highlighting its failures and the ambition of reformers. In the second part, moving to its replacement in the loss of control defence, we explain how certain failings in the previous law

1 Thereby avoiding the mandatory life-sentence for murder. Although a life sentence can be handed down for manslaughter, the usual sentence is a specific term of years. Subject to good behaviour, only half the term will be spent in prison, whereas for a prisoner serving a mandatory life sentence the minimum term of imprisonment set by the trial judge must be served in full. Beyond that point, release is subject to approval by the Parole Board.

2 The burden of disproving this partial defence falls on the prosecution, who must also prove that D intended to kill or cause V serious harm. In theory, as we discuss later, it is possible that a loss of self-control might be so profound as to be incompatible with proof of these intentions, where this is the case the partial defence would be irrelevant.

3 Homicide Act 1957, s 2. The terms of diminished responsibility were significantly amended by the Coroners and Justice Act 2009.

4 Coroners and Justice Act 2009, ss 54 and 55.

have persisted; and how predictable (and predicted)[5] problems with the subjective requirement continue to undermine the effectiveness of the defence.[6] The final two sections of the article are forward looking, but cautioned with a realistic view of that future, in which any legal changes of direction (at least for the next decade) are only likely through the appellate courts. Thus, where the third part identifies aspirations for reform, the fourth part discusses how something approaching those targets can be achieved through the courts. We contend that, despite some positive developments in the interpretation of the loss of control defence in recent years, including some of the language used to define the subjective requirement, the application of the law remains faulty – with major analytical challenges (both legal and scientific), as well as normative underinclusivity.

PART 1: WHY DID PROVOCATION FAIL AS A PARTIAL DEFENCE TO MURDER?

Provocation was, in its essentials, accepted by the common law[7] as a partial defence to murder for centuries.[8] In the typical provocation scenario, D was angered by something that V did (an attack, a sexual proposition, an insult etc), and angered to an extent that D 'was so subject to passion as to make him or her for the moment not master of his mind'.[9] If a jury, on reviewing the facts of the case, thought it was reasonably possible that D was in such a state immediately following something said or done by V, they then had to ask themselves whether a reasonable person might too have been in such an immediately angry state if placed in such circumstances and go on to express his or her anger in the same violent way. D's killing remained a serious wrong, but mitigation from murder to manslaughter reflected a concession to human frailty, an acceptance that others may have done the same in D's place.

An early concern, however, was that provocation could apply too broadly. Courts are very reluctant to disallow consideration by a jury

5 See, in particular, A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011).

6 The 2009 Act does not define what amounts to a loss of self-control save for stipulating that it need not happen suddenly and that any loss of self-control that is a response to sexual infidelity must be disregarded.

7 Provocation was given statutory recognition as a partial defence to murder by the Homicide Act 1957, s 3 (repealed): s 3 was essentially declaratory of the common law save for including words as well as acts as provocative events.

8 For a full account of the origins and development of provocation, see J Horder, *Provocation and Responsibility* (Oxford University Press 2005).

9 *Duffy* [1949] 1 All ER 932.

of any question reserved for the jury. The effect of this reluctance in the context of provocation was that almost anything that caused D to suddenly lose his temper made it a case where provocation had to be considered by the jury. In *Doughty*,[10] for example, the Court of Appeal ruled that the trial judge was wrong to withdraw provocation from the jury on the basis that no reasonable jury could find that the crying of V, a baby, could amount to legally adequate provocation. Essentially, too much latitude was given to sudden violence arising from anger.[11] This underscores the difficulty of using loss of self-control (as then interpreted)[12] as the basis of *any* form of excuse, even partial excuse. Loss of self-control can be very circumstantial: D might be a violent tyrant at home, yet polite and deferential at work.

The insistence on a 'sudden and temporary' loss of self-control made provocation both over and under inclusive.[13] Of particular concern were cases known as battered woman syndrome (BWS) cases. In *Ahluwalia*[14] and *Thornton*,[15] the defendants, at separate trials, had been charged with murder after killing their respective husbands while these men were asleep, killings done to stop ongoing violent abuse. It was argued in both cases that the women were entitled to raise provocation despite what seemed, particularly on the facts of *Ahluwalia*, planned and deliberated killings. The argument for allowing provocation was that a woman suffering from BWS would experience a 'slow-burn' reaction to abuse; a state of simmering anger culminating in a sudden eruption in circumstances when the inhibiting effects of fear had eased.[16] However, despite the positive intentions behind legal acceptance of the causes and effects of BWS, it led to uncertainty because for decades a sudden and temporary loss of control was taken to be at the heart of provocation. The BWS cases also blurred the line between provocation and diminished responsibility by allowing a psychological

10 (1986) 83 Cr App R 260.

11 G R Sullivan, 'Anger and excuse: reassessing provocation' (1993) 13(3) Oxford Journal of Legal Studies 380.

12 We discuss alternative interpretations of loss of self-control later.

13 '[A] sudden and temporary loss of self-control is of the essence of provocation': *Duffy* [19491] 1All ER 932 (Devlin J). As was the case in *Ibrams* (1981) 74 Cr App R 154, persons with much diminished culpability would be denied any mitigation because their reaction was often too delayed.

14 [1992] 4 All ER 889.

15 [1992] 1 All ER 306.

16 In *Ahluwalia*, the Court of Appeal was receptive to acknowledging BWS but considered the trial judge's direction on provocation to be correct. D's conviction was quashed on the basis that the partial defence of diminished responsibility should have been put to the jury.

syndrome (BWS) to be attributed to the reasonable woman.[17] Further cases continued to blur the line between provocation and diminished responsibility.[18]

In view of these, and other criticisms, it was no surprise that the Law Commission undertook a project to review provocation alongside the other partial defences; or, indeed, when the Commission rejected loss of self-control as a defining element of its new version of provocation.[19] The Commission's scheme, though not its rejection of loss of self-control, forms the basis of the current law.

There was a lot to be said for abolishing provocation and not replacing it with anything else, and we discuss this briefly in the third part below. However, the case for abolition relies (in large part) on the removal of the mandatory sentence for murder, and, alas, for political reasons, the fixed penalty will be with us for a long time yet.[20] Because of that, mitigation of the fixed penalty has to be delivered by way of rules of substantive criminal law. But there is no reason why those rules should not be broadly framed and accommodating. We are not dealing with situations that require an acquittal. We are trying to identify situations where D, though killing V with intent to kill or cause serious harm, nonetheless, does not deserve a life sentence but typically will deserve a term of imprisonment. At the same time, the rules must not let off the hook persons who do deserve to be labelled and sentenced as a murderer. The partial defence of provocation failed to do this: it excluded persons who did not deserve a life sentence yet included persons who did deserve a life sentence.

---

17 D Nicolson and R Sanghvi, 'Battered women and provocation: the implications of *R v Ahluwalia*' [1993] Criminal Law Review 78. In favour of the approach in these cases it was argued that BWS was not a mental abnormality within the meaning of s 2 of the Homicide Act 1957, but a condition that would affect women of normal temperament and stability if subjected to sustained abuse.

18 It was well settled that while idiosyncrasies of D could be referenced to explain why D found V's conduct so offensive (eg mockery of an addiction), D's reaction to the conduct of V had to be judged against the standard of a reasonable person of D's age and gender: *Camplin* [1978] AC 705. The House of Lords disrupted this well-established doctrine in *Smith* [2001] 1 AC 146 and was criticised for doing so by the Privy Council in *A-G for Jersey v Holley* [2005] UKPC 23.

19 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) part 3.

20 The parliamentary process that led to the passing of the Murder (Abolition of the Death Penalty) Act 1965 was by way of a Private Members' Bill. To ensure the passage of the Bill to statute, the sponsors gave an undertaking that all murders would be punished by life imprisonment. Since then, all Home Secretaries of whatever party have rejected any proposal to remove the mandatory sentence.

PART 2: WHY DOES LOSS OF CONTROL FAIL AS A PARTIAL DEFENCE TO MURDER?

The essential task of the current partial defence of loss of control is still the same as the old defence of provocation, to identify persons who are not pleading diminished responsibility or insanity, yet do not merit the label of murderer even though the defining elements of that offence are proved. Loss of control is narrowly drawn: self-control must be lost because of (i) a 'qualifying trigger' of either a fear of serious violence from V or gravely wrong conduct which leaves D with a justifiable sense of being seriously wronged, of such character that (ii) a reasonable person in the same circumstances as D and of the same sex and age as D may have reacted in the same or similar way.

It is to be regretted that the Law Commission's recommendation as to the first of these requirements, that 'loss of self-control' should be abandoned as a constituent of any new partial defence to murder, was not followed.[21] Essentially, under the Commission's recommended scheme, the work done by the positive subjective requirement for a loss of self-control under the old law of provocation was to be replaced with a series of negative exclusions: the core of the defence would shift to the partially excusing reasons for D's conduct, qualified only with the requirement that such conduct was *not* done in consideration of revenge or deliberately instigated by D. There was notable criticism of this recommended approach from scholars concerned that the reformed defence might apply too widely,[22] and the Law Commission accepted that additional restrictions may have been required,[23] but the scheme was essentially coherent.

In retaining the requirement that D must have lost self-control, the new partial defence did not reject the exclusionary approach recommended by the Commission. Rather, the subjective positive requirement was simply overlaid as an additional (rather than alternative) approach. This has resulted in a confusion concerning the very rationale of the partial defence of loss of control. Loss of self-control is not given any mitigating force in its own right. That is made

21 Law Commission (n 19 above).

22 See, for example, R Holton and S Shute, 'Self-control in the modern provocation defence' (2007) 27(1) Oxford Journal of Legal Studies 49.

23 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) part 5, and particularly the options set out at para 5.32.

clear by the exclusion of sexual infidelity as a qualifying trigger.[24] The exclusion of this very common source of human distress must rest on the principle that losing self-control for an insufficient reason counts for nothing by way of mitigation. By contrast, killing as a response to a threat of serious violence or conduct that causes a justifiable sense of being seriously wronged brings into play the loss of control defence, but only if D lost self-control at the time he killed V.[25] So, in two sets of similar circumstances, which in both instances amount to qualifying triggers, if D1 retained self-control when killing V1 whereas D2 had lost self-control when he killed V2, only D2 may obtain a verdict of manslaughter rather than murder.

The relationship between elements within the loss of control defence has therefore continued to cause problems, with the subjective loss of self-control requirement sitting uncomfortably within a scheme for which it was not designed. It also remains problematic in isolation. What exactly is a loss of self-control within the meaning of this partial defence to murder? No definition is offered in the legislative provisions, despite its rejection by the Law Commission being at least partially based on its complex and inconsistent treatment at common law; prompting the Commission to label the requirement 'unnecessary and undesirable'.[26] The condition must still leave intact D's capacity to recognise and respond to a qualifying trigger and to form an intent to kill V or cause her serious harm. The loss of control need not be sudden, yet D must not act with a 'considered desire for revenge'.[27] When considering 'the circumstances of D', any feature of D which merely bears on his general capacity for tolerance and self-restraint' is to be disregarded.[28] The plea will fail if D incited V's otherwise provocative conduct to provide an excuse to use violence.[29] These conditions and exceptions are to be resolved by juries under judicial direction. They are not intended as questions for experts in the science of human behaviour such as psychologists or neuroscientists. But do these conditions and exceptions make any sense to such experts? Could such experts, if they were allowed to, help with the resolution of such questions?

---

24 Coroners and Justice Act 2009, s 55(6)(c). The exclusion of evidence of sexual infidelity is not as complete as might appear from this provision. Although sexual infidelity cannot be a qualifying trigger in its own right, it can be referenced if necessary, to explain the context and gravity of facts other than sexual infidelity that, taken in full context, explain why D had a justifiable sense of being seriously wronged by the conduct of V: *Clinton* [2012] EWCA Crim 2.

25 Coroners and Justice Act 2009, s 54(1)(a).

26 Law Commission (n 23 above) paras 5.17–5.19.

27 Coroners and Justice Act 2009, s 54(4).

28 Ibid s 55(3).

29 Ibid s 55(6)(a).

The problem of self-control

Is loss of self-control a robust concept supported by neuroscience or is it just a crude folk psychological expression used to describe people in emotional states of agitation? Is there, in terms of excuses, anything special about brain states which can lead to conduct (non-scientifically) described as the conduct of a person who has lost self-control contrasted with other criminogenic brain states leading to conduct which would be typically described (non-scientifically) as the product of volition or deliberation?

What loss of self-control means and what use it is as a concept requires examination: from foundational issues of free will and determinism (ie to what extent are we in 'control' of any decision or action?) through to more precise issues of degree and target. Clarity here is essential for the consistent and fair operation of the loss of control defence.

Is there any control to lose?

Arguably, there is something deeply problematic about partially excusing criminal acts arising from a mental state that a jury might find amounted to a loss of self-control, yet assuming full responsibility for conduct arising in the same or similar circumstances where D (in lay terms at least) retains self-control. Research in psychology and neuroscience teaches us that our thoughts, choices and actions are ultimately reducible to and explained by physical activity in increasingly well-characterised, but exceptionally complex, brain circuitries; circuitries developed and tuned by genetics, maturation[30] and experiential factors to process and react to external stimuli often outside of and separate from conscious deliberation and control.[31] Classic studies by Libet and others demonstrate how even complex decisions can be detected and predicted from looking at brain function, many seconds before subjects themselves report being aware of making their decisions.[32] These types of findings and the increasingly

30 It is well accepted that a person's neural possibilities following birth are not exclusively determined by genetics. Brain development can be greatly influenced for better or worse by nutrition, affection and care, or the lack thereof, together with educational processes and other social interactions.

31 Two acclaimed works, R Sapolsky, *Behave: The Biology of Humans at our Best and Worst* (Penguin 2017) and R Plomin, *Blueprint: How DNA Makes Us Who We Are* (Allen Lane 2018) give the general reader an excellent account of recent advances in neuroscience and behavioural genetics respectively.

32 B Libet et al, 'Time of conscious intention to act in relation to onset of cerebral activity (readiness-potential): the unconscious initiation of a freely voluntary act' (1983) 106 Brain 623; C S Soon et al, 'Predicting free choices for abstract intentions' (2013) 110 Proceedings of the National Academy of Sciences 6217.

reductionist and mechanistic view of how the brain generates action and thought has led some neuroscientists (and philosophers) to argue that criminal punishment based on what is for them an unwarranted assumption of free will is unethical.[33]

It may well be that at some point in the future the field of neuroscience will challenge the law on this most basic level, but the current state-of-the-art offers us little more than a suggestion. We will not rehearse the arguments here, and refer the reader to works by others,[34] but we should note that the mere fact that thoughts and actions can be reduced to physical mechanisms in our brains does not necessitate that such mechanisms operate in a deterministic manner to challenge our intuitions of free will. To date, the data are overwhelmingly consistent with such neural mechanisms acting in a probabilistic or stochastic manner, and little evidence suggests a level of predictability that would empirically support a deterministic view. Whether this reflects the actual workings of the brain mechanisms, or the fact that our understanding is (inevitably) incomplete and/or inaccurate is (and will likely remain) unclear.

Of course, criminal punishment will remain in any imaginable future. The vast majority of persons, even when prompted to consider a deterministic viewpoint,[35] believe in free will as a matter of lived experience: if P, after long and difficult reflection, finally decides on X rather than Y, she will very likely not believe you if you tell her it was always going to be X.[36] For the influential criminal law theorist Stephen Morse, a stable and a general belief in free will is all that is needed to justify the punishment of criminal acts.[37] Further, in a famous paper, Sir Peter Strawson argued most convincingly that, even if one takes determinism to be true, particular kinds of conduct will still

33 On the basis that no one should be punished (rather than restrained) in the absence of free choice. See D Pereboom, *Free Will, Agency and Meaning in Life* (Oxford University Press 2014) *passim* and Sapolsky (n 31 above) 580ff.

34 A Roskies, 'Neuroscientific challenges to free will and responsibility' (2006) 10 Trends in Cognitive Sciences 419.

35 E Nahmias et al, 'Surveying freedom: folk intuitions about free will and moral responsibility' (2005) 18 Philosophical Psychology 561.

36 There is often a disconnect between how things seem and what is actually the case. Taking a gentle stroll on a calm summer evening, it is impossible to believe that one is walking on a sphere hurtling through space. And, of course, scientific findings may be ignored or even suppressed if going with the science would be inconvenient.

37 Morse is content to affirm the primacy for criminal justice of what he terms folk psychology over science: 'Neuroscience for all its recent astonishing discoveries raises no new challenges [regarding] the existence and source and content of meaning of morals and purpose in human life.' See S Morse, 'The Neuroscientific non-challenge to Meaning, Morals and Purpose' in G D Caruso and O Flanagan (eds), *Neuroexistensialism* (Oxford University Press 2018) 333.

arouse strong negative reactions.[38] For him, these 'reactive attitudes' ensure the survival of adverse moral judgements leading to punitive responses. Suppose D kills V because he wanted to take his money. Even if we accept that D was neurologically predetermined to act in that way in those particular circumstances and agree that this throws doubt on whether he is culpable because culpability requires free will, we may, none the less, recoil from what he has done. And no one can doubt that V was gravely wronged and that public recognition of that fact is required.[39] Our response may well be different had D killed V while V was asleep in order to escape the regime of extreme abuse that D suffered under V.[40] Whether, in each of these different scenarios, it was possible to claim that D had lost self-control is therefore deeply and variously contested.

We are not arguing here that a legal system can/should accept that all conduct is determined and treat all forms of conduct on the same footing regardless of what kind of mental state D was in at the material time. However, by way of a starting point, it is useful to acknowledge the depths of theoretical conflict that lay beneath any engagement with 'control' as a definitional requirement. Defining a workable test of self-control for the purposes of the loss of control defence therefore requires us to identify and engage with a thinner model of that concept. In this manner, Morse is correct when he refers to provocation defences as 'irreducibly normative':[41] the law must normatively construct (as opposed to metaphysically discover) an appropriate meaning. Failing to define 'loss of self-control' within the 2009 Act, despite its vital role within the partial defence, therefore represents the central failure of its creators.

How much control must be lost?

Loss of self-control is discussed variously in terms of voluntariness and volition (ie our ability to make choices in movement), or in terms of rationality (ie our ability to reflect on and regulate choices in movement), and we return to this important distinction shortly.

38 P Strawson, 'Freedom and resentment' in Freedom and Resentment (Methuen 1974).

39 A belief in determinism is entirely compatible with a policy of deterrence. Effective deterrence may require a denunciatory and punitive criminal law.

40 The facts of *Ibrams* (1981) 74 Cr App R 154. The Court of Appeal confirmed his conviction for murder because there was no imminent threat of violence from V, as is required for self-defence, and no sudden loss of self-control by D as was then required for the applicable partial defence of provocation. The abuse that D suffered at the hands of V was so extreme as to prompt the presiding judge, Lawton LJ to write to the Home Secretary, recommending D's immediate release.

41 S Morse, 'The irreducibly normative nature of provocation/passion' (2009) 43 University of Michigan Journal of Law Reform 193.

However, whichever is preferred, it should be clear that the loss of control defence cannot require a *complete* loss of self-control. A complete and blameless loss of voluntariness or rationality will (and should) always result in an acquittal. The criminal law adjudicates such claims through the rules of automatism and insanity,[42] including the much-discussed 'psychological blow' cases where D claims to have experienced a complete loss of self-control following a psychologically traumatic event.[43] Where loss of self-control is required for a *partial* defence to murder, therefore, we must logically be looking for some lesser degree of impairment. The language of lost self-control can be read to imply something total and complete, likewise the use of 'involuntariness' in the context of duress. In both cases this is unfortunately misleading.

A finding of lost self-control is therefore compatible with a finding that D retained *some* level of volition or rationality, that he continued to make certain choices in action (such as intentional killing). This recognition is important when engaging with psychological critiques of the partial defence. For example, Sarah Sorial uses evidence from social psychology (as well as additional clinical data) to highlight the control maintained by provoked defendants in the regulation of their emotions and translation into conduct.[44] For Sorial, whilst accepting that 'intense anger can inhibit analytic processing',[45] evidence of various levels of control mean that we should abandon any partial defence of loss of control and instead focus on D's normative reasons in action. We have considerable sympathy for this conclusion, as we discuss in the next part. But, as must be remembered, the criticism observed here is primarily one of language: a loss of self-control requirement, in application, can only be targeting a certain point on a spectrum of volition or rational decision-making; and so, although the language may imply a *complete* loss of self-control (rightly criticised as incoherent within a partial defence), this is not the basis for the legal test. Thus, although the lack of precise definition for 'loss of self-control' is deeply problematic (as we continue to explore), evidence suggestive of a partial impairment of self-control is not.

Targeting a certain point within a spectrum of self-control brings obvious problems for the law, but we see such problems as inevitable (where this concept is used). Indeed, this is why partial impairments

42 See A P Simester et al, *Simester and Sullivan's Criminal Law* 7th edn (Hart 2019) chs 18–19.

43 See J Horder, 'Pleading involuntary lack of capacity' (1993) 53 Cambridge Law Journal 298.

44 S Sorial, 'Anger, provocation and loss of self-control: what does "losing it" really mean?' (2019) 13 Criminal Law and Philosophy 247.

45 Ibid 260.

are better dealt with at sentencing, where the range of disposal and punishment options provides a more appropriate mechanism for matching D's particular blameworthiness. When dealt with at the liability stage through the partial defences, threshold analysis becomes inevitable, but it is far from clear where such thresholds should be drawn and/or how they may be recognised reliably in the manner required for legal adjudication. Courts and academics may console themselves with metaphors of elastic that is stretched to a recognisable snap,[46] but where and how we identify that snap in the human condition remains rather more elusive.

Voluntariness or rationality?

The question here is fundamental, but again left open by the absence of a statutory definition of self-control: are we looking for a partial loss of voluntariness or volitional capacity (ie D's ability to make choices in conduct) or are we concerned with impaired rationality (ie D's ability to perceive and recognise, reflect on and to adjust those choices within his broader goals and values), or perhaps some combination of both? When thinking about the design and application of law, the first of these, the voluntariness test, has an obvious appeal. Voluntariness is a familiar marker of criminal responsibility and intuitively lends itself more easily to the threshold requirements of the liability stage. However, in line with other commentators such as Stephen Morse,[47] we do not accept that asking whether D's conduct was voluntary or involuntary is apposite. Where D kills V with intention to kill or cause grievous bodily harm, it is accurate to say that she has voluntarily chosen to do so (and if not, there would be no liability for murder). So, in this context, the only way to understand a claim of partial or impeded voluntariness would be something akin to an irresistible impulse.[48] But this is equally problematic, first, because we expect reasonable people to resist urges to do harm to others;[49] and, second, because in the absence of any mental condition with specific, identifiable symptoms, we lack the evidential tools to understand and quantify the push factors D claims to have experienced.[50]

The better approach, we contend, is to examine D's impaired rationality at the time of acting. In this manner, the relevant focus (when assessing loss of self-control) is not the overpowering of D's

46 See R Holton and S Shute, 'Self-control in the modern provocation defence' (2007) 27(1) Oxford Journal of Legal Studies 49.

47 S Morse, 'Culpability and control' (1994) 142 University of Pennsylvania Law Review 1587, 1650.

48 Ibid 1611–1619.

49 Usefully discussed in Sorial (n 44 above).

50 Morse (n 47 above) part 5.

willpower or ability to resist, but D's ability to rationally consider, self-monitor and evaluate the wider circumstances and options available to him; to 'fly straight' to use Morse's terminology.[51] Where D is faced with extreme antagonism or threat, it is coherent for him to claim that he could not process the situation (including his own responses) as he otherwise would/should have done; and this accords, as a human experience, with both the social and the neural sciences.[52]

Indeed, we know a lot about the various consequences that extreme antagonism or threat have on human cognitive capacities that feed into our ability to rationally make decisions, plan ahead, weigh our options and consider the consequences of our actions or inactions. For instance, in the lab, exposure to and/or experience of threats (eg expectancy of a painful shock; anxiety disorders) can enhance the detection and impact of potential harmful or aversive stimuli, by lowering sensory-perceptual thresholds, enhancing/biasing attention towards threatening cues (though the data are less consistent), enhancing long-term (but not short-term) memory storage, and more complex effects on executive function and decision-making (eg increasing or decreasing risk avoidance).[53] Critical is that some of these effects are seen with both acute and more sustained threat experiences, whereas others vary with the type and duration of exposure/experience. But, equally, a phenomenon of learned helplessness shows us that sustained or repeated exposure to unpredictable and uncontrollable threats can produce profound (pathological) changes in the behaviour of animals, leading to apathy, depression-type symptoms and especially a severe and sustained inability to develop and/or initiate escape responses (ie animals learned that 'nothing they did mattered').[54]

The literature in these areas is vast, and modern neuroscience is revealing the underlying brain changes. But the more general point here is that a focus on rationality and the cognitive, emotional or otherwise capacities that affect our ability to regulate our decisions and actions, (and that allow us to 'fly straight') provides us with identifiable targets. Targets that can be operationalised and measured and, therefore, better understood for legal purposes, with the help of research findings produced in the psychology and neuroscience laboratory.

---

51 Ibid 1605.

52 See L Claydon and C Rödiger, 'Fear, loss of control and cognitive neuroscience' (2016) 22(2) European Journal of Current Legal Issues.

53 O J Robinson et al, 'The impact of anxiety upon cognition: perspectives from human threat of shock studies' (2013) 17(7) Frontiers in Human Neuroscience 203.

54 S F Maier and M E Seligman, 'Learned helplessness at fifty: insights from neuroscience' (2016) 123 Psychological Review 349.

Where D's fear or anger-related impaired rationality leads to D killing V, such conduct is clearly not fully excused; it is still an expression of D's intentions and goals. However, as a partial concession to human frailty, D's compromised ability to rationally self-regulate does provide plausible grounds for partial mitigation; particularly where this is combined with objective tests within the loss of control defence (ie the need for a justifiable sense of being seriously wronged, and the requirement that a reasonable person in the same position might have done likewise). The difficulty with this approach, however, is that the relevant point of impairment along the possible spectrum remains open to interpretation and remains elusive as a fact to be demonstrated (or challenged) in evidence.

How is the test applied in practice?

The courts have faced an unenviable task when interpreting and applying the subjective loss of self-control requirement: a requirement without statutory definition, which leaves the fundamental uncertainties just discussed for the court to resolve; a requirement that will inevitably have a significant effect on the boundaries of the partial defence; and a requirement, it should be remembered, that the Law Commission's recommended scheme (most of which was incorporated into the loss of control defence) was specifically designed to exclude. The reform also presented a confused picture on the usefulness of previous case law engaging with the meaning of self-control that might otherwise have assisted the courts. For example, by excluding the requirement that D's loss of self-control need be 'sudden and temporary', and by highlighting the need to avoid inappropriately gendered interpretations, Parliament clearly signalled its desire for a change. However, in failing to articulate the direction of this change in terms of an alternative definition, uncertainty has prevailed.[55]

The first major cases to reach the Court of Appeal reflect this uncertainty. In *Clinton*,[56] the Lord Chief Justice emphasised that loss of self-control no longer needs to be sudden or temporary, and that both men and women may lose self-control, but he then qualified this with the observation that 'where there is a genuine loss of control, the remaining components [of the partial defence] are likely to arise for

55 For example, even within the Explanatory Notes for the 2009 Act, when highlighting that a loss of self-control need not be 'sudden and temporary', this is qualified by the observation that 'delay' between provocation and loss of control remains a key consideration for both judge and jury. Coroners and Justice Act 2009, Explanatory Notes, para 337.

56 [2012] EWCA Crim 2.

consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used'.[57] Similarly, in *Dawes*,[58] although the court went further than *Clinton* to explicitly recognise the potential for 'cumulative impact' where D is antagonised over a period of time,[59] old tropes about the meaning of self-control quickly re-emerged when applying law to facts (for example, the observation that D was 'shocked rather than angry').[60] In this manner, both cases appear to tread carefully, avoiding detailed criteria or definitions for the application of loss of self-control. But in doing so, both in analysis and application, they suggest that little may have changed from the previous law.

A major concern in early commentaries was that the loss of self-control requirement would continue to be interpreted on the basis of an imprecise folk-psychological association between lost control and extreme anger, and would continue to exclude slow-burn scenarios such as the BWS cases introduced earlier.[61] There was little in the initial case law to displace such concerns. Indeed, in the case of *Charles*,[62] not only did the Court of Appeal focus on D's apparent voluntariness, but it went on to highlight the nature of V's physical injuries as evidence that D had not 'gone berserk' at the time of killing.[63] The court here seems to take an exceptionally narrow approach to loss of self-control, equating it with the loss of physical motor control and/or coordination – an approach that was convincingly critiqued over 40 years ago.[64] To the extent that courts here were engaging with the questions we raise in the preceding sections, their answers remained (at best) confused.

A potential shift can be identified from the subsequent case of *Jewell*.[65] *Jewell* is an important case because, although not involving BWS, D was intimidated and provoked over a period of weeks and acted to kill V in the absence of any immediately provocative act. As a result, the Court of Appeal were forced to engage with the possibility of a loss of self-control due to an accumulated impact on rationality in a manner that had not been previously required under the new law. Crucially, in analysis, the Court of Appeal adopted a definition for the loss of

57 Ibid para 9.
58 [2013] EWCA Crim 322.
59 Ibid para 54.
60 Ibid para 64.
61 See, for example, S Edwards, 'Loss of self-control: when his anger is worth more than her fear'; B Mitchell, 'Loss of self-control under the Coroners and Justice Act 2009: oh no!' both in Reed and Bohlander (eds) (n 5 above)
62 [2013] EWCA Crim 1205.
63 Ibid para 20.
64 A Ashworth, 'The doctrine of provocation' (1976) 35 Cambridge Law Journal 292.
65 [2014] EWCA Crim 414.

self-control that also pointed towards an analysis of rationality over simple volitional control. For the court, loss of self-control should be equated with 'a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning'.[66]

Despite this apparent shift within *Jewell* in terms of the *analysis* of self-control, however, the *application* of the law in this case (and the cases that have followed it) demonstrate (again) that little may have changed. In *Jewell* itself, for example, despite endorsing a test based on impaired 'judgment' and 'reasoning', the court went on to conclude that evidence of a 12-hour cooling-off period made the judicial decision not to leave loss of control to the jury 'inevitable', 'overwhelming'[67] and 'unimpugnable'.[68] This was despite D's description of feeling trapped in the circumstances,[69] and despite D displaying a 'kamikaze' type of behaviour that was 'spectacularly out of character'.[70] The point here is not that loss of control should necessarily have succeeded on the facts, but simply to emphasise a potential instability in the application of the new loss of self-control test, and the temptation of falling back upon traditional volition-based markers. Indeed, the subsequent case of *Gurpinar* arguably takes us back to square one.[71] First, the Lord Chief Justice declined to endorse the definition of loss of self-control from *Jewell* when challenged by the Crown.[72] And, second, in application of the law, the court unhelpfully focuses on voluntariness and (again) physical motor control, emphasising evidence that '[t]he video made it clear that Gurpinar delivered one thrusting blow with the knife which was plainly aimed at the deceased's chest'.[73] On the meaning of loss of self-control, therefore, both as to target and threshold, the law remains confused and detached from scientific understandings. Correcting this, however, is far from straightforward, and we repeat our recognition of the difficult position in which the courts have been placed. As a starting point, we need further clarity as to our reformative ambitions.

PART 3: WHAT DOES THE IDEAL DEFENCE LOOK LIKE?

In many respects, the loss of control partial defence is an improvement from provocation. The requirement that D must have a justifiable sense of being seriously wronged arising from conduct of an extremely grave

66 Ibid para 24. The definition is taken from D Ormerod, *Smith & Hogan's Criminal Law* 13th edn (Oxford University Press 2011).
67 Ibid para 52.
68 Ibid para 55.
69 Ibid para 30.
70 Ibid para 27.
71 [2015] EWCA Crim 178.
72 Ibid para 19–20.
73 Ibid para 55.

character will ensure that cases such as *Doughty*,[74] where D claimed he was 'provoked' by a crying child, will no longer be candidates for partial excuse.[75] It is also useful to explicitly inform judges that they can withdraw this partial defence it they consider no reasonable jury could find for D.[76] The exclusion of sexual infidelity as a qualifying trigger, though not without its difficulties,[77] should mean that some of the most troubling cases of successful provocation pleas will not recur.

However, as discussed in the second part of this article, the continued failings of the loss of control defence require us to consider alternatives. We will next consider what, from a blank slate perspective, would be the ideal replacement. But, of course, there is no blank slate; the partial defence of loss of control is not going anywhere soon. The point of attempting to sketch a better replacement is to test the extent to which loss of self-control jurisprudence can be interpreted (particularly by the Supreme Court) towards that ideal.

Abolition of the mandatory sentence

The most obvious solution to the loss of control debate (though often remaining an unspoken elephant in the room)[78] is the abolition of the mandatory life sentence for murder, allowing for the subsequent abolition of loss of control as a partial defence. All serious studies of the fixed penalty for murder have recommended its abolition,[79] principally because murder, like other serious offences, embraces conduct of different degrees of turpitude, from the slaughter of concert-goers to the reluctant killing of a loved one for reasons of compassion. In this manner, allowing trial judges' discretion when sentencing those convicted of murder would provide a benefit in its own right. A collateral benefit arising from the abolition of the fixed penalty would be to give up on trying to capture what are essentially matters of circumstantial mitigation by rules of law and turn instead to the guided discretion of sentencing.[80]

---

74 (1986) 83 Cr App R 260.

75 Judging whether it was justifiable for D to consider V's conduct gravely wrong may involve difficult cultural issues, but this seems unavoidable.

76 Coroners and Justice Act 2009, s 54(6).

77 Sexual infidelity rather than sexual jealousy must assume a relationship that excludes other sexual partners. The phrase most comfortably sits with the sex act itself but may well go beyond it. See further *Clinton* [2012] EWCA Crim 2.

78 See A Cornford, 'Mitigating murder' (2016) 10(1) Criminal Law and Philosophy 31, reviewing the Reed and Bohlander collection (n 5 above).

79 *Report of the Advisory Council on the Penal System: Sentences of Imprisonment* (1978) paras 235–254; House of Lords Select Committee on Murder and Life Imprisonment (Session 1988–1989), HL Paper 78, paras 108–118.

80 For proposals for a radical simplification of the law of homicide, see L Blom-Cooper and T Morris, *Fine Lines and Distinctions: Murder, Manslaughter and the Unlawful Taking of Human Life* (Waterside Press 2011).

We endorse this approach as the best way forward for the law. But we do not do so naively. Even where the loss of self-control discussion moves to the sentencing stage, as we typically see in civil law jurisdictions (and across several common law jurisdictions as well),[81] issues around extreme emotion and/or loss of rationality remain contested subjects of mitigation. It is also far from self-evident that, when moved to sentencing, BWS cases will receive greater mitigation than traditional paradigms of provocation.[82] Rather, we favour this approach because we see the sentencing stage as the best place to represent D's blame across a spectrum of rationality impairment.[83]

A partial defence of 'extenuating circumstances'

Our preference for abolition is stated briefly in the previous section because, for the next decade at least, the potential for reform of that kind is extremely (politically) remote. In this next subsection we move to a more realistic option, though one that would still require statutory reform: an amended partial defence of 'extenuating circumstances'.[84] Alas, even here, the prospect of reform is slim.[85] However, in setting out this option we begin to see more clearly a set of ideals that might guide future interpretations of the current law, a subject we turn to directly in the sections that follow.

The idea behind the phrase 'extenuating circumstances' is simple. On a charge of murder, it would, on appropriate facts, be left to the jury to find if it were reasonably possible that at the time that D killed V there were circumstances that made a manslaughter verdict more morally fitting than a murder verdict. Would the situation facing D when he killed V raise the possibility that a person of D's sex and age, with a normal degree of tolerance and self-restraint, would or might also have reacted in the same or similar way. The fact that D was voluntarily intoxicated when he killed V, and likely would not have killed but for being disinhibited, would not of itself undermine the partial defence provided a sober person might have reacted in the same or similar way. It would be for the judge to rule whether the evidence given on behalf

81 See the extremely useful comparative chapters in Reed and Bohlander (eds) (n 5 above).

82 See eg the discussion of German law in Claydon and Rödiger (n 52 above).

83 Namely, avoiding the threshold analysis required at the liability stage.

84 A version of this approach is usefully outlined in J Spencer, 'Lifting the life sentence' (2009) Archbold News 5. It is employed in Israel and the French Penal Code, Article 345.

85 An amendment based on Spencer's recommendations was put forward in the House of Lords during the passage of the 2009 Act, but it was not accepted. It was perceived (negatively) as an erosion of the mandatory life sentence. See HL Deb 26 October 2009, cols 1008–1009.

of D might amount to extenuating circumstances. It would be for the jury to find whether they do.

This partial defence is not tied down to any psychological effect that the conduct of V had on D: in particular, there need be no evidence suggestive that D may have lost self-control when she killed V. The English and Welsh Law Commission when pondering a replacement for provocation identified the requirement for loss of self-control as the most troublesome element of the partial defence of provocation, and we agree that moving away from such a requirement (as a substantive rule at the liability stage) would provide significant benefits for the law.

What should count as an extenuating circumstance would ultimately be left at large. Which is not to say that certain circumstances that are likely to recur in other cases cannot be set down in legislation. But there may be other exceptional circumstances which might cause persons of normal sensibility to react in the same or similar way to D. The judge should be left free to identify such cases as and when they come up. It would be for the judge to rule whether the facts adduced on behalf of D can amount to an exceptional circumstance, and, if she thinks that they might, it would be for the jury to find whether they do. Unlike the current loss of control partial defence, there would be no restrictions on the kind of circumstances that can partially excuse. The fact that D killed his wife V because of her affair with P – and could be said to have taken revenge against V and P – would not *per se* exclude him from this proposed partial defence. As the decision in *Clinton* demonstrates,[86] courts will evade *ex ante* restrictions on what kind of circumstances can partially excuse if justice requires the whole story to be told. Judgments about culpability should be taken *ex post* on all the available evidence. As is the case at present, a judge can decide not to put this partial defence to the jury if she considers that no reasonable jury could find in favour of D on the evidence put on his behalf.

Fear of serious violence is an obvious example of an extenuating circumstance. At present such a fear must at some point lead to a loss of self-control if murder is to be reduced to manslaughter. The principal reason given for this loss of self-control requirement was the fear that without it too many gangland killings would be partially excused. But a gangland killing would only be so favoured if the judge thought that the circumstances of the killing could amount to extenuating circumstances and the jury found that such were present. Freed from the loss of self-control restraint, a broader swathe of conduct that is essentially fearful and defensive rather than aggressive would be exempted from the fixed penalty for murder. As self-defence leads to acquittal, it is

86 [2012] EWCA Crim 2.

understandable that it is bounded by requirements of immediacy and proportionality, but their absence should not mean that pre-emptive or excessive responses triggered by a fear of serious violence should not qualify for partial excuse. Furthermore, the exclusion of duress as a defence to murder would be tempered: there is no reason to block consideration of duress in the context of partial excuse.

It would be appropriate to retain within this partial defence responses to things done or said which made for circumstances of extremely grave character causing D to have a justifiable sense of being seriously wronged. But, with the need for loss of self-control removed, some caution is required. Feelings of being seriously wronged may be very culturally specific. A father may be outraged that his daughter will not marry the man chosen for her, or, even more distressing perhaps, a daughter who renounces the faith she was brought up to follow. Yet, in a liberal democracy, choosing whom to marry or not marry and what faith to follow, if any, are fundamental freedoms. A judge should have this very much to the forefront of her mind when a killing by way of response to a culturally specific wrong is argued to be manslaughter rather than murder.

Though it is useful to specify what might make for extenuating circumstances, there should not be a closed list. The judge should be left leeway for the exceptional case, such as *Wallace*.[87] V ended his relationship with D. While V slept, D doused him with acid to devastating effect: V was paralysed from the neck downwards, blinded and in incessant pain. V sought and received a lawful lethal injection in Belgium. The Court of Appeal considered it was foreseeable that V would wish his life to end. All blame was focused on D. She was ultimately convicted of an offence against the person. Had the lethal injection taken place in the UK, the doctor (or any non-doctor) would have been guilty of murder. The legal position is well established; there is no shifting of it in the foreseeable future. But one need not take any position on the sanctity of life/euthanasia debate to question whether a person acceding to a perfectly understandable request for the relief that only death can bring for certain conditions should be punished as a murderer.[88] Sanctity of life zealots can take comfort from the fact that a manslaughter verdict still concedes that euthanasia remains unlawful, yet punished in a less draconian fashion.

87 [2018] EWCA Crim 690. A P Simester and G R Sullivan, 'Causing euthanasia' (2019) 135 Law Quarterly Review 21.

88 See also *Cocker* [1989] Crim LR 740: a tragic case in which D's caution when killing his terminally ill wife demonstrated that he was not out of control, and thus outside the provocation defence.

Looking to the courts

Recognising the limited potential for legislative reform, we find ourselves appealing to the interpretive powers of the higher courts. This is not our ideal response to the problems we have identified in the preceding sections, but, in our view, it does have the best potential for making the kind of changes that are needed now. The appellate courts, and particularly the Supreme Court, have demonstrated a willingness in recent years to abandon common law precepts (even those that have been in place for decades) if it is deemed necessary for reasons of fairness and coherence across the law: examples in the criminal law include the abolition of joint enterprise in *Jogee*[89] and the redefinition of dishonesty in *Ivey*.[90] It is a controversial trend in decision-making,[91] but arguably a necessary one at a time when legislative corrections to the substantive criminal law (in all but the most politically expedient areas) have become extremely rare. Indeed, the recent case of *Barton* has expanded the potential for judicial correction still further, with a specially constituted five-member Court of Appeal Criminal Division explicitly accepting the potential for Supreme Court precedent to emerge from unanimous *obiter* declarations.[92]

In what follows, we do not contend that the courts should abandon a form of liability as they did for complicity and the joint enterprise doctrine, or that they should reinterpret a settled common law concept as they did with 'dishonesty'. Rather, in the context of the partial defence of loss of control, we simply encourage the courts to reinterpret a defence requirement (ie loss of self-control) to ensure that it can be fairly and consistently applied. As we discuss in the final part below, we contend that such interpretation should be as expansive as possible, refocusing the test of self-control to D's rationality rather than his volitional capacity.

PART 4: THE ROLE OF THE APPEAL COURTS

An important starting point is that the current partial defence of loss of control is failing, as discussed in the second part. There is a lot to be said for the new objective elements introduced via the Law Commission's recommendations: remodelling the qualifying triggers to ensure

89 [2016] UKSC 8.

90 *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, confirmed in *Barton* [2020] EWCA Crim 575.

91 See, for example, F Stark, 'The demise of "parasitic accessorial liability": substantive judicial law reform, not common law housekeeping' (2016) 75 Cambridge Law Journal 550; and, generally, B Krebs (ed), *Accessorial Liability after Jogee* (Hart 2020).

92 *Barton* [2020] EWCA Crim 575, paras 93–105.

that the defence only applies to 'serious' and 'justifiable' prompts;[93] introducing a new exclusion where D acts in a 'considered desire for revenge';[94] and (to some extent at least) clarifying the requirement that a reasonable person in D's position might have been caused to act similarly.[95] However, the positive subjective requirement that D must have lost self-control at the point of killing remains deeply confused and problematic, both in terms of clarity of target and threshold for application. Unfortunately, just as the courts struggled to interpret and apply the equivalent requirement to the old law of provocation, the first decade of the loss of control defence has failed to mark a significant change.

Such change is possible, however, and it is possible through reinterpretation and clarification in the appellate courts. Essentially, in line with our discussion from parts two and three above, we call on the courts to abandon and reject any interpretation of self-control within the partial defence that appeals to folk-psychological notions of lost volitional capacity: the scientific basis for partial volitional impairment as a mitigating factor is (at best) contested, and the evidential mechanisms available to test it in application lie in unhelpful metaphor and storytelling.[96] Rather, 'loss of self-control' should be interpreted expansively, asking whether the circumstances impaired D's ability to make considered and rational judgements in action, an impairment that made 'flying straight' improbable and induced conduct that otherwise would not have occurred. As we discussed in part two, this interpretation has the advantage of greater scientific validity and measurability as a source of partial mitigation. And of equal importance, in line with our normative analysis in part three, it has the effect of relegating loss of self-control to a secondary issue in all but the most exceptional of cases. Where D has not acted in a considered desire for revenge, and where we agree that a normal person in D's position might also have killed with intention to kill or cause serious harm, it may safely be assumed that D's rationality was impeded.

We recognise that some will see this reinterpretation as overly generous to D, and there is some evidence that broad partial defences can become equally problematic in different ways.[97] However, against

93 Coroners and Justice Act 2009, s 55.

94 Ibid s 54(4).

95 Ibid s 54(1)(c). Usefully discussed in *Rejmanski & Gassman* [2017] EWCA Crim 2061.

96 See Morse (n 47 above) and Sorial (n 44 above).

97 For example, see discussion of 'extreme emotional disturbance' within the US Model Penal Code, s 1.12(2), in A Reed and N Wake, 'Anglo-American perspectives on partial defences' in Reed and Bohlander (eds) (n 5 above) Cf, in the same volume, P Robinson, 'Abnormal mental state mitigations or murder: the US perspective'.

this, and in line with our discussion in part three of this article, two points should be emphasised. First, it must be remembered that loss of control is a *partial* defence: we are not therefore engaged in a search for the conditions of legitimate excuse as we see for other *complete* defences; but should rather perceive its function more in line with a mitigation of sentence. Secondly, unlike a broad 'extenuating circumstances' partial defence, or the US focus on 'extreme emotional disturbance', the loss of control defence already includes a host of objective requirements that are capable of excluding unmerited applications.[98]

Curiously, we do not believe that any great reinterpretation of the law is required to meet these desired ends. As we discussed in the second part above, the Court of Appeal in *Jewell* has already endorsed a definition of loss of self-control that is *broadly* in line with what is called for in this article: 'a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning'.[99] This definition should be explicitly endorsed in future cases. And, more importantly, the *application* of the law must be brought into line with the rationality focus that this definition centres around: questions of rational judgement do not necessarily turn on time delays before killing and are certainly not undermined by evidence of physical control in movement. The fallacies and folk psychology of the old provocation defence must be set to one side.

In most cases, we believe that our broader rationality-based interpretation of self-control can be applied by courts with little difficulty. As explained above, we can assume a finding of loss of self-control being made whenever the other objective criteria within the partial defence are met. However, we would highlight that certain experiences of impaired rationality should be presumed outside the experience of the court, and so expert evidence may be appropriate to understand how a 'reasonable person' might resort to killing in those circumstances. We are chiefly referring to cases of abused women (it typically is women) who kill their abusers in circumstances of apparent calm and safety, though we would not limit it to such cases. The idea here is not to explain symptoms of a mental illness, better dealt with within the partial defence of diminished responsibility, but to explain the cumulative impact of abuse upon a 'normal' but rationally impaired mind.[100]

98 See, for example, *Davies-Jones* [2013] EWCA Crim 2809, discussing the revenge exclusion as a logical precursor to an investigation of D's potential loss of self-control.

99 [2014] EWCA Crim 414, para 24.

100 See useful discussion of such evidence in Queensland in Claydon and Rödiger (n 52 above) part 4.

CONCLUSION

The loss of control defence represents a partial concession to human frailty; it does not excuse or justify D's choices in killing V. However, to the extent that such concession is appropriate, particularly in circumstances of a mandatory life sentence for murder, we believe that it should be interpreted broadly to include all cases where D's rational decision-making was seriously impaired as a result of a qualifying trigger. In such cases, D should be convicted of manslaughter where his sentence can more accurately reflect the blameworthiness of his actions. Such a change would, we contend, make the law more defensible, including in its scientific credibility and, more importantly, make it fairer and more consistent in application. Such change is within the appropriate powers of the court.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 224–244
Article DOI: 10.53386/nilq.v72i2.873

What's happening with the reformed diminished responsibility plea?

Ronnie Mackay*

De Montfort University
Correspondence email:rdm@dmu.ac.uk

ABSTRACT

The reformed section 2 of the Homicide Act 1957 is markedly different from the original provision. Despite this, the 'official line' has been that the changes to the plea were merely ones of 'clarification' and 'modernisation'. This article analyses the requirements of the new section 2 in the context of the results of an empirical study into the operation of the new plea carried out by myself and Professor Barry Mitchell. In doing so, it attempts to evaluate the changes which have taken place through an analysis of a sample of 90 cases involving the new plea. The results of the study are discussed in order to assess the validity of the 'official line'. Is it correct, or have the new elements in section 2 resulted in unintended consequences?

Keywords: diminished responsibility; homicide; partial defences; reform; Law Commission; Ministry of Justice; modernisation; contested cases.

INTRODUCTION

It is now over 10 years since the diminished responsibility plea was reformed in the Coroners and Justice Act 2009 as a result of recommendations proposed by the Law Commission and taken forward by the Ministry of Justice (MOJ). As such, this article clearly sets out to re-evaluate the 'official line' which continues to persist, that the changes to the diminished responsibility plea were ones of 'clarification' and 'modernisation'. It does so by examining the plea's requirements in the context of an empirical study (the only one to date which exists). The data from the study, it is argued, supports the contention that the new section 2 has resulted in unintended consequences, including more contested pleas, and a corresponding increase in the number of murder convictions. These findings, supported by the study, give the article's empirical contribution to the literature.

* Professor of Criminal Policy and Mental Health, Leicester De Montfort Law School. With thanks to David Hughes (formerly of the Law Commission) for his helpful comments on an earlier draft of this article.

The diminished responsibility plea has undergone reform and contains significant changes from how it was originally drafted.[1] The original provision contained in section 2 of the 1957 Homicide Act reads:

> 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 in doing or being a party to the killing.

This was replaced by section 52 of the Coroners and Justice Act 2009 which provides:

> 52 **Persons suffering from diminished responsibility (England and Wales)**
>
> (1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—
>
> "(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 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."

This has led the appellate courts to remark on how the new plea is more structured and more open to medical scrutiny in the form of expert psychiatric input. In particular, the Supreme Court endorsed

---

1 For discussion, see 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 2019) ch 2: Louise Kennefick 'Introducing a new diminished responsibility defence for England and Wales' (2011) 74 Modern Law Review 750.

this in *Golds*[2] when, in the course of his judgment (in which the other members of the court concurred), Lord Hughes stated:

> .... medical evidence (nearly always forensic psychiatric evidence) has always been a practical necessity where the issue is diminished responsibility. If anything, the 2009 changes to the law have emphasised this necessity by tying the partial defence more clearly to a recognised medical condition, although in practice this was always required.[3]

The changes which have taken place were the result of the Law Commission's recommendations which were taken forward by the MOJ. Thus, in the Circular dealing with the new plea issued by the Criminal Policy Unit of the MOJ it is stated that: 'It replaces the existing definition of the partial defence with a new, more modern one.'[4] A similar view was expressed by Maria Eagle MP, the then Parliamentary Under-Secretary of State, saying, 'We do not believe that the changes we are proposing to diminished responsibility will change the numbers enormously; it is really just a clarification of the way in which that defence works.'[5] A month later the same minister summarised the changes as follows:

> Our change of wording for the partial defence is designed to make the law clearer, easier, more modern and better able to move into the future. The definition should be easily understood rather than left behind by medical developments, as the current one arguably has been.[6]

THE OPERATION OF THE NEW PLEA

At the outset it should be noted that, although the wording of the original section 2 had been the subject of much criticism, the Law Commission, drawing on my empirical research which it had commissioned, concluded:

> Our view is that for the time being, and pending any full consideration of murder, section 2 should remain unreformed. There appears to be no great dissatisfaction with the operation of the defence and this is consistent with our consideration of the results of Professor Mackay's investigation of the defence in practice.[7]

---

2 [2016] UKSC 61.

3 Ibid [38].

4 Circular 2010/13, *Partial defences to murder: loss of control and diminished responsibility; and infanticide: Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009* (MOJ, 4 October 2010) [5].

5 Coroners and Justice Bill, Public Bill Committee, 3 February 2009, col 8.

6 Ibid 3 March 2009 col 416.

7 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) [5.86]. My empirical study can be found at appendix B of that Report.

That study presented data relating to 157 defendants where the diminished responsibility plea was clearly an issue of relevance within the trial process from which it appeared that the plea was operating in a broadly pragmatic but satisfactory manner. Certainly, there was no suggestion that the plea was being abused or that the defendants who were subject to such manslaughter convictions were somehow wrongly avoiding murder convictions. In short, while this was the nature of criticism aimed at the provocation plea, the same could not be said for diminished responsibility. Nevertheless, the Commission decided that it was appropriate after further consultation to recommend adoption of a reformulated definition of the plea 'developed from a definition adopted in the state of New South Wales in 1997'.[8] This, in turn, was taken forward by the MOJ and duly enacted in the 2009 Act.

The new plea is worded very differently from that of the original section 2 of the Homicide Act. In a paper discussing this, I pointed out that little remains of the old plea. Instead, most elements have been replaced in order to ensure that the plea 'has a basis on both valid medical diagnoses and in specifying how a defendant's abilities are to be impaired for the defence to succeed'.[9] In an attempt to gain some understanding of how the new plea is operating in practice, Professor Barry Mitchell and myself were able to examine 90 cases[10] involving the new plea (the CPS study) and compare them with the 157 cases dealt with under the old plea in my Law Commission study. We did this in the hope of assessing 'whether the "official" view of the new plea referred to above is correct or whether the reformulated section 2 goes further and is more far reaching in scope'.[11] The results of this study are informative for a number of reasons. First, in terms of demographics, there were no obvious contrasts between the two studies. In addition, there was considerable consistency in the method of killing with the use of a 'sharp instrument' predominating in both studies. Further, although the four most common primary diagnoses in both studies were schizophrenia, depression, personality disorder and psychosis (but with some slight variations), the relationship between those diagnoses and whether there was a jury trial or not gave rise to interesting results which were described as follows:

---

8 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) [5.112].

9 Ronnie Mackay, 'The new diminished responsibility plea' [2010] Criminal Law Review 290, 293.

10 All 90 cases are from England and Wales. The study does not include any cases from Northern Ireland.

11 Ronnie Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] Criminal Law Review 18, 23.

> Although more than half (56.7%) the cases in the CPS study were dealt with by way of guilty plea, there was a trial in most of the personality disorder cases (12 of the 15). (In the earlier Law Commission study there was no trial in two-thirds of the personality disorder cases.) In addition ... those cases where the 'recognised medical condition' was schizophrenia – and, to a slightly lesser extent, psychosis – remained very likely to be dealt with by way of guilty plea.[12]

These findings need to be considered in the context of the study of the new law (the CPS study) which found a higher proportion of cases being dealt with as jury trials (43.3 per cent) than under the Law Commission study of the old law (22.9 per cent). This, in turn, resulted in a higher proportion of murder verdicts in the CPS study than in the Law Commission research – 34.4 per cent compared to 14 per cent. Although these results must be considered with caution, a possible conclusion is that there has been a shift in the number of contested cases under the new law resulting in an increase in murder convictions and that this, in turn, may partly be tied into the diagnosis used to support a diminished responsibility plea with personality disorder in particular now more likely to lead to contested trials. However, the other novel elements contained in the new section 2 are also likely to have a role to play in relation to the increase in jury trials, and, in that connection, this article will now consider each of these elements in turn.

THE NEW SECTION 2

Under the new/current law the defence must satisfy the court on a balance of probabilities that:

1 D was suffering from an abnormality of mental functioning which:
2 arose from a recognised medical condition;
3 substantially impaired D's ability to do one or more of (a) understand the nature of his conduct; (b) form a rational judgment; or (c) exercise self-control;
4 provides an explanation for D's acts or omissions in the killing – and the 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 his conduct.

What is immediately apparent is that these requirements are all novel with the exception of the phrase 'substantially impaired' which itself has ironically undergone major reinterpretation as a result of the Supreme Court's decision in *Golds*,[13] examined below. However, before the issue of impairment is considered, I will first briefly discuss the first two

12 Ibid 32.
13 *Golds* (n 2 above).

novel factors. It is clear that the requirement 'an abnormality of mental functioning' was inserted into the new section 2 as it was preferred by psychiatrists as being one upon which they could express an expert opinion.[14] However, although it is a wide concept, it is also clear that it is inextricably tied to the need for a 'recognised medical condition' and that if the 'abnormality of mental functioning' suffered by D did not arise from such a condition then the plea will fail. If confirmation of this basic point is needed, it can be found in *R v Lindo*[15] where Hallet VP, in a case dealing with a drug-induced psychosis, dismissed D's appeal against his murder conviction, stating:

> ... we turn to the judge's directions on diminished responsibility. It is important to focus on the issues as presented to the jury. It was common ground that the appellant was in a prodromal or at risk state for paranoid schizophrenia, he was in a state of psychosis, and the state of psychosis was drug-induced. It was in dispute whether the abnormality of functioning arose from a recognised medical condition. The only candidate for a recognised medical condition left to the jury was drug-induced psychosis in the context of an underlying prodromal, state. In that context, in our view, the judge's directions taken as a whole left the issue of diminished responsibility to the jury in as fair and generous a way possible.[16]

Thus, although there was clear evidence of an 'abnormality of mental functioning', the court applied the decision in *R v Dowds*[17] to the effect that a recognised medical condition grounded in self-induced intoxication will not suffice as evidence of a 'recognised medical condition' for the purposes of section 2. Hughes LJ in *R v Dowds* put it this way:

> It is enough to say that it is quite clear 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. 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.[18]

Clearly, therefore, whether any medical condition is 'recognised' as falling within section 2 is a question of law rather than one of medicine. This is not to say that the legal position is uncomplicated as the role of voluntary intoxication within the new section 2 and its relationship to other mental health issues and psychiatric conditions from which

14 Law Commission (n 8 above) [5.114].
15 [2016] EWCA Crim 1940.
16 Ibid [61].
17 [2012] EWCA Crim 281.
18 Ibid [40].

D may have been suffering has given rise to considerable litigation.[19] For example, in *R v Foy*[20] the primary issue in relation to diminished responsibility concerned a dispute amongst the medical experts as to the roles which drugs and alcohol and a concurrent medical condition played in the homicide. In rejecting the proposed fresh medical evidence Davis LJ concluded that describing D's abnormality of mental functioning as being 'caused by the recognised medical condition of an acute psychotic episode' was 'tautologous'[21] and that, excluding the involvement of the voluntarily ingested alcohol and drugs, there was 'simply no solid basis for asserting an abnormality of mental functioning arising from a recognised medical condition which substantially impaired the appellant's ability in the relevant respects and which provided an explanation (in the sense of the statute) for his acts'.[22] Further, it is interesting to note that a medical condition described by the defence expert as an 'abnormal personality structure' was referred to by Davis LJ as not being a recognised medical condition. So it would now seem that as a matter of law this particular condition can be added to the list of conditions that do not qualify as 'recognised' within section 2. Before leaving the vexed question of voluntary intoxication, it is important to remember that following *Dietschmann*,[23] decided under the old law, a similar approach has been taken under the current legislation. Thus, in *Kay and Joyce*,[24] cited with approval in *Foy*,[25] Hallett VP made it clear that a person suffering from schizophrenia was not prevented from pleading diminished responsibility where voluntary intoxication had triggered the onset of a psychotic state. Her Ladyship opined:

> The recognised medical condition may be schizophrenia of such severity that, absent intoxication, it substantially impaired his responsibility (as in the case of *Jenkin*); the recognised medical condition may be schizophrenia coupled with drink/drugs dependency syndrome which together substantially impair responsibility. However, if an abnormality of mental functioning arose from voluntary intoxication and not from a recognised medical condition an accused cannot avail himself of the partial defence. This is for good reason. The law is clear and well established: as a general rule voluntary intoxication cannot relieve an

19 For a comparative critique, see Nicola Wake, 'Recognising acute intoxication as diminished responsibility? A comparative analysis' (2012) Journal of Criminal Law 76(1), 71–98.

20 [2020] EWCA Crim 270.

21 Ibid [87]. The crucial issue was 'to ascertain from what recognised medical condition that psychotic episode arose' [80].

22 Ibid [95].

23 [2003] UKHL 10.

24 [2017] EWCA Crim 647.

25 [2020] EWCA Crim 270 at [75]–[76].

> offender of responsibility for murder, save where it may bear on the question of intent.[26]

Turning now to the other requirements which D must prove to succeed under section 2, I will first consider the level of impairment needed, followed by the 'impairment factors' and finally the 'explanation' factor.

THE LEVEL OF IMPAIRMENT

In our empirical study, all 90 cases in our sample pre-date the Supreme Court's decision in *Golds*,[27] so the study's findings relating to the 'substantially impaired' requirement, namely that a positive view was expressed in 80 (72.7 per cent) of the reports[28] which addressed this issue, must be viewed in that light. There has been much academic commentary on *Golds* with consistent criticism that the decision gives rise to uncertainty.[29] The problem stems from the fact that, although Lord Hughes unsurprisingly confirmed that 'substantially' remains a jury question, he makes it clear that the proper approach to dealing with the word is as follows:

> It does not follow that it is either necessary or wise to attempt a re-definition of 'substantially' for the jury. First, in many cases the debate here addressed will simply not arise. There will be many cases where the suggested condition is such that, *if* the defendant was affected by it at the time, the impairment could only be substantial, and the issue is whether he was or was not so affected. Second, if the occasion for elucidation does arise, the judge's first task is to convey to the jury, by whatever form of words suits the case before it, that the statute uses an ordinary English word and that they must avoid substituting a different one for it. Third, however, various phrases have been used in the cases to convey the sense in which 'substantially' is understood in this context. The words used by the Court of Appeal in the second certified question in the present case ('significant and appreciable') are one way of putting it, providing that the word 'appreciable' is treated not as being synonymous with merely recognisable but rather with the connotation of being considerable. Other phrases used have been 'a serious degree of impairment' (*Seers*), 'not total impairment but substantial' (*Ramchurn*) or 'something far wrong' (*Galbraith*). These are acceptable ways of elucidating the sense of the statutory requirement but it is neither necessary nor appropriate for this court to mandate a particular form of words in substitution for the language used by Parliament. The jury must understand that 'substantially' involves a matter of degree, and that it is for it to use the

26 [2017] EWCA Crim 647 at [16].

27 *Golds* (n 2 above).

28 Mackay and Mitchell (n 11 above) 33.

29 M Gibson, 'Diminished responsibility in Golds and beyond: insights and implications' [2017] Criminal Law Review 543; Ronnie Mackay, 'R v Golds' [2017] Archbold Review 4.

> collective good sense of its members to say whether the condition in the case it is trying reaches that level or not.[30]

So, in most cases, a jury will be left to make this assessment without any guidance. But in cases where guidance is required, the jury will be directed to apply its collective good sense in its deliberations as to whether the degree of impairment reaches a level akin to 'significant and appreciable' or 'serious' impairment. As a result, it seems more than likely that different juries will apply different standards,[31] with the undirected jury being left to use any standard it sees fit as opposed to the directed jury having to apply the stricter standard. Not only that, it also seems possible that this level of confusion is already present in the appellate cases. Thus, in *Squelch*, the direction to the jury was as follows: '"Substantially" is an ordinary English word on which you will reach a conclusion in this case, based upon your own experience of ordinary life. It means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment.'[32] This was approved by the Court of Appeal which stated:

> As it seems to us, that concise direction amply complies with what Lord Hughes had indicated in giving the judgment in the case of *Golds* in the Supreme Court. Moreover, it commendably does so (and, again as encouraged by Lord Hughes), without undue elaboration.[33]

By way of contrast more recently in *Foy*, the same Lord Justice of Appeal, Davis LJ remarked:

> The Supreme Court [in *Golds*] rejected the notion that any impairment beyond the trivial would suffice. Aside from that, it was to be left to the jury to decide whether in any given case the impairment was of sufficient substance or importance to meet the statutory test. Although this approach has been the subject of academic criticism to the effect that it leaves so important an issue as in effect undefined for the jury,

---

30 *Golds* (n 2 above) [40].

31 Interestingly, this issue is raised by Lord Hughes in ibid [38] when in the context of the existence of two possible senses of the word 'substantially' he states that this would lead to 'a risk that different juries may apply different senses'. And yet this is exactly what the judgment has achieved.

32 [2017] EWCA Crim 204 [37].

33 One may legitimately ask: what is the difference between this 'concise direction' and the following direction given by Ashworth J in *Lloyd* [1967] 1 QB 175, para 5 at pages 178-179: 'I am not going to try to find a parallel for the word "substantial". You are the judge, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?'

> and with consequential room for the approach to be adopted to vary from case to case, it is to be presumed that such an approach is based on pragmatic considerations in the context of jury trials.[34]

Further, in *R v Brown*[35] the Court of Appeal stated '"substantially" is an ordinary English word which imports a question of degree and it is for the jury to decide whether it is satisfied. The impairment must be more than merely trivial and "significant and appreciable" may be another way of putting it see *Golds*.'[36] Thus, in that case, Lord Hughes warned that:

> ... it is not enough that the impairment be merely more than trivial; it must be such as is judged by the jury to be substantial. For the same reason, if an expert witness, or indeed counsel, should introduce into the case the expression 'more than merely trivial', the same clear statement should be made to assist the jury.[37]

So where does this leave us? In particular, how are psychiatrists to approach this issue which, although a matter of degree for the jury, is a matter of clinical judgment for the expert? One suspects that, in much the same way as many experts in making this clinical assessment under the old law did not expand on the meaning of the word 'substantially',[38] this approach will continue, as was the case in our empirical study of the new law prior to *Golds*.[39] For clinicians, this approach may be desirable as it avoids the expert having to give any detailed analysis of how the assessment that D's impairment was 'substantial' was reached. However, if there is disagreement on this issue amongst the experts then, of course, such detailed analysis may well be required and, in that connection, there is a real concern that *Golds* will result in more disputes of this type with the result, as has been remarked in a commentary on *Golds*, that the judgment 'may have a negative impact upon this figure'[40] of 72.7 per cent of reports[41] which in our empirical study were found to have reached the 'substantial' threshold and so, in turn, reduce the availability of the plea; an issue which may also be exacerbated by the new 'impairment factors' which will now be discussed.

---

34 *Foy* [2020] EWCA Crim 270 [77].
35 [2019] EWCA Crim 2317.
36 Ibid [5].
37 *Golds* (n 2 above) [41].
38 Law Commission (n 7 above) appendix B, [32]–[33].
39 Mackay and Mitchell (n 11 above) 33.
40 Karl Laird 'Case comment' on *Golds* [2017] Criminal Law Review 316, 317.
41 Mackay and Mitchell (n 11 above) 33.

THE IMPAIRMENT FACTORS

The new section 2(1) requires that there be an impairment of one or more of three particular abilities. They are the ability:

(a) to understand the nature of D's conduct;
(b) to form a rational judgment; and
(c) to exercise self-control.

In this connection, it is clear that '[t]he new wording gives significantly more scope to the importance of expert psychiatric evidence'[42] and that this is particularly so in relation to the three specified abilities.[43] However, the problem is: what do these impairment factors mean and how are they to be applied? Clearly, they are based upon the Law Commission's recommendations,[44] and although the Commission in its discussion of 'what impact on capacity the effects of an abnormality of mental functioning must have' gives some illustrative examples,[45] there is no discussion as to their meaning. Nor is there any such discussion in the official MOJ Circular which merely cites the three abilities without any further comment.[46] In his judgment in *Golds*[47] Lord Hughes states:

> ... the expression 'substantially impaired' has been carried forward from the old Act into its new form. But whereas previously it governed a single question of 'mental responsibility', now it governs the ability to do one or more of three specific things, to understand the nature of one's acts, to form a rational judgment and to exercise self-control. *Those abilities were frequently the focus of trials before the re-formulation of the law*. But previously, the question for the jury as to 'mental responsibility' was a global one, partly a matter of capacity and partly a matter of moral culpability, both including, additionally, consideration of the extent of any causal link between the condition and the killing. Now, although there is a single verdict, the process is more explicitly structured. The jury needs to address successive specific questions about (1) impairment of particular abilities and (2) cause of behaviour in killing. Both are of course relevant to moral culpability, but the jury is not left the same general 'mental responsibility' question that previously it was. The word used to describe the level of impairment is, however, the same.[48]

42 *Brennan* [2014] EWCA Crim 2387 [49].
43 Ibid [51]; *Squelch* (n 32 above) [53].
44 MOJ, Consultation *Paper, Murder, manslaughter and infanticide: proposals for reform of the law* (CP19/08, 28 July 2008) [50].
45 Law Commission (n 8 above) [5.121].
46 Circular 2010/13 (n 4 above) [6].
47 *Golds* (n 2 above).
48 Ibid [7], emphasis added.

Because of this statutory 'reformulation', I have argued elsewhere that:

> [As the three abilities] are now central to any diminished responsibility plea they are not purely medical or psychiatric matters but are rather medicolegal concepts which require careful analysis not only from a medical but also from a legal perspective so that both professions have a clear(er) view of what is required for each.[49]

In the course of that discussion, I made some attempt to do just that and what follows is a summary of my thoughts in this connection.

The first impairment factor in (a) is 'to understand the nature of D's conduct'. It has been remarked that this element seems similar to the 'nature and quality' limb of the M'Naghten Rules.[50] Our empirical study might be interpreted as lending some support for this view as in not a single case was this ability on its own used to support a diminished responsibility plea.[51] This, in turn, might indicate that, like the first limb of the M'Naghten Rules – the 'nature and quality' limb – this ability is also difficult to satisfy. However, the wording is different and an important question is whether ability (a) encompasses a lack of understanding about the wrongfulness of D's conduct. In *Conroy*,[52] Davis LJ made it clear in respect of the ability to form a rational judgment that 'whether an act is right or wrong … will be one element – and potentially an important element – on which a jury's appraisal may be directed as part of the overall circumstances'.[53] Accordingly, I have argued that if that is true for ability (b) then that should be the case for ability (a) as part of what Davis LJ referred to as the jury's assessment of 'all relevant circumstances preceding, and perhaps preceding over a very long period, the killing as well as any relevant circumstances following the killing'.[54] This, in turn, would allow experts a degree of flexibility when considering this ability and might increase its relevance as it would include those whose recognised medical condition resulted in a substantial lack of knowledge that the killing was not only legally but also morally wrong.[55] Accordingly, on this basis, ability (a) would encompass 'a substantial impairment of D's ability to understand the legal or moral wrongfulness of his actions'.

---

49 Ronnie Mackay 'The impairment factors in the new diminished responsibility plea' [2018] Criminal Law Review 462, 471. See also Nicholas Hallett, 'Psychiatric evidence in diminished responsibility' (2018) 82(6) Journal of Criminal Law 442, 449–454. Here it is strongly argued that the 'impairment factors' are not solely psychiatric in nature but have moral dimension.

50 Mackay (n 9 above) 296.

51 Mackay and Mitchell (n 11 above) 34.

52 [2017] EWCA Crim 81.

53 Ibid [33].

54 Ibid [32].

55 There is no reason to suppose that an assessment of wrongfulness should be here restricted to legal wrongfulness as in the M'Naghten Rules.

The second ability (b) is 'to form a rational judgment'. This phrase is identical to that used by Lord Parker CJ in *Byrne*[56] and was favoured by the Royal College of Psychiatrists.[57] As such it is now enshrined in statutory form. However, its meaning is far from clear. First, the phrase is built on the 'formation' of a rational judgment rather than on the judgment itself and, second, it is a 'judgment' rather than a 'decision' which is the crucial element in this ability. With regard to the latter, a decision is reached after a judgment is made and, in respect of the former, the 'formation' of a judgment concerns the thought processes which are involved in the making of that judgment. What this means is that the 'forming' of a judgment takes place before the actual judgment is made. Further, there is surely a clear difference between the two terms 'judgment' and 'decision'. Take, for example, legal proceedings where the 'judgment' of the court precedes the actual 'decision'. Accordingly, I have argued that:

> even from a common-sense perspective, there is a clear difference between the two terms which might be summarised as follows. Judgment is the process of the weighing up of options before making a decision as to which alternatives to choose and 'forming a judgment' relates to the thought processes involved in the making of that judgment.[58]

However, it does seem that discussion of this type is likely to be regarded as being, as Davis LJ remarked in *Conroy*, 'over-refined'[59] and perhaps unhelpful. In this connection, it seems that when ability (b) is discussed sometimes no distinction is being made between the terms 'judgment' and 'decision'. Thus, in *Conroy*, the trial judge in dealing with ability (b) told the jury:

> What does 'rational judgement' mean, and how do you apply its meaning to the circumstances of this case? The expression 'rational judgement' has not been defined by the Act of Parliament that creates the defence of diminished responsibility, nor is it an expression used by psychiatrists. Accordingly you should apply the English language definition of the expression, namely 'a considered decision based on reason'.[60]

Interestingly, no complaint was made about this wording in the course of the appeal in *Conroy* even though, as mentioned, there is a clear distinction between the two words. Further, experts might be surprised to learn that the expression referred to in ability (b) is not one 'used by psychiatrists'. However, what is becoming clear is that, when considering this ability, a jury may have to consider the

56 [1960] 2 QB 396, 403.
57 Law Commission (n 8 above) fn 85 on page 102.
58 Mackay (n 59 above) 468.
59 *Conroy* (n 52 above) [37].
60 Ibid [27].

'defendant's thinking processes' and not restrict their deliberations to 'the actual outcome'.[61] Indeed, in confirming that 'The wording is altogether more open-ended', Davis LJ emphasised that legal directions should 'focus on the actual provisions of the section without undue elaboration'.[62] That the whole of the defendant's thought processes should be considered when the jury comes to consider this ability seems also to be confirmed in *Blackman* where the Court Martial Appeal Court gives full consideration to a whole range of emotional factors which impacted on the defendant's final decision to kill the victim.[63] In conclusion, our empirical study found that ability (b) was the most frequently used ability by experts with 86 (78.2 per cent) of reports referring to the ability to form a rational judgment of which 74 were positive. Accordingly, I have suggested that a way forward might be to interpret this ability as requiring an assessment of whether and how far 'all D's thought processes leading up to and including the killing were based on reason and logic'.[64] This would allow experts to adopt a wide approach when assessing the judgments (including their formation and rationality) made by D before and during the behaviour which led to the fatal act.

The third and final ability is (c) 'to exercise self-control'. In our empirical study, we found that 77 reports (70 per cent) cited this ability, 64 of which were positive which means that the ability to exercise self control was used a little less frequently than ability (b). In addition, although 32 of these reports combined abilities (b) and (c)[65] and 24 reports combined all three abilities, in only six reports was the ability to exercise self-control used on its own compared to 16 which used ability (b) on its own.[66] These figures might tentatively suggest that, although ability (c) is of importance to psychiatrists, it is not as important as ability (b).

Turning to the wording used to describe ability (c), an obvious point to note is that the phrase 'self-control' is identical to that used in the 'loss of control' plea contained in sections 54 to 56 of the Coroners and Justice Act 2009. However, rather than require 'self-control' to be lost, ability (b) focuses on a failure to 'exercise' self-control. The use of the word 'exercise' is troubling. The Law Commission's original wording

61 Ibid [37], [32]; *Squelch* (n 32 above) [44].

62 *Conroy* (n 52 above) [38].

63 *Blackman* [2017] EWCA Crim 190, [109]–[111].

64 Mackay (n 49 above) 469.

65 This could indicate that there is some degree of overlap between abilities (b) and (c) which in turn might result in juries blending the two in much the same way as may have occurred when both diminished responsibility and 'loss of control' are pleaded together, see below.

66 Mackay and Mitchell (n 11 above) 34, table 11.

was to 'control him or herself',[67] without any reference to 'exercise' which was added later. But it is not clear how this came about as the MOJ stated in its Consultation Paper, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*:

> The Law Commission recommendation clarifies that the following must be substantially impaired: the defendant's capacity (i) to understand the nature of his or her conduct, (ii) to form a rational judgment or (iii) to control him or herself. We agree that this is helpful and have incorporated this wording in our draft clause.[68]

But, in the same Consultation Paper, clause (1A)(iii) of the draft bill at Annex B inserts 'exercise' without any explanation.[69] So we are left to wonder about the role which the word 'exercise' is supposed to play in ability (c). If there is found to be a substantial impairment of D's 'ability' to control himself, then is that not enough to bring him within the new plea without any need to consider further the requirement of the ability to 'exercise' self-control. While it does seem likely that the draftsperson was influenced by Lord Parker LCJ's remark in *Byrne* referring to the defendant's 'ability to exercise will-power to control his physical acts',[70] until the Court of Appeal decides that the word 'exercise' has a distinct meaning and role to play within ability (c) it is perhaps best regarded as superfluous. As far as experts' reports are concerned, they tend to reach a conclusion by citing ability (c) and thus including the word 'exercise'. The same can be said for the Court Martial Appeal Court in *Blackman*, where Lord Thomas CJ when referring to ability (c) said: 'we have also considered whether he lost his self-control (within the context of diminished responsibility)'.[71] Pausing there, it is of note that there is no mention made here of 'exercise' until later in the same paragraph when Lord Thomas finally states:

> The appellant's decision to kill was probably impulsive and the adjustment disorder had led to an abnormality of mental functioning that substantially impaired his ability to exercise self-control. In our judgement the adjustment disorder from which he was suffering at the time also impaired his ability to exercise self-control.[72]

With this in mind, it seems likely, as mentioned above, that the inclusion of the word 'exercise' was as a result of the Law Commission's wording being altered so as to include reference to 'self-control' rather than 'control him or herself', but in doing so it means that 'ability' and

67 Law Commission (n 8 above) [5.112].
68 MOJ (n 44 above) [50].
69 Ibid page 35.
70 *Byrne* (n 56 above) 403.
71 *Blackman* (n 63 above) [112].
72 Ibid [112].

'exercise', as mentioned above, seem to play similar roles. If this is correct then it might be appropriate to interpret ability (c) as requiring 'a substantial loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning'.[73] This mirrors the approach taken in the loss of control plea and approved by the Court of Appeal,[74] and there is no reason to believe that the phrase 'loss of self-control' should be given a different meaning in diminished responsibility. Support for this view can be found in the fact that, as confirmed by the Court of Appeal in *R v Sargeant*:

> The two defences may be presented together as alternatives. The law does not therefore ignore a mental disorder that, through no fault of a defendant, renders him or her unable to exercise the degree of self-control of a 'normal person.[75]

Although the interrelationship between the loss of control and diminished responsibility pleas may now be different,[76] it remains common practice as part of a defence strategy to plead them together and, if this strategy is successful, the sentence must be based on both.[77] In short, although the impairment of 'self-control' may be qualitatively different as between the two pleas, the essential nature and definitional meaning of the term is surely the same. Further, adopting this approach would allow experts, in the context of section 2, to focus on the degree to which D's normal powers of reasoning were affected by his recognised medical condition[78] which would normally be placed in the context of the full phraseology contained in ability (c).

---

73 David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* 14th edn (Oxford University Press 2015) 583.

74 *R v Jewell* [2014] EWCA Crim 414 [24].

75 *Sargeant* [2019] EWCA Crim 1088 [44].

76 For discussion of using both pleas under the old law, see R D Mackay, 'Pleading provocation and diminished responsibility together' [1988] Criminal Law Review 411.

77 For an example of this, see *R v Caddick* [2018] EWCA Crim 865 where it is stated at [11]: 'The court in sentencing, however, indicated that the appellant, through his counsel and his defence case statement, had put forward the other partial defence, namely that of loss of control. Having had regard to the opinions of the psychiatrists as to the impact on the appellant's loss of control of his mental state and abnormality of mental functioning at the time, the court accepted that the appellant should be sentenced on this basis also.'

78 See Hallett (n 49 above) 454, stating that the difference between the two pleas lies in 'what has caused the loss of self-control'.

THE 'EXPLANATION' FACTOR

Section 52(1)(c) adds the requirement that only if the abnormality of mental functioning 'provides an explanation for D's acts and omissions in doing or being a party to the killing' will D be entitled to avail himself of the new plea. Further, subsection (1B) adds '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.' In our empirical study, we found that report writers were frequently failing to address this requirement, and when they did so they were inconsistent in its application. This is not surprising in view of the fact that the relationship between these two provisions is unclear. This stems from the fact that the Law Commission, after consultation, decided against a strong causal provision in favour of an 'explanation' requirement which in its view ensured 'an appropriate connection between the abnormality of mental functioning … and the killing'.[79] However, both the MOJ and government ministers made it clear that a stronger causal requirement was needed.

This, in turn, resulted in what is now subsection (1B). While it seems clear that the 'explanation' requirement is mandatory it has been argued by Smith et al that this may not be the case in respect of subsection 1(B) as it does not include the word 'only' before 'if it causes'.[80] Although this is a view taken in the Crown Court Compendium,[81] it is notable that in the 'Directions' reliance is placed exclusively on the need for the additional requirements in (1B) to be satisfied, which in turn may stem from the fact that the MOJ was adamant that this was essential, a view also strongly supported by Simester and Sullivan.[82] Further, in *Gold*s, this was also the view of Lord Hughes when, in summarising the 'new statutory formulation', he referred to 'cause or significantly contribute to his killing the deceased' without any mention of the 'explanation' provision.[83] In addition, the Court of Appeal endorsed this in *Sargeant*

79 Law Commission (n 8 above) [5.123]–[5.124].

80 David Ormerod and Karl Laird, *Smith, Hogan, & Ormerod's Criminal Law* 15th edn (Oxford University Press 2018) 560.

81 Judicial College, Crown Court Compendium: Part One (December 2020) 19-1 at 12 which states: 'It is possible, however, for an argument to be advanced that a causal link does not need to be established. Subsection (1B) does not say that for the defence to succeed a sufficient explanation can *only* be provided if the abnormality of mental functioning is a cause. On this basis a causal link is just one of the ways in which the killing might be "explained." There may therefore be cases where the abnormality provides an explanation sufficient to mitigate the conduct to manslaughter even if there is no causal link.' Emphasis in original.

82 A P Simester et al, *Simester and Sullivan's Criminal Law* 7th edn (Hart Publishing 2019) 789–791.

83 *Golds* (n 2 above) [8]. See also his Lordship's remark at [32].

where in confirming this approach it emphasised that 'Whilst the effect of the changes in the law has certainly been to emphasise the importance of medical evidence, causation … is essentially a jury question.'[84]

However, this does not mean that experts do not offer an opinion on this matter and that these do not differ. Indeed, our empirical study revealed that, of those reports which addressed subsection (1)(c), 61 reports (55.5 per cent) referred to 'explanation' of which 54 gave a positive view.[85] A further examination of these 54 reports reveals that over 50 per cent (n=28) relied exclusively on subsection (1)(c) without any mention of 'cause' or 'significant contributory factor'. This may well be because the 'explanation' requirement is perhaps easier to apply than subsection (1B) and so can be exclusively relied upon if, as advocated above by Smith et al, that for an 'explanation' to be provided there is no additional need to prove that the abnormality of mental functioning must have 'caused or been a significant contributory factor in causing' the killing.

Turning now to subsection (1)(B), it is interesting to note that, when it came to applying this provision, 66 reports were silent on this issue, 28 of which as already mentioned had relied exclusively on the 'explanation' factor. Of those that did address the causal requirement, they did so in a variety of ways with some referring only to 'cause' (n=14), some only to 'contributory factor' (n=13) and others to both (n=11). Again this is perhaps not surprising in view of the fact that there is no guidance given on this issue. Thus, not only is the relationship between the two subsections unclear, but so also is the strange drafting of subsection (1)(B) which refers to 'causes' *or* 'a significant contributory factor'. Why it may be asked, is the latter alone not sufficient and at what stage will a causal link be insufficient thus triggering a need for a consideration of the 'contributory factor' requirement? This places experts in a difficult position when they are called upon to address this subsection, which itself is perhaps a good reason for avoiding it and relying only on the need for an 'explanation'. Interestingly, the Judicial College remarks with confidence that 'In the vast majority of cases the issue of a causal link will not generate special problems',[86] and it is true that to date the causal issue does not seem to have given rise to judicial scrutiny.

One thing that does seem to be clear about subsection (1)(B) is that the abnormality of mental functioning need not be the sole cause of the killing, otherwise there would be no need for the 'contributory factor'

84 [2019] EWCA Crim 1088, [29], [51] and [55] the trial judge's direction on causation is approved.

85 47 reports made no mention of the 'explanation' requirement. Mackay and Mitchell (n 11 above) 34.

86 Judicial College (n 81 above) 19.1 [11].

requirement which requires only that it be 'a significant contributory factor'. This is endorsed by the MOJ which remarks that 'a strict causation requirement ... would limit the availability of the partial defence too much'.[87] So it is clear that other factors may be relevant such as 'loss of control'[88] or the effects of intoxicants.[89] Finally, the use of the word 'significant' in the subsection is important. It cannot mean 'substantial' as, presumably, the draftsperson would have chosen that word had it been intended. So it must mean something less in terms of 'weight' than that given in *Golds* to 'substantial'. It is submitted that Maria Eagle was correct when she said 'We do not require the defence to prove that [the abnormality] was the only cause or the main cause or the most important factor, but there must be something that is more than a merely trivial factor.'[90] Accordingly, any 'contributory factor' which is more than trivial should be 'significant' for the purposes of subsection (1)(B).[91]

CONCLUDING REMARKS

In *Golds*, Lord Hughes emphasised the importance of the Crown's entitlement in appropriate cases to 'accept that the correct verdict is guilty of manslaughter on the grounds of diminished responsibility and no trial need ensue'.[92] In support of what he referred to as 'this responsible course',[93] his Lordship cited my empirical research for the Law Commission under the old plea which revealed that this took place in 77.1 per cent of cases in the research sample. By way of contrast, our empirical study of the new plea reveals that the percentage of cases where the prosecution accepted a guilty to diminished responsibility plea was 56.7 per cent.[94] This, in turn, means that 43.3 per cent of these cases were contested compared to 22.9 per cent under the old plea with murder convictions being returned in 34.4 per cent of the new plea contested cases as opposed to a murder conviction rate of 14 per cent under the old plea.[95] The reasons for this increase in contested pleas and murder convictions is unclear. However, what

87 MOJ (n 44 above) [51].
88 *Caddick* (n 77 above).
89 *Kay and Joyce* (n 24 above).
90 *Hansard*, 3 March 2009, cols 416–417.
91 *Sargeant* (n 75 above) [51], [55] where the trial judge's direction considered 'appropriate' by the Court of Appeal states: 'It does not have to be the sole cause of her conduct but she must prove that it was more than a trivial cause.'
92 *Golds* (n 2 above) [48].
93 Ibid.
94 Mackay and Mitchell (n 11 above) 26, table 3.
95 Ibid 27, table 4.

is clear is that one of the policy reasons for abolishing provocation and introducing a narrower 'loss of control' plea was to increase the number of convictions for murder. Thus the MOJ in its remarks about the effects of abolishing provocation stated:

> We think trials would be likely to be affected in two ways by the new, narrower partial defence. *On the one hand, the CPS would accept fewer pleas to manslaughter, thus increasing the number of trials.* On the other hand, some defendants who currently plead manslaughter unsuccessfully would plead guilty to murder in future (because their chances of succeeding with a manslaughter plea would be so reduced).[96]

But when discussing diminished responsibility the MOJ made the following remark:

> The Law Commission recommended that the law be clarified and updated to reflect developments in medical knowledge. The Government's proposals aim to do this. Given the nature of the changes proposed, *we do not expect any significant shifts in the numbers or types of cases which benefit from the partial defence of diminished responsibility, and our analysis of the 2005 cases supports this conclusion.* We do not therefore think that there will be an impact on the courts or prison population as a result of the changes.[97]

So an increase in murder convictions was not in any way a reason for reformulating section 2. Rather the remark emphasises that the reasons given for reforming diminished responsibility were to clarify and update the original plea. In support of the view that there was no expectation of shifts 'in the numbers or types of cases', the MOJ refers to its 'analysis of the 2005 cases'.[98] However, this study of some 39 diminished responsibility cases[99] which is limited to sentencing remarks gives the reader little detail on how these cases were dealt with, and, in particular, no information is given as to how many were full trials as opposed to guilty pleas which were accepted by the prosecution. So what is the basis of the MOJ's conclusion that there will be no impact on numbers or types of cases? The lack of any rationale to support this conclusion is troubling. Indeed, the conclusion reached in relation to provocation about an increase in murder convictions seems to be also applicable to diminished responsibility having regard to the radical nature of the changes introduced in the new

96 MOJ, *Impact Assessment* – Coroners and Justice Bill – homicide clauses (14 January 2009) 4, emphasis added.

97 Ibid 5–6

98 Ibid 6.

99 Ibid 15–16.

section 2. These changes surely go beyond mere 'modernisation' and 'clarification' as they require proof of a number of new elements that also involve greater psychiatric input.[100] Taken together, what this means is that experts may be more likely to disagree over one or more of these new elements. Granted that the results of our empirical study into the operation of the new plea should be treated with caution, however, with this in mind what they suggest is that there are now more contested cases, more jury trials and a corresponding increase in rejections by the prosecution of diminished responsibility resulting in more murder convictions. On the face of it, as the new section 2 clearly narrows the scope of the defence, surely this consequence, of a possible increase in convictions for murder, should have been anticipated and catered for in the drafting. Instead, such an increase is an unintended consequence which seems particularly regrettable as there was never any suggestion that the old plea was somehow being manipulated or used in an unacceptable manner such as to warrant the type of change, as took place with the abolition of provocation, which would increase the number of jury trials and consequent murder convictions. Will this be a continuing legacy of the new diminished responsibility plea? Taken together with the decision in *Golds* which adds to the problems now facing the accused – as it makes it more difficult for D to prove that any impairment suffered was 'substantial'– this now seems likely, but only time will tell.

100 See Hallett (n 49 above) 455, who argues that the new s 2 requirements 'have encouraged psychiatrists to step outside their area of expertise and usurp the function of the jury'.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 245–270
Article DOI: 10.53386/nilq.v72i2.877

Women who kill abusive partners: reviewing the impact of section 55(3) 'fear of serious violence' manslaughter – some empirical findings

Susan S M Edwards*

University of Buckingham
Correspondence email: susan.edwards@buckingham.ac.uk

ABSTRACT

In October 2010, section 55(3) of the Coroners and Justice Act 2009 came into force, and 'fear of serious violence' was expressly included in the statute as a qualifying trigger for 'loss of self-control' voluntary manslaughter, a partial defence to murder. This development (albeit that it is a gender-neutral provision) was anticipated to be an important step in recognising the situation of a woman who, in fearing a partner's violence, control and abuse, kills to preserve her own life. The provision is only operative where 'fear of serious violence' and 'loss of self-control' can be established, which, given its limitations, prohibits many women in fear of a partner's violence and coercion from successfully using this defence. The author's review of the legal reform and the case law, together with 40 homicide cases involving female defendants who killed intimate current or former partners (April 2011–March 2016) demonstrates that this defence, which promised to deliver justice for abused women, has been little used. Women's vulnerability and fear and response to intimate partner abuse and control is still insufficiently understood and explored and is evident where juries return murder rather than manslaughter verdicts. Further reform is needed to the legal framework regarding this and other defences in order to achieve a just law by incorporating women's experience of, and defensive response to, violence and control in its many forms.

Key words: intimate partner; abuse; fear; manslaughter; self-defence; homicide; murder; women who kill.

INTRODUCTION

In this article, I review the impact of the statutory developments introduced by the Coroners and Justice Act (CandJA) 2009, sections 54–56, which have reformed the voluntary manslaughter (formerly 'provocation') defence. I examine, first, the limitations and the expansions in law that have been introduced, focusing especially on section 55(3) which recognises the emotion of 'fear of serious violence'

* Professor of Law, Emerita, Buckingham.

as a potential trigger for 'loss of self-control' manslaughter. Second, through recent case law decisions, I explore the statutory interpretation of these provisions including the meaning and application of 'fear of serious violence' (section 55(3)) and the consequences of the retention of the requirement of 'loss of self-control', especially for women who, in fear of abusive partners, kill. Third, through a consideration of published statistics and unpublished Home Office data on partner homicide over a five-year period, April 2011 to year ending March 2016,[1] I offer a provisional assessment of the impact of section 55(3) CandJA. In my concluding remarks on the impact of section 55(3) manslaughter, I call for an amendment to existing legislation to remove the 'serious violence' and 'loss of self-control' requirements, the former setting a high bar informed by an equality of arms precept, the latter cognitively twinned with what men have been permitted to do in anger, both of which undermine the accessibility of this provision for women who, in fear of abusive partners, kill. I also call for law reform across criminal law defences of self-defence and the 'householder defence' and duress, both of which are legal constructs historically drawing on notions of male proportionality (the householder defence accommodating some concessions) to accommodate an understanding of women's physical, mental and financial vulnerability when faced with violence and coercion from intimate partners.[2]

The CandJA introduced important changes to the law, reforming voluntary manslaughter and abolishing the common law defence of 'provocation' which, as a partial defence to murder, recognised that an ordinary man (person) when provoked by 'thing(s) said or done' could 'lose self-control' and kill. This common law defence was given statutory force in the 1957 Homicide Act (HA), section 2:

> 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.

---

1 For this part of the study, permission was granted by the Home Office. This is part of a larger and ongoing study, and I am grateful to the Home Office Analysis and Insight Department, London, for access to data. Any details on circumstances and outcomes is derived from information that is in the public domain only.

2 S S M Edwards, 'Recognising the role of the emotion of fear in offences and defences' (2019) 83(6) Journal of Criminal Law 450–472; N Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77(5) Journal of Criminal Law 433–457; J Loveless, 'Domestic violence, coercion and duress' [2010] Criminal Law Review 93.

This section of the HA was repealed and provocation abolished by section 56 CandJA and replaced with sections 54–56 CandJA. Lord Judge, in *R v Clinton*, said of the former law: 'Its common law heritage is irrelevant.'[3] The court in *R v Gurpinar*[4] said the defence of 'loss of control' is different from provocation and that the development of the criminal law is not assisted by continued reference to the old cases. Lord Diplock, in *DPP v Camplin*,[5] had said much the same about disregarding the pre-1957 law. But contiguity with the past is not so easily refuted since much of the former legal framework and morphological structure of 'loss of self-control' manslaughter, and its ontology and meaning are retained.

In an attempt to address the masculinism within the former 'provocation' law, particularly the meaning of 'loss of self-control' and the evidence required, the construction of the reasonable man (person) and the circumstances that were considered to provoke, and women's' consequent exclusion, provisions in the CandJA place three limitations on the 'loss of self-control' and introduce two expansions. The limitations have been introduced because it was widely considered that a defence of 'loss of self-control' (provocation manslaughter) was too easily used by men – the predominant offenders – elevating male excuses for killing female partners to an objective standard.[6] The first two limitations are placed on the 'trigger' and on what circumstances (objective element) can be said to be operative where 'sexual infidelity' is expressly excluded from being used as an excuse or justification for the subjective element in 'loss of self-control' (section 55(6)(c)). A second limitation on the 'trigger' is introduced by the twinned requirement that a 'thing done or said causing a defendant to lose self-control' must be of (a) an 'extremely grave character' (section 55(4)(a)) and (continuing to appeal to moral indignation) (b) cause the defendant to have a 'justifiable sense of being seriously wronged' (section 55(4)(b)), so as to exclude trifling matters from being pleaded and to raise the bar in relation to when killing in anger might be pleaded and/or understandable or excusable.[7] A third limitation is provided by section 54(6) which requires 'sufficient evidence' of 'loss of self-control' (the subjective element) to be adduced before, in the opinion of the judge, such a defence can be put before a jury. This departs from the

3 *R v Clinton; R v Parker; R v Evans* [2012] 3 WLR 515, [2012] EWCA Crim 2 [2].

4 *R v Gurpinar; R v Kojo-Smith and another* [2015] 1 WLR 3442.

5 [1978] AC 705.

6 See, for example, J Horder, *Provocation and Responsibility* (Clarendon Press 1992).

7 S Parsons, 'The loss of control defence—fit for purpose?'(2015)) 79(2) Journal of Criminal Law 94–101: 'It seems that the law now requires something overwhelming for there to be loss of control as a result of anger, anger that is so extreme that defendants can claim lack of mens rea.' 95.

former position where, under the 1957 Act, a defence of provocation could be put before a jury if there was 'evidence'[8] and, following *R v Stewart*,[9] *R v Rossiter*,[10] *R v Thornton*,[11] and *R v Scamp*,[12] evidence 'however tenuous' satisfied.

Turning now to the expansions in the law, these were introduced largely to address criticism and to respond to law reform recommendations that found that 'loss of self-control' manslaughter/provocation as legally framed precluded many women from successfully using the defence. First, the proximity in time requirement established in *R v Duffy*[13] (expanded in *R v Ahluwalia*)[14] is removed by section 54(2), so that 'loss of self-control' is no longer required to be 'sudden'[15] upon the provocation (now called the 'qualifying trigger') and only to be taken into account provided that there is no evidence of a 'considered desire for revenge' (section 54(4)). Removing this requirement is intended to address what Horder identified as 'the immediacy dilemma'[16] and extends a 'loss of self-control' manslaughter defence to those who kill even where there is a period of time elapsing between the circumstances that cause the defendant to lose self-control and the killing. The introduction of this section was primarily intended to accommodate women who in fear of violent partners delayed their self-defensive reaction in order to avoid death or serious harm which would likely follow if they attempted to defend themselves upon the moment. In the *Duffy* case, the court in 1948 considered that her delayed response negated the provocation defence.[17] Second, 'fear of serious violence', an emotion that has received little or no recognition within the

8 *Gurpinar* (n 4 above) [6].

9 [1995] 4 All ER 999, where the judge had left provocation to the jury the appeal ground was that he had not given them sufficient direction. Appeal was dismissed.

10 [1994] 2 All ER 752.Where provocation was not put before the jury and the Court of Appeal held it should have been and quashed the conviction for murder.

11 *R v Thornton (No 2)* [1996] 1 WLR 1174. Here the Court of Appeal accepted the criticisms of the trial judge's direction to the jury on provocation and ordered a retrial.

12 [2010] EWCA Crim 2259. The case at trial was self-defence. The appeal was based on criticism of the judge's direction to the jury on provocation and the murder conviction was quashed and manslaughter substituted.

13 [1949] 1 All ER 932.

14 [1992] 4 All ER 889.

15 Coroners and Justice Act 2009, Explanatory Note, 335.

16 J Horder, 'Reshaping the subjective element' (2005) 25 Oxford Journal of Legal Studies 127.

17 I say 'alleged' because my careful reconstruction of this case discovered that there was little or no time elapsing. See S S M Edwards, 'Mr Justice Devlin's legacy: Duffy – a battered woman "caught" in time' [2009] Criminal Law Review 851.

criminal law defence framework,[18] is now included as a 'qualifying trigger' for 'loss of self-control' (section 55(3)), but, as with section 55(4), it requires a consideration of whether self-control is lost and the effect the trigger would have on a reasonable man (person).

STATUTORY INTERPRETATION

Reforming qualifying triggers

The reception and interpretation of the 'sexual infidelity' exclusion (section 55 (6) (c)) has been equivocal. When its removal was being debated at the Bill stage, Lord Neill of Bladen said:

> [it] is ridiculous and out of line with the way in which people think about human passions. It is the one great terrible event that can happen in a married life and to say that it is to be disregarded ... We will lose the public's respect if we legislate in this way.[19]

Lord Lloyd of Berwick said:

> Why should we exclude sexual infidelity from a jury's consideration? Is Parliament really to say that sexual infidelity can never give rise to a justifiable sense of being seriously wronged? Surely not. That must be a question for the jury.[20]

Such objections were also reiterated at the report stage.[21] Some of these arguments are reflected in defence submissions and in case law and mitigation of sentence.[22] Baroness Scotland at the Bill stage replied:

> We accept that these situations may have a devastating impact on the individuals involved. In this day and age, whatever the views may be about that, we want to put beyond peradventure that this cannot be the basis upon which one should seek to take another's life.[23]

Uncertainty over the ambit of its meaning and application has resulted in several appeals.[24] Following the statutory removal of sexual infidelity,

---

18 Edwards (n 2 above).

19 Coroners and Justice Bill, HL Deb 7 July 2009, vol 712, col 577.

20 Ibid.

21 Lords Hansard text for 26 October 2009 (pt 0013), parliament.uk, col 1060 per Lord Thomas of Gresford, who said removal of sexual infidelity was 'outstandingly obnoxious'; col 1061 per Lord Lloyd of Berwick: 'It is little short of astonishing that Parliament should be asked to tell the jury whether sexual infidelity is enough for a man or woman to lose their self-control.'

22 K Horder and K Fitzgibbon, 'Where sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing' (2015) 74(2) Cambridge Law Review 307–328.

23 HL Deb (n 19 above) col 589.

24 For example, see *R v Otunga (Richard Nyawanda)* [2015] EWCA Crim 2517.

Lord Judge, in *R v Clinton*,[25] ruled that in certain circumstances, provided that sexual infidelity was not the sole reason for the killing and was part of a wider context, then it would not necessarily be excluded[26] since the provision, he said, was intended to prohibit the misuse of sexual infidelity and not to function as a blanket exclusion.[27]

Second, the introduction of the twinned tests of 'extremely grave' circumstances (albeit the prefix 'extremely' is intended to restrict excuses for killing) and 'justifiable sense of being seriously wronged' have both proved to be problematic, lacking exactitude, impossible to separate one from the other and saturated with moral judgements, especially through the moral barometer of assessing what is 'justifiable'. As I made clear in 2004,[28] moral indignation or temper should only, if ever, be considered in mitigation of sentence. Lord Lloyd also queried: 'What is a jury to make of the phrases?'[29] 'This is all nonsense. It is derived from antique law and it has been mangled in the process of producing this Bill.'[30]

Third, section 54(5)(6) prohibits judges from allowing a defence of 'loss of self-control' to go before the jury unless there is 'sufficient evidence' of a 'loss of self-control'. Nowhere is this defined.[31] Judicial decisions to withhold a defence of 'loss of self-control' from the jury have resulted in several appeals, including cases where men have been convicted of murder in circumstances of gang violence and where a defence of self-defence and/or plea to 'no intent' involuntary manslaughter has failed[32] on the ground that 'loss of self-control' resulting from 'justifiable' anger (sections 54, 55(4)(a)(b)) or from fear of serious violence (section 55(3)) was wrongly withheld. In *R v Gurpinar*,[33] where the appellant had stabbed and killed a rival, a defence of self-defence and of no intent manslaughter failed. The appellant submitted, as a ground of appeal, that the judge had wrongly withheld from the jury's consideration the defence of 'loss of self-control' because, as counsel submitted:

---

25 *R v Clinton* (n 3 above).

26 These same arguments constituted the objections to the removal of sexual infidelity during the Commons consideration of the Lords amendments to the Bill: HL Deb 9 November 2009, vol 499, col 80 per Mr Grieve.

27 *R v Clinton* (n 3 above) [35]–[37].

28 S S M Edwards, 'Abolishing provocation and reframing self-defence – the Law Commission's options for reform' [2004] Criminal Law Review 181–197.

29 HL Deb (n 19 above) col 578.

30 Ibid col 570.

31 The Crown Court Compendium Part 1: Jury and Trial Management and Summing Up (December 2020) 19-14 [7].

32 For example, *R v Sharp (Brian)* [2015] EWCA Crim 686. Here a conviction for murder was upheld.

33 *Gurpinar* (n 4 above).

> There was evidence of loss of self-control both from witnesses and Gurpinar that Gurpinar was either angry or frightened at the time of the fight. Given his anger and his being frightened, there was an inference of 'loss of self-control' to be drawn from the actual fact of a 14 year old boy of good character stabbing another in the chest.[34]

The Court of Appeal upheld the trial judge's decision to withdraw 'loss of self-control' from the jury and referred to the Explanatory Note to this section which makes clear that the 2009 Act requires a much higher threshold of evidence of 'loss of self-control' before a judge can put the defence to a jury.[35] In *R v Kojo Smith*,[36] where two groups clashed, Kojo Smith stabbed and killed a member of the rival group. His plea of self-defence failed, and he was convicted of murder. The trial judge's decision to withhold 'loss of self-control' from the jury was also upheld on appeal. On appeal it was submitted by counsel that the judge had wrongly withheld 'loss of self-control'.

> It was said that there had been loss of control and that there was a qualifying trigger, for the purposes of the statutory provisions, in the form of fear of serious violence on the part of the deceased towards the appellant, by reference to section 55(3).[37]

The appeal court reiterated that 'a much more rigorous evaluation'[38] by the trial judge before 'loss of self-control' is put to the jury is required.[39] In *R v Jovan Martin*,[40] the appellant stabbed his close friend following a disagreement. His defence of self-defence and no intent manslaughter failed, and 'leading counsel then appearing for the Appellant had made clear to the judge in discussion that loss of control was not being advanced and had expressly agreed that such an issue did not arise on the evidence.'[41] The Court of Appeal upheld the decision of the trial judge to withhold the defence of 'loss of self-control' from the jury and, citing *R v Dawes*,[42] said 'even serious anger will not often cross the threshold into loss of control'.

Fear of serious violence as a qualifying trigger

Turning to the statutory expansions primarily intended to accommodate women's self-defensive response arising out of fear of abusive and

34 Ibid [53].
35 Ibid [34].
36 Ibid [57].
37 Ibid [21].
38 Ibid [33].
39 See also J Stannard, 'Getting past the judge in cases of loss of control: R v Goodwin' (2019) 70(3) Northern Ireland Legal Quarterly (377).
40 [2017] EWCA Crim 1359.
41 Ibid [1].
42 Ibid [49]. See also *R v Dawes; R v Hatter; R v Bowyer* [2014] 1 WLR 947 [963c].

coercive partners, the provision of section 55(3) has had a limited impact for two reasons. First 'fear of serious violence' section 55(3) sets an extremely high bar. As I argued in 2004,[43] the requirement of 'serious violence', which was originally proposed by the Law Commission,[44] treats women homicide defendants as if they are men in respect of size and strength such that the victim of violence and abuse is only permitted a lethal response where 'serious violence' is feared, whilst by comparison a 'loss of self-control' section 55(4)(a) defence requires proof of the more fluid 'grave circumstances' amendable to subjective assessment. The requirement of 'serious violence' to trigger the fear defence sets a high standard of violence not set for any other qualifying trigger and in so doing mirrors the legal requirement for self-defence perpetuating an incommensurability. Masculinist legal concepts, criticised at the Bill stage, notwithstanding the proclaimed intention to reform the law more comprehensively, have been retained and women added onto a predesigned and marginally unaltered masculinist legal framework,[45] with a male-centric reasonable man[46] and legal method.[47] The 'fear of serious violence' provision, then, is incomplete and unfinished.

The second problem lies with leaving the 'loss of self-control' requirement at the centre of the defence, which, without definition, as I have previously pointed out, continues in its coupling contiguity with notions of anger and men's rage and has become a signature for anger and male outburst,[48] far removed from and incongruous with a fear response. Its retention proves to be an obstacle for women who kill. The Law Commission in 2004 proposed its abolition: it was, said the Commission, 'a judicially invented concept, that lacked sharpness or a clear foundation in psychology',[49] concluding that the retention

43 Edwards (n 28).

44 Law Commission, *Partial Defences to Murder* Final Report (Law Com No 290, 2004).

45 C Smart, *Feminism, and the Power of Law* (Routledge 1989).

46 K Lahey, 'Reasonable women and the law' in M Fineman and N S Thomadsen (eds), *At the Boundaries of Law, Feminism and Legal Theory* (Routledge 1991) 3.

47 M J Mossman, 'Feminism and legal method: the difference it makes' in Fineman and Thomadsen (n 46 above) 283.

48 S S M Edwards 'Anger and fear as justifiable preludes for loss of self-control' (2010) 74(3) Journal of Criminal Law 223–241; S S M Edwards, 'Loss of self-control: when his anger is worth more than her fear' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) 79–96; S S M Edwards, 'Descent into murder – provocation's stricture – the prognosis for women who kill men who abuse them' (2007) 71(4) Journal of Criminal Law 342–361.

49 Law Commission (n 44 above) para 3.30.

of the 'loss of self-control' remained an obstacle to any reform of provocation.[50] Mitchell et al pointed out:

> Instead of retaining a requirement for 'loss of self-control', as is currently construed in the rather unsophisticated sense of overtly physically out of control, the law should look at the extent of the defendant's emotional disturbance and how far that disrupted the individual's normal thinking, reasoning and judgment.[51]

At the bill stage, Lord Thomas of Gresford acceded that 'loss of self-control' aligns with male anger[52] and is founded on measuring self-control against that of the reasonable man. After the passage of the Act, since 'loss of self-control' lacked any statutory definition, Professor David Ormerod made a valiant effort to rescue it from its calcified gendered framing, asserting that, for the purposes of the 2009 Act, 'loss of self-control' could be best understood as 'founded on whether the D has lost his ability to maintain his actions in accordance with considered judgment or whether he had lost normal powers of reasoning'.[53] This definition was approved in *R v Jewell*.[54]

Whilst the intention of the fear defence (section 55 (3)) was to concede women's fear of men's violence (albeit that it is a gender-neutral provision), men have also attempted to use this defence as in *R v Otunga*[55] and *R v Goodwin*.[56] In *R v Otunga*, where the deceased wife had been stabbed 32 times and there was evidence of 29 blows to the body, the court rightly rejected the ground of appeal that submitted that the judge had wrongly withheld loss of self-control/fear from the jury.[57] Whilst CandJA, sections 54–56, were said to extinguish the old law on provocation, like it or not, provocation's legacy remains embedded in legal reasoning, and arguably jury and judicial understandings of what looks like a 'loss of self-control' remain intact. 'Loss of self-control' may now be differently articulated around a breakdown in functioning, recognising fear, terror and anxiety (as well as anger), but understanding of its outward appearance remains visibilised by anger. In the House of Lords debate committee stage on the Bill, Baroness Scotland of Asthal expressed her misgivings with the drafting:

---

50 Ibid para 4.163.

51 B J Mitchell, R D Mackay and W J Brookbanks, 'Pleading for provoked killers: in defence of Morgan Smith' (2008) 124 Law Quarterly Review 675.

52 HL Deb (n 19 above) col 572.

53 D Ormerod in *Smith and Hogan's Criminal Law* 13th edn (Oxford University Press 2011) para 15.1.2.5 and cited by the court in *Gurpinar* (n 4 above) [19].

54 [2014] EWCA Crim 414 [24].

55 *Otunga* (n 24 above).

56 [2018] EWCA Crim 2287.

57 *Otunga* (n 24 above). See also *R v Lodge* [2014] EWCA Crim 446.

> The concerns are numerous; for example, that the defence may be too easily accessible to those who kill in anger and not sufficiently accessible to those who kill in fear. Although the courts have developed case law to accommodate this—as the noble and learned Lord has made clear—there is, in reality, no obvious place for killings in fear of serious violence in a defence designed for angry reactions. It is right that there should be a tailored response to these sorts of cases.[58]

Many recognise, however, that the triggers for 'loss of self-control', what amounts to 'loss of self-control' and when such loss is justifiable are socially constructed excuses and behavioural manifestations respectively, and, as Horder points out, such excuses function to give the individual 'permission' to lose control.[59] So, for example, the typical male excuse for loss of self-control in blaming a female partner's lack of interest in him or starting a new relationship, once sufficient to morally excuse his killing conduct, at least in law, is no longer an adequate ground. As for the abused and coerced partner, her state of mind and manifestation of conduct at the time of the killing is not characterised by a 'loss of self-control' in the traditional masculinist sense at all, nor is she in the period before the killing in a state of anger, instead she is in a state of 'fearful contemplation'.[60] Horder,[61] with reference to provocation recognised: 'The defence of provocation (focused on anger) is ... poorly equipped to deal with those who are driven to act as they do out of despair.' This remains an omnipresent concern obstructing the accessibility of a fear defence so long as 'loss of self-control' is required. According to Mitchell et al, 'fear ... will probably result in what is overtly less frantic, more deliberate behaviour'.[62] Additionally, the construct of 'reasonableness' requires the jury to consider how a person with a 'normal degree of tolerance and self-restraint' (section 54(1)(c)) might have reacted. The terrified woman may not meet the standard of reasonableness demanded, although it is to be noted that in another context an exemption privilege is accorded the male 'startled householder' where the law recognises the presence of an intruder as compromising the ability of a (male) householder to weigh to a legal nicety the degree of force required to repel such an attacker (section 43 Crime and Courts Act 2013).

Jury and judicial determinations

As Lord Thomas recognised at the Bill's committee stage, the law is interpretive and: 'juries control the situation in a murder trial where

58 HL Deb (n 19 above) col 581.
59 Horder (n 16 above) 127, 128.
60 Edwards, 'Loss of self-control' (n 48 above) 88.
61 Horder (n 6 above) 191.
62 Mitchell et al (n 51 above) 683.

the provocation defence is run. They set the standard, and it changes over the years as people's views change.'[63] Jurors determine what amounts to 'fear' and to 'serious violence', whether self-control is lost and whether the things done and said are 'extremely grave' and might be considered 'justifiable' to invoke a sense of being 'seriously wronged'. Jurors are likely, in looking for signs of 'loss of self-control', to consider as relevant defendant's descriptions of 'red mist', 'boiling over' and 'snapping',[64] and less inclined to give weight to emotions of anxiety, despair and fear. Lord Lloyd said that the attempt to include both fear and anger in the same defence has resulted in a

> ... mishmash, which is bound to confuse the jury, and which will, if I am right, take many years for the courts to elucidate. Since the structure itself is defective, it cannot now be put right by amendment. We must get rid of the clause altogether and think again.'[65]

At both the appellate and sentencing stage, it is judges and the statutory tariffs that 'control the situation'. In *R v Lawrence (Denise)*, following the introduction of the Criminal Justice Act (CJA) 2003 – section 269 and para 6 of schedule 22 – the case was referred to the High Court for the determination of the minimum sentence term. The defendant's daughter made allegations that the deceased, the husband of the defendant and step-father to the defendant's daughters, had sexually abused her and her sister.[66] The deceased's husband was charged with sexual abuse and subsequently acquitted following a criminal trial. The defendant remained haunted by the allegations and stabbed the deceased (whilst he was tied to the bed, that part being an aspect of the sex they had together) because of her belief that he had abused her daughters. A defence of diminished responsibility (section 2 manslaughter) was rejected by the jury and the judge put provocation to the jury which they also rejected, albeit that questions from the jury to the judge when arriving at their verdict suggested the matter, for them, was not clear cut. A sentence of 12 years was handed down, as a minimum term to serve following her conviction for murder. Richards LJ in the high court (also the trial judge) said:

> The case is as close to one of diminished responsibility as it is possible to get without inconsistency with a verdict of murder. The defendant's responsibility was undoubtedly impaired by her abnormality of mind, albeit that the jury did not accept that it was 'substantially' impaired.[67]

---

63 HL Deb (n 19 above) col 587.
64 Edwards, 'Anger and fear' (n 48 above).
65 HL Deb (n 19 above) col 580 per Lord Lloyd.
66 [2006] EWHC 140 (QB).
67 Ibid [28][i].

Media reports were less sympathetic and preferred to report 'ex-husband executed by wife'.[68] This writer understood the extreme and unremitting 'provocation' of the alleged acts done by the deceased (albeit unproven to the criminal standard) and the defendant's desire to prove to her daughters (who had been told by another relative that the defendant did not believe the daughter's allegations) that she did in fact believe them and loved them.[69] In *R v Stephanie Elizabeth Williams*,[70] the defendant was provoked following an argument[71] which arose in a restaurant where the deceased had left the table for over half an hour for the purpose, the defendant believed, to supply another with drugs. When he returned, she tried to leave the restaurant, he stood up to restrain her and she stabbed him once with a steak knife which was on the table. Her defence was self-defence, and the judge also put provocation to the jury. Both defences were rejected by them. On appeal, she submitted fresh evidence of her fear of her partner and evidence of her fearful state (battered woman's syndrome evidence). The Court of Appeal in dismissing her appeal said:

> ... it is hard to see how the appellant, even on all the material on which he sought to rely about Lamont's abusive conduct toward her, could have perceived herself in such danger in the restaurant that she had to stab him with a knife to protect herself.[72]

The difficulty posed for women in putting forward a defence of self-defence is the proportionality requirement and test of reasonableness. As Wake points out: 'When an abused woman kills her partner, she will rarely be able to claim self-defence, either because the force used was disproportionate or she is unable to prove that the threat was imminent.'[73] There are cases, however, where the abused and controlled woman who kills a partner or former partner has succeeded with a plea of diminished responsibility and occasionally provocation. In *R v Fell (Tara Mary)*,[74] where there was evidence of continuous violence against the defendant from the deceased, a plea of diminished responsibility was accepted. In *Gardner (Janet Susan)*,[75] where the appellant had been the victim of violence from the deceased, the jury accepted her defence of provocation. In *R v C (Janet Catherine)*,[76]

---

68 'Ex-husband executed by wife' (*BBC News*, 16 December 2003); 'Murdered after kinky sex' (*Evening Standard*, 16 December 2003).

69 Defending counsel Jane Crowley QC.

70 [2007] EWCA 2264.

71 See also 'Model jailed for restaurant murder' (*BBC News,* 22 October 2002).

72 *Williams* (n 70 above) [58].

73 Wake (n 2 above).

74 [2000] 2 Cr App R(S) 464.

75 [1994] 14 Cr App R (S) 14.

76 [2003] EWCA Crim 415. Also reported as *R v Charlton*.

where provocation had been successfully pleaded, a sentence of five years was substituted with a sentence of three-and-a-half years because the deceased was violent and controlling and an aspect of sexual abuse became more prominent as the relationship developed, which was accepted by the judge who described the deceased as a 'control freak'.[77]

Post CandJA, where women have killed violent partners and been convicted of murder, some convictions have been overturned following fresh evidence of the appellant's mental state supporting pleas of diminished responsibility rather than pleas of 'fear of serious violence' (section 55 (3)). Stacey Hyde stabbed the partner of her friend following his abuse of the friend, and at her trial for murder relied on the defences of self-defence, diminished responsibility and provocation, all of which were rejected by the jury[78] (27 reported incidents of the deceased's violence towards his partner were accepted by the prosecution).[79] In an application for permission to appeal, the main ground of appeal relied on fresh evidence of her mental state which was accepted by the court who subsequently ordered a retrial. At retrial, the jury accepted fresh evidence of attention deficit hyperactivity disorder and her plea of self-defence. Hyde was reported as saying:

> She was screaming for me to help her. I came in running and jumped on his back to pull him off her ... Next thing I remember is he is on top of me and he is strangling me – I remember him holding my neck down and the light fading. I was screaming – I know he was going to kill me, he is not stopping – no one was coming to help.[80]

Emma-Jayne Magson[81] killed her partner with a single stab wound following an argument. She said:

> ... he grabbed me around my throat and pushed me back against the side where the sink is. I couldn't move or get away ... I thought the assault on me would get worse. I was right next to the sink and reached out to grab something. Due to the way he was holding my throat, I could not see what was in the sink. I picked up the first thing which came to hand, which was a steak knife with a plastic handle. The knife was in my hand, and I hit out once. It happened so quickly I cannot be sure exactly how it happened. I didn't mean to harm him, I just wanted him to get off me.[82]

---

77 Ibid [2].

78 [2014] EWCA Crim 673.

79 Sandra Laville, 'Stacey Hyde: "There are many more who need their cases re-examined"' *The Guardian* (London, 11 June 2015).

80 See 'Stacey Hyde cleared of murder in retrial' *The Guardian* (London, 21 May 2015).

81 [2018] EWCA Crim 2674. See also Harriet Wistrich's blog on this case: 'The Emma-Jayne Magson case: misogyny is alive and well in the criminal justice system' (*Justice for Women*, 8 April 2021).

82 Ibid EWCA [14].

Convicted of murder, the jury rejected her defence of diminished responsibility. In December 2019, the Court of Appeal ruled her conviction for murder unsafe,[83] hearing fresh evidence of her emotionally unstable personality disorder at the time, ordering a retrial. At retrial in March 2021 she was found guilty of murder and sentenced to a 17-year minimum term.[84] In *R v Challen*,[85] the defendant hit a controlling and domineering husband 20 times with a hammer. The jury rejected her plea of diminished responsibility and provocation (the latter, which the judge had put to the jury). She was convicted of murder with a minimum sentence term of 22 years, reduced to 18 years on appeal.[86] On appeal against conviction, Lady Justice Hallett[87] quashing the conviction and ordering a retrial[88] accepted that evidence of 'coercive control' and fresh evidence of two psychiatric conditions if available at the time of the trial might have resulted in a different outcome. The prosecution subsequently decided not to pursue a retrial as the appellant had already served 10 years in prison.[89]

'FEAR OF SERIOUS VIOLENCE' SECTION 55(3): SOME EMPIRICAL FINDINGS

Gender homicide trial outcomes

In exploring further the use and impact of a 'fear of serious violence' defence (section 55(3)), I consider some of the empirical evidence which provides an indication of the use of this and other homicide defences and the circumstances where women kill. As the CandJA came into force on 4 October 2010, I have selected as the relevant time frame those cases heard from April 2011. First, referring to published

83 See 'Emma-Jayne Magson: steak knife murder conviction "unsafe"' (*BBC News*, 10 December 2019).

84 'Emma-Jayne Magson jailed again after murdering boyfriend in row' (*BBC News*, 29 March 2021).

85 [2019] EWCA Crim 916.

86 *R v Georgina (Sarah Anne Louise) Challen* [2012] 2 Cr App R (S) 20.

87 Lady Justice Hallett the presiding judge in *R v C (G A)* [2013] EWCA Crim 1472, where duress was pleaded said [26]: 'Learned helplessness would be of particular relevance to a possible defence of duress.'

88 *Challen* (n 86 above). See also V Bettinson, 'Aligning partial defences to murder with the offence of coercive or controlling behaviour' (2019) 83(1) Journal of Criminal Law 71–86; T Storey, 'Coercive control: an offence but not a defence *R v Challen* [2019] EWCA Crim 916, Court of Appeal' (2019)83(6) Journal of Criminal Law 513–515.

89 See Challen (n 85 above); 'Sally Challen walks free as court rules out retrial for killing abusive husband' *The Guardian* (London, 7 June 2017).

generic statistics (data set 1),[90] I examine all homicides (regardless of relationship of victim to suspect) including murder, diminished responsibility and 'other' manslaughter by gender, year ending March 2011 to year ending March 2019. The category 'other' manslaughter combines 'no intent' or involuntary manslaughter – accident, 'loss of self-control' – voluntary manslaughter (sections 54–56) (including cases under section 55 (3) fear manslaughter), and gross negligence manslaughter. This generic grouping makes any definitive assessment of the use of 'fear of serious violence' manslaughter impossible.[91] Second, I consider a snapshot of statistics on all 'domestic homicide' and court outcomes (data set 2)[92] for the year ending March 2016 to year ending March 2018. Third, I consider (data set 3)[93] convictions of all women (n=40) who killed intimate partners/former partners during the period April 2011 to year ending March 2016 (five years). Permission was sought and granted by the Home Office for access to data set 3, and any information reported on these cases including the circumstances of these homicides and the trial outcomes are derived from information already in the public domain.

Since the 1980s, when I first began to conduct research into homicide between intimate partners/former partners and the method of killing,[94] between 12 and 21 male partners were killed annually by female partners and between 90 and 110 female partners were killed by male partners.[95] In the 1980s the killing of female partners by male

90 Data set 1: for year ending March 2011 to year ending 2019, taken from Appendix Tables 21 and 23, Homicide in England and Wales: year ending March 2019 (Office for National Statistics, 25 February 2021). Figures are subject to revision as further information becomes available: Version 25 February 2021.

91 This lack of statistical differentiation was the subject of comment by B J Mitchell and R D Mackay, 'Investigating involuntary manslaughter: an empirical study of 127 cases' (2011) 31(1) Oxford Journal of Legal Studies 165, fns 14, 18 and 19.

92 Data set 2: 'Domestic abuse prevalence and victim characteristics England and Wales' Appendix Tables 22 and 23 (Office for National Statistics, release date 25 November 2020). As at December 2018, as figures are subject to revision as further information becomes available. See 'Year ending March 2019 edition of this data set'.

93 Data set 3 is derived from an extract from the Homicide Index supplied by permission of the Home Office and subject to the confidentiality conditions in a Deed of Agreement such that any details of cases included in this or any publication are derived from information already in the public domain, including for example newspapers, web sources, law reporting etc and reference is made to the source used.

94 S Edwards, 'Gender "justice"? Defending defendants and mitigating sentence' in S Edwards (ed), *Gender Sex and the Law* (Croom Helm 1985) especially 138–145; S Edwards, *Women on Trial* (Manchester University Press 1984) 175.

95 Criminal Statistics 1988 (Cm 847, HMSO 1988) table 4.4 (b). Note too that at that time statistics were collated on those intimate partners who were or had been living together, and 'spousal homicide' was the preferred term.

partners accounted for 40 per cent of all homicides of females.[96] Bel Mooney's article in *The Times* in 1981: '"Has a woman the right to fight back?" No!' summed up the prevailing attitude to women who acted in self-defence.[97] Women then, as now, predominantly use a knife to kill, accounting for 72 per cent of all female on male partner homicides 1987–1996[98] and 75 per cent of all female on male partner homicides in 2011–2012.[99] Since 2009 between 46 and 52 per cent of all females killed are killed by intimate partners.[100]

Considering data set 1 (year ending March 2011 to year ending March 2019), approximately 3267[101] defendants were convicted of homicide. As a percentage of all homicides, convictions for murder rose from 64 per cent in 2011 to 71 per cent in 2019, continuing an upward trend from 1969 when murder constituted 29 per cent of homicide convictions.[102] Diminished responsibility declined from 5 per cent of all convictions in 2011 to 4 per cent by March 2019 (accounting for 10 defendants).[103] 'Other' manslaughter accounted for 30 per cent of all convictions for homicide. Disaggregating these figures by gender 2977 males and 278 females were convicted of homicide.[104] Of all males convicted, 1915 (64 per cent) were convicted of murder, 159 (5 per cent) of diminished responsibility and 903 (30 per cent) were convicted of 'other' manslaughter.[105] Of all 278 females convicted, 154 (55 per cent) were convicted of murder, 31 (11 per cent) of diminished responsibility and 93 (33 per cent) were convicted of 'other' manslaughter.[106] Hidden within the generic 'other' manslaughter category are successful section 55(3) fear of serious violence manslaughter defences, and within the murder category are the unsuccessful section 55(3) defences.

96 S S M Edwards, *Policing Domestic Violence* (Sage 1989) 125; Edwards (n 28 above).

97 *The Times* (London, 21 July 1981).

98 S S M Edwards, 'Ascribing intention – the neglected role of modus operandi implications for gender' (1999/2000) CIL 243.

99 See Focus on Partner/Ex-partner Homicide (Office for National Statistics, 13 February 2014) table 2.1: 'Characteristics of partner/ex-partner homicides for victims aged 16 and over, combined data for 2010/11 to 2012/13'.

100 Data set 2 (but from source at n 92 above) Appendix Table 10b .

101 Data set 1 (n 90 above). Appendix Table 21. Version 25 February 2021.

102 It is significant that the judgment in *R v Nedrick* [1986] 1 WLR 1025, and its tightening of the test of intention for murder with the nomenclature of 'virtual certainty', surprisingly made no impact on reducing the percentage of murder convictions; nor did *R v Woollin* [1999] 1 AC 82 with its requirement to 'find' murder instead as formerly permission to 'infer'.

103 Data set 1 (n 90 above). Appendix Table 21.

104 Ibid Appendix Table 21.

105 Ibid Appendix Table 23.

106 Ibid Appendix Table 23.

'Domestic homicide' trial outcomes

Considering the second data set (data set 2), a snapshot of published statistics on 'domestic homicide' including partners/former partners, parents, children and other family members (year ending March 2016 to year ending March 2018),[107] show that 216 females and three males were killed by a male intimate partner/former partner, and 40 males and one female killed by a female intimate partner/former partner.[108] Nearly one-third of all domestic homicides perpetrated by males were committed against parents (47), children (3) and other family members (41) (n=91), compared with one quarter (n=14) where females were perpetrators where seven parents and seven other family members were killed. Considering court outcomes in 'domestic homicides',[109] 119 male defendants were convicted of murder, 22 of diminished responsibility and 24 of 'other' manslaughter (proceedings were not initiated in 62 cases due to the suspect committing suicide in 45 cases, and court decisions were pending in a further 83 cases at the time of publication of these statistics). Regarding female defendants, 14 were convicted of murder, four of diminished responsibility and 10 of 'other' manslaughter (proceedings were not initiated in 12 cases and court decisions were pending in 15 cases at the time of publication of these statistics). Since 10 females were convicted of 'other' manslaughter (no intent, loss of self-control and gross negligence), it may be reasonably assumed that only a few, or possibly none of these cases, involved convictions for section 55(3) manslaughter in partner/former partner relationships. It is also important in considering this question that the 14 murder convictions are not overlooked since it is possible that a defence of self-defence and/or fear manslaughter and/or no intent manslaughter or diminished responsibility may have been pursued and failed. From this data thus far a picture begins to emerge that section 55(3) is likely little used and when used likely unsuccessful.

Women who kill intimate partners and outcomes

The paramount question in this study is whether the inclusion of fear (section 55(3)) as a trigger for 'loss of self-control' is accessible to women who kill. This important question is now pursued through a study of unpublished data held in the Homicide Index (data set 3, for the period April 2011 to year ending March 2016 – five years).[110] During this period 40 females were convicted of homicide offences against 39 male intimate partners/former partners and one female

107 Data set 2 (n 92 above) tables 22 and 23.
108 Ibid table 22.
109 Ibid table 23.
110 Data set 3 (n 93 above).

partner. The circumstances and legal outcomes of these cases were tracked through searches of publicly held information.[111] Of the 40 cases where women were recorded as killing partners/former partners, three were convicted of diminished responsibility, seven were convicted of 'other' manslaughter and 30 women were convicted of murder. It is not possible to ascertain the original pleas at trial. Of the three diminished responsibility convictions, one defendant was sentenced to a hospital order,[112] where she had stabbed her husband and there had been a history of mental illness and hospitalisation. One defendant was sentenced to a term of seven-and-a-half years' imprisonment where she had stabbed her husband but was unable to remember what had happened on the night of the killing.[113] One defendant had her original sentence of 12 years' imprisonment reduced on appeal to six, where she had stabbed the deceased and the appeal court described the relationship as 'volatile'.[114]

Of the seven cases where 'other' manslaughter was recorded and therefore 'no intent' involuntary manslaughter or 'loss of control' would have been accepted by the jury following a murder trial, then, from information already available in the public domain, none suggested that the defendants were convicted either for 'loss of self-control', 'things said or done' (section 55(4)(a)(b)) or 'fear of serious violence' (section 55(3)). The sentences handed down by the court reflected the wide-ranging circumstances. In one case the defendant received a fully suspended sentence of imprisonment.[115] In one case, an 18-month sentence was suspended for two years, where both partners had made a suicide pact (section 4 HA 1957), the male partner dying and the female partner surviving, and where the court recognised that the defendant was under the control of a 'domineering husband'.[116] In one further case, a sentence of seven years was handed down where the defendant, who had stabbed the deceased following an argument, where there had been a history of violence, could not remember what had happened.[117] In one further case, a sentence of nine years was

111 For example, newspaper searches, Gale, thelawpages.com, court information, Lexis and Westlaw searches.

112 See 'GP Geraint Hughes unlawfully killed by wife in Feock' (*BBC News*, 15 August 2019).

113 See 'Marie Gavin admits stabbing partner in Bedford' (*BBC News*, 14 November 2011).

114 *R v Martin (Ella Marie)* [2014] EWCA Crim 795.

115 See 'Middleton woman charged with husband's murder' (*BBC News*, 17 August 2011). See also The Law Pages.

116 See 'Suicide pact wife avoids prison over husband's killing' (*BBC News*, 7 May 2014).

117 See 'Lemington mum Lisa Palmer jailed for seven years for a killing she can't remember' (*Chronicle*, 20 Marcy 2015).

handed down where the parties had separated and the deceased had continued to return to the property where the defendant was living, and during an argument the defendant stabbed the deceased – the defendant said in self-defence.[118] In one further case, a sentence of nine years was handed down where the deceased found the defendant with another man and following an argument the defendant stabbed the deceased.[119] In one further case, the defendant was an accomplice in an arson attack which was instigated and perpetrated by her current boyfriend who was also the former husband of the deceased (in this case three persons died). The defendant was described by the judge as being 'a joint perpetrator in a common venture to burn the home'.[120] Acquitted of murder, she was found guilty of 'no intent manslaughter' and received a prison sentence of 14 years minimum. In one further case[121] a 16-year sentence was handed down where the deceased was said to be domineering, controlling and sexually abusive and had forced the defendant into prostitution.

Convicted of murder: the 75 per cent

Of the 30 cases where women were convicted of murder (75 per cent of all women n=40 who killed intimate partners during this period) (including one woman in a same sex relationship who killed her female intimate partner), it is not known in how many of these cases a defence at trial of self-defence, 'loss of self-control', 'things said or done' (section 55(4)) or 'fear of serious violence' (section 55(3)) or diminished responsibility (section 52) were pleaded and failed. In at least four of these 30 convictions the defendant pleaded guilty to murder. In two cases, the circumstances were such that it is curious that a trial was not run since the fatal attack appeared to follow on from an argument where there was evidence of violence from the deceased. However, the sentencing discount of an early guilty plea[122] may have been persuasive in inducing such a plea.

From the information in the public domain, I have grouped together the murder outcomes depending on the circumstances albeit cognisant that press and media reporting on these cases is prosecution-favoured. A word is required here on the sentencing regime for murder. Section 269

118 See 'Mother-of-six stabbed "devoted" father of her children to death' (*Mail Online*, 24 May 2013).

119 See 'Abingdon river death: girlfriend denies knife murder' (*BBC News*, 7 April 2015).

120 See 'Danai Muhammadi jailed for killing family in Chatham fire' (*BBC News*, 2 July 2021).

121 See 'Prostitute killed "domineering" pimp boyfriend' (*Mail Online*, 17 March 2014).

122 See s 144 CJA; Reduction in Sentence for a Guilty Plea: Definitive Guideline (Sentencing Council, 1 June 2017).

and schedule 21 of the CJA, which sets out sentence length, sets out the framework for minimum terms or 'starting points' and removes much judicial discretion. Minimum terms must be served in full. Paragraph 11 of schedule 21 sets out further factors, which the sentencing court may take into consideration once a minimum term has been decided, these include aggravating and mitigating factors.[123] Mitigatory factors of particular relevance in cases involving abused and coerced women who kill include:

> (a) an intention to cause serious bodily harm rather than to kill ...
>
> (c) that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered 'his' degree of culpability,
>
> (d) that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,[124] ...
>
> (e) the fact that the offender acted to any extent in self-defence.[125]

In 25 of the 30 convictions for murder a weapon was used, and in 19 of these 30 cases a knife was used to kill, in four cases a blunt instrument, in one case arson and in one shooting. The use of a weapon attracts a longer sentence, and the different defence and sentencing outcomes regarding weapons versus body force has been a continual point of conjecture, concern and injustice, especially where women whose size and strength may require them in order to defend themselves to resort to the use of a weapon to hand.[126]

In one of the five joint-enterprise cases, the defendant was recruited by the current boyfriend who used her to kill his former girlfriend. In the four other joint-enterprise cases the defendant appeared to be the prime suspect who recruited another/others to kill a former boyfriend. Sentences in this category ranged from 20 to 32 years minimum.

In the remaining 25 murder convictions, in at least four cases there was evidence of violence against the defendant, reflected in the defence pleas of self-defence where fear was evident and also in the 'no

---

123 Para 10: Aggravating factors (additional to those mentioned in paragraph 4(2) and 5(2)) that may be relevant to the offence of murder include (a) a significant degree of planning or premeditation, (b) vulnerability of the victim because of age or disability, (c) mental or physical suffering inflicted on the victim before death, (d) the abuse of a position of trust, (e) the use of duress or threats against another person to facilitate the commission of the offence, (f) the fact that the victim was providing a public service or performing a public duty, and (g) concealment, destruction, or dismemberment of the body.

124 In *R v Bradley John Allardyce, Wayne Barry Turner and Shane Porter* [2006] 1 Cr App R (S) 98 at 587, a sentence of 18 years was reduced to 15 years. See also *R v James King* [2006] 1 Cr App R (S) 121, 715.

125 S 269 and sched 21 of the CJA, para 11.

126 Edwards, 'Descent into murder' (n 48 above).

intent' to kill pleas. The remarks of the sentencing judge acceded the defendant's lack of intent in all these four cases, and in one said: 'It was self-defence turned into an attack.'[127] Sentences in this group ranged between 12 to 14 years minimum term reflecting mitigatory factors.[128] In *(R v Cox) (Louise Jane)*[129] a defence of self-defence failed and on appeal the issue was whether bad character evidence had been unfairly admitted potentially impacting on the jury verdict so as to render the conviction for murder unsafe.

> [10] The defence case was that the appellant had acted in lawful self-defence after the deceased attacked her, gripped her tightly round the neck and held her against a wall. ... She picked up a knife from the kitchen drawer and returned to the bedroom area ... [16] I believed he was going to come after me and strangle me again and I thought I might die'.

The Court of Appeal upheld her conviction for murder. Farieissia Martin[130] received a sentence of 13 years' imprisonment for murder, having defended herself by stabbing her partner having been grabbed by the throat by him. On 16 December 2020, the Court of Appeal quashed the murder conviction[131] and ordered a retrial. At retrial despite evidence of a history of abuse she was sentenced to a prison term of 10 years and nine months.

In at least 10 further cases, published reports indicated that there had been arguments between the parties over matters including finances, drug abuse, children, relationships and, in many cases, against a background of violence.[132] In most of these cases a single knife wound was inflicted by the defendant. Judges' remarks at the sentencing stage in several cases suggested that they accepted that the defendant lacked an intention to kill.[133] Here, sentences ranged from 12 to 15 years. For example, in *R v Hughes (Susan Michelle)*,[134] a

127 See 'Margate woman Janice Carter jailed for husband's murder' (*BBC News*, 2 April 2021).

128 See 'Birkenhead woman Cherie Cooper jailed for life for stabbing violent partner through the heart' (*Liverpool Echo*, 12 December 2012).

129 [2014] EWCA Crim 804. See also 'Trowbridge murderer jailed for 14 years after stabbing lover' (*Wiltshire Times*, 17 May 2013).

130 See 'Woman wins first stage in battle to overturn murder conviction' (*The Guardian*, 3 December 2019). See also 'Kyle Farrell murder: Farieissia Martin jailed for life' (*BBC News*, 9 June 2015); 'Farieissia Martin, who stabbed her "violent" boyfriend to death, will stand trial again after new evidence emerged' (*ITV News*, 16 December 2020).

131 See Justice for Women, 'Farieissia Martin'.

132 See, for example, 'Wolverhampton woman jailed for life after stabbing partner through heart in domestic row' (*Birmingham Mail,* 14 May 2014).

133 For example, see 'St Helens mum Amanda O'Shaughnessy sentenced to life in prison for murdering her partner' (*Liverpool Echo,* 6 July 2015).

134 [2015] EWCA Crim 2514.

defence of loss of self-control and diminished responsibility failed; her case was that she had been the victim of abuse over a long period.[135] On appeal the grounds of appeal failed, and the conviction was upheld.

In three further cases, where the defendants did not want the relationship to end and where their partners had formed new relationships, in two of these cases, the judge accepted a lack of intent to kill, which was reflected in the sentencing remarks and sentences of 13 and 14 years minimum was handed down.[136] In the third case, where the deceased had ended the relationship, the defendant used a shotgun to kill and entered a guilty plea to murder. In this case, the court imposed a minimum sentence of 24 years since the sentencing powers of the judge are determined by a mandatory starting point of 30 years for killing with a firearm.[137] Horder and Fitzgibbon[138] have explored sentencing outcomes where men have killed partners in which circumstances of sexual infidelity have been said by the defendant to trigger the killing. They contend that post-2009 'sexual infidelity-related evidence should have no bearing on mitigation in murder cases by virtue of the application of s. 55(6)(c), except in so far as it is part and parcel of a—necessarily rare—claim of "prolonged stress" bordering on mental disorder'.[139] However Lord Judge LCJ in *Attorney General's Reference (No 23 of 2011)*, said:

> [55(6)(c)] is concerned with the substantive criminal offence of murder, not with the determination of the minimum term where murder is admitted or proved. Paragraph 11 of Schedule 21 remains in force. ... provocation may provide relevant mitigation to murder [and] mitigation for an offence of murder [is] not closed as a result of section 55 of the 2009 Act.[140]

In a further seven cases, from information in the public domain the defendant appeared to be the aggressor, and in most of these cases the killing involved a sustained assault causing several injuries to the deceased. Sentencing reflected these aggravated circumstances and defendants received minimum terms of 15 to 20 years. In one of these seven cases where a sentence of 15 years was handed down the defendant had serious mental health issues which appear to have been insufficiently explored[141] which suggests that a diminished

135 Ibid [8].

136 See 'Glamour model stabbed her boyfriend to death when he sent text saying: "It's over"' (*The Mirror*, 21 September 2016).

137 See 'Stratton Strawless murder: Catherine Hodges jailed for 24 years' (*BBC News*, 26 August 2011).

138 Horder and Fitzgibbon (n 22 above).

139 Ibid 326.

140 [2012] 1 Cr App R(S) 45, 268.

141 See 'Michelle Mills jailed for Edward Miller's murder in Scalford' (*BBC News*, 30 April 2013).

responsibility plea may have been more appropriate. In one of these seven cases the defendant appealed the sentence term of 20 years which was dismissed.[142]

In one further case (*R v Sampford*),[143] an elderly defendant, who was caring for her elderly sick and terminally ill husband, snapped. She pleaded guilty to murder and appealed the sentence length of nine years. Refusing permission to appeal, the single judge said: 'This is clearly a tragic case that has caused me to review the papers with considerable anxiety.' Following a renewed appeal application a sentence of nine years was upheld.[144]

Notwithstanding these imperfect findings and analysis an indication is nonetheless very strongly suggested of the little impact of section 55(3) CandJA in cases where the defendant is so clearly the victim of violence and where violence has characterised the relationship. A substantive study by the Centre for Women's Justice[145] 'Women who kill', which explored the presence of prior violence and coercion against women from the deceased, examined 92 cases of women who had killed partners in the period April 2008 to November 2020 and found that in 77 per cent of cases (n=71) women had experienced violence or abuse from the deceased. In the 92 cases, 43 per cent (n=40) were convicted of murder, 46 per cent of manslaughter and 7 per cent (n= 6) were acquitted This author's study on which this article is based further endorses their findings.

FINAL REFLECTIONS

Several tentative conclusions can be drawn from this compiled picture of the operation of section 55(3) 'fear of serious violence' manslaughter. The 'loss of self-control' requirement in sections 55–56 CandJA still leaves relatively intact the pre-2009 formulation, notwithstanding that judicial guidance asserts that 'loss of self-control' within the CandJA is different to the loss of control in provocation that preceded it[146] and that the trigger for sexual infidelity is excluded and circumstances of the trigger must be grave. With regard to the fear provision, the

142 *R v Edwards (Sharon)* [2017] EWCA Crim 2101.

143 [2014] EWCA Crim 1560 [17].

144 See s 269 and sched 21 of the CJA, para 11. Mitigating factors that may be relevant to the offence of murder included, in this particular case, (f) a belief by the offender that the murder was an act of mercy and (g) the age of the offender.

145 See Centre for Women's Justice, 'Women who kill'. The methodology involved 20 case studies following interviews with women who had killed abusive partners, court transcripts, interviews with counsel and legal practitioners and a study of domestic homicide reviews.

146 Crown Court Compendium (n 31 above 19-10 [3].

trigger specifies 'serious violence' as the requisite threshold before a fear manslaughter defence can be considered. This undermines much understanding of how an abused, coerced and controlled woman (person) in anticipation of such abuse might react and ignores any understanding of coercion and also that an abused/controlled woman's reaction to the abuser's violence/threats and coercion does not necessarily follow on from the severity of the last act of violence or threat but from a perception of the severity of the threat of control or abuse.[147] These understandings of an abused person's fear of further coercive control and violence need to inform and be conceded across the framework of legal defences. Since self-defence is founded on an ancient formulation of combat between two males equal in physical stature and overlaid with a masculinist notion of proportionality, in very few cases where women kill abusive and violent male partners with a weapon is a defence of self-defence successful, even less attempted in such circumstances. Elizabeth Hart-Browne,[148] who was hit and grabbed by the throat by the deceased and picked up a kitchen knife and stabbed him, provides one of the few cases where fear of a partner's violence resulted in a successful self-defence pleading. Reasonable force continues to remain elided with a notion of male proportionality, such that leaving jurors to determine what is a reasonable response of an abused woman depends on their appreciation and understanding of the situation of a woman who is abused, coerced and controlled. In fact, where women have been subject to violence and control from male partners it is often considered within a diminished responsibility appeal as in *R v Hyde*,[149] and *R v Challen*[150] (and *R v Magson*,[151] although on retrial the jury convicted of murder). There has been much publicity and optimism surrounding the 'fear of serious violence' section 55(3) defence. As Laird points out in the decision in *R v Challen*:[152]

> The judgment in this case was welcomed, as it was assumed that it heralded a sea-change in how coercive control is recognised by the law. This is far from clear, however, as it remains to be seen whether evidence of the kind that led the Court of Appeal to quash the appellant's conviction would be relevant to a jury's consideration of loss of control.

147 Edwards, 'Anger and fear' (n 48 above) 233. See also *Osland v R* [2000] 2 LRC 486 [57].

148 'Elizabeth Hart-Browne cleared of murdering boyfriend' (*BBC News*, 27 April 2017). She pleaded self-defence and loss of self-control/fear (s 55(3)). She was acquitted. Defending counsel James Scobie QC.

149 [2014] EWCA Crim 673.

150 *Challen* (n 85 above).

151 *Magson* (n 81 above).

152 *Challen* (n 85 above).

> If it transpires that it is only relevant to diminished responsibility, then the law has not come very far despite the 2009 reforms.[153]

As the 'Women who kill'[154] study found, the problem lies not only with legal constructs as currently framed but also with the preparedness of counsel to explore the history of violence and coercion and the mental health of the defendant. McPherson also found in her Scottish study of women who kill violent abusers that the mental health of defendants was insufficiently explored and understood.[155] The 40 conviction outcomes (data set 3) strongly indicate that 'loss of self-control' section 55(3) is little used. Pleas of 'no intent' manslaughter, it is suggested, also fail, and that may be because circumstances are insufficiently explored, because of jury attitudes or bias and because women use a weapon and not body force. Amendments proposed during the passage of the Domestic Abuse Bill 2020–21 pressed for reform to the 'householder defence' to acknowledge the predicament of women in a situation of violence and coercion in their own home.[156] Clause 33,[157] proposed by Peter Kyle MP, if passed would have provided domestic abuse survivors with the same legal protection that householders have in cases of self-defence. As Wake pointed out, 'The 'startled householder' provision places a premium on home invasion cases and ignores other equally deserving defendants.'[158] Clause 46,[159] proposed by Jess Phillips MP, was intended to provide a defence of 'compulsion' for victims of domestic abuse who commit any criminal offence, but unsupported by the Government both motions were withdrawn.[160] On 10 March 2021,[161] Baroness Kennedy of the Shaws moved two amendments: Amendment 50 to introduce 'Reasonable force in domestic abuse cases to include domestic abuse in the householder defence' and Amendment 51 – 'Defence for victims of domestic abuse who commit an offence under compulsion' – intended to reform current strictures of duress. Both motions were rejected.[162]

153 K Laird, 'Homicide *R v Challen* (cases and comment)' [2019] 11 Criminal Law Review 980, 982.

154 Centre for Women's Justice (n 145 above).

155 See also R McPherson, 'Battered woman syndrome, diminished responsibility and women who kill: insights from Scottish case law' (2019) 83(5) Journal of Criminal Law 381.

156 Public Bill Committees, Domestic Abuse Bill, Twelfth Session, 17 June 2020, col 437.

157 Ibid col 437.

158 Wake (n 2 above). See also A Carline and P Easteal, *Shades of Grey* (Routledge 2014) 134.

159 Public Bill Committees (n 156 above) col 462.

160 Ibid col 440 and col 473 respectively.

161 See Domestic Abuse Bill, Report (2nd Day) HL 10 March 2021, col 1741.

162 Ibid col 1753.

What is required, as has been recognised by many academics for several decades, by the Law Commission for two decades, and now by politicians, is that a root-and-branch reform of law beyond the *ad hoc* appendage approach is required. Criado Perez's commentary on 'invisible data'[163] makes some very relevant general observations on data collection which are of particular relevance here, where the collation and recording of homicide statistics on trial outcomes continues to obfuscate any transparency on the operation of homicide defences, especially both voluntary and involuntary manslaughter, and, in this instant case, the section 55(3) 'fear of serious violence' defence is subsumed within the generic 'other' manslaughter category which also includes accident 'no intent' manslaughter, 'loss of self-control' (section 55(4)) and gross negligence manslaughter. It is difficult to comprehend how the Government and the legislature can be held to account when there is no transparency with regard to the use of these very disparate defences and where administrative convenience seems the more important. In 1986, I wrote an article entitled, 'The real risks of violence behind closed doors'[164] in which I spoke of the home as the least safe place for women. Today this remains the case in fact and in law both for women who die at the hands of men and for women who defend themselves against them.

163 C Criado Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (Vintage 2020).

164 S Edwards, 'The real risks of violence behind closed doors' New Law Journal (12 December 1986) 1191–1193.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 271–323
Article DOI: 10.53386/nilq.v72i2.878

The role of loss of self-control in defences to homicide: a critical analysis of Anglo-Australian developments

Heather Douglas

University of Melbourne

Alan Reed

Northumbria University

Correspondence email: douglash@unimelb.edu.au

ABSTRACT

The provocation defence has been the subject of legislative reform in England and Australia over the past 10 years. In England, it was abolished by section 56 of the Coroners and Justice Act 2009 and replaced with a partial defence of loss of control. In Australia, the provocation defence has been abolished in some states and significantly reformed in others. One of the key challenges for law reform has been how to ensure homicide defences are not overly restrictive for abused women who kill their abuser, while at the same time ensuring that homicide defences are not overly expansive for domestic abusers who ultimately kill their partner. With these challenges in mind, we critically examine the operation of the loss of control defence in England. There has been significant reform to the provocation defence across Australia, and, in this article, we also focus on the most recent reforms in Queensland and New South Wales. We conclude with some suggestions for further reform.

Keywords: Anglo-Australian provocation defence; homicide; loss of control; Coroners and Justice Act 2009; domestic abuse; coercive control; provocation triggers; serious violence; sexual infidelity; separation; jury directions.

INTRODUCTION

Provocation was abolished as a partial defence to murder in English law by section 56 of the Coroners and Justice Act 2009 (CJA), effective from 4 October 2010. Reforms promulgated a new loss of control iteration, predicated on novel qualifying triggers, derived from fear of serious violence and imperfect justification, and with bespoke 'apparent' exclusions for sexual infidelity and revenge killings. Significantly, the legislative response charted a paradigm shift from jury evaluation of the normative characteristics of the reasonable defendant at common law towards contemplation of all of

the circumstances leading up to the fatal action. It was uncertain under prior provocation standardisations which individuated characteristics of the defendant were relationally relevant for juror consideration as a modulation of the amorphous reasonable person contextualisation.[1]

This article contextualises Anglo-Australian theoretical and substantive developments that have occurred in the last decade since the introduction of the loss of control framework for voluntary manslaughter in England. Australian reforms in the two states of New South Wales (NSW) and Queensland (Qld) have aimed to ensure that in exceptional cases, abused women who kill are able to rely on the defence of provocation. At the same time, they have aimed to ensure that male proprietorial anger does not excuse a fatal response. Our comparative review focuses upon whether new models of defences involving loss of control have shifted the partial defence from one viewed through a lens of male proprietorial anger to a defence that reflects culpability standardisations for victims of domestic abuse who kill abusive partners. Lessons are drawn from Australian initiatives that have occurred over the intervening 10-year period, including Social Framework Evidence and enhanced juror directions.

We include a critique of the 'fear of serious violence' qualifying trigger as a different configuration of loss of control with elaboration on the fluidity and polysemicity of the signs and manifestations of fear. The threshold hurdles for the defence to overcome to successfully plead a provocation defence are analysed. Further, this article reviews the unanticipated consequences that have occurred via the apparent exclusion of consideration of sexual infidelity in provoked killings. It addresses the standardisation of the normative 'reasonable' killer in such contextualisations. The article concludes with optimal Anglo-Australian reform proposals to reflect a new comparative pathway for abusive partner and sexual infidelity killings and consideration of rational 'half-way house' defence alternatives.

THE CORONERS AND JUSTICE ACT 2009 REFORMS: GROSS PROVOCATION AND IMPERFECT JUSTIFICATION

The defence of provocation in crimes of homicide has always represented an exceptional mitigatory factor in English law. In violent crimes that resulted in injury short of death, the fact that the accused committed the violent act under provocation did not affect the nature

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

of the offence.[2] The fact that the provocation caused the accused to lose her self-control was merely a matter to be taken into consideration in determining the appropriate penalty to impose. In homicide, however, provocation effected a change in the offence, reducing it from murder, for which the penalty became imprisonment for life, to manslaughter, where the penalty lay at the discretion of the judge.[3] As Simester et al have commented,[4] the derivations of this form of extenuation may be traced back to verdicts of medieval judges, whereby certain spontaneous angry killings were dispositively contextualised as killings *se defendo*, indulgently abrogating a verdict of murder, and with attendant implications.[5]

The CJA legislative reforms replaced provocation with a bespoke and constrained defence of loss of control.[6] It is straitened by subjectivisation to specific qualifying triggers, but the partial nature of the defence was retained, aligned with a corresponding burden of proof on the prosecution.[7] A triumvirate of new threshold elements was adopted, disaggregating the former provocation nomenclature. The ambit of the defence, in part determined by governmental policy rationale, was significantly narrowed, vituperatively criticised in parliamentary debates prior to enactment as 'all over the place', 'beyond redemption' and a 'dog's breakfast'.[8] A marked shift towards objectification occurred throughout the reforms, and the trial judge can now remove the defence from consideration on the predicate that no properly directed jury could reasonably conclude its applicability.[9]

---

2 *DPP v Camplin* [1978] AC 705, 713 *per* Lord Diplock. Notably, there is an exception to this in the jurisdiction of Qld, Australia, where provocation is a complete defence to assault, see ss 268 and 269 QCC.

3 Timothy Macklem, 'Provocation and the ordinary person' (1987) 11 Dalhousie Law Journal 126; Alan Reed, 'Duress and provocation as excuses to murder: salutary lessons from recent Anglo-American jurisprudence' (1996) 6 Florida State University, Journal of Transnational Law and Policy 51.

4 A P Simester, J R Spencer, F Stark, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* 6th edn (Hart 2019) 408–422.

5 Ibid 408.

6 Carol Withey, 'Loss of control: loss of opportunity?' [2011] Criminal Law Review 263.

7 Alan Norrie, 'The Coroners and Justice Act 2009 – partial defences to murder (1) loss of control' [2010] Criminal Law Review 275.

8 Jo Miles, 'A dog's breakfast of homicide reform' (2009) Archbold News 6; Amanda Clough, 'Loss of self-control as a defence: the key to replacing provocation' (2010) 74 Journal of Criminal Law 127; Stanley Yeo, 'English reform of provocation and diminished responsibility: whither Singapore?' (2010) Singapore Journal of Legal Studies 177.

9 CJA, s 54(6); Susan S M Edwards, 'Anger and fear as justifiable preludes for loss of self-control' (2010) 74 Journal of Criminal Law 223.

The reformed defence posits three hurdles for the defence to overcome or, more transformatively, three opportunities for the Crown to disprove it. The first requirement is subjective, retaining the controversial threshold that the killing resulted from the accused's (partial) loss of control.[10] An individual loss of control, contrary to old provocation law derived from the much-criticised *Duffy*[11] standardisation, no longer needs to be 'sudden' and 'temporary'. This criterion had clearly prejudged certain societal groupings, notably identified in a number of high-profile cases where battered women, as primary victims, had responsively killed their abuser, but after a temporally individuated delay between the final provoking event and fatal action.[12] A concern was that this particular group of female primary victims commonly reacted in a phenomenologically different manner (slow-burn) than the male response to provoking stimuli, which translated as immediate aggressive anger.[13]

The retention of the loss of control imperative, considered further below, means that, as Fortson has contended, defence counsel still unfortunately transmogrify back to the utilisation of descriptors often heard in cases of common law provocation such as 'snapped', 'went berserk', 'lost the plot', and 'the straw that broke the camel's back', which are not necessarily helpful when deciding whether the partial defence has been made out.[14] The defence will not operate where the defendant has acted in a considered desire for revenge, which is emotionally inconsistent with a loss of self-control contextualisation.[15]

The second threshold hurdle of the classificatory schema interposed new qualifying triggers. Constitutively, it presents the only type of emotional excuse that is validated to potentially offer a partial

10 CJA, s 54(1)(a); Nicola Wake, 'Political rhetoric or principled reform of loss of control? Anglo-Australian perspectives on the exclusionary conduct model' (2013) 77 Journal of Criminal Law 512.

11 [1949] 1 All ER 932; Susan S M Edwards, 'Justice Devlin's Legacy: *Duffy* – a battered woman caught in time' [2009] Criminal Law Review 851.

12 Aileen McColgan, 'In defence of battered women who kill' (1991) 18 Journal of Law and Society 219.

13 Joshua Dressler, 'Battered women who kill their sleeping tormentors: reflections on maintaining respect for human life while killing moral monsters' in Stephen Shute and Andrew Simester (eds), *Criminal Law Theory* (Oxford University Press 2002) 259: Edwards (n 9 above) 225–229.

14 Rudi Fortson, 'Homicide reforms under the CAJA 2009' (Criminal Bar Association of England and Wales Seminar, October 2010). Further bespoke training may be required to properly conceptualise the actual meaning behind loss of self-control.

15 CJA, s 54(4); and see Andrew Ashworth, 'Homicide, Coroners and Justice Act 2009 section 54 – loss of control – qualifying trigger' [2012] Criminal Law Review 539, 542, who states that: '[A] desire for revenge that may fairly be described as fleeting or instinctive stands at one end of the spectrum, and a "considered desire for revenge" is well on the way to the other end of that spectrum.'

exemption. Imperfectly justified anger is mandated, and the qualifying trigger is satisfied by a thing said or things done or said (or both) which constituted circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged.[16] Fear is the only other emotion that is supererogatory, with the trigger requiring the defendant to fear violence from the victim against the defendant, or another identified person.[17] The partial defence is unavailable to the inciter of violence,[18] and controversially anything done or said related to sexual infidelity is denied jury recognition.[19] This apparent exclusion, however, reviewed in *Clinton*,[20] is more attenuated than English legislators presupposed.[21] Normatively, within the third element of the reformulated template, the jury are to assess whether a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of the defendant, might have reacted in the same way, or in a similar manner.[22] The defendant's circumstances prior to the killing are subject to fact-finder evaluation, apart from those circumstances which only bear on her general capacity for tolerance and self-restraint.[23]

The legislative reforms represented a significant momentum shift, beyond the apparent exclusion of infidelity more generally, trammelling a bifurcation away from a broad hybrid and eclectic excuse-based defence towards a more constrained imperfect justification predicate.[24] This partial justification of paradigmatic inculcation reflected normative beliefs in fear and anger in *strictu sensu*, as partially appropriate responses to causally related behaviour of the provoker:[25] '[T]he new

16 CJA, s 55 (4).
17 Ibid s 55 (3).
18 Ibid s 55 (6)(9).
19 Ibid s 55 (6)(c).
20 [2012] EWCA Crim 2.
21 See Dennis J Baker and Lucy X Zhao, 'Contributory qualifying and non-qualifying triggers in the loss of control defence: a wrong turn on sexual infidelity' (2012) 76 Journal of Criminal Law 254; and Alan Reed and Nicola Wake, 'Sexual infidelity killings: contemporary standardisations and comparative stereotypes' in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic Comparative and International Perspectives* (Ashgate 2011) 115.
22 CJA, s 54 (1)(c).
23 Ibid s 54(3). See also Janet Loveless, '*R v GAC*: battered woman syndromization' [2014] Criminal Law Review 635, for a criticism of the objectification of learned helplessness *vis-à-vis* loss of self-control.
24 Norrie (n 7 above) 276–277.
25 Susan S M Edwards, 'When his anger is worth more than her fear' in Reed and Bohlander (n 21 above) 79, who asserts: '[H]abitual gendered thinking will continue to impress on the construction of what is a qualifying trigger … [W]omen will still be required to lose self-control in the conventional way, and her fear will not be understood.'

defence moves from a defence based on angry loss of control to one based on righteous indignation or moral outrage.'[26] This mirrors recent developments in Australia, notably NSW, where in terms of gross provocation a requirement prevails that the provocative act must be a serious indictable offence, and interpretational difficulties in this contextualisation are comparatively reviewed herein. In England, reforms were anticipated to cathartically and efficaciously address the plight of the domestic abusee, primordially female, who fatally killed her partner.[27] The sections that follow, reveal that further changes in Anglo-Australian provocation laws are needed to meet designated aspirations of equal and just disposal, a clarion call that Edwards[28] and other commentators[29] have cogently advanced:

> [I]n the Coroners and Justice Act 2009 ... despite some gains for abused women, the alchemy persists, and while certainly holding the abused woman within its contemplation for a moment she who kills out of fear with all its despair, hopelessness, sorrow, helplessness, anguish and trauma, is still required to lose self-control ... [B]ut the legal template of loss of self-control ... remains soldered to a male angered reaction with its outward demonstration embedded in a legacy of serious wrongs and justifiable hubris.[30]

---

26 Jonathan Herring, 'The serious wrong of domestic abuse and the loss of control defence', in Reed and Bohlander (n 21 above) 66.

27 Vanessa Bettinson, 'Criminalising coercive control in domestic violence cases: should Scotland follow the path of England and Wales?' [2016] 165; Julia Tolmie, 'Coercive control: to criminalize or not to criminalize' (2018) 18 Criminology and Criminal Justice 50.

28 Susan S M Edwards, 'Loss of self-control: the cultural lag of sexual infidelity and the transformative promise of the fear defence' in Alan Reed and Michael Bohlander (eds), *Homicide in Criminal Law: A Research Companion* (Routledge 2019) 82–101.

29 E Sheehy, J Stubbs and J Tolmie, 'Securing fair outcomes for battered women charged with homicide: analysing defence lawyering in *R v Falls*' (2014) 38 Melbourne University Law Review 666; Nicola Wake, 'His home is his castle, and mine is a cage: a new partial defence for primary victims who kill' (2015) 66 Northern Ireland Legal Quarterly 151; S Walklate, K Fitz-Gibbon and J McCulloch, 'Is more law the answer? Seeking justice for victims of intimate partner violence through the reform of legal categories' (2018) 18 Criminology and Criminal Justice 115.

30 Susan S M Edwards, 'Recognising the role of the emotion of fear in offences and defences' (2019) 83 Journal of Criminal Law 450, 468. See also Susan S M Edwards, 'The strangulation of female partners' [2015] Criminal Law Review 12; Nicola Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77 Journal of Criminal Law 433.

THE *SALLY CHALLEN* CASE: CONTROLLING/COERCIVE BEHAVIOUR AND THE LIMITS OF LEGISLATIVE REFORMS

It is not immediately apparent, in any real sense, that an abused woman in an intimate relationship, subjected to coercive and controlling behaviour, is now in a better position to successfully claim a loss of self-control as a partial defence to homicide than 10 years previously via provocation at common law. It has not proved the panacea many commentators hoped it would prove.[31] The triumvirate of threshold hurdles to surmount, within sections 54–56 of the CJA, as presented above, may be deconstructed in light of the *Sally Challen* case[32] – juxtapositionally interpreted under the old common law, but the subject of an appellate review in 2019:[33] a review which provided a vignette of extant challenges that still prevail to successfully run any domestic abuse intimate partner killing defence, and chart future reform pathways that we argue should be actioned immediately.

In August 2010, Sally Challen, then aged 56, killed her 61-year-old husband Richard Challen at their family home in Surrey with at least 20 blows of a hammer. The marriage had endured 31 years, during which time he had been unfaithful on several occasions causing considerable distress, had visited brothels, and demeaned her in front of family and friends. Sally Challen made allegations of anal rape and other sexual assaults, and egregious and continual demands within the matrimonial home, creating an atmosphere of total subservience and reinforced by threats.[34] The couple separated, but in June 2010 a reconciliation transpired, a *decree nisi* was rescinded, a new post-marital property resettlement was constructed, wholly disadvantageous to Sally Challen, and the couple agreed to sell the family home, and go to Australia for six months. On the day of the fatal attack, the defendant, who remained suspicious about her husband's relationships with other women, met with him to clear out the house and garage in advance of their overseas trip.[35] In the course of this meeting, the defendant noticed

31 Susan S M Edwards, 'Coercion and compulsion – re-imagining crimes and defences' [2016] Criminal Law Review 876; and Nicola Wake, 'Manslaughter by loss of control: sentencing primary victims who kill' [2019] Criminal Law Review 291.

32 [2019] EWCA Crim 916.

33 Tony Storey, 'Coercive control: an offence but not a defence: *R v Challen*' (2019) 83 Journal of Criminal Law 513.

34 Note, at the time of Challen's trial, the defence psychiatrist diagnosed her with depression, but not battered women syndrome, presumably because there were no immediate indications of physical violence.

35 Vanessa Bettinson, 'Aligning partial defences to murder with the offence of coercive or controlling behaviour' (2019) 83 Journal of Criminal Law 71.

that the phone had been moved, and dialled the last-called number, and realised that her husband had rung another woman. She then proceeded to enact the violent attack during lunch, utilising a hammer that she had brought to the property. Sally Challen was convicted of murdering her husband in 2011, after unsuccessfully pleading diminished responsibility. At the initial trial, provocation was not pleaded, but left to the jury for their consideration. She was sentenced to life imprisonment with a minimum specified period of 22 years.[36]

The appeal against conviction, heard eight years subsequently, was on the predicate of fresh psychiatric evidence unavailable at the time of the initial trial. It was suggested that Sally Challen had a borderline personality disorder and a severe mood disorder, specifically bipolar affective disorder, at the time of the killing, and consequentially suffered an 'abnormality of mind', within the contextualisation of diminished responsibility.[37] It was further contended that evidence of her husband's coercive and controlling behaviour supported the defence of provocation, in that it would have affected the gravity of conduct stipulated as the threshold.[38]

In the interim period between conviction and fresh appeal, the nature of coercive/controlling behaviour, and community understanding of the experiences of psychological torment by another ('controlling or coercive behaviour'), had been criminalised as an offence in England by section 76 of the Serious Crime Act 2015.[39] Whilst a particularised offence was introduced, no specific defence applied to those who experienced controlling or coercive behaviour. The offence engages causing a person to fear that violence would be used against them on at least two occasions, or where it adversely affects their day-to-day life.[40] New developments in 2020 in England and Wales also led to steps taken to criminalise domestic abuse as an offence, but again not

36 Note an appeal against sentence was allowed and the minimum term was reduced to 18 years: see *R v Challen* [2011] EWCA Crim 2019.

37 Note that leave to appeal was finally granted in March 2018: *R v Challen* [2018] EWCA Crim 471.

38 Storey (n 33 above) 513 who states, in the context of fresh evidence of controlling behaviour during their marriage: '[T]his latter argument was supported by, *inter alia*, the couple's adult sons, David and James Challen, and C's cousin, who said that during their marriage R "pulled the strings" and C "danced".'

39 Edwards (n 31 above) 877.

40 C Wiener, 'What is "invisible in plain sight": policing coercive control' (2017) 56 Howard Journal 500; A Robinson, M C Pinchevsky and J Guthrie, 'Under the radar: policing non-violent domestic abuse in the US and UK' (2016) 40 International Journal of Comparative and Applied Criminal Justice 195; Bettinson (n 27 above) 167.

a bespoke defence.[41] A wider appreciation of the criminal behaviour engaged in as coercive/controlling behaviour has been presented by a number of commentators, viewed through a lens of 'patriarchal' or 'intimate' terrorism:[42]

> [A] time period during which the woman may never know when the next incident will occur, and may continue to live with on-going psychological abuse – is to fail to recognise what some battered women experience as a continuing state of siege.[43]

Coercive/controlling behaviour engages, as Herring contends, a serious breach of trust within the sphere of an intimate relationship.[44] Stark, acting as a defence witness, explained to the court in *Challen* that, in coercive control, abusers deploy a broad range of non-consensual, non-reciprocal tactics over an extended period to subjugate or dominate a partner, rather than merely to hurt them physically.[45] Compliance, as Stark contends, is achieved by '[M]aking victims afraid, and denying basic rights, resources and liberties, without which an individual is not able to effectively refuse, resist, or escape demands that militate against their interests.'[46] Douglas articulated that broader understanding is required beyond legislative reform to change abusee's experience of

---

41 The new legislation will create a statutory definition of domestic abuse, emphasising that domestic abuse is not just physical violence, but can also be emotional, coercive or controlling, and economic abuse. It also provides for a new domestic abuse protection order, which will prevent perpetrators from contacting their victims, as well as force them to take positive steps to change their behaviour, for example, by seeking mental health support.

42 Michael Johnson, 'Apples and oranges in child custody disputes: intimate terrorism vs situational couple violence' (2005) 2 Journal of Child Custody 43.

43 Mary Ann Dutton, 'Understanding women's response to domestic violence' (2003) 21 Hofstra Law Review 1191, 1204

44 Herring (n 26 above) 73. See also A Carline and P Easteal, *Shades of Grey – Domestic and Sexual Violence Against Women* (Routledge 2014) 134–135, contending that dissonant public responses apply to self-defence in the contextualisation of domestic abuse killers, contending that the criminal justice system should abrogate intrinsically unfair gendered bifurcations.

45 [2019] EWCA Crim 916. See also Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007) 363: '[I]n the romantic vernacular, love and intimacy compensate women for their devaluation in the wider world. Personal life does something more. It provides the state where women practice their basic rights, garner the support needed to resist devaluation, experiment with sexual identities, and imagine themselves through various life projects. Coercive control subverts this process, bringing discrimination home by reducing the discretion in everyday routines to near zero, freezing feeling and identity in time and space, the process victims experience as entrapment.'

46 [2019] EWCA Crim 916; and see also Evan Stark, 'Re-presenting battered women: coercive control and the defense of liberty' (2012) 5, *sine loco*.

justice: '[T]he impact of legal change is dependent on wider social and cultural contexts.'[47] The psychological impacts on primary victims of coercive and controlling behaviour is yet to be fully deconstructed or explored by Anglo-Australian courts. This was vividly exemplified in *Challen* and highlighted previously by Edwards:

> Law shapes the social reality such that victims' stories of intimidation, coercion and control are met with response, Yes, yes, but did he hit you'?, and that women come to learn not to talk in court about non-physical forms of coercion and control, and to understand that it is only physical conduct that is significant.[48]

The appellate court in *Challen*, in a constrained and particularised determination, held that the conviction was unsafe, and should be quashed with a retrial ordered. This was explicitly based on the evidence relating to Sally Challen's personality and mood disorders, and not on the evidence of her husband's controlling behaviour.[49] Lady Justice Hallett asserted that the court was not persuaded that, had it stood alone, the general theory of coercive control on the facts as presented would have afforded a ground of appeal.[50] No view was expressed as to whether Sally Challen was the victim of coercive control, and no view, if she was a victim, on the extent to which it impacted upon her ability to exercise self-control, or her responsibility for her actions. Hallett LJ also re-emphasised that it was important to highlight that coercive control *per se* is not a defence to murder, but only relevant in the context of other defences, namely self-defence, diminished responsibility and provocation.[51] It is significant, as such, to posit how primary victims of coercive/controlling behaviour who kill abusive partners may supplant (or otherwise) the three threshold hurdles to any successful provocation defence in the CJA. English

47 Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45 Australia and New Zealand Journal of Criminology 367, 378.

48 Edwards (n 31 above) 879.

49 [2019] EWCA Crim. 916. See also Bettinson (n 35 above) 81: '[T]he insistence of the diminished responsibility plea to characterise defendants who kill their abusers as mentally unwell, detracts from the understanding and learning around the use of coercive control in domestic relationships. It works against the operation of the offence which does not require psychiatric injury, but the adverse effect on a person's day-to-day activities. It, therefore, remains an inherently unsuitable defence for women who kill their abusers as a result of coercive or controlling behaviours.'

50 [2019] EWCA Crim 916; Storey (n 33 above).

51 Ibid. Note that in June 2019 the Crown, rather than promulgate a retrial the next month at the Old Bailey, accepted a plea of guilty to manslaughter on grounds of diminished responsibility. Sally Challen was sentenced to nine years and four months – time already served – and consequentially was entitled to be released immediately.

reforms are comparatively reviewed against the contours of liability in Australia, including the state of Qld. Qld reforms state that, except in circumstances of an exceptional character, the provocation defence does not apply (in the context of a domestic relationship) where the provocation is based on something done by the deceased to end or change the nature of the domestic relationship.

SUBJECTIVE LOSS OF CONTROL: OLD WINE IN NEW BOTTLES

The Law Commission of England and Wales, as Horder articulates, initially argued in favour of abrogation of any loss of control requirement: '[I]n the Commission's view there should instead be a negative test of whether D acted out of a considered desire for revenge, and, if not, then the defence would be available in principle.'[52] The CJA does not define what amounts to a loss of control, but self-evidently, a defendant in the factual scenario presented in the *Challen* case would find it difficult to meet the threshold hurdles, within either old or new provocation law, where any delayed and slow-burn responses are indicated.[53] As Bettinson argues, whilst reaction no longer needs to be 'sudden' and in a heat of passion, nonetheless, the longer the temporally individuated delay, and the stronger the evidence of deliberation on the part of any defendant, then deontologically the less likelihood of a successful defence.[54]

The loss of control requirement remains opaque, and subject to *ad hoc* and solipsistic judicial interpretation. Over the course of the last decade, there has been predominant support for review via a powers of ratiocination/individual actor blurred judgement perspective at the time of fatal action, divested from an emotional response/partial loss of capacity conceptualisation of loss of control. This standardisation, however, has not universally been adopted, or always applied

52 Jeremy Horder, *Ashworth's Principles of Criminal Law* 9th edn (Oxford University Press 2018) 264; Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.18: 'Women's reactions to provocation are less likely to involve a loss of self-control, as such, and more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence.'

53 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004), para 3.30: '[T]he requirement of a loss of self-control was a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant, but flawed attempt to encapsulate a key limitation to the defence – that it should not be available to those who kill in considered revenge.'

54 Bettinson (n 35 above) 82–83.

logically,[55] and the debate that follows illustrates the consequential unpredictability of outcome(s).

In general terms, this limb of the defence has been interpreted in a delimited manner, trammelled via a limitation on the parameters of any provocation defence.[56] This is especially the case where evidence exists of premeditation or the court identifies aspects of 'cold-blooded' killing. In *Gurpinar*,[57] for example, the appellate court asserted that a trial judge should undertake a much more rigorous evaluation of the evidence before the defence could be left to the jury than had been required under the former law of provocation.[58] The partial defence is now self-contained within the statutory provisions and, as such, the common law heritage is 'irrelevant'.[59] Sufficient evidence of loss of self-control is now needed for the trial judge to leave the matter for fact-finder consideration;[60] the old law only required 'any evidence at all of a specific provoking event'.[61]

It is necessary for the trial judge to consider the weight and quality of the evidence before coming to a conclusion to leave matters to the jury. As McCombe LJ made clear in *Barnsdale-Quean*,[62] 'mere speculation without a proper evidential foundation of loss of self-control, is inadequate'.[63] This requirement, of cogent evidence, beyond the merely fanciful, was repeated by Rafferty LJ in *Jewell*,[64] where the appellate court transmogrified a 12-hour cooling-off period between the provoking event and fatal action as the embodiment of premeditation and revenge. The corollary was that the determination not to leave the issue of loss of control to the jury was 'overwhelming', 'inevitable' and 'impregnable':[65] '[A]s the appellate court put it in *Martin (Jovan)*, judge's should not "clutter up" a jury's deliberations by inviting them to consider issues which, in truth, did not arise on the evidence.'[66]

---

55 Simester et al (n 4 above) 413–415. Most recently, in *Dawson* [2021 EWCA Crim 40, a very high threshold was set for consideration of loss of self-control.

56 G R Sullivan, 'Anger and excuse: reassessing provocation' (1993) 13 Oxford Journal of Legal Studies 380.

57 *Gurpinar and Kojo-Smith* [2015] EWCA Crim 178; [2015] 1 WLR 3442.

58 Ibid [12]–[14].

59 Ibid [12]–[13].

60 Ibid [55].

61 *Acott* [1997] 2 Cr App R 94, 102 (Lord Steyn) who stated that, what was required was 'some evidence of a specific act or words of provocation resulting in a loss of self-control'.

62 [2014] EWCA Crim 1.

63 Ibid [15].

64 [2014] EWCA Crim 414 [27]–[28].

65 Ibid [52].

66 Horder (n 52 above) 265; *Martin (Jovan)* EWCA Crim 1359 [44] (Davis LJ).

The appellate court in *Jewell*, more broadly, viewed loss of self-control through the legal prism of D's powers of ratiocination (or otherwise), and positively endorsed an interpretational construct predicated on impaired judgement and reasoning.[67] In a similar vein, the Lord Chief Justice in *Clinton*[68] viewed the validity of loss of self-control as coterminous with the other two limbs of the partial defence, reviewable simultaneously at the time of, or immediately before, the fatal action.[69] This was extended in *Dawes*[70] to adduce consideration of the potential for 'cumulative impact' where antagonism endured over a longer period, but where D was 'shocked' at the time of the final violent blow:[71] '[D]elay between a stimulus and the loss of self-control may be the product of the cumulative impact of events, an especially important explanation for loss of self-control when the defendant and the victim were living together for a long period of time.'[72] The standardisation, however, of loss of control, remains uncertain, and the successful prediction of outcome as likely as tattooing soap bubbles, albeit ratiocination, wrongly it is suggested, holds sway over emotional responses/impaired capacity.[73]

One perspective is that a greater appreciation is needed, as the *Challen* case exemplifies, of the mixture of emotional responses that apply to the domestic abusee. Mitchell et al suggest that:

> [I]nstead of retaining a loss of control as is currently constructed in the rather unsophisticated sense of overtly physical out of control, the law should look at the extent of the defendant's emotional disturbance, and how that disrupted the individual's normal thinking, reasoning and judgment.[74]

A wider perspective of loss of control may arguably be required, integrating detonative[75] partial involuntariness if needed, through a wider kaleidoscopic lens than simply imperfectly justified retributive

67 [2014] EWCA Crim 414 [27].
68 [2012] EWCA Crim 2.
69 Ibid [9].
70 [2013] EWCA Crim 332.
71 Ibid [64]. See also Tony Storey, 'Loss of self-control: the qualifying triggers, self-induced loss of self-control and cumulative impact' (2013) 77 Journal of Criminal Law 189.
72 Horder (n 52 above) 264.
73 Sorial (n 1 above).
74 Barry Mitchell, Ronnie Mackay and Warren Brookbanks, 'Pleading for provoked killers: in defence of *Morgan Smith*' (2008) 124 Law Quarterly Review 675.
75 'Detonative' is adapted herein in the contextualisation of a sudden and instant violent outburst, often wholly atypical.

anger or constricted fear of 'serious' violence.[76] A widened defence based upon semi-voluntariness and partial loss of capacity may arguably extend to actors who kill under conditions of intense grief or sadness, or under other extreme conditions such as intimate breach of trust, and coercive/controlling behaviour as in the *Challen* case.[77] Further consideration is also essential as to when coercive control should lead to a self-defence claim. Extreme reactions are common under other types of emotional conditions, and there is significant psychological literature in support of this proposition.[78] Emotions provide a connecting narrative between cognition and volition, and, in this perspective, Solomon described emotions as an expression of a personal value system.[79] The arousal of a particular emotion, and disconnection thereby, may provide an indication that the individual had subjectified prevailing circumstances in a particular manner, and with a subliminal value code: '[E]very emotion … is a personal ideology, a projection into the future, and a system of hopes and desires, expectations and commitments, and strategies for changing our world.'[80] Emotions are frequently complex phenomena, and, as Dennis has stated, great anger may be mixed with great fear, or with extreme frustration, despair, or shock.[81] Such a cocktail of mixed emotions resonates to the primary victim of controlling/coercive behaviour, viewed through a prism of patriarchal/intimate terrorism, rather than lessened powers of ratiocination or (ill)considered judgements.[82]

---

76 Reid Griffith Fontaine, 'Adequate (non) provocation and heat of passion as excuse not justification' (2009) 43 University of Michigan Journal of Law Reform 27, 49: '[I]t is not the provocation that mitigates the defendant's culpability and punishment, but the emotionally charged effect that it has …'.

77 Walklate et al (n 29 above) 118, who contend that 'the effective place for clinical understandings of, and explanations for intimate partner violence, may better lie in expert testimony'; Joshua Dressler, 'Why keep the provocation defence? Some reflections on a difficult subject' (2002) 86 Minnesota Law Review 959.

78 Alan Reilly, 'Loss of control in provocation' [1977] 21 Criminal Law Journal 320; Jeremy Horder, 'Reshaping the subjective element in the provocation defence' (2005) Oxford Journal of Legal Studies 123.

79 Robert C Solomon, *The Passions* (University of Notre Dame 1976) 'Preface'.

80 Ibid 212; Robert C Solomon, *A Passion for Justice* (Addison Wesley 1990); Robert C Solomon, 'Philosophy of emotions' in M Lewis and J M Haviland (eds), *Handbook of Emotions* (Guildford Press 1993).

81 Ian Dennis, 'Editorial' [2008] Criminal Law Review 829; Celia Wells, 'Provocation: the case for abolition' in Barry Mitchell and Andrew Ashworth (eds), *Rethinking English Homicide Law* (Oxford University Press 2000) 89: '[A]n excuse based on loss of self-control seems to imply an underlying aggression in all of us which is capable of release under certain circumstances.'

82 Victoria Nourse, 'Passions progress: modern law reform and the provocation defense' (1997) 106 Yale Law Journal 1331, 1332–1333: '[T]he defendant's claim to our compassion must put him in a position of normative equality *vis-à-vis* his victim. A strong measure of that equality can be found by asking whether the emotion reflects a *wrong* that the law would independently punish.'

THE SEXUAL INFIDELITY EXCLUSION AND LOSS OF SELF-CONTROL

Sally Challen was presented by the prosecution as a jealous and brooding wife, rather than a coercee who had endured the extreme sexual infelicities of her husband, his continued visits to brothels, and intimate breach of trust including the final discovery that he was seeing another woman.[83] The apparent disqualificatory trigger of sexual infidelity in section 55(6)(c) of the CJA presents another potential hurdle to surmount for similar primary victims. It is considered further in the subsequent review of extant laws in Qld, and within the contextualisation of the ambit and parameters of exclusionary triggers more broadly, to ensure comportation with appropriate contemporary standards and societal mores of the day.

Although it is contentious, and dissonant views prevail,[84] it is illogical in the framework of a more nuanced understanding of detonative involuntariness and partial responsibility to universally exclude all and everything said or done that relates to sexual infidelity, as part of a subjectivised loss of self-control fact-finder determination.[85] The provocative nature of sexual infidelity may operate across a continuum of gradated severity. Emotional excuse needs to be recalibrated to reflect more broadened phenomenological narratives and responses. Killings prompted by proprietorialness (often male), sexual jealousy, envy and premeditation by a cuckolded partner ought to be excluded from denial of responsibility. In equal measure there may be some exceptional cases of 'gross provocation', where sexual infidelity is part of a narrative embracing excessive taunting, extreme sexual humiliation and coercion, and a spontaneous fatal blow ought arguably to be allowed for consideration by fact-finders.[86] Withey has contended that sexual infidelity is inappositely excluded, when it often coheres with public sympathies and understanding, whilst honour killings, which receive no societal compassion, are still inclusionary under English law.[87] Edwards reiterates the anomaly in such a bifurcation, positing that it is 'strange' how juries can be relied upon to disqualify honour killings, but

83 Bettinson (n 35 above) 82.

84 Baker and Zhao (n 21 above); and see, in contradistinction, Amanda Clough, 'Sexual infidelity: the exclusion that never was' (2012) 76 Journal of Criminal Law 382, 384 who states: '[T]o view any other circumstances without shedding light on infidelity claims would give us a very blurred picture of what happened.'

85 Amanda Clough, 'Battered women: loss of control and lost opportunities' (2016) 80 Journal of International and Comparative Law 279.

86 Douglas Brown, 'Disentangling concessions to human frailty: making sense of Anglo-American provocation doctrine through comparative study' (2007) 39 New York University Journal of International Law and Politics 675.

87 Carol Withey, 'Loss of control, loss of opportunity' [2011] Criminal Law Review 263.

not demarcated cases of sexual infidelity.[88] Turner compartmentalises the exclusion within a politically motivated and sentencing framework:

> What the government is proposing will not save any lives, because a sudden loss of self-control cannot be influenced by the new law. It will, however, lead to many more … [s]erving extremely long sentences for crimes of passion that they could not prevent themselves from committing.[89]

Ignoring the emotional excuse narrative attached to extreme illustrations of sexual humiliation, taunting, coercion and breach of trust, and disregarding the consequential partial loss of control, is to separate law from reality and phenomenological triggers. Extreme emotional distress as part of subjectivised detonative involuntariness should, as Reilly has intimated, form a central part of the moral capacity inquiry: '[T]he assessment of the gravity of the provocation is the outlet for the telling of the history. The narrative of how the loss of control transpired begs the question of why.'[90] It is inapposite to solely focus upon the precise moment that the fatal blow was struck, and a broader evaluative context is required, otherwise it 'diminishes the power of the preceding narrative, bending the climax to the existence or not of the nebulous concept of a loss of self-control'.[91]

The divorce from moral capacity is apparent in the extreme breach of trust illustration that Horder has presented.[92] D loses self-control and kills V when V (D's husband) admits having had long-standing affairs with (and made pregnant) each of D's three 16 to 18-year-old daughters by a previous marriage. Horder posits that this scenario presents a series of intractable questions, and multifarious difficulties, under exclusionary extant law:

> May the jury take into account the girl's pregnancies that are the result of the infidelity in that they are offspring born and related to D? Further, suppose V started an affair with one of the daughters before meeting D, would D be able to rely on evidence of that affair given that there was no obligation of fidelity to D at that stage? How far into the question whether the affair started before V met D should the court be prepared to go?[93]

---

88 Edwards (n 9 above) 230.

89 J Turner, 'Provocation and infidelity' (1963) 127 Justice of the Peace and Local Government Review 745.

90 Reilly (n 78 above) 331–332.

91 Ibid.

92 Note that the postulation is repeated verbatim from Horder's memorandum submitted to the Commons at the committee stage of the CJA: House of Commons, Coroners and Justice Bill Committee, Memorandum submitted by Jeremy Horder, 3 February 2009, CJ 01.

93 Ibid.

By judicial sleight of hand, albeit counterfactually and contrary to legislative import, the appellate court in *Clinton*,[94] post-CJA 2009 reform, has acknowledged a wider inclusionary contextualisation for sexual infidelity killings. The aim of the determination was to 'prevent injustice' and 'absurdity of result'.[95] It is comparatively reviewed subsequently in terms of recent developments in Qld. A legislative effort to exclude the provocation defence in Qld in the context of sexual infidelity and in circumstances where women appear to have changed or left the relationship has been evaluated in two very recent important cases of *Peniamina*[96] and *Pilcher*,[97] effecting unanticipated and inconsistent extant laws.

In *Clinton*,[98] the defendant was devastated when his wife of 16 years left him and their two children to begin a trial separation. The killing occurred a few weeks after the separation. In the interim period, Clinton had accessed his wife's Facebook account which revealed a new relationship, and he found sexually explicit photographs which confirmed the affair. The victim had also informed him that she had engaged in sexual intercourse with five different men, providing graphic details, and taunted him over accessing a suicide website, and stated that he would have full responsibility for all childcare arrangements. D picked up a wooden baton and struck V repeatedly, before strangling her with a ligature, and posted pictures of her dead body to her new partner. The appellate court determined that it was a misdirection to withdraw the loss of self-control defence from fact-finder consideration predicated on V's confession of sexual infidelity, as it 'should' be relevant to the totality of matters relied on as a qualifying trigger. A retrial was ordered, but Clinton pleaded guilty to murder in advance of the retrial commencing and was sentenced to imprisonment for not less than 26 years.

Sexual infidelity, evidenced throughout the narrative in *Challen*, and as a final provoking stimuli, remains excluded from consideration post-*Clinton* when it arises as the only qualifying trigger. In other cases, it may potentially be evaluated to provide an integral contextualisation to events, determining whether circumstances are grave and to establish a justifiable sense of being seriously wronged.[99] A mystical divining-rod is needed to help direct a befuddled jury in this regard, as the appellate court itself identified in *Clinton*:

---

94 [2012] EWCA Crim 2.
95 Ibid [39].
96 [2019] QCA 273.
97 [2020] QCA 8.
98 [2012] EWCA Crim 2.
99 Simester et al (n 4 above) 419.

> [T]heir will be occasions when the jury would be both disregarding and considering the same evidence. That is, to put it neutrally, counter-intuitive.[100]

More broadly, and directly applicable to Sally Challen and other coercee killers, the underlying narrative of emotional excuse, and relational construct in which the detonative partial loss of capacity occurred, could perhaps be addressed in a recalibrated loss of self-control framework.[101] Further review, beyond the strictures of current provocation law, should indicate a preference for a new self-preservation defence, as considered later in this article, albeit in limited situations. The extant requirement for subjectivised loss of self-control at the time of the fatal action ought to be abrogated: it is not about powers of ratiocination and judgement, but rather extreme emotional response and reduced capacity: 'without attention to the batterer's use of coercion, pressure, influence or threat of force to the degree that these tactics interfere with a victim's volition, courts hear only parts of victims' stories'.[102] It may be illogical to have a blanket exclusion for *all* standardisations of sexual infidelity, and no particularised pathway for coercive/controlling behaviour that coalesces as a partial defence to murder. A wider and more coarse-grained response is needed, which embraces more delineated contextualisations of excuse.[103] The effect would be to reduce murder to manslaughter where the accused committed the act under the influence of extreme emotional distress for which there is a reasonable explanation or excuse, obviating direct reference to subjectivised loss of self-control.[104] The benefit, as Reilly has identified, is that the courts would not feel obliged to create taxonomies of emotional conditions associated *only* with a loss of self-control and would avoid parlous psychological assessments of this issue alone.[105] The broader consideration of extreme emotional distress as an excuse, possibly subject to semi-voluntary conduct and disinhibition, could allow for fairer labelling and disposal. It is integral

100 [2012] EWCA Crim 2 [32].

101 Griffith Fontaine (n 76) 43, who asserts: '[I]t is because the reactive violence, though wrongful, is understandable, that the reactor is partially excused. The understanding lies in the acknowledgement that, given the circumstances, a similarly placed individual would likely experience emotional disturbance similar to that of the defendant's, and that such an emotionally aroused state can .... Limit one's self-control'.

102 Tamara I Kuenmen, 'Analysing the impact of coercion on domestic violence victims: how much is too much?' (2013) 22 Berkeley Journal of Gender, Law and Justice 2.

103 Suzanne Uniacke, 'Emotional excuses' (2007) 26 Law and Philosophy 95 and Sanford H Kadish, 'Excusing crime' (1987) 75 California Law Review 257.

104 Withey (n 6 above); Horder (n 78 above); Brown (n 86 above); Dressler (n 77 above).

105 Reilly (n 78 above) 329–332.

in cases of controlling/coercive behaviour such as Sally Challen, to battered women who killed in *Ahluwahlia*,[106] *Thornton*,[107] and *Humphreys*,[108] and as part of the legal hinterland attached to emotional trauma more broadly, including mercy killings.[109]

FEAR OF SERIOUS VIOLENCE AND DETONATIVE SELF-PRESERVATION AS A PARTIAL DEFENCE

The old provocation law was untrammelled in that the adduction of loss of control simply had to occur from 'any' specific provoking event. The CJA 2009 reforms, however, mandate a more restrictive template where derivatively only two qualifying triggers are operative – fear of serious violence directed by V against D or another, or alternatively imperfectly justified anger (gross provocation). The former standardisation, unfortunately, has not proved the anticipated panacea to cathartically cure the ills attached to unfair disposals of battered women abusive partner killings.[110] The fear trigger is wholly exclusionary where the threats are not of immediate physical injury, but rather psychological harm.[111] As presented in *Challen*, the anticipatory threat was not of instant physical violence, but the slow-drip incremental effect of desensitising/dehumanising conduct creating a cycle of control.[112] A fundamentally different *modus operandi* of fear was constructed, contextualised as bending to his will: individual functionality was precluded. As Wells states, an alternative paradigm exists, beyond the stereotypical imagery of 'one to one (man to man) violence' and threats: '[D]omestic violence is outwith the paradigm where it occurs it is chronic, cyclical and often inescapable.'[113] The challenge remains, often insurmountable, for the domestic abusee in fear of harm(s) to convey her psychological perception of experiencing

106 [1992] 4 All ER 889.

107 *Thornton (No 2)* [1996] 2 All ER 1023.

108 [1995] 4 All ER 1008.

109 Jonathan Rogers, 'Prosecutorial policies, prosecutorial systems and the *Purdy* litigation' [2010] Criminal Law Review 543. In suggesting this, however, we do not discount the need for an expanded role for self-defence in some cases where abused women kill their abuser.

110 Edwards (n 28 above) 95: '[T]his new provision reflects a moral and conceptual shift and retreat from *Duffy* in that the past violent conduct of the deceased becomes foregrounded in a centrifugal aspect of the relevant factual and evidential narrative in evaluating whether there exists evidence of a claim of fear of serious violence.'

111 Edwards (n 25 above) 79 who asserts: '[W]omen will still be required to lose self-control in the conventional way and her fear will not be understood.'

112 Bettinson (n 35 above) 83.

113 Celia Wells, 'Battered woman syndrome and defences to homicide: where now?' (1994) 14 Legal Studies 266, 272.

immediate 'serious' violence. A particularly high threshold for fact-finders' determination where the final triggering act does not meet the particularisation of 'serious' violence, or an 'imminent' threat, essential constituent elements within an alternative self-defence criteria:[114]

> [T]he last act preceding the killing of the abusive partner may be the sound of keys turning in the lock, or a car parking in the driveway, hardly an act of violence let alone serious violence.[115]

A high bar has been set for the self-defence effectuation, consequentially making it more difficult for women to succeed with the fear trigger: '[L]ast straw, frayed elastic arguments may be excluded.'[116] Edwards has made clear that, whilst the legislative reforms were predicated upon the development of a new compartmentalisation of cumulative fear, 'fear sharpening fear for the future',[117] aspirations are deleteriously compromised by the serious violence template, deontologically iterating a proportionate response inculcation, or within a proportionate continuum inappositely synchronising fear, reaction and response.[118] Gender imbalances over *modus operandi* of killing methods *per se* linked to physicality, continue to refract disadvantageously for disposal of women defendants: women are more likely to use weapons than men, and this has significant implications at both prosecutorial and sentencing stages.[119] In violent altercations, as Wake adumbrates, the use of bodily force is considered a mitigating factor, whereas the use of weapons in like circumstances is regarded as an aggravating feature.[120] A further layer of difficulty applies to the fear trigger, in that a subjectivised loss of control must still be presented at the time of the fatal action, with attendant inconsistencies appurtenant thereto: '[T]he behavioural response of a person in fear will almost certainly

114 Nicola Wake, 'Human trafficking and modern day slavery: when victims kill' [2017] Criminal Law Review 658; Wake (n 29 above); Clough (n 85 above).

115 Edwards (n 25 above) 93. See also Mitchell et al (n 74) 680, who recognise that the outward manifestation of fear is likely to be the antithesis of anger's externality: '[F]ear ... will probably result in what is overtly less frantic, more deliberate behaviour.'

116 Ibid 92–93.

117 Edwards (n 30 above) 468, also stating: '[T]he "serious violence" requirement contemplates something approximating a proportionate response, or at least inhabits a position on the proportionality continuum.'

118 Clough (n 85 above) 285, who contends that: 'Proportionality is equally problematic with battered women often choosing to arm themselves rather than face their attacker with bare fists. This often makes the violence a battered woman uses to defend herself seem excessive when she is really resorting to a form of violent self-help.'; Wake (n 29 above).

119 Wake (n 31 above).

120 Wake (n 30 above) 437, contending: '[A] discrepancy in physical strength may require the abused D to arm herself thereby rendering it more likely that such conduct would be considered excessive.'

place the terrified woman outside the jurisdiction of anger's expression, its typological template of loss of self-control.'[121]

A new type of psychological partial defence is required, predicated on self-preservation, detonative loss of capacity and extreme emotional response.[122] This *de novo* via media defence should be complemented by social framework evidence and mandatory jury directions, considered subsequently, similar to those operating in Victoria (Australia) albeit in an alternative self-defence template.[123] A newly structured interlocutory appeal procedure would provide defendants with an opportunity to challenge the judge's refusal to admit the defence prior to trial, thereby preventing unnecessary appellate court litigation. This would recognise the challenge, in part, that Wells presents that coercive/controlling behaviour (domestic abuse) typified in *Challen* does not simply infract an individual's physical integrity, 'it is an instrument of psychological and emotional control'.[124] A requirement is that the defendant acted in extreme emotional response, integrating dissonant categorisations of abusive behaviour, incorporating controlling coercive conduct. As such, the term 'abuse' should be broadly construed to include psychological and sexual harm, and coercive/controlling behaviour, in addition to 'serious' physical violence.[125] The victim of abuse's response to the predominant aggressor in future cases should not necessarily follow primordially from the severity of the last act of abuse but, as Clough contends,[126] should flow from the cumulative perceptions of the severity of the threat posed, articulated within the penumbra of social framework evidence and particularised juror directions.[127]

In cases of prolonged and systematic abuse, where D kills an abuser, and self-defence, as an all or nothing affirmative defence is unavailable (because imminency of threat/proportionality, reasonable force criteria are unsatisfied) a *de novo* alternative partial defence is needed, plus further changes to self-defence.[128] Reflective consideration

121 Edwards (n 25 above) 92.

122 See Carline and Easteal (n 44 above)140.

123 Jury Directions Act 2015 (Vic).

124 Wells (n 113) 272.

125 Ana Speed, Callum Thomson and Kayleigh Richardson, 'Stay home, stay safe, save lives? An analysis of the impact of Covid-19 on the ability of victims of gender based violence to access justice' (2020) 84(6) Journal of Criminal Law 539-572; and see enactment of domestic abuse legislation in England and Wales.

126 Clough (n 85 above) 284.

127 Wake (n 31 above) 298; Wake (n 30 above) 439.

128 Amanda Clough, 'Honour killings, partial defences and the exclusionary conduct model' (2016) 80 Journal of Criminal Law 177; Jeremy Horder and Kate Fitz-Gibbon, 'When sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing' (2015) 74 Criminal Law Journal 307.

of the *Challen* case ought to promulgate a new psychological self-preservation partial defence,[129] especially as no political will exists in England to realign and recalibrate either loss of control or diminished responsibility: '[T]he fear descriptors must be cast so as to reflect the multifacedness of women's experience of, and reaction to abuse and its threats.'[130]

A partial defence of detonative self-preservation avoids the stigmatic murder label; it may influence charging practices by encouraging guilty pleas, thereby avoiding unnecessary trials, or by encouraging a trial where self-defence might apply on grounds that the partial defence represents a safety net.[131] It sends a signal, as Wake contends in a different context, to sentencing judges and society generally regarding culpability levels.[132] The extant fear trigger fails to properly accommodate the very different manifestations of attitudinal fear and the overarching requirement of loss of self-control: '[E]xperts will be needed to elaborate on the fluidity and polysemicity of the signs and manifestations of fear.'[133] The absence of any proportionality and imminency requirements is justified on the predicate that detonative psychological (and physical) self-preservation is a partial rather than a complete defence. In cases where D claims to have a particular belief as regards the circumstances, as presented in the new evidence in *Challen*, the reasonableness or otherwise of that belief is relevant to the question of whether D genuinely held it, but there must be an intelligible basis for the belief.[134] Importantly, the defence will not automatically apply where self-defence fails on grounds of lack of reasonableness/imminency, as otherwise it would be overbroad in ambit and subject to similar criticisms that were levelled at the defensive homicide defence in Victoria, prior to abrogation.[135] It would facilitate an understanding of Challen's experience and other similar abusees.[136]

---

129 Neil Cobb and Anna Gausden, 'Feminism, "typical" women and losing control' in Reed and Bohlander (n 21 above) 97.

130 Edwards (n 25 above) 92.

131 Wake (n 31 above) 298.

132 Clough (n 85 above) 286.

133 Edwards (n 28 above) 83.

134 Bettinson (n 35 above) 83, who comments that: 'Even with an appreciation of coercive control, it seems unlikely that the court would construe a fear of serious violence to extend to Challen's fear of separation from her abuser.'

135 Brenda R Midsom, 'Degrees of blameworthiness in culpable homicide' (2015) 6 New Zealand Law Journal 220. See also Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defense: A Comparative Perspective* (Palgrave MacMillan 2014).

136 Barbara Midsom, 'Coercive control and criminal responsibility: victims who kill their abusers' (2016) 27 Criminal Law Forum 417.

COERCIVE OR CONTROLLING BEHAVIOUR AS A QUALIFYING TRIGGER: NEW JUROR DIRECTIONS

An alternative route for consideration, beyond fear of serious violence, applies more directly in similar cases to *Challen*. The loss of self-control within section 55(4)(a) of the CJA 2009 will also have a qualifying trigger if it was attributable to something done or said or both which constituted circumstances of an extremely grave character and caused D to have a justifiable sense of being seriously wronged. The Government, in setting this qualifying trigger as a preliminary filter device in the CJA 2009, again raised the discretionary bar in an exclusionary fashion. The prescribed aspiration was to 'raise the threshold' so that words and conduct would constitute a defence 'only in exceptional circumstances'.[137] A by-product is that defendants in the older common law types of 'provocative' situations, presented in *Doughty*[138] (stressed parent of persistently crying child), or *Dryden*[139] (obsessional home owner embroiled in planning dispute), or *Baillie*[140] (affronted parent of drug-dealing son), and presumptively *Morhall*[141] (glue-sniffing addiction), are no longer within the operational purview of the defence as falling far below the threshold standards(s) of 'justified anger'. That said, coercive/controlling behaviour and domestic abuse fit a wholly different categorisation, and expert testimony in *Challen*, and other similar cases, could adventitiously articulate the applicability of circumstances of an extremely grave nature. This would transmute our understanding of *Challen*'s case beyond that of defence representation as a vengeful spouse responding simply to discovery of her husband entering a new relationship.[142] As Simester et al have articulated, whether the circumstances were extremely grave, and D was seriously wronged and whether D's sense of grievance was justifiable, are to be evaluated normatively by fact-finders as moral arbiters.[143]

The focus, within this qualifying trigger, is on the reasonableness or otherwise of the coercee's actions set against provoking conduct, rather than their psychological trauma/extreme emotional disturbance at the time of the fatal blow: '[T]he effect is to transmute battered women syndrome from locating women's motive for conduct within an abnormal state of mind to situating it within a framework of reasonableness, necessity and duress.'[144] The wrongfulness of the abuse the coercee

137 HC Deb 3 February 2009, col 8 (Maria Eagle, Parliamentary Under-Secretary of State for Justice).
138 (1986) 83 Cr App R 319.
139 [1995] 4 All ER 987.
140 [1995] 2 Cr App R 31.
141 [1996] 1 AC 90.
142 Bettinson (n 35 above) 83–84.
143 Simester et al (n 4 above) 417–418.
144 Edwards (n 9 above) 235.

is suffering must, as Herring states, be properly understood.[145] There is a need to adopt in English law a reconstituted set of jury directions. The challenge, as Bettinson has outlined, is to explain the dynamics of coercive/controlling behaviour within the contemporisation of the imperfectly justified anger qualifying trigger: problematic where 'the things said or done involve psychological tactics'.[146]

A reform route for English law is presented by legislative changes adopted by Victoria in Australia, within the purview of the Jury Directions Act 2015.[147] These directions may be adapted to comport with coercive/controlling behaviour and domestic abuse as a partial defence, rather than self-defence as an all or nothing standardisation, and within a widened family violence framework.[148] Where requested by the defence, and where relevant; the trial judge must inform the jury that coercive/controlling behaviour is in issue and that evidence of family violence (physical, sexual or psychological abuse) is to be considered and may be relevant in determining whether D acted under a loss of self-control.[149] It is possible for a trial judge to decline such a request, but only where there are good reasons to do so, for example, unnecessarily demeaning the victim. The following matters may be included in the direction.

- That family violence:
  - is not limited to physical abuse and may include sexual abuse and psychological abuse;
  - may involve intimidation, harassment and threats of abuse;
  - may consist of a single act; and
  - may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, where viewed in isolation, appear to be minor or trivial.
- It is not uncommon for a person who has been subjected to family violence:
  - to stay with an abusive partner after the onset of family violence or to leave and then return to the partner; and

145 Herring (n 26 above) 66–67.

146 Bettinson (n 35 above) 84.

147 Jury Directions Act 2015 (Vic), ss 55–60. See also Crimes Act 1958 (Vic), ss 322J and 322M(2) for the basis of these provisions.

148 Note that the Crimes Amendment (Abolition of Defensive Homicide) Act 2014 abolished the Australian state of Victoria's only general partial defence of defensive homicide and replaced the existing statutory self-defence in murder/manslaughter provisions and general common law self-defence rules with a single test. In the absence of a partial self-defence, self-defence becomes an all or nothing claim, where a successful plea results in an outright acquittal, and an unsuccessful plea results in conviction for the offence charged.

149 Wake (n 29 above) 156–158.

– not to report family violence to police or seek assistance to stop family violence.[150]

These jury directions could similarly be amended to capture the broader category of primary victim which the proposed reforms seek to accommodate. The jury directions are designed to complement the social framework evidence provisions in Victoria, considered below, and to assist in counteracting myths surrounding the impact of abuse, and they are designedly flexible in order to ensure that the trial judge can tailor individual directions to the specific facts of the case.[151]

It is essential to collectively transform our presuppositions and how 'reasonableness' of action is evaluated/directed in the *Challen* case, and domestic abuser killings more broadly. The trial judge in the CJA 2009 reforms has the authority to reject a loss of control claim on the predicate that no jury properly directed could reasonably conclude that sufficient evidence prevails for the defence to apply.[152] A new interlocutory appeal procedure ought adventitiously to be adopted, mirroring Victoria, whereby the grounds for the plea would be considered at a pre-trial hearing under case management procedures. The implementation of an interlocutory appeal route, as Wake articulates in a different contextualisation,[153] would mean that a trial judge's decision could be challenged (only) before trial, thereby preventing unnecessary appellate court litigation.[154] In cases where family violence is present, then juror directions, as above, and adapted from Victoria's promulgations, ought to be mandatory, ensuring consistency rather than solipsistic and incremental counsel requests: '[P]roperly understood domestic abuse should readily be regarded as a very serious wrong, where coercive control is a feature.'[155] Further explanation of the interposition of gross provocation, provoker wrongdoing and interpretation of 'warranted excuse' is provided in our review of recent developments in NSW.[156]

150 Nicola Wake and Alan Reed, 'Reconceptualising the contours of self-defence in the context of vulnerable offenders: a response to the New Zealand Law Commission' (2016) 3 Journal of International and Comparative Law 195–247 .

151 Ibid.

152 CJA, s 54(6); Reed and Wake (n 21 above) 129–133.

153 Wake (n 29 above) 158.

154 Reed and Wake (n 21 above) 130–131.

155 Herring (n 26 above) 66–67.

156 Susan D Rozelle, 'Controlling passion adultery and the provocation defense' (2005) 37 Rutgers Law Journal 197, 226–227, who contends that a provocation defence ought to be available only where the law actually permits the victim of an attack to protect herself through use of force, but the defendant uses too much force and kills the provoker; and see Roni Rosenberg, 'A new rationale for the doctrine of provocation: applications to cases of killing an unfaithful spouse' (2019) 37 Columbia Journal of Gender and the Law 220.

THE NORMATIVE STANDARDISATION OF LOSS OF CONTROL AND SOCIAL FRAMEWORK EVIDENCE

Finally, the defendant's loss of control must be judged by reference to a normative standard. The circumstances of the defendant are excluded from fact-finder evaluation where the 'only' relevance is that they bear upon a general capacity for normal tolerance and self-restraint. This layers an element of flexibility into the standardisation, and illustratively the Lord Chief Justice stated in *Asmelash*,[157] albeit *obiter*, that alcoholism may be a relevant consideration for the purposes of the objective test where D is mercilessly taunted about the condition to the extent it is relevant in it cohering to the gravity of the individual's provocation.[158] The appellate court, however, in *Rejmanski; Gassman*,[159] in conjoined appeals engaging post-traumatic stress disorder and an emotionally unstable personality disorder, constrained the cognisance of such mental disorders where they simply reduced D's 'general' capacity for tolerance or restraint.[160] In *Challen*, and similar future coercive/controlling behaviour cases, the defendant will be judged against a standardisation of normative restraint, but crucially the relevance of the particularised background of controlling/coercive 'circumstances' needs to be provided in expert testimony to the jury.[161]

A widened contextualisation and understanding of the abusive relationship, desensitising/dehumanising and overarching coercive circumstances needs to be presented to the jury, beneficially adapting Social Framework Evidence provisions in Victoria.[162] The initial utility of expert testimony of battered woman syndrome, in general, in a forensic context, lay in explaining the circumstances of the abuse. However, erroneous, albeit benevolent, applications meant, as Wake has stated,[163] that 'syndromisation' of the term was frequently invoked as a relevant and defining characteristic of the 'reasonable

157 [2013] EWCA Crim 157.

158 Ibid [25]. See also *Ruddelle* [2020] NZHC 1983, wherein in a New Zealand case the sentencing judge examined the interaction of alcohol and coercive control.

159 [2017] EWCA Crim 2061.

160 Note that in *Dawes* [2013] EWCA Crim 322 the appellate court established some threshold parameters: 'For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger do not often cross the threshold into loss of control.'

161 Bettinson (n 35 above) 84; I Leigh; 'Two new partial defences to murder' (2010) Criminal Law and Justice Weekly 53.

162 Wake (n 29 above); Crimes Act 1958 (Vic), s 322J, and more recently see changes in Western Australian law: s 39 of the Evidence Act 1906 (WA).

163 Wake (n 30 above) 437.

person' amorphous test.[164] The connotations associated with the syndromisation, and potential for misapplication, render its future utility in depicting the nature of dissonant domestic abuse doubtful. More appropriate is adaptation of a broadened, gender-neutral and non-stigmatising provision of Social Framework Evidence: '[U]nfortunately criminal law frameworks struggle to capture the real nature of the harm. Instead the focus is on isolated physical injuries that can be seen where context is disregarded.'[165]

Social Framework Evidence, as a derogation from Victoria's provisions, engenders a departure from a primordial focus on the physical impact of the abuse and highlights the relevance of the dynamics of the relationship, any psychological harm(s), strategic responses designed to resist, avoid or escape the violence, control and coercion, and the ramifications of these efforts, in addition to social and economic factors pertinent to the abuse.[166] A departure from the pathologisation of the primary victim is adduced, facilitates an explanation and understanding of Sally Challen's response to her circumstances and experience and provides an appropriate route for English law reform development.[167] The following evidence may be admissible in addressing liability:

a) the history of the relationship between the person and the family member, including abuse by the family member towards the person, or by the person towards the family member, or by the family member or the person in relation to any other family member;
b) the cumulative effect, including psychological effect on the person or family member of that abuse;
c) social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
d) the general nature and dynamic of relationships affected by family abuse, including the possible consequences of separation from the abuser;
e) the psychological effect of violence on people who are or have been in a relationship affected by abuse; and
f) social or economic factors that impact on people who are or have been in a relationship affected by abuse.[168]

164 Alan Reed and Nicola Wake, 'Anglo-American perspectives on partial defences: something, old, something borrowed, and something new' in Reed and Bohlander (n 21 above) 183.

165 Bettinson (n 27 above) 167.

166 Wake and Reed (n 150 above).

167 Thomas Crofts and Danielle Tyson, 'Homicide law reform in Australia: improving access to defences for women who kill their abusers' (2013) 30 Monash University Law Review 864.

168 Asher Flynn and Kate Fitz-Gibbon, 'Bargaining with defensive homicide, examining Victoria's secretive plea-bargaining system post law reform' (2011) 35 Melbourne University Law Review 905.

The blameworthiness of coerced vulnerable defendants needs proper and fair re-evaluation. Our attention now turns to fuller consideration of Australian precepts on loss of control and developments over the course of the last decade.

AUSTRALIA'S REFORMS

Similar to England and Wales, debates about provocation reform have continued in Australia. In the Australian context, scholars have also identified concerns with the provocation defence, in particular arguing it operated to protect and excuse male anger, jealousy and control over women.[169] While on its face the provocation defence is neutral, Ramsey points out that it:

> ... encourages a stereotype of men as hot-blooded, impulsive, and unable to control their violent urges. This is especially troubling because an alternate construction of the facts often suggests a premeditated murder arising from the defendant's outrage at his failure to dominate his intimate partner over a long period of time.[170]

Similarly, in her consideration of the provocation defence, Morgan found that it appeared to accept that it is 'provocative' for women to leave their partners, at least when they 'flaunt' their new relationship.[171] Morgan suggested that fatal responses to women's choices about the relationship could be understood as attempts by male partners to 'control'[172] their female partner.

At the same time, women who feared for their life and killed their abuser in response to a continuing experience of domestic and family violence and control over a long period often relied on the defence of provocation because they struggled to fit their experience into the requirements of self-defence.[173] As McMahon notes, the traditional requirements for self-defence including imminent threat, proportionality of response and retreat were 'derived from one-off, sudden encounters between males of (presumed) equal strength'.[174]

---

169 Fitz-Gibbon (n 135 above); Danielle Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge 2013).

170 Carolyn Ramsey, 'Provoking change: comparative insights on feminist homicide reform' (2010) 100 Journal of Criminal law and Criminology 33–108, 59.

171 Jenny Morgan, *Who Kills Whom and Why: Looking Beyond the Legal Categories* 7 (Victorian Law Reform Commission Occasional Paper, 2002) 39. See also Adrian Howe, 'Reforming provocation (more or less)' (1999) 12 Australian Feminist Law Journal 127, 130.

172 Morgan (n 171 above).

173 Ramsey (n 170 above) 60; Morgan (n 171 above) 41–43.

174 Marilyn McMahon, 'Homicide, self-defence and the (inchoate) criminology of battered women' (2013) 37 Criminal Law Journal 79, 81–82.

Over the past 30 years or more, research in the social sciences has shown that domestic violence is often underpinned by coercive and controlling tactics, developed by the abuser frequently over a long period of time and targeted to the individual victim.[175] This research has also showed that, for women in coercive and controlling relationships, separation was dangerous because it challenged the abuser's control.[176] Often the coercive and controlling abuser isolated the victim from those who might be able to help her, and so escape was both difficult, or impossible, and certainly dangerous.[177] In some Australian cases, abused women have relied on the provocation defence, resulting from their fear of their abuser, rather than anger, and armed themselves with whatever is to hand, killing their abuser when he was unarmed, his back was turned or he was asleep.[178] Access to self- defence in such cases was difficult because of the requirements of imminence, proportionality and retreat.

With these concerns in mind, Australian jurisdictions have experimented with a variety of approaches to reform homicide defences over the past 20 years. In this section, we focus on reforms to the provocation defence. Australia's constitutional arrangements result in homicide largely being a matter for the states and territories to regulate,[179] and, as a result, the partial provocation defence, and the question of how loss of self-control is dealt with in the context of homicide, is managed differently in each of the eight Australian jurisdictions. Only in South Australia[180] does the common law approach to provocation continue to apply. In recent times Tasmania

175 Stark (n 45 above).

176 Martha Mahoney, 'Legal images of battered women: redefining the issue of separation' (1991) 90 Michigan Law Review 1; Walter S DeKeseredy, Molly Dragiewicz and Martin D Schwartz, *Abusive Endings: Separation and Divorce Violence against Women* (University of California Press 2017).

177 Australia's National Research Organisation for Women's Safety (ANROWS), *Women Who Kill Abusive Partners: Understandings of Intimate Partner Violence in the Context of Self-defence* (ANROWS 2019) 17.

178 *Chhay v R* (1994) 72 A Crim R 1; *Van den Hoek v R* (1986) 161 CLR 158. See also Rebecca Bradfield, *The Treatment of Women Who Kill their Violent Male Partners within the Australian Criminal Justice System* (Unpublished PhD Thesis, University of Tasmania, 2002): in the case of all 22 women who killed their partners and successfully argued provocation, there was a history of prior physical violence.

179 Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press 2019) 40–41.

180 *Lindsay v The Queen* [2015] HCA 16. See also Kent Blore, 'Lindsay v The Queen: homicide and the ordinary person at the juncture of race and sexuality' (2018) 39 Adelaide Law Review 159-201.

(in 2003),[181] Victoria (in 2005)[182] and Western Australia (WA) (in 2008)[183] have abolished provocation as a partial defence to murder, ultimately leaving the loss of self-control as a matter for sentencing.[184] Notably, in Victoria[185] and WA[186] changes to the defence of self-defence and evidence laws were introduced alongside the abolition of the provocation defence in efforts to expand the application of self-defence to circumstances where battered women kill their abusive partner. In at least three states, Victoria, NSW and Qld, the most recent decision to abolish or reform the partial defence was underpinned by a specific case where a man had violently killed his intimate partner and successfully claimed provocation. These cases shocked the community and galvanised activists and politicians to implement change.[187] While NSW (in 2014),[188] Qld (in 2010[189] and then again in 2017),[190] Northern Territory (NT) (in 2006)[191] and Australian Capital Territory (ACT) (in 1990)[192] have retained the partial defence of provocation, each jurisdiction has reformed its limits and application differently. To add to the complexity and patchwork of approaches in Australia, in

181 Criminal Amendment (Abolition of Defence of Provocation) Act 2003 (Tas), repealed s 160 of the Criminal Code Act 1924 (Tas). The Criminal Code Amendment (Life Prisoners and Dangerous Criminals) Act 1994 (Tas) amended s 158 of the Criminal Code Act 1924 (Tas), removing the mandatory life sentence for murder, replacing it with a maximum life sentence.

182 Crimes (Homicide) Act 2005 (Vic). See generally Victorian Law Reform Commission, *Defences to Homicide* (Report No 94, October 2004). Victoria abolished mandatory life imprisonment for murder in 1986, Crimes (Amendment) Act 1986 (Vic).

183 Criminal Law Amendment (Homicide) Act 2008 (WA). This legislation also reformed the penalty for murder from mandatory to presumptive life imprisonment: see Criminal Code Compilation Act 1913 (WA), s 279(4). For background to the reforms, see Western Australia Law Reform Commission, *Final Report: Review of the Law of Homicide* (Report No 97, September 2007).

184 Ramsey (n 170 above) 33.

185 Bronwyn Naylor and Daniel Tyson, 'Reforming defences to homicide in Victoria: another attempt to address the gender question' (2017) 6(3) International Journal for Crime, Justice and Social Democracy 75; s 322J of the Crimes Act 1958 (Vic).

186 Stella Tarrant, 'Self defence against intimate partner violence: let's do the work to see it' (2018) 43(1) University of Western Australia Law Review 196, and Evidence Act 1906 (WA), s 39.

187 *R v Ramage* [2004] VSC 508; *Singh v R* [2012] NSWSC 637; *R v Sebo, ex parte Attorney General* [2007] QCA 426.

188 Crimes Amendment (Provocation) Act 2014 (No 13) (NSW).

189 Criminal Code and Other Legislation Amendment Bill 2010 (Qld), cl 5 amended s 304 QCC.

190 Criminal Law Amendment Act 2017 (Qld).

191 Criminal Reform Amendment Act (No 2) 2006 (NT).

192 Crimes Amendment Ordinance (No 2) 1990 (ACT).

Qld,[193] South Australia,[194] the ACT[195] and the NT[196] life imprisonment is still a mandatory penalty for murder, whereas elsewhere in the country it is now a maximum penalty.[197] In the absence of abolition of the mandatory life imprisonment penalty for murder, reform bodies have argued for the retention and modernisation of the defence of provocation, rather than its abolition.[198] No Australian jurisdiction has taken the same path in its approach to reform.[199] However, similar to England and Wales, for all Australian jurisdictions, the decision to abolish or reform the defence was informed by two central concerns.[200] First, a growing concern that too often the provocation defence was used to justify male proprietorial anger towards a female partner[201] and/or a killer's response, grounded in homophobic masculinity, to a homosexual advance.[202] Second, a concern that battered spouses, usually women who kill their abuser, fearing further serious abuse or death, should not be convicted of murder.[203] While legislative reforms to self-defence have been introduced in WA[204] and Victoria[205] to respond to these issues, there are some homicide defendants in this category whose response may be found disproportionate to the risk of future harm.[206] Both Victoria and Qld attempted to deal with this issue through the introduction of the ill-fated offence of 'defensive

193 Criminal Code Act 1899 (Qld), s 305.
194 Criminal Law Consolidation Act 1935 (SA), s 11.
195 Crimes Act 1900 (ACT) s 12.
196 Criminal Code Act 1983 (NT) s 157.
197 Crimes Act 1900 (NSW), s 19A; Crimes Act 1958 (Vic), s 3; Criminal Code Act 1924 (Tas), s 158. Note in WA life is now a 'presumptive' penalty for murder: see Criminal Code Compilation Act 1913 (WA), s 279(4).
198 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation Report* (Report No 64, 2008) 57–63 (QLRC Report) 471; and re NT, see Andrew Hemming, 'Provocation: a totally flawed defence that has no place in Australian criminal law irrespective of sentencing regime' 14 University of Western Sydney Law Review 1–44, 3.
199 Crofts and Tyson (n 167 above).
200 Ibid.
201 Morgan (n 171 above).
202 Kent Blore, 'The homosexual advance defence and the campaign to abolish it in Queensland: the activist's dilemma and the politician's paradox' (2012) 12(2) Queensland University of Technology Law Journal 36–65. See also *R v Meerdink* [2010] QCA 273; *Green v R* [1997] HCA 50, (1997) 191 CLR 334.
203 Crofts and Tyson (n 167 above) 873.
204 Criminal Law Amendment (Homicide) Act 2008 (WA).
205 Crimes (Homicide) Act 2005 (Vic), s 9AC.
206 *Osland v R* [1998] HCA 75; 197 CLR 316.

homicide' in Victoria[207] and in Qld the still operating 'defence of self-preservation'.[208] Given the complexity of the responses across Australia, we focus on the most recent reforms to provocation in the Australian jurisdictions of Qld and NSW. These two states have decided to retain and reform the provocation defence in the past 10 years.

Developments in Qld, Australia

Background to the reforms

In 2005 the defence of provocation in s 304 of the Criminal Code 1899 (Qld) (QCC) stated:

> When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

A succession of cases had developed the interpretation of the provision. Essentially, it had three key elements: the defendant must kill 'in the heat of passion', where the passion was caused by sudden provocation and before there had been time for the passion to cool. Once raised on the evidence, it was for the prosecution to disprove it beyond reasonable doubt.[209] Over time, the interpretation of the provision had become increasingly complex. Virtually any conduct could qualify as provocation unless the prosecution satisfied the jury beyond reasonable doubt that the 'hypothetical ordinary person' could not have reacted to the conduct in the way (that is the nature and extent of the reaction, rather than the precise physical form) in which the defendant acted.[210] While generally words alone, for example a confession of adultery, would not be considered sufficient provocation, case law had identified that in 'extreme or exceptional' circumstances words might be sufficient and it was 'the combination of circumstances' that needed to be evaluated.[211] In a case emanating from Qld, the High Court of

---

207 Defensive homicide was introduced in 2008 (Crimes Act 1958 (Vic), s 9AD) and abolished six years later in 2014 (Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic), s 3(3)). See also Madeleine Ulbrick, Asher Flynn and Danielle Tyson, 'The abolition of defensive homicide: a step towards populist punitivism at the expense of mentally impaired offenders' (2016) 40 Melbourne University Law Review 324; Kate Fitz-Gibbon and Sharon Pickering, 'Homicide law reform in Victoria, Australia: from provocation to defensive homicide and beyond' (2012) 52(1) British Journal of Criminology 159.

208 Criminal Code Act 1899 (Qld), s 304B.

209 *Pollock v The Queen* [2010] HCA 35 [6]–[7].

210 Ibid [67].

211 *Buttigieg v The Queen* (1993) 69 A Crim R 21, 37.

Australia had clarified that the requirement for 'sudden provocation' did not mean that the accused's response to the provocation must be 'immediate', but rather the killing must occur when the person is in a state of loss of self-control caused by the provocative conduct.[212]

Towards the end of 2005, 28-year-old Damian Sebo was charged with the murder of his 16-year-old girlfriend, Taryn Hunt. They had been in a sexual relationship for around two years. Sebo killed her as they were returning from the casino. The defence case was that Hunt had taunted Sebo about her relationships with other men. The defence asserted that, when Hunt said she planned to continue to cheat on him, Sebo struck her several times with a steering wheel lock. Sebo took Hunt to hospital, but she died two days later from her injuries. Initially charged with murder, Sebo offered to plead guilty based on Hunt's 'provocative' taunts and the Crown accepted the plea. Sebo was sentenced to 10 years' imprisonment. The Attorney General appealed the sentence on the basis that this was inadequate, but the appeal was dismissed.[213] There was significant community disquiet about the conviction and sentence.[214] In response, the Attorney General asked the Queensland Law Reform Commission (QLRC) to review the defence of provocation.[215]

Law Reform in Qld

The Attorney General's reference stated that the QLRC should have regard to 'the existence of a mandatory life sentence for murder and the Government's intention not to change the law in this regard'.[216] At the same time, the Attorney General asked the QLRC to consider 'whether the partial defence of provocation (section 304 of the *Criminal Code*) should be abolished, or recast to reflect community expectations'.[217]

In making its recommendations, the QLRC was influenced by data showing that in Qld 29 per cent of all homicides were intimate partner homicides and 80 per cent of the intimate partner homicides involved

212 *Pollock v The Queen* [2010] HCA 35 [54]; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defences to homicide for battered women: a comparative analysis of laws in Australia, Canada and New Zealand' (2012) 34 Sydney Law Review 467–492, 481.

213 *R v Sebo, ex parte Attorney General* [2007] QCA 426. For further consideration of the case, see QLRC Report (n 198 above).

214 Mark Oberhardt, 'Damian Sebo's jail term not increased for Taryn Hunt's death' *Courier Mail* (Brisbane, 29 November 2007).

215 QLRC Report (n 198 above), see terms of reference, app 1, 521–522

216 Ibid 621.

217 Ibid 621, (c).

men killing women.[218] Further, the QLRC quoted statistics that 14 per cent of killings were motivated by the end of a relationship and 58 per cent arose from a domestic argument.[219] The QLRC identified that those who have size and strength are generally the ones who respond to provocation with violent rage because they have the power to do so.[220] Furthermore, the QLRC identified a number of cases where the provocation consisted of words including taunts, insults and admissions of infidelity from the victim[221] and found that in provocation cases 'the reduction to manslaughter is artificial because it masks the fact that the killing under provocation was an intentional one'.[222] However, 'constrained'[223] by the mandatory life imprisonment sentence in Qld, the QLRC rejected the abolition argument primarily 'because [of] the need to preserve the defence for those who genuinely deserve relief from mandatory life imprisonment, for example, the battered woman who loses control after discovering that her abuser has been raping their infant child'.[224]

In recasting the provocation defence, the QLRC had several goals. It sought to recognise that, in extreme situations, human frailty could cause a person to react with lethal violence, and compassion in sentencing was deserved.[225] The QLRC sought to limit the application of the defence to retaliations to serious wrongs, hence it recommended an overarching requirement that the defence should not be available in response to provocation that involves words alone, or mainly words unless the circumstances were 'extreme or exceptional'.[226] Further, it sought to ensure that the defence did not operate in a gender-biased way and recommended that, unless circumstances were extreme or exceptional, the deceased's choice about the relationship could

218 Megan Davies and Jenny Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report* (Australian Institute of Criminology 2006) 23; QLRC Report (n 198 above) 226.

219 Davies and Mouzos (n 218 above); QLRC Report (n 198 above) 227.

220 QLRC Report (n 198 above) 465.

221 Ibid 467; *R v Auberson* [1996] QCA 321, *R v Smith* [2000] QCA 169, *R v Perry* Indictment No 312 of 2003, *R v Schubring, ex parte A-G* (Qld) [2005] 1 Qd R 515, *R v Sebo* [2007] QCA 426.

222 QLRC Report (n 198 above) 469

223 Ibid 474.

224 Ibid 471, indirectly referencing similar facts in the case of *R v R* (1981) 28 SASR 321.

225 Ibid 21.1, 500.

226 Ibid rec 21.2, 500.

not amount to provocation.[227] Finally, under a new formulation of provocation the QLRC found that the defendant should be required to prove, on the balance of probabilities, that 'confronted with provocation, he or she retaliated in a state of intense emotion and failed to exercise self-restraint'.[228] The QLRC also recommended the reversal of the onus of proof in circumstances where provocation is raised. In considering the onus of proof in its Report, the QLRC noted the conflict between two principles: first, 'the great principle of the common law that the onus of proof of a criminal charge should rest on the prosecution'; second, 'a general principle that a party seeking to take advantage of a particular rule (in this case one allowing murder to be mitigated to manslaughter because of provocation) should carry the onus of persuasion in relation to the rule'.[229] The QLRC identified several other examples of reversal of the onus with respect to defences in the QCC[230] and determined that, among other things, the defendant is in the best place to articulate the claim, the reversed onus would result in claims that are more well-articulated and the trial judge will have enhanced capacity to prevent unmeritorious claims.[231]

Parliament largely followed the recommendations of the QLRC and introduced changes to the provocation defence in 2011.[232] The previous language of the defence is retained in the first paragraph of the reformed provision: the fatal act must be done in the 'heat of passion', in response to 'sudden provocation' and 'before there is time for the person's passion to cool'.[233] However, several limiting subsections are now included, reflecting the recommendations of the QLRC Report.

227 Ibid rec 21.3, 500. Note in this context, the QLRC Report recommended further consideration of the development of a separate defence for battered persons who kill: ibid rec 21.4, 501. Subsequent to the QLRC enquiry, a report was prepared on the possibility of introducing a new defence specifically targeting battered persons; Geraldine Mackenzie and Eric Colvin, *Homicide in Abusive Relationships: A Report on Defences* (Bond University 2009) prepared for the Attorney General and Minister for Industrial Relations. The findings of this report underpinned the introduction of new partial defence, s 304B of the Criminal Code (Qld): 'Killing for preservation in an abusive domestic relationship'. For discussion of the operation of this defence. See Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45(3) Australian and New Zealand Journal of Criminology 367.

228 QLRC Report (n 198 above) 497 rec 21.5.

229 Ibid 196.

230 For example, diminished responsibility (s 304A QCC), mistake of fact regarding age in a number of sexual offences against minors (ss 209, 211, 215 QCC).

231 QLRC Report (n 198 above) 492–493.

232 Criminal Code and Other Legislation Amendment Act 2011 (Qld).

233 Provocation remains undefined in the legislation and takes its meaning from the common law: *R v Buttigieg* (1993) 69 A Crim R 21; *Stingel v The Queen* (1990) 171 CLR 312, 326. Note also loss of self-control may arise from anger or resentment, or other emotions such as fear or panic: *Van Den Hoek v The Queen* (1986) 161 CLR 158.

The reformed provision identifies that words alone cannot constitute provocation 'except in circumstances of an exceptional character' (section 304(2) QCC). Further, except in 'circumstances of an exceptional character' the provocation defence does not apply, in the context of a domestic relationship,[234] where:

> (c) the sudden provocation is based on anything done by the deceased, or anything the person believes the deceased has done—
>
> i) to end the relationship; or
>
> ii) change the nature of the relationship; or
>
> iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship. (section 304(3) QCC)

The provision states that, when determining whether the character of the provocation is exceptional, regard may be had to any relevant history of violence (section 304(7) QCC). Importantly, this sub-section explicitly allows the court to take account of a history of violence, both in cases where a domestic violence abuser ultimately kills his victim and in cases where the victim kills her abuser. Evidence of the history of abuse provides context to the fatal conduct. The objectives of the reforms were to 'recast the defence of provocation … to address its bias and flaws'.[235] The Explanatory Notes for the reformed provocation provision highlighted the concern with the historical gender bias of the defence:

> … it is not uncommon for men who kill their intimate partners to raise the defence of provocation on the basis that they were provoked to kill by their partner's infidelity, insults or threats to leave the relationship … The amendments will: remove insults and statements about relationships from the scope of the defence; recognise a person's right to assert their personal or sexual autonomy; and will reduce the scope of the defence being available to those who kill out of sexual possessiveness or jealousy.[236]

The onus is on the defence to prove that s/he is guilty of manslaughter by provocation (section 304(9) QCC) to the balance of probabilities standard. The onus is on the defendant to prove more probably than not that there was provocation by the deceased, that the defendant lost control in response to the provocation and the defendant was still provoked when doing the act that caused the victim's death.[237] There

234 Defined under s 13 of the Domestic and Family Violence Protection Act 2012 (Qld). See s 304(5): 'For subsection (3)(a) despite the Domestic and Family Violence Protection Act 2012, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.'

235 Criminal Code and Other Legislation Amendment Bill 2010, Explanatory Notes, 1.

236 Ibid 2–3.

237 Supreme and District Courts Criminal Directions Benchbook [98].

has been almost no debate about this change. Indeed, subsequent enquiries into reform of homicide defences in other Australian states have merely noted this change without significant comment.[238] This apparent acceptance can be contrasted with the United Kingdom where the onus of proof remaining with the prosecution has been considered a matter of human rights protection and is strongly guarded.[239]

After the QLRC Report was handed down, barrister John Jerrard was tasked to head a Special Committee to consider the so-called 'homosexual advance defence'.[240] The Special Committee determined that claims of a homosexual advance as a provocation to murder were not common but had played a role in two cases.[241] The special committee was divided about the necessity for reform but ultimately recommended change. In 2017, legislative reforms introduced a further limitation on the application of the provocation defence.[242] Sudden unwanted sexual advances,[243] except when of an exceptional character, are no longer recognised as provocation under the Qld provocation defence (section 304(4) QCC).

Implementing the Qld reforms

The legislative effort to exclude the provocation defence in the context of sexual infidelity and circumstances where women appear to have changed or left the relationship have been considered in two recent, and very similar, cases: *R v Peniamina*[244] and *R v Pilcher*.[245] The two

238 See, for example, South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 2* (South Australian Law Reform Institute 2018) 21.

239 See, for example, *Keogh v R* [2007] EWCA Crim 528.

240 John Jerrard, *Special Committee Report on Non-Violent Sexual Advances* (Special Committee Report to the Queensland Attorney-General, Parliament of Queensland 2012). See also David Mack, '"But words can never hurt me": untangling and reforming Queensland homosexual advance defence' (2013) 35 Sydney Law Review 167.

241 *R v Peterson and Smith* (Unreported, Maryborough Circuit Court, 14 October 2011); *R v Meerdink and Pearce* (Unreported, Maryborough Circuit Court, 13 May 2010).

242 Criminal Law Amendment Act 2016 (Qld) Clause 10.

243 Under s 304(4) QCC 'unwanted sexual advance' to a person, means a sexual advance that—(a) is unwanted by the person; and (b) if the sexual advance involves touching the person—involves only minor touching. *Example*—patting, pinching, grabbing or brushing against the person, even if the touching is an offence against s 352(1)(a) or another provision of this Code or another Act' (see s 304(11) QCC).

244 [2019] QCA 273.

245 [2020] QCA 8. A model direction is included in the *Supreme and District Courts Bench Book, Queensland Courts* (n 237 above) [98].

cases highlight the unpredictable ways in which law reforms designed to address gender inequity are sometimes implemented and the difficulty of law reform.[246]

In *R v Peniamina*,[247] Arona Peniamina killed his wife Sandra Peniamina. In the months leading up to the homicide, Arona and Sandra had been having marriage problems. She had been sleeping in the spare room and Arona believed she was having an affair with a man in New Zealand. Arona told family members he was worried about her taking the children overseas. On the night Arona killed Sandra, he had tried to talk to her about text messages he found on her mobile phone; he presumed they were from her boyfriend. Arona told police he thought she did not care, that he hit her and her mouth began to bleed. She moved into another room and obtained a knife 'presumably to defend herself against further attack'.[248] Arona grabbed the knife by the blade to try to take it off her, she pulled the knife back and Arona's hand was cut in the process. Arona told the police 'I feel my hand really pain … just more angry and more angry … I can't stop that time.'[249] Sandra tried to run away, and Arona stabbed her over twenty times with the knife, killing her.[250] The jury convicted him of murder. He appealed against the conviction based on errors with respect to jury directions on the provocation defence, especially with respect to section 304(3) QCC.

Both at trial and on appeal, the defence argued it was the brandishing of the knife, which led Arona to grab the blade and his hand to be cut, that was the 'sudden provocation' that caused him to lose self-control and 'tipped [him] over into a rage',[251] rather than something Sandra did to change the nature of the relationship.[252] The Crown case was that the provocation was the acts done by Sandra Peniamina 'to change the nature of the relationship', and this put the defence in the position where they needed to prove that the provocative acts were of 'an extreme and exceptional character' in order to successfully engage the provocation defence.[253] The trial judge had directed the jury that the defence had to prove provocation was not based on something Sandra

246 And, indeed, the difficulties of changing law through legislation: see Kate Fitz-Gibbon, 'Replacing provocation in England and Wales: examining the partial defence of loss of control' (2013) 40(2) Journal of Law and Society 280, 281, especially fn 2 for a list of references.

247 [2019] QCA 273.

248 *R v Peniamina* [2019] QCA 273 [94] (Applegarth J).

249 *Peniamina v R* B32/2020, appellants' submissions to the High Court of Australia, 3.

250 *R v Peniamina* [2019] QCA 273 [97] (Applegarth J).

251 Ibid [118].

252 Ibid [69], [99].

253 Ibid [67].

did to change the nature of the relationship. Arona appealed and in a 2:1 majority, the appeal was dismissed.[254]

Applegarth J, in the majority on appeal, said that section 304(3) QCC would be engaged where 'the sudden provocation was closely related to a thing done by the deceased to change the relationship'.[255] He noted that the defendant might nominate a more immediate act of provocative conduct (eg in this case the grabbing of the knife), but the evidence might show that the sudden provocation 'was based on a thing done by the deceased to change the relationship'.[256]

The factual question of whether the claimed (or assumed) sudden provocation was 'based on' an act of the deceased done to change the relationship calls for an evaluation of the chain of events and the causative potency of the act of the deceased. The statute uses words which suggest that the act of the deceased must have been a foundation of what followed. A mere connection between the act and the sudden provocation, in that the act made some contribution in terms of cause and effect to the eventual outcome is unlikely to be sufficient to support a finding that the sudden provocation was 'based on' the act.[257]

Applegarth J found that the words 'based on' have an ordinary meaning connoting a 'substantial' causal connection.[258] He found there might be a sufficient connection where, even though something had occurred between the deceased's acts in ending the relationship and the accused's loss of self-control, 'the intervening matter is a likely or not unexpected consequence of a thing done to end or change a relationship'.[259]

Applegarth J expressed concern that if interpreted too narrowly section 304(3) QCC would be deprived of its intended operation:

> In my view, it would be an odd, and seemingly unintended, result if a defendant could effectively avoid the practical operation of s 304(3) by nominating the most immediate act of the deceased (eg a blow struck in self-defence during a fight that quickly followed her act in trying the leave the relationship) as the provocative act.[260]

Morrison JA also dismissed the appeal. He found that the phrase 'based on' requires the change of relationship to be a 'foundation' or 'basis' for the sudden provocation.[261] Morrison JA also emphasised

254 Applegarth J and Morrison JA dismissed the appeal; McMurdo J allowed the appeal and would have ordered a retrial.

255 *R v Peniamina* [2019] QCA 273 [182].

256 Ibid [182].

257 Ibid [184].

258 Ibid [185].

259 Ibid [166].

260 Ibid [169].

261 Ibid [16].

that 'belief' of the accused that the victim had acted to end or change the relationship, or had indicated that she would end of change it, was required. It was not necessary under section 304(3)Q CC on Morrison JA's view for the victim to have actually done anything to end or change the relationship.[262]

However, McMurdo JA, dissenting, would have allowed the appeal. Interpreting the application of section 304(3) QCC narrowly,[263] he found that, in order for section 304(3)QCC to be engaged, the jury had to find that what was done by the deceased with the knife was done to end or change the nature of the relationship. In making this finding, he preferred an interpretation of the circumstances that excised two discrete actions, the victim's action with the knife and the accused's response, from their relationship context and history.

On appeal to the High Court, the majority (Bell, Gageler and Gordon JJ) preferred McMurdo JA's conclusion in *R v Peniamina* that the words 'based on' 'signify a relation of causation simpliciter between the sudden provocation and the thing done by the deceased to change the relationship', finding that Applegarth J's 'wide construction' gives the words 'based on' an 'uncertain operation'.[264] The majority found that the defence requires the accused 'to nominate the thing done (or believed to have been done) by the deceased that induced his or her loss of self-control' and to prove not only that the killing was done in a state of loss of self-control but that the state was induced by the nominated conduct.[265] The appeal was allowed and a new trial ordered. The minority (Keane and Edelman JJ) found that the phrase 'based on' is broader than the phrase 'caused by', and the deliberate choice of this different language would be impermissible for the courts to ignore.[266] The minority suggested that it was 'unlikely' that Parliament could be taken to have intended that the operation of section 304(3) QCC would be 'a matter for the forensic choice of an accused, superintended by the judge, and removed from consideration by a jury' and said that 'the knife incident cannot be viewed in isolation from the other conduct of the deceased leading up to the killing, or the beliefs of the appellant in relation to that conduct'.[267] They would have dismissed the appeal.

R v Pilcher [2020] QCA 8 was decided three months after *R v Peniamina* [2019] QCA 273. Dane Pilcher[268] had been in a sexual relationship with the deceased, Corinne Henderson, for two years.

262 Ibid [20], [21].
263 Ibid.
264 *Peniamina v R* [2020] HCA 47, [12], [16].
265 Ibid [26].
266 Ibid [87], [88].
267 Ibid [103]; [105].
268 *R v Pilcher* [2020] QCA 8.

They had separated at the deceased's instigation around three months prior to the homicide. Henderson had begun a new relationship. It was common ground that Pilcher killed Henderson in her house, stabbing her with a kitchen knife. On the day Pilcher killed her, a friend of Pilcher's had forwarded Facebook photos of the victim with her new partner to Pilcher. Pilcher had become 'distressed, upset and emotional'.[269] He went out drinking and later that day made his way to the victim's house. At this point, the prosecution case relied primarily on the testimony of the killer.[270] When Pilcher arrived at the house, he knocked but no one answered, so he broke the kitchen window and climbed in. He confronted the victim in the kitchen, she asked him to leave six times, and, on Pilcher's account, she stabbed him with a knife and, in the context of trying to get the knife from her, he killed her, stabbing her 21 times. The main defence relied on by the accused was accident – or if intent was found, self-defence. Ultimately, the jury was directed to consider self-defence, accident, compulsion and provocation at trial. At trial, the defence had not explicitly run the defence of provocation, however, it was raised on the evidence. The defence team proceeded on the basis that section 304(3) QCC applied to the circumstances, namely that the basis of the provocation was Henderson's decision to separate from Pilcher. As a result, the trial judge's direction to the jury was that the provocation defence pursuant to section 304(1) QCC was not applicable unless the jury were satisfied that the sudden provocation had occurred in circumstances of a 'most extreme and exceptional character'[271] pursuant to section 304(3) QCC. Pilcher was convicted of murder. He appealed against the conviction, in part on the basis that the jury was misdirected on provocation.

This time the Court of Appeal was required to follow the precedent of *R v Peniamina*, and much of Applegarth J's interpretation of section 304(3) QCC in that case is repeated by McMurdo JA[272] in his judgment in *R v Pilcher*. Recall McMurdo JA had earlier dissented in *R v Peniamina*.[273] However McMurdo JA (Fraser JA concurring)[274] allowed the appeal, this time because the jury was not instructed to first consider the question of whether the evidence engaged section 304(3) QCC. McMurdo JA found that the trial judge had missed an important step in his directions to the jury. The trial judge had assumed

269 Ibid [13].

270 The only other person present was the victim who, of course, cannot testify; Jenny Morgan, 'Provocation law and facts: dead women tell no tales, tales are told about them' (1997) 21 Melbourne University Law Review 237–276.

271 *R v Pilcher* [2020] QCA 8 [4].

272 Ibid [34]–[36] .

273 *R v Peniamina* [2019] QCA 273.

274 *R v Pilcher* [2020] QCA 8 [1].

that section 304(3)QCC was engaged and directed the jury that they would need to identify exceptional circumstances to find provocation and convict on manslaughter. Crow J, in the minority, would not have allowed the appeal on this basis. He found that the question of whether section 304(3)QCC was relevant was not in issue between the parties, so the trial judge's direction was appropriate.[275]

These two Qld cases where men killed their (ex)partners in the shadow of separation provided an opportunity to test the application of the reformed provocation defence in Qld. Applegarth J's judgment in *R v Peniamina*[276] viewed the alleged provocation within the broader history of the relationship between the killer and victim, finding that the killer's loss of control was 'based on' his partner's decision to change the relationship. In contrast, McMurdo JA (and subsequently the majority of the High Court) takes a narrower approach, extracting a discrete incident of provocation from its broader context. In determining the application of section 304(3) QCC McMurdo JA refuses to take into account the history of the relationship between the killer and victim in locating loss of self-control. McMurdo JA's judgment in *R v Peniamina* considers loss of self-control arises from a single incident, ignoring the surrounding circumstances, including the killer's building frustration that their partner has chosen to leave. This approach of refusing to see the provocative act in its broader context would allow what Fitz-Gibbon has described as 'jealous man provocation' to continue to be applied.[277]

In the context of this article, it is of interest to consider how the narrow versus broad approach might apply to a woman whose 'loss of control' develops from an experience of long-term coercive control and family violence who finally 'snaps' when confronted with her partner's sexual infidelity (eg the circumstances facing Sally Challen in England).[278] On McMurdo JA's narrow approach the abusive partner's sexual infidelity would not be seen in its broader context and section 304(3) QCC would apply. This would mean the killer has an extra hurdle: unless the sexual infidelity could be found to have occurred 'in circumstances of an exceptional character', the provocation defence pursuant to section 304(1) QCC would not be available to her. Applying Applegarth J's broader approach, the history of coercive control would be part of the context: that is the loss of control would potentially be 'based on' coercive control and the extra hurdle of

275 Ibid [95].

276 *R v Peniamina* [2019] QCA 273.

277 Kate Fitz-Gibbon, 'Homicide law reform in New South Wales: examining the merits of the partial defence of "extreme" provocation' (2017) 40 Melbourne University Law Review 769, 788. See also Tyson (n 169 above); Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992) 192–193; Morgan (n 171 above); also see Howe (n 171 above) 130.

278 *R v Challen* [2011] EWCA Crim 2019.

section 304(3) avoided. Of course, in either case, if section 304(1) QCC would ultimately apply, the killer would need to satisfy the jury to the balance of probabilities standard that she was responding in the 'heat of passion' to 'sudden provocation' 'before there was time for her passion to cool'. As observed by the High Court:

> The law [in Australia] requires that the killing occur while the accused is in a state of loss of self-control that is *caused* by the provocative conduct, but this does not necessitate that provocation is excluded in the event that there is any interval between the provocative conduct and the accused's emotional response to it and if the killing is determined to be 'premeditated' (ie not done in the heat of passion while self-control was lost) the jury would be required to convict of murder.[279]

One of the difficulties of the *Challen* case was that Sally Challen went to the victim's house armed with a hammer. Nevertheless, if the Qld provocation law had applied to Sally Challen, under the broad approach, it is possible the jury would have been directed to consider provocation. Applying the broad approach, a person in Challen's circumstances may have been able to convince a jury on the balance of probabilities that the provocation was the coercive control that she experienced over a long period from the victim and that she was still responding to that provocation when she killed. Under the narrow approach, which, subsequent to the High Court's decision in *Peniamina v R*, is how the provision must be interpreted in Qld, she would have an extra hurdle to convince the jury that the sexual infidelity was of an 'exceptional character'.[280]

Developments in NSW, Australia

Background to the reforms

NSW introduced significant reforms to the defence of provocation in 1982,[281] in part to broaden its application to battered women who killed their intimate partner.[282] Under those reforms the mandatory

279 *Pollock v The Queen* [2010] HCA 35 (20 October 2010) [54] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) allowing for a 'slow burning' loss of control: *R v Chhay* (1994) 72 A Crim R 1, 13. Although see Andrew Hemming, 'Impermissibly importing the common law into criminal codes: *Pollock v The Queen*' (2011) 18 James Cook University Law Review 113, for criticism of this case.

280 Note s 304(7) QCC allows the history of family violence to be taken into account where the alleged provocation is based on the deceased's decision to leave or change the relationship. As observed earlier, the High Court of Australia is set to rule on the correctness of the broad versus narrow approach: *Peniamina v The Queen* [2020] HCA Trans 75 (5 June 2020).

281 For an overview of the history and approach to reform in NSW, see Fitz-Gibbon (n 135 above) ch 7, 150–177.

282 *Report of New South Wales Task Force on Domestic Violence to Honourable N K Wran QC, MP Premier of New South Wales, July 1981* (Government Printer 1981).

life imprisonment penalty was abolished (and reformed to maximum life). In 2009 section 23(1) Crimes Act 1900 (NSW) provided:

> Where, on the trial of a person for murder, it appears that the act or omission causing death was an act done or omitted under provocation and, but for this subsection and the provocation, the jury would have found the accused guilty of murder, the jury shall acquit the accused of murder and find the accused guilty of manslaughter.

Under the provision, provocation could be established where:

> ... an act or omission was the result of a loss of self-control by the defendant that was induced by any conduct of the deceased[283] toward or affecting the defendant; and the conduct of the deceased was such that it could have induced an ordinary person to have so far lost self-control as to have formed intent to kill or inflict grievous bodily harm.[284]

In 2009, Chamanjot Singh was charged with the murder of his wife, Manpreet Kaur, after he cut her throat several times with a box-cutter.[285] Singh pleaded guilty to manslaughter but not guilty to murder, claiming that his wife had provoked him by threatening to deport him, and by her suggestions that she had never loved him and was in love with someone else.[286] The jury verdict was manslaughter.[287] The sentencing judge observed that the jury were not convinced that an ordinary person in Mr Singh's position would not have responded to the alleged provocative conduct in the manner that he did[288] and sentenced Singh to eight years with a non-parole period of six years. The case sparked significant debate in the community and calls for a review of the defence.[289]

Law reform in NSW

A month after Singh was sentenced the legislative council of the NSW Government established a Select Committee on the Partial Defence of Provocation (the Committee). The terms of reference included that the Committee should report on abolishing or amending the provocation

283 The conduct could include 'grossly insulting words or gestures', see s 23(2)(b) (repealed).

284 Summary extracted from Select Committee on the Partial Defence of provocation, *The Partial Defence of Provocation: Final Report* (NSW Legislative Council 2013) 13. See s 23(2)(a) Crimes Act 1900 NSW (repealed).

285 *Singh v R* [2012] NSWSC 637 [30].

286 Ibid [1], [27].

287 Ibid [1]–[2].

288 Ibid [2].

289 Paul Bibby and Josephine Tovey, 'Six years for killing sparks call for law review' *Sydney Morning Herald* (Sydney, June 2011).

defence.[290] The Committee chairman's foreword referred to the *Singh* case stating:[291]

> It is unacceptable that the law offers a partial defence to people who kill in response to 'provocative' circumstances which are, in fact, a normal part of human experience, such as being told a relationship is going to end, discovering infidelity, or feeling jealous or betrayed.[292]

However, the Committee was unable to agree that the provocation defence should be abolished, primarily because it accepted that, for many women who are long-term victims of abuse, the provocation defence may be appropriate. The Committee settled on recommending substantial reforms to the defence,[293] and, drawing in part on the model developed by the English Law Commission discussed earlier in this article,[294] recommended a 'gross provocation' model,[295] available only where the defendant acted in response to words or conduct which caused him or her to have a justifiable sense of being seriously wronged.[296]

Following the release of the Committee's report, the Crimes Amendment (Provocation) Bill 2014 was introduced. Parliament made more limited changes to the defence than the Select Committee recommended. [297] The reformed provocation defence in NSW provides for a verdict of manslaughter in cases where the killer lost control in response to 'extreme provocation,' defined as a 'serious indictable offence'.[298] A non-violent sexual advance or conduct incited by the accused to provide an excuse to use violence against the deceased are expressly excluded as forms of extreme provocation.[299]

---

290 NSW Legislative Council, Inquiry into the Partial Defence of Provocation: Terms of Reference (2012).

291 Select Committee on the Partial Defence of Provocation, *The Partial Defence of Provocation: Final Report* (NSW Legislative Council 2013).

292 Ibid x.

293 Ibid x.

294 Law Commission (53 above).

295 Select Committee (n 291 above) 191.

296 Crofts and Tyson (n 167 above) 876.

297 Thomas Crofts and Arlie Loughnan, 'Provocation, NSW style: reform of the defence of provocation in NSW' [2014] Criminal Law Review 109. Note also that some submissions recommended there should be clear limits on the defence, for example provocation should not include things done or said to change the relationship. See eg Thomas Crofts and Arlie Loughnan, 'Provocation: the good, the bad and the ugly' (2013) 37 Criminal Law Journal 23, 36 .

298 Crimes Act 1900 (NSW), s 23(1) and (2).

299 Ibid s 23(3). Provocation is a mitigating factor for the purposes of sentencing: s 21A(3)(c) Crimes (Sentencing Procedure) Act 1999 (NSW).

When introducing the legislation, the Attorney General discussed the threshold requirement that the provocation would have to be a 'serious indictable offence'.[300] He observed that victims of domestic violence will be able to rely upon the partial defence in appropriate cases:

> Domestic violence, particularly long-term abuse, will generally involve conduct involving serious indictable offences, such as the range of assaults in the *Crimes Act 1900*. Even where abuse is not physical, but psychological, it may amount to the serious indictable offence of stalking or intimidation set out in section 13 of the *Crimes (Domestic and Personal Violence) Act 2007*.[301]

While the reforms were said to allow for the possibility that a woman who killed her abuser in response to domestic violence might successfully plead the defence of provocation, it is likely that many abused women would be excluded from claiming it. Non-physical forms and patterns of domestic abuse, including coercive control, are increasingly recognised as entrapping women in abusive relationships.[302] However, unlike England and Wales, there is currently no offence of coercive control in NSW.[303] Unless an abused woman can prove that the abuse she experienced was a 'serious indictable offence', the abuse will not reach the threshold of provocation. Even though there is no requirement under NSW law that the provocation occur immediately before the fatal act,[304] allowing for a slow-burning provocation, 'on-going emotional abuse, such as belittling, persistent taunts and criticism' would not meet the threshold of a 'extreme provocation' required for provocation.[305]

To date there have been no cases under the 2014 reformed provocation provision dealing with abused women who kill their abuser. There are, however, four reported cases that have considered the interpretation of 'extreme provocation'. Three of the cases have considered when the provocative act reaches the threshold of 'serious indictable offence'. A fourth case is interesting for its facts and the role of relationship choice by the wife of the accused in provocation to kill.

---

300 Crimes Amendment (Provocation) Bill 2014, second reading speech, Reverend the Hon Fred Nile, NSW Legislative Council, Hansard and Papers, Wednesday 5 March 2014, p 27033.

301 Ibid.

302 See, for example, Evan Stark, 'The "coercive control framework": making law work for women' in Marilyn McMahon and Paul McGorrery, *Criminalizing Coercive Control* (Springer 2020) 33–50.

303 Cf England and Wales: Serious Crime Act 2015, s 76.

304 Crimes Act 1900 (NSW), s 23(4).

305 Crofts and Loughnan, 'Provocation, NSW style' (n 297 above) 122.

Implementing the NSW reforms

In *R v Turnbull* (No 5)[306] the victim, a government-employed compliance and regulation officer, was inspecting the offender, Turnbull's, property on suspicion of illegal land-clearing when Turnbull killed him. Turnbull claimed he was stalked by the victim. The trial judge accepted that an offence of stalking or intimidation may be a 'serious indictable offence for the purpose of the provocation defence'.[307] However, she refused, on the facts, to direct the jury to consider provocation as she was not satisfied the deceased's behaviour met the threshold for the offences of intimidation or stalking.[308] The judge referred to the Attorney General's second-reading speech, noting that the requirement of 'serious violent offence' will 'ensure that members of the community who are lawfully going about their business do not inadvertently "provoke" another person to form an intention to kill or seriously injure them'.[309] In this case, the victim was lawfully 'going about his business'. The victim 'may have been rude, abrupt, perhaps even overzealous in the performance of functions in the course of employment. The issue under consideration here is not one of best practice, but whether conduct may constitute a serious criminal offence.'[310]

How much evidence is required before the defence satisfies the evidential onus that the victim committed a 'serious violent offence', allowing the defence of provocation to be put before the jury, was considered in *R v Cliff (No 5)*.[311] Cliff fatally stabbed his neighbour[312] and was charged with murder. He alleged the victim had struck him from behind, causing breathing difficulty. There was medical evidence that Cliff had soft tissue injuries, although their cause was unclear. Cliff argued that the partial defence of provocation should be left to the jury. Campbell J concluded:

> ... there is some evidence, being more than a mere scintilla, that the conduct of [the victim], if the evidence of the accused is accepted, as at least being a reasonably possible version of events, amounted to the serious indictable offence of assault occasioning actual bodily harm.[313]

306 [2016] NSWSC 439.

307 *R v Turnbull (No 5)* [2016] NSWSC 439 [75].

308 Ibid [77]. Note the judge accepted the possibility that the defence might adduce evidence of a serious indictable offence during the trial that would be capable of raising the defence of provocation: see [118].

309 Ibid [60].

310 Ibid [77].

311 [2018] NSWSC 166.

312 There were 34 stab wounds: *R v Cliff (No 6)* [2018] NSWSC 587 [11].

313 *R v Cliff (No 5)* [2018] NSWSC 166 [18].

Notably, in considering his gatekeeping role with respect to the defence of provocation, Justice Campbell highlighted a statement from Lord Tucker in *Bullard v R*:[314]

> Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.[315]

The judge determined that provocation should be left to the jury.

McDonald[316] was charged with murder after he stabbed his brother once in the chest with a carving knife. McDonald lived next door to his brother and claimed that, in the weeks leading up to the fatal stabbing, his brother and his brother's wife had verbally abused him and treated him disrespectfully. On the night of the stabbing, McDonald heard the deceased having a noisy argument and a door was slammed. McDonald entered his brother's house in response to the noise and 'snapped' in a 'moment of madness' stabbing the victim.[317] McDonald claimed that his brother's behaviour amounted to provocation.[318] The trial judge considered there was sufficient evidence of 'threshold facts',[319] accepting that the victim's conduct was an indictable offence (intimidation).[320] In considering this, Harrison J said that the legislative reference to serious indictable offence 'was undoubtedly formulated with a broad range of serious criminal conduct in mind', and the fact that 'the conduct of which Mr McDonald complains is possibly at the lower end of the spectrum is entirely beside the point. It is clearly capable of constituting a serious indictable offence.'[321] Harrison J pointed to evidence that the accused stated the conduct of the deceased had caused him to lose self-control, and there was no evidence to refute it. Finally, the judge determined the conduct of the deceased 'could' have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased, and thus provocation should be left to the jury.[322]

---

314 [1957] AC 635, 644.

315 While provocation was left for the jury's consideration, ultimately the jury verdict was murder: *R v Cliff (No 6)* [2018] NSWSC 587 [3].

316 *R v McDonald* [2019] NSWSC 839.

317 Ibid [16].

318 Crimes Act 1900 (NSW), s 23(3)(2)(b).

319 *R v McDonald* [2019] NSWSC 839 [40].

320 Contrary to s 13(1) of the Crimes (Domestic and Personal) Violence Act 2007.

321 *R v McDonald* [2019] NSWSC 839 [38].

322 McDonald was convicted of manslaughter: ibid [45]. McDonald was sentenced to serve six years in prison with a non-parole period of three years: see Margaret Scheikowski, 'Man jailed for brother's one-stab death' (*7 News*, 11 July 2019).

Both *R v Cliff (No 5)*[323] and *R v MacDonald*[324] suggest that 'a mere scintilla' of evidence of the victim's alleged serious violent offending will be sufficient for provocation to be put before the jury. It appears also that 'serious violent offence' will encompass a wide range of behaviours including assaults, intimidation and stalking.[325] Both these factors are likely to facilitate the application of the provocation defence in cases where abused women kill their abuser. However, while assaults and non-physical abuse such as intimidation and stalking are common aspects of the pattern of domestic abuse experienced by many abused women, there is often limited evidence of their occurrence apart from the abusee's testimony.[326] It is not yet clear whether the abusee's testimony about a provocative 'serious violent offence' will be sufficient on its own to meet the threshold 'mere scintilla' of evidence and ensure provocation is left to the jury. On the one hand, given the difficulties abusees face with proving domestic abuse, their testimony should be considered sufficient for provocation to be left to the jury to consider. On the other hand, such an expansive approach risks provocation continuing to be left to juries to consider in cases where abusive partners testify to their partner's provocative serious violence. As Jenny Morgan has said, 'dead women tell no tales, tales are told about them'.[327] To date 'serious violent offence' has been interpreted widely, limiting the role of judges as gatekeepers of the defence,[328] leaving the question largely to the jury.

In NSW there have been no reported cases explicitly involving an accused claiming to have been provoked by the victim's choice about the relationship, so it is not clear how that will be interpreted by the courts. However, the case of *R v A1 (No 6)*[329] is of interest in this context. A1 had arranged for the victim to come to Australia to marry his daughter. The victim began an affair with A1's wife. There was evidence A1 had used tracking devices to track his wife's vehicle and conversations and discovered the affair. On the evening of the killing, AI went to the victim's house, hid behind bushes in a disguise and, when the victim returned home, A1 shot him seven times, killing him. A1 was charged with murder, but pleaded not guilty. His defence appeared to be based on 'his outrage at the conduct of the victim and the Offender's wife,

323 [2018] NSWSC 166.
324 *R v McDonald* [2019] NSWSC 839.
325 Ibid; *R v Cliff (No 5)* [2018] NSWSC 166.
326 Heather Douglas, 'Do we need a specific domestic violence offence?' (2015) 39 Melbourne University Law Review 434, 436.
327 Morgan (n 270 above).
328 Crofts and Loughnan, 'The good, the bad and the ugly' (n 297 above) 37.
329 [2019] NSWSC 1581.

accompanied by feelings of dishonour'.[330] Historically, the provocation defence was available for men who used violence in defence of their honour and being 'cuckolded' was historically a classic provocation circumstance.[331]

Provocation was not left to the jury, and the jury found A1 guilty of murder. At sentencing, AI's lawyer submitted that the conduct of the victim was provocative, pursuant to section 21A(3)(c) Crimes (Sentencing Procedure) Act 1999 and should mitigate the sentence.[332] The sentencing judge, Johnson J, took into account that the events leading up to the murder had a confronting effect 'arising from the victim's conduct and the honour-related cultural sentiments experienced by the Offender'.[333] However, the sentencing judge found that, in this case, the 'offender's motive … was to punish the victim for his conduct with the Offender's wife which agitated the Offender in an extreme fashion, magnified by a strong sense of dishonour'.[334] He further commented:

> To the extent that the term '*honour killing*' has been used in this and other cases, I record my immediate rejection of the concept of '*honour*' as playing any part in an understanding of this crime … the killing of a person in circumstances such as this should not attract the use of the term '*honour killing*' as '*there is no honour about such an event*'.[335]

The judge's comments in the case show a clear refusal to blur the concept of dishonour with any lawfully recognised notion of provocation when considering sentencing.[336] Rather than provocation, AI's response is identified as rooted in his 'obsessive and controlling' attitude towards his wife.[337]

---

330 Ibid [58].

331 Graeme Coss, 'The defence of provocation: an acrimonious divorce from reality' 18(1) Current Issues in Criminal Justice 51, 63; Horder (n 277 above) 26–27.

332 *R v A1* [2019] NSWSC 1581 [70]; s 21A(3)(c) Crimes (Sentencing Procedure) Act 1999 (NSW).

333 *R v A1* [2019] NSWSC 1581 [71] and note the judge did accept that in certain cases 'circumstances of this type' are capable of constituting a form of provocation: *R v Khan* (1996) 86 A Crim R 552, 556–557.

334 *R v A1* [2019] NSWSC 1581 [65].

335 Ibid [79] referring to *R v Khan* [2016] 1 Cr App R (S) 47; [2015] EWCA Crim 1816 [23] (italics in the original).

336 Provocation is specifically identified as a mitigating factor for the purposes of sentencing in NSW, Crimes (Sentencing Procedure) Act 1999 (NSW), s 21A(3)(c).

337 *R v A1* [2019] NSWSC 1581 [97]. Note that A1 was sentenced to 32 years in prison with a non-parole period of 23 years' imprisonment. In contrast, note Morgan's suggestion that 'leaving "provocative" facts to the discretion of a judge in sentencing … will do nothing to remove the gendered assumptions embodied in the current use of the provocation defence by men in situations of "sexual jealousy"': Morgan (n 270 above) 275.

It is possible that, if Sally Challen's case had come before the NSW courts, provocation would have been left to the jury. While Challen's ex-partner's infidelity would not have amounted to a serious indictable offence, her testimony, backed up by expert evidence, that she had experienced serious violent offences such as rape at the hands of her abusive partner, may have been sufficient to leave it open to the jury. The jury would then have to be satisfied, beyond reasonable doubt, that Challen was not acting under the provocation of a serious violent offence that continued to underpin her loss of control when she killed. The presence of the hammer, Challen's recent discovery of the victim's further infidelities and the lapse of time between the alleged serious violent offence and the killing would, however, be matters the prosecution would highlight as suggesting premediated murder.[338]

CONCLUDING COMMENTS: ALTERNATIVE APPROACHES

In England and Wales, Qld and NSW, reforms to the provocation defence aimed to balance the aspirations of limiting the defence of provocation in circumstances where men act with proprietary entitlement over women's lives with the need to retain the defence for use by abused women who have killed their partner after experiencing abuse. Our analysis questions whether the reforms have achieved this balance. Indeed, the cases decided in relation to reforms show how difficult it is to achieve this balance through legislative reforms to the provocation defence.

In NSW and Qld the continued uncertainty and limitations around the application of the provocation defence in cases where abused women kill their abuser may be less of a concern than in England. This is because alternatives may be available. For example, in NSW an accused charged with murder might rely on the defence of 'self-defence with excessive force'. A person would be guilty of manslaughter where she used a level of force that caused death, believing it was necessary to defend herself, but the force used was not a reasonable response in the circumstances, as she perceived them.[339]

---

338 Note as mentioned earlier, in Australia provocation is not necessarily excluded where there is 'any' interval between the provocative conduct and the accused's emotional response to it: *Pollock v The Queen* [2010] HCA 35 (20 October 2010) [54].

339 Crimes Act 1900 (NSW), s 421 (introduced in NSW in 2001). Recall there is a maximum life penalty, rather than a mandatory life penalty, for murder in NSW: s 19A of the Crimes Act 1900 (NSW). Note excessive self-defence is also available in WA: Criminal Code Act Compilation Act 1913 (WA), s 248(3)).

In Qld, a partial defence entitled 'Killing for Preservation in an Abusive Relationship'[340] (the preservation defence) was introduced in 2010. Pursuant to this defence, the person will only be guilty of manslaughter where:

a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and

b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and

c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.[341]

So far, there are no reported cases where the jury has determined that the defence was applicable and found manslaughter. In at least two cases involving abused women who killed their partners, the jury was directed to consider both the preservation defence and self-defence and acquitted the accused on the basis of self-defence.[342] It is difficult to imagine circumstances where a jury could be directed to consider the preservation defence without also being directed to consider self-defence. Once the jury accepts the accused acted to preserve herself, it is a very small step for them to find self-defence.[343]

These NSW and Qld defences are also important as they provide an alternative option for prosecutors to charge manslaughter at the outset when abused women kill their abuser in circumstances that fall short of self-defence. Of course, some abused women who kill their abuser may be able to rely on the complete defence of self-defence, although to date this has been rare.[344] In Australia, debates continue about the (appropriate) elements of self-defence and how they should be interpreted to ensure that self-defence is available, where appropriate to abused women who kill.[345]

---

340 QCC, s 304B.

341 Ibid.

342 *R v Falls, Coupe, Cummin-Creed & Hoare* (Unreported, QSC, 26/5/10) per Applegarth J and *R v Irsliger, Pilkington & Bundesan* (Unreported, QSC, 24/2/12) per Mullins J. In a third case, the jury were directed to consider the preservation defence and could not make a finding, and she later pleaded guilty to manslaughter on the basis of diminished responsibility: *R v Ney* (2011) (Unreported, QSC, 8/3/11) per Dick AJ.

343 Heather Douglas, 'A consideration of the merits of specialised homicide offences and defences for battered women' (2012) 45 Australian and New Zealand Journal of Criminology 367, 377.

344 Sheehy et al (n 29 above) 668.

345 Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (ANROWS Research Report No 03/2019, June 2019).

In this article, we have focused our attention on provocation and, in the context of English law, reviewed the strictures presented by the CJA to successfully raise a loss of control defence when an abused woman kills her abuser. Further reform of the partial defence of loss of control is not on the political agenda and, as such, it is important to consider alternative, and adventitious, pathways to reform. New options are presented by the excessive force in self-defence adaptation in NSW, or alternatively the preservation defence in extant Qld law. This evaluation aligns with beneficial evidential alterations that should be promulgated in England that coalesce around Social Framework Evidence and enhanced jury directions that apply in Victoria and WA. Adaptation of self-defence as part of reform optimality is for future consideration.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 324–362
Article DOI: 10.53386/nilq.v72i2.874

Diminished responsibility determinations in England and Wales and New South Wales: whose role is it anyway?

Thomas Crofts*

City University of Hong Kong and Northumbria University

Nicola Wake

Northumbria University

Correspondence email: t.crofts@cityu.edu.hk

ABSTRACT

A decade has passed since changes to the Homicide Act 1957, section 2 (under section 52 of the Coroners and Justice Act 2009) were implemented. The issues that have arisen since implementation have resulted in significant role confusion in the operation of the partial defence, with the real risk of inconsistent outcomes in practice. The article argues that medicalisation of the partial defence in England and Wales has impacted the role of parties in reaching plea agreements pre-trial, rendered the delineation between legal and medical questions regarding the recognised medical condition requisite unclear and produced significant role confusion between medical experts and jurors in assessing the partial defence. The position stands in stark contrast to the approach under the Crimes Act 1900 (New South Wales) section 23A, where the legislation explicitly outlines the respective role of the medical experts and jurors and prohibits experts from commenting on whether murder ought to be reduced to manslaughter in such cases.

Keywords: benign conspiracy; Coroners and Justice Act 2009; diminished responsibility; intoxication; New South Wales; substantial impairment because of mental health impairment or cognitive impairment; substantial impairment by abnormality of mind.

INTRODUCTION

A decade has passed since changes to section 2 of the Homicide Act 1957 (HA 1957) under section 52 of the Coroners and Justice Act 2009 were implemented.[1] Since implementation, the revised plea has resulted in higher numbers of 'contested' diminished

* Thank you to Dr Andrew Dyer, Professor Arlie Loughnan, Professor Alan Reed and Associate Professor Natalie Wortley for their comments on earlier iterations of this article. Any errors or omissions remain the authors'.

1 The Coroners and Justice Act 2009 (Commencement No 4, Transitional and Saving Provisions) Order 2010.

responsibility trials, despite the Law Commission's proposals and subsequent amendments being described as a 'mere modernisation' and 'clarification' of the law.[2] A review of the interpretation, operation and application of the plea over the past 10 years reveals evidence of public policy concerns, *constituit iudicem legi* (judicial activism),[3] and a lack of clarity providing a (potential) aperture for re-emergence of the benign conspiracy that had operated under its predecessor.[4] The benign conspiracy is seen in the judiciary, parties and medical experts reaching an outcome favourable to the defendant in 'deserving cases' that stretches the parameters of the partial defence, eg mercy killing cases.[5] Our references to the 'benign conspiracy'[6] herein, are to any instances where the ambit of the partial defence is stretched, and not solely to mercy killing cases. The Law Commission of England and Wales (E&W) made clear that it would prefer bespoke provisions for cases deserving of a (partial) defence that do not fit the parameters of extant (partial) defences and/or warrant the murder label.[7] The

2 Ronnie Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] 1 Criminal Law Review 18–35; *Hansard*, HC, 3 March 2009, col 414 (Maria Eagle Parliamentary Under-Secretary of State for Justice); Ronnie Mackay, 'The new diminished responsibility plea: more than mere modernisation' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 9; Ministry of Justice, *Partial Defences to Murder: Loss of Control and Diminished Responsibility; and Infanticide* (MoJ Circular No 13/ 2010).

3 Beatrice Krebs, 'Diminished responsibility and unanimous psychiatric evidence' (2019) 83(5) Journal of Criminal Law 406–409. See also, Richard Percival, 'Cases in brief' (2019) 5 Archbold Review 2–3.

4 A primary concern was the extent to which the 'benign conspiracy' which allowed 'deserving' (not always mentally disordered) offenders to claim the partial defence could continue to operate under the increasingly medicalised language of the new plea: Ronnie Mackay, 'The diminished responsibility plea in operation – an empirical study' in Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) appendix B. See also, Edward Griew, 'The future of diminished responsibility' [1988] Criminal Law Review 75, 79–80; Ronnie Mackay, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (2): the new diminished responsibility plea' [2010] 4 Criminal Law Review 290–302; Mackay (n 2 above). See also, Matthew Gibson, 'Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea' (2017) 81(3) Journal of Criminal Law 177–200.

5 Amanda Clough, 'Mercy killing, partial defences and charge decisions: 50 shades of grey' (2020) 84(3) Journal of Criminal Law 211–227. For specific discussion of mercy killing cases, see Amanda Clough, 'Mercy killing: three's a crowd?' (2015) 79(5) Journal of Criminal Law 358–372; Gibson (n 4 above); and Ben Livings, 'A new partial defence for the mercy killer: revisiting loss of control' (2014) 65(2) Northern Ireland Legal Quarterly 187–204.

6 Mackay (n 2 above).

7 Law Commission (n 4 above) para 2.34.

issues that have arisen since implementation of the revised plea have highlighted significant role confusion in the operation of the partial defence, with the genuine risk of inconsistent outcomes in practice. The amendments under section 2 have, arguably had significant 'unintended consequences'.[8]

This article compares new HA 1957 section 2(1) with section 23A of the New South Wales (NSW), Australia, Crimes Act 1900 (CA 1900) to assess whether more explicit legislative guidance regarding the respective roles of actors in diminished responsibility cases might have prevented some of the problems that have arisen in E&W. This comparator has been selected because it was one of the E&W Law Commission's posited options for reform, and, unlike the other models proposed, this partial defence of substantial impairment because of mental health impairment or cognitive impairment (formerly known as substantial impairment by abnormality of mind, hereafter referred to as 'substantial impairment')[9] has been operating in NSW since 1997. It thus provides a unique opportunity to review case law pertaining to the alternative partial defences across both jurisdictions. The defence of substantial impairment also makes an interesting comparator because of the NSW influence on the E&W partial defence; while the changes were described as a 'mere modernisation' and 'clarification' of the law in E&W,[10] the NSW reform in 1997 was intended to exclude 'trivial impairments' and thereby narrow the field of cases in which the equivalent partial defence could be raised.[11] The Law Commission (E&W) was also influenced by several aspects of the NSW Law Reform Commission's proposals and subsequently section 23A CA 1900, albeit that not all recommendations based upon the NSW provision were subsequently enacted by Parliament.[12]

We begin in the first section with an outline of the old and new law in E&W, and section 23A CA 1900. We consider the degree to which the medicalisation of the partial defence in E&W has undermined the

8 Mackay and Mitchell (n 2 above). See also, Ronnie Mackay, 'The impairment factors in the new diminished responsibility plea' [2018] 6 Criminal Law Review 462–471; Ronnie Mackay, '*R v Golds*' (2017) 1 Archbold Review 4–5; and Law Commission (n 4 above) para 5.8 (comment by consultee).

9 This change in terminology was introduced through the Mental Health and Cognitive Impairment Forensic Provisions Act 2020, sched 3.7, [6]–[9] (sched 3 repealed after changes introduced) in order to, amongst other things, update terminology in the Crimes Act 1900 (NSW). See Mental Health and Cognitive Impairment Forensic Provisions Bill 2020, Explanatory Note.

10 Mackay and Mitchell (n 2 above); Eagle (n 2 above).

11 NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (Report 138, 2013) paras 4.59 and 4.60.

12 Law Commission (n 4 above) para 5.76. Mackay (n 2 above) 9.

scope for the normative role of jurors in diminished responsibility cases compared to NSW, where the role of the jurors as representatives of community values is made central to assessment of liability. We then consider how the structure of the revised defence impacts the role of the parties in reaching plea agreements in diminished responsibility cases and, in NSW, by seeking a trial by judge alone. In the next part, we then highlight oscillation between the role of legal and medical experts in determining which conditions are legally valid for the purposes of the respective partial defences. This is followed by a consideration of the respective role of the psychiatrist and jurors in both jurisdictions. In our conclusion we suggest that the reforms in E&W have led to significant confusion in the role that respective parties play in determining diminished responsibility, much of which might have been avoided if a similar approach to distinguishing the responsibilities of medical experts and jurors adopted in NSW had been implemented in E&W.

BACKGROUND TO THE REFORMS

Originally introduced to circumvent the mandatory death penalty, then later life sentence, for murder – the partial defence has the effect of reducing murder to manslaughter and thus affording judicial discretion in sentencing.[13] In E&W, the revised partial defence requires the defendant to establish, on the balance of probabilities,[14] that at the time of the killing D was suffering from an 'abnormality of mental functioning' rather than, as under the old law, an 'abnormality of mind'.[15] The 'abnormality of mental functioning' must have arisen from a 'recognised medical condition' instead of in response to a 'condition of arrested or retarded development of mind or inherent cause or [by being] induced by disease or injury'.[16] The moral question of whether the abnormality 'substantially impaired the defendant's responsibility for the killing' now engages a higher threshold psychiatric test requiring that the 'abnormality of mental functioning … substantially impaired D's ability to (a) understand the nature of D's

13 Law Commission, *Partial Defences to Murder* (Law Com CP No 173, 2003) paras 7.9 and 7.7.

14 HA 1957 (as amended) s 2(2). See also, *Dunbar* [1958] 1 QB 1.

15 Gibson (n 4 above) 186. 'Abnormality of mind' was described in *Byrne* [1960] 2 QB 396, 403 as 'wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment'.

16 HA 1957 (as amended) s 2.

conduct; (b) form a rational judgment; [or] (c) exercise self-control'.[17] The reform also statutorily mandates that the 'abnormality of mental functioning provides an explanation for D's conduct'. An explanation is provided if the abnormality 'causes, or is a significant contributory factor in causing, D to carry out that conduct'.[18]

Given the reluctance of the British Government to move away from the mandatory life sentence for murder,[19] the key rationale for retention of the partial defence continues to be the need for both 'fair and just labelling'[20] and affording judicial discretion during sentencing.[21] The extent of judicial discretion has arguably been reduced in the wake of Definitive Sentencing Guidelines, but the position is preferable to the mandatory sentence attached to murder.[22] Retention of the partial defence in NSW places specific emphasis on retaining the jury as a 'moral barometer'[23] in such cases and the 'fair labelling' issue,[24] given that the mandatory life sentence for murder was abolished in 1989.[25] A preponderance of respondents to the Law Commission (E&W) Consultation on *Partial Defences to Murder* 'favoured retention of the defence even if the mandatory life sentence were to be abolished'.[26] Respondents noted that, *inter alia*, the 'out-dated nature' and 'stigma' attached to the insanity defence reinforces the need for the partial defence; jurors may nullify a murder charge where an alternative partial defence is unavailable; and, the importance of ensuring that

17 Ibid s 2 (1A). For further discussion on the impairment factors, see Mackay 'The impairment factors' (n 8 above).

18 HA 1957 (as amended) s 2(1B).

19 Law Commission, *A New Homicide Act for England and Wales: An Overview* (Law Com CP No 177, 2006) paras 1.2 and 1.43. See also paras 5.71–5.72.

20 Law Commission (n 4 above) para 5.18.

21 'the *raison d'être* of section 2 is to avoid the fixed penalty for murder and to afford the sentencing judge complete discretion that a verdict of manslaughter allows'; Andrew Simester and Bob Sullivan, *Criminal Law Theory and Doctrine* (1st edn, Hart 2000) 578.

22 Sentencing Council, *Manslaughter by Reason of Diminished Responsibility* (SC, 2019). See also, *Westwood* [2020] EWCA Crim 598 and *Rodi* [2020] EWCA Crim 330.

23 See description of diminished responsibility in E&W as a 'moral barometer' in Alan Reed and Nicola Wake, 'Anglo-American perspectives on partial defences: something old, something borrowed, and something new' in Reed and Bohlander (n 2 above) 184.

24 NSW Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) para 3.11.

25 Crimes (Life Sentences) Amendment Act 1989 (NSW) amended s 18 of the Crimes Act 1900 (NSW) to allow a sentence of 25 years or life for murder and s 19 was repealed and replaced by s 19A which provided a maximum sentence of life imprisonment. In 2011 s 19B was introduced which provides for mandatory life imprisonment for murder of a police officer in the course of their duty.

26 Law Commission (n 4 above) para 5.13.

the culpability issue is determined by a jury, as moral arbiters, in cases involving disputes between medical experts.[27]

The wording of the partial defence bears strong similarities to section 23A CA 1900, but differs in significant respects. Section 23A CA 1900 requires a person to prove, on the balance of probabilities, that their capacity to understand events, or to judge whether their actions were

---

27 Ibid para 5.22.

28 Crimes Act 1900, s 23A:

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if—
  (a) at the time of the acts or omissions causing the death concerned, the person's capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired by a mental health impairment or a cognitive impairment, and
  (b) the impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

(2) For the purposes of subsection (1) (b), evidence of an opinion that an impairment was so substantial as to warrant liability for murder being reduced to manslaughter is not admissible.

(3) If a person was intoxicated at the time of the acts or omissions causing the death concerned, and the intoxication was self-induced intoxication (within the meaning of section 428A), the effects of that self-induced intoxication are to be disregarded for the purpose of determining whether the person is not liable to be convicted of murder by virtue of this section.

(4) The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

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

(6) The fact that a person is not liable to be convicted of murder in respect of a death by virtue of this section does not affect the question of whether any other person is liable to be convicted of murder in respect of that death.

(7) If, on the trial of a person for murder, the person contends--
  (a) that the person is entitled to be acquitted on the ground that the person was not criminally responsible because of mental health impairment or cognitive impairment, or
  (b) that the person is not liable to be convicted of murder by virtue of this section,
  evidence may be offered by the prosecution tending to prove the other of those contentions, and the Court may give directions as to the stage of the proceedings at which that evidence may be offered.

(8) For the purposes of this section, a person has a cognitive impairment if—
  (a) the person has an ongoing impairment in adaptive functioning, and
  (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
  (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (9) or for other reasons.

right or wrong, or to control themselves, was substantially impaired because of mental health impairment or cognitive impairment.[28] The requirement of a mental health impairment or cognitive impairment appears narrower than the 'abnormality of mental functioning' mandate in E&W.[29] Finally, it must also be proven that 'the impairment was so substantial as to warrant liability for murder being reduced to manslaughter'.[30] Expert evidence is expressly admissible to determine the former elements of the defence but not the latter overarching moral question.[31] This is the aspect of the partial defence which, in our view, might have significantly improved the operation of diminished responsibility in E&W had a similar clause been adopted.

Gibson notes that medicalisation of diminished responsibility in E&W has engendered a 'philosophical shift' in the rationale underpinning the partial defence.[32] The ambiguity of the original section 2(1) HA 1957, combined with the requisite assessment of mental (moral) responsibility, engaged jurors in a normative/value judgment regarding D's culpability.[33] As Gibson suggests, new section 2(1) HA 1957 poses a 'barrier to contextualising mental irregularities by reference to circumstantial pressures', indicating that the partial defence is 'less able to take account of how social norms exert psychological effects'.[34] Equally, however, as Hallett observes, 'the fundamental issue of moral responsibility remains and is [simply] obscured by the "medicalising" of the defence'.[35] Problematically, 'moral responsibility' is cloaked in 'psychiatric terminology' which 'allows psychiatrists to usurp the function of the jury'.[36] The reforms have undoubtedly resulted in a more restrictive plea,[37] but an evaluation of case law (highlighting

---

(9) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons—

28 [cont] (a) intellectual disability,
(b) borderline intellectual functioning,
(c) dementia,
(d) an acquired brain injury,
(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
(f) autism spectrum disorder.

29 Mackay (n 2 above) 6.

30 Crimes Act 1900 (NSW) 23A(1)(b).

31 Ibid s 23A(2).

32 Gibson (n 4 above) 189.

33 Ibid. See also Law Commission (n 4 above) para 5.55 (fn 61). Although cf Rudi Fortson, 'The modern partial defence of diminished responsibility' in Reed and Bohlander (n 2 above) 26.

34 Gibson (n 4 above) 186.

35 Nicholas Hallett, 'Psychiatric evidence in diminished responsibility' (2018) 82(6) Journal of Criminal Law 442–456, 443.

36 Ibid.

public policy concerns, *constituit iudicem legi* (judicial activism)[38] and the (potential) re-emergence of the benign conspiracy through case law)[39] suggests that diminished responsibility, at least, in part, continues to ascribe to the 'moral and social barometer'[40] metaphor which pre-dated the reforms of the 2009 Act. Unfortunately, the problems associated with medicalisation of the partial defence not only cause role confusion in relation to medical experts and jurors[41] but are manifest at every stage of the interpretation, operation and application of the partial defence.

Potential clarification of the role of the medical expert and the jury had been considered by the Law Commission (E&W). During Consultation, the Law Commission outlined six potential options for reform, and a seventh 'other' category. Four of the six included what the Law Commission referred to as 'the pervasive "ought to be reduced to manslaughter" test'.[42] One of the proposals was based on a recommendation of the NSW Law Reform Commission[43] which was enacted into law in 1997 (save 'mind' was substituted for 'mental functioning' by the NSW Parliament) under section 23A(1)(b) and (2) CA 1900.

None of the options posited by the Law Commission drew widespread support.[44] Those who favoured the 'ought to be reduced to manslaughter' test, however, did so because of the moral/societal computation involved.[45] Members of the judiciary, in contrast, indicated that tests which 'give an undue normative role' to or engage jurors in 'a value judgment' are problematic.[46] The Law Commission agreed, stating that the test would allow 'the jury to set its own standard for what ought to reduce murder to manslaughter'.[47]

This stands in complete contrast to NSW where the Law Reform Commission noted that the controversial nature of such cases warrants community input.[48] The recommendation to cement the role of the jury as central to the determination of culpability in these cases was

37 Mackay and Mitchell (n 2 above). See also, Mackay, 'The impairment factors' (n 8 above); Mackay, '*R v Golds*' (n 8 above) 4–5.
38 Krebs (n 3 above). See also Percival (n 3 above).
39 See, for discussion, Gibson (n 4 above) 200.
40 Reed and Wake (n 23 above) 184.
41 Hallett (n 35 above).
42 Law Commission (n 4 above) para 5.54.
43 NSW Law Reform Commission (n 24 above) recommendation 4.
44 Law Commission (n 4 above) para 5.53.
45 Ibid para 5.54.
46 Ibid para 5.55, fn 61.
47 Ibid para 5.56.
48 NSW Law Reform Commission (n 24 above) paras 3.11 and 3.22.

a response to comments by Gleeson CJ in *Chayna*.[49] Gleeson CJ expressed serious concern about the difficulty for juries in dealing with concepts contained in section 23A which 'medical experts find at least ambiguous and, perhaps, unscientific'.[50] Following this case, the NSW Law Reform Commission was asked to investigate the partial defence.[51] The Commission recommended that the defence be retained but reformed. It was not in favour of removing the partial defence from the jury because of the role that juries play in considering issues of moral responsibility as representatives of the community.[52] It was also felt that community input was vital to enhance community acceptance of the due administration of criminal justice (including acceptance of sentences imposed).[53] The Government therefore proposed that the Crimes Amendment (Diminished Responsibility) Bill 1997 would 'emphasise the role of the jury' in the defence of 'substantial impairment by abnormality of mind' (now, 'substantial impairment because of mental health impairment or cognitive impairment').[54]

No further elaboration for the position of the Law Commission in E&W regarding the 'ought to be manslaughter' test was provided. The nature of the jury role was, therefore, left without legislative clarification as would have been the case if a test equivalent to section 23A CA 1900 had been adopted. This failure to place the role of the jury on a statutory footing has led to a confused philosophical and operational basis for the partial defence. Howard noted that 'the defence still lacks the theoretical underpinning which should be required of any statutory defence'.[55] The 'psychiatric tenor'[56] of the plea means that psychiatrists frequently comment on all aspects of the partial defence in E&W; '[w]here there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so'.[57] As Laird articulates, the 'threshold' for departure is 'not high'; there must 'simply be a rational basis, which

49 (1993) 66 A Crim R 178.
50 Ibid 189–190.
51 NSW Law Reform Commission (n 24 above) para 1.3.
52 Ibid paras 3.11 and 3.12.
53 Ibid para 3.11.
54 Gareth Griffith and Honor Figgis, *Crimes Amendment (Diminished Responsibility) Bill 1997: Commentary and Background* (NSW Parliamentary Library Research Service Briefing Paper No 19/97) 3.
55 Helen Howard, 'Diminished responsibility, culpability and moral agency: the importance of distinguishing the terms' in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars Publishing 2015) 318.
56 *Conroy* [2017] EWCA Crim 81 [7].
57 *Brennan* [2014] EWCA Crim 2387 [44].

need not be supported by expert evidence'.[58] The tension across legal, medical and normative determinations, therefore, carries the real risk of increased litigation and inconsistent outcomes in diminished responsibility cases. Howard's suggestion that 'to deny the importance of a sound underpinning rationale could render the defence vulnerable to inconsistent application' appears to be borne out in the revised plea.[59] The nature of the case will determine whether the ultimate outcome is predominantly a legal, medical, or normative decision. Given that the Law Commission was otherwise heavily influenced by the NSW Law Reform Commission and section 23A CA 1900, it is disappointing that greater consideration was not afforded to section 23A in relation to the tension across medico/normative aspects of diminished responsibility.

THE BURDEN OF PROOF AND THE PLEA-BARGAINING PROCESS

Psychiatric evidence is a necessity in diminished responsibility cases.[60] The partial defence engages a reverse burden of proof that is regarded as compatible with the European Convention on Human Rights where it is 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[61] Noting the problems associated with the reverse burden, Ashworth points out that the most 'compelling' reason for the reverse burden, established in *Foye*,[62] is that it would be 'wholly impractical … if the Crown had to bear the onus of disproving diminished responsibility whenever it was raised on the evidence'.[63] The Law Commission explained that this is

58 Karl Laird, 'Homicide: R v Hussain (Imran) Court of Appeal (Criminal Division): Hallett LJ, VPCACD, Russell and Goss JJ: 2 April 2019; [2019] EWCA Crim 666' [2019] 10 Criminal Law Review 877–879.

59 Howard (n 55 above) 323.

60 *Byrne* (n 15 above) 403; *Vinagre* (1979) 69 Cr App R 104 (CA); *Dix* (1982) 74 Cr App R 306, 311 (Shaw LJ); *Bunch* [2013] EWCA Crim 2498. See also, Tony Storey, 'No defence without evidence' (2014) 78(2) Journal of Criminal Law 2014, 113–116.

61 *Salabiaku v France* (1988) 13 EHRR 379. See also *Sheldrake v DPP* [2004] UKHL 43; [2005] 1 AC 264 [21].

62 [2013] EWCA Crim 475.

63 Andrew Ashworth, 'R v Foye (Lee Robert): diminished responsibility – Homicide Act 1957 s 2(2) Court of Appeal (Criminal Division): Lord Hughes, Gloster LJ and Hickinbottom J: April 24, 2013; [2013] EWCA Crim 475' [2013] 10 Criminal Law Review 839–844. See also *Wilcocks* [2016] EWCA Crim 2043. Other reasons presented in *Foye* included: '(i) Diminished responsibility is an exceptional defence available in an appropriate case with a view to avoiding the mandatory sentence which would otherwise apply, so that a discretionary sentence can be imposed, tailored to the circumstances of the individual case. (ii) Diminished responsibility depends on the highly personal condition of the defendant himself, indeed on the internal functioning of his mental processes.'

because the defendant's state of mind 'can only be investigated with his cooperation' and 'weak' medical evidence may be very difficult to disprove to the criminal standard.[64]

In cases where the medical evidence indicates diminished responsibility, the parties may agree on a plea of guilty to manslaughter, thereby avoiding a murder trial.[65] Fortson explained that, under the old law, this led to a 'benign conspiracy' between parties which had 'worked satisfactorily' and predicted the benign conspiracy would continue under the revised plea.[66] According to Fortson, the ability to 'exercise discretion' in such cases is 'commend[able]' particularly in 'borderline cases' [67] but prosecutorial 'decisions ... to accept such a plea are not taken lightly'.[68]

Notwithstanding that the benign conspiracy may continue to operate through the plea-bargaining process, 'the stakes for offenders' pleading diminished responsibility appear to be higher under the new law.[69] Mackay and Mitchell's 2017 empirical study identified that 43.3 per cent of cases proceed to trial by jury compared to 22.9 per cent under the original section 2(1) HA 1957. As Mackay and Mitchell observe: 'more cases are being contested under the new law'; 'fewer diminished responsibility pleas are now being accepted';[70] and, defendants are arguably finding it more difficult to persuade prosecutors that diminished responsibility applies. The potential for 'a merciful but just disposition of certain types of case where all parties consider it meets the justice of the case', a key rationale for retaining the plea, appears to have been reduced.[71] The increased number of trials also has significant resource implications.[72] Benevolent plea bargaining may continue to operate, albeit in a more restrictive form than under the old law. In the context of the respective roles of the parties, more cases are being left to jury determination, notwithstanding increased emphasis on the use of expert medical evidence. This can be viewed as positive given the controversy surrounding the use of plea bargaining. As Clough articulates:

> Perhaps we should have more trials and less bargains because in the end, the jury get it right. Justice is to be valued over efficiency, and

64 Law Commission (n 4 above) para 5.90. See also, Ashworth (n 63 above).
65 *Cox* [1968] 1 WLR 308.
66 Fortson (n 33 above) 27.
67 Ibid.
68 Ibid.
69 Ashworth (n 63 above).
70 Mackay and Mitchell (n 2 above).
71 Law Commission (n 4 above) para 5.22.
72 Clough, 'Mercy killing, partial defences' (n 5 above).

> plea bargaining undermines the fundamental principles of the criminal justice system.[73]

In NSW, before diminished responsibility was replaced by substantial impairment in 1997, there was a concern that defendants were opting for trial by judge alone rather than a jury trial because juries found it difficult to deal with the concepts contained in section 23A (pre-1997 version). Criticism of diminished responsibility peaked in *Chayna*[74] where the expert evidence of seven psychiatrists differed significantly, with diagnoses favouring insanity, diminished responsibility, both and neither defences. Gleeson CJ noted that this confusion disadvantaged the accused, who carries the onus of proving the defence on the balance of probabilities. To avoid this situation, accused persons were often opting for a trial by judge alone.[75] In investigating this matter, the NSW Law Reform Commission found that 'between 1990 and 1993, only five of a total of 256 sentenced homicide offenders were tried by judge alone, all five relying on the defence of diminished responsibility to a charge of murder'.[76]

In reformulating the defence, the NSW Law Reform Commission regarded that leaving the determination of the ultimate issue for the jury 'was the "centrepiece" of substantial impairment when it was introduced to parliament and was the "principal and fundamental reason" for [its] recommendation to retain and amend the defence of diminished responsibility in Report 82'.[77] The NSW Law Reform Commission noted that trial without a jury should be the exception:

> ... since it is now clear that the application of that defence requires a value judgment as to whether there was substantial impairment of the accused's responsibility, which is a question of degree reflecting community standards, and not a question which medical experts can properly answer.[78]

Defendants opting for trial by judge alone, however, continues to be an ongoing issue even after the 1997 reform. In its 2013 report, the NSW Law Reform Commission noted that there were concerns that

---

73 Ibid.

74 (1993) 66 A Crim R 178.

75 This is provided for in s 132 Criminal Procedure Act 1986. This will be granted if the accused and the prosecutor both agree to trial by judge alone (s 132(2)). It may be granted even if the prosecutor does not agree if the court considers it in the interests of justice to do so (s 132(4)), but not if the accused does not agree (s 132(3)).

76 NSW Law Reform Commission (n 24 above) para 3.26, fn 48.

77 NSW Law Reform Commission (n 11 above) para 4.43, referring to NSW, Parliamentary Debates, Legislative Council, 25 June 1997, 11 066 (J W Shaw) and NSW Law Reform Commission (n 24 above) para 3.11.

78 NSW Law Reform Commission (n 24 above) para 3.27, see also paras 3.41–3.43.

the central objective of community involvement was weakened by the reduced rate at which juries are used in substantial impairment cases.[79] It was found that between 2005 and 2011 just under half (43 per cent) of all substantial impairment cases were heard by jury while 18 per cent were heard by judge alone. A significant number of cases (39 per cent) proceeded on the basis of a negotiated plea with of the Office of the Director of Public Prosecutions (ODPP).[80] It was noted that while the ODPP has 'strict guidelines that prescribe that the prosecution must consider community values inherent in the requirement of s 23A CA 1900 when negotiating a plea in cases of substantial impairment' such an assessment relies on prosecutor's 'expertise and experience but lacks the legitimising force of a jury decision'.[81] Despite this observation, the NSW Law Reform Commission noted that most cases do still proceed to trial by jury, and the ODPP is required to consider community values.[82] The situation has been noted to be similar in E&W, though it is unclear how such an assessment of community values is to be made.[83]

ABNORMALITY OF MENTAL FUNCTIONING ARISING FROM A RECOGNISED MEDICAL CONDITION

In order to establish diminished responsibility under section 2 HA 1957 (E&W), D must have been suffering from an 'abnormality of mental functioning' arising from a 'recognised medical condition'. The Law Commission (E&W) anticipated greater clarity in the operation of diminished responsibility by substituting 'abnormality of mind'[84] with 'abnormality of mental functioning'. The Law Commission (E&W) had been influenced by the NSW Law Reform Commission who preferred the latter as the term 'abnormality of mind' had caused disagreements between experts.[85] The NSW Law Reform Commission noted that most of the criticisms of the defence had been directed at the term 'abnormality of mind', 'which has been described as 'largely ... meaningless' because it lacks legal or medical basis. Further, disagreement between experts means that 'abnormality of the mind' risks inconsistent application and

79 NSW Law Reform Commission (n 11 above) para 4.44.
80 Ibid.
81 Ibid.
82 Ibid, referring to NSW Office of the Director of Public Prosecutions, Prosecution Guidelines (2007) Guideline 20, 24.
83 Mackay (n 2 above) 16.
84 *Byrne* (n 15 above).
85 Law Commission (n 4 above) para 5.78 referring to the NSW Law Reform Commission (n 24 above) para 3.34.

too wide an interpretation [86] (the term was recently amended in 2020 to 'because of mental health impairment or cognitive impairment').Under section 2(1) HA 1957, the 'abnormality of mental functioning' must arise from a 'recognised medical condition' rather than the 'out-of-date set of causes' that operated under the old law which had 'never had an agreed psychiatric meaning'.[87] The Law Commission (E&W) had recommended that the 'abnormality of mental functioning' should arise from an 'underlying condition'[88] as was the position in NSW before 2020.

The term 'underlying condition' was defined as 'a pre-existing mental or physiological condition, other than a condition of a transitory kind'.[89] This definition was designed to exclude transient emotional states, such as, anger, rage or jealousy.[90] Hemming asserted that the NSW Commission's rejection of an exhaustive list of conditions effectively 'put in the "too hard" basket any attempt to limit the number of conditions falling within the scope of the defence preferring to stand behind the rubric of maintaining flexibility'.[91] Despite these concerns, the NSW Law Reform Commission found that since 1997 the reformed definition of the defence 'is meeting the objective of narrowing the field of cases where it can be raised, and in doing so, restricting the application of the substantial impairment defence to serious cognitive and mental health conditions'.[92] Nonetheless, in 2020 a list of conditions which amount to, or may amount to, cognitive impairment replaced the former definition of 'underlying condition' in the Crimes Act 1900 (NSW).[93] The British Government considered, in contrast, that the term 'recognised medical condition' would contribute to the precision of the plea by 'encourag[ing] defences to be grounded in a valid medical diagnosis linked to the accepted classificatory systems'[94] (the International Classification of Diseases (ICD) and Diagnostic and Statistical Manual (DSM))[95] whilst remaining flexible enough to 'accommodate future developments in diagnostic practice'.[96]

---

86 NSW Law Reform Commission (n 11 above) para 4.56 (references omitted).
87 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) paras 5.114 and 5.111.
88 Crimes Act 1900 (NSW) ss 23A(1)(a), (8) (old version).
89 Ibid ss 23A(8) (old version).
90 NSW Law Reform Commission (n 24 above) para 3.51.
91 Andrew Hemming, 'It's time to abolish diminished responsibility, the coach and horses' defence through criminal responsibility for murder' (2008) 10 University of Notre Dame Australian Law Review 1–35.
92 NSW Law Reform Commission (n 11 above) para 4.60.
93 Crimes Act 1900 (NSW), ss 8 and 9.
94 Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (MoJ, CP 19/08/2008) para 49.
95 Ibid.
96 Ibid.

Recognised medical condition: a medical question until it becomes a legal question

Potential ambiguity associated with the 'recognised medical condition' requirement, however, was extrapolated in *Dowds*.[97] Their Lordships explained that the usefulness of the ICD and DSM in forensic contexts is necessarily limited.[98] The classificatory systems are designed primarily for use by doctors, clinicians and health professionals.[99] There may be a 'divergence between the level of impairment which may bring a patient within a ... classification and the level necessary to have legal impact'.[100] The Court of Appeal explained that a number of conditions, for example, paedophilia, kleptomania, intermittent explosive disorder, etc, raise important questions for the courts.[101] Accordingly, the presence of a 'recognised medical condition' is a necessary but not always sufficient basis on which to found diminished responsibility.[102] Problematically, this approach implies that defendants would need evidence of 'something beyond a recognised medical condition' to establish that aspect of the defence, but not necessarily in all cases.[103] Where medical experts are of the view that D's mental abnormality arising from a recognised medical condition substantially impaired D's abilities, it is unclear on what basis that condition ought to be excluded. The result is that this determination will need to be made on a case-by-case basis, reinforcing the fact that diminished responsibility ultimately remains a legal rather than a medical question, notwithstanding the medicalised language of the partial defence. The terminology has further added to the confusion regarding when the decision will constitute more of a legal rather than a medical determination.

Prior fault: a legal determination

In *Dowds*, acute intoxication was precluded from founding diminished responsibility, but that decision accords with established intoxication doctrine (intoxication is not a defence, save in the limited context of whether a 'specific intent' has been formed)[104] and case law

97 [2012] EWCA Crim 281 (CA).
98 Ibid [31].
99 Ibid [29]–[30].
100 Ibid [30].
101 Ibid [31].
102 Ibid [41].
103 Nicola Wake, 'Diminished responsibility and acute intoxication: raising the bar' (2012) 76(3) Journal of Criminal Law 197–202.
104 Andrew Simester, 'Intoxication is never a defence' [2009] 1 Criminal Law Review 3–14.

pre-2009.[105] The outcome is unsurprising, but 'not in every sense an obvious one'.[106] Under the civil law, acute intoxication is a recognised 'mental disorder' for the purposes of section 136 of the Mental Health Act 1983 (amended 2007). A 2017 study of 245 individuals detained under section 136 revealed that nearly half were intoxicated.[107] Accordingly, '[a]n intoxicated person is at the time of intoxication suffering from an abnormal state of [mental functioning] which does affect his ability to determine or control his conduct'.[108] As such, 'the basis of the exclusion [in criminal contexts] is not the definition of the plea but the clear policy of the criminal law'.[109]

In NSW, section 23A (3) CA 1900 replicates the common law position in providing that the effects of self-induced intoxication do not amount to an abnormality of the mind and are to be disregarded in assessing whether or not the defence of substantial impairment is applicable. However, the partial defence is available in cases where the accused can prove that it was the underlying condition (brain damage) not the short-term effects of intoxication which caused the abnormality of mind resulting in the substantial impairment.[110] The NSW Law Reform Commission recommended that this position be clarified by defining mental health impairment as including 'substance induced mental disorders', which 'should include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances'.[111] This recommendation was adopted in 2020. The Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) establishes that a mental health impairment may arise from 'a substance induced mental disorder that is not temporary' but does not include 'a substance use disorder' or 'the temporary effects of ingesting a substance'.[112] This approach runs counter to the position in E&W which has recognised dependence syndrome (addiction)

105 *Dowds* (n 97 above). See also *Majewski* [1977] AC 443.

106 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Scottish Law Com No 195, 2004) para 3.40.

107 Jennifer Burgess, Sarah-Jane White and Aileen O'Brien, 'Retrospective cohort follow-up study of individuals detained under section 136' (2017) 3(6) British Journal of Psychology 281–284.

108 Scottish Law Commission (n 106 above) para 3.40.

109 Ibid para 3.40.

110 *Jones* (1986) 22 A Crim R 42; *De Souza* (1997) 41 NSWLR 656; *Zaro v Regina* [2009] NSWCCA 219.

111 NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (Report 135, 2012) recommendation 5.2; also NSW Law Reform Commission (n 11 above) recommendation 3.2, para 3.88.

112 Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) s 4(2)(d) and (3).

as founding a basis for diminished responsibility since prior to the reforms to section 2 HA 1957.[113]

In NSW, a person who has a psychiatric disorder may fall under the definition in instances where a disorder was brought on by substance abuse (or addiction), as identified in *Woutersz*.[114] While *Woutersz*,[115] is a case from the Australian Capital Territory (ACT) it was noted that it seemed that section 23A CA 1900 and the current provision in the ACT are intended to have essentially the same operation. In *Woutersz*,[116] Penfold J found that the acute psychotic episode which led to the killing 'emerged from either an underlying functional illness (most likely schizophrenia), or an underlying mental condition, that was either aggravated, or caused, by Ice [crystal methamphetamine] use over a period of two or more years before the killing'.[117] Penfold J was, therefore, 'satisfied on the balance of probabilities that Ms Woutersz was suffering from schizophrenia (or possibly another psychiatric illness) which had been aggravated or exacerbated by drug use, rather than a drug-induced psychotic disorder'.[118] As a result:

> the particular psychotic episode that became apparent on the day of the killing, but that seems to have been developing over at least several days before that, impaired Ms Woutersz' mental responsibility for the killing of her mother sufficiently to justify a verdict of manslaughter by reason of diminished responsibility.[119]

This approach to co-morbidity appears to be progressive in recognising that 'there is a high correlation between mental illness and substance use disorder'.[120] The resistance to regarding addiction (substance use disorder) as a basis for diminished responsibility in the NSW proposals, however, marks an outdated view of mental impairment. The NSW Law Reform Commission notes that behavioural scientists define substance use disorder as 'the abuse of, and dependence on, drugs, alcohol and/or other substances "to the extent that the person's functioning is affected"'.[121] This is distinguished 'from casual substance use or temporary intoxication' and also 'from a substance-

113 *Wood* [2008] EWCA Crim 1305 (CA). More recently reaffirmed in *Lindo* [2016] EWCA Crim 1940 (CA) and *Foy* [2020] EWCA Crim 270 (CA). For further discussion, see Natalie Wortley, 'New cases: evidence and procedure: appeal (fresh evidence): R v Foy' (2020) Criminal Law Weekly CLW/20/10/1.

114 [2018] ACTSC 36.

115 Ibid [144].

116 Ibid.

117 Ibid [290].

118 Ibid [289].

119 Ibid [291].

120 NSW Law Reform Commission (n 111 above) para 5.95.

121 Ibid para 5.94 (references omitted).

induced mental disorder, an impairment that is caused by a person's "substance use, abuse, intoxication or withdrawal"'.[122] The defence will only apply in this context where 'prolonged use of alcohol or drugs led to brain damage that substantially impaired their ability to control their actions'.[123] In 'such cases, the defendant must prove that it was the brain damage (being the underlying condition) that caused the abnormality of mind'.[124]

An equivalent approach had applied in E&W in the 1989 case of *Tandy*[125] in which Linda Tandy, a chronic alcoholic, fatally strangled her daughter following the consumption of almost a full bottle of vodka. The appellate court confirmed that D must have been acting in a state of automatism[126] (ie every drink consumed on the day of the killing must have been involuntary) or the drink must have induced brain damage before the partial defence could apply. It is the latter that is most similar to NSW's requirement that the alcohol or drug consumption results in a mental impairment, for example, drug or alcohol induced brain damage before the partial defence would apply; substance use disorder (including addiction) would be excluded.[127] The Court of Appeal ruling in *Tandy* was criticised for failing to appreciate the 'concept of alcoholism as a disease',[128] and this criticism can be equally levelled at the approach of the NSW Law Reform Commission and post-2020 iteration of the defence. As Reed and Wake explained: '[t]he determination in *Tandy* fundamentally undermined the rationale underpinning the partial defence by failing to recognise that a complete destruction of the defendant's free will was not required for her liability to be substantially impaired'.[129]

The decision in *Tandy* was subsequently reversed in *Wood* (considered further below), where the appellate court confirmed that brain damage was not required for the partial defence.[130] Addiction, or alcohol dependence syndrome *per se* could potentially satisfy the partial defence where the extent of the condition met the remaining requirements of the partial defence. In making such determination, jurors are directed to 'focus exclusively on [the addiction/dependence

122 Ibid para 5.94.

123 Ibid para 5.99.

124 Ibid para 5.99, citing J*ones v The Queen* (1986) 22 A Crim R 42 [44]; *Ryan v The Queen* (1995) 90 A Crim R 191, 196–197.

125 [1989] 1 WLR 350 (CA).

126 See, for discussion, *Wood* (n 113 above) [37] (Sir Igor Judge P).

127 NSW Law Reform Commission (n 11 above) para 5.99, citing *Jones v The Queen* (n 124 above); *Ryan v The Queen* (n 124 above) 196–197

128 Jonathan Goodliffe, 'R v Tandy and the concept of alcoholism as a disease' (1990) 53 Modern Law Review 809, 809–14.

129 Reed and Wake (n 23 above) 187.

130 *Wood* (n 113 above) [41] (Sir Igor Judge P).

syndrome and accordingly] the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily'.[131]

Despite E&W offering a more medically valid approach to addiction (dependence syndromes) than the NSW Law Reform Commission, recent case law in E&W has highlighted that tension across prior fault principles and diminished responsibility continues to pose problems for the courts. Kay stabbed V to death in a 'frenzied and brutal' attack following a 'three day bender',[132] where he imbibed 'cocaine, amphetamines, methamphetamine, morphine, cannabis, and ecstasy'.[133] Medical experts agreed that Kay suffered from paranoid schizophrenia and heroin dependency, both recognised by the ICD-10.[134] The issue at trial was whether Kay's responsibility was diminished by an 'abnormality of mental functioning' arising from a 'recognised medical condition'. The trial judge put the following question to the jury:

> ... was the psychotic episode leading to the killing caused by the voluntary consumption of drink or drugs or was it caused by, or significantly caused by, the schizophrenia *made worse by the intoxication* against a background of dependency syndrome?[135]

The jury returned a verdict of murder. The defence appealed arguing that a 'more nuanced approach' to diminished responsibility ought to be undertaken given increased understanding of mental disorder.[136] In particular, the defence argued that the court erroneously 'excluded ... the possibility that [Kay] was suffering from an abnormality of mental functioning (a psychotic state) which arose from a medical condition (schizophrenia) and which, *in combination with voluntary intoxication*, substantially impaired his responsibility for his actions'.[137]

The Court of Appeal rejected Kay's application on the basis that the trial judge's direction followed 'a long line of [binding] authority' which pre-dated the 2009 Act amendments.[138] Ironically, the trial judge's direction appeared to be more lenient than previous authorities in allowing jurors to explore whether 'the schizophrenia [was] *made worse by the intoxication* against a background of alcohol dependency syndrome'.[139] In potentially implying that *any* intoxication set against

131 Ibid.
132 *Joyce; Kay* [2017] EWCA Crim 647; 2017 WL 02212863 [6].
133 Ibid [8].
134 Ibid [9].
135 Ibid (emphasis added).
136 Ibid.
137 Ibid [14] (emphasis added).
138 Ibid [19].
139 Ibid (emphasis added).

D's background of dependence syndrome would satisfy the partial defence, the direction appears equivocal on the issue of voluntariness/involuntariness (ie intoxication is only relevant where the intoxicants are consumed as a direct result of the illness), whereas the law pre-dating 2009 was not.

Prior to reform, the House of Lords, in *Dietschmann*, made clear that jurors should consider whether, *despite the drink*, D's abnormality of mind substantially impaired his mental responsibility for the killing.[140] As noted, the Court of Appeal similarly ruled, in *Wood*, that jurors ought to 'focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and *ignore the effect of any alcohol consumed voluntarily*'.[141] Their Lordships, in *Stewart*, provided further guidance, whilst reaffirming the position; assuming the necessary *mens rea* was established, murder could be reduced to manslaughter '*notwithstanding the consumption of alcohol*, on the basis of diminished responsibility'.[142] The Court of Appeal, in Kay did not criticise the initial trial judge's direction, but confirmed that the position pre-2009 had not changed, the partial defence would only be available where the recognised medical condition (schizophrenia) was 'of such severity that, absent intoxication, it substantially impaired [D's] responsibility', or 'where the RMC (schizophrenia) coupled with drink/drugs dependency syndrome substantially impair[ed] D's responsibility'.[143]

Hallet LJ further opined that:

> The approach (in Kay and the authorities pre-dating reform) is neither binary nor simplistic but is flexible enough to encompass a wide variety of factual circumstances in a manner that is fair to all. It takes full account of the kind of mental health issues under consideration and our increased understanding of them. In our view, it rightly does not necessarily provide even a partial defence to everyone diagnosed with schizophrenia, who, *well aware* of the possible consequences, *chooses to abuse drink and or drugs to excess* and then kills.[144]

Three key issues arise from this observation. First, requiring jurors to 'separate out each drink of the day' does appear somewhat 'binary' and does not seem to accord with 'increased understanding' of medical conditions. The difficulty associated with requiring jurors to separate mental disorder from voluntary intoxication and dependence syndrome is palpable in the testimony of the medical experts. Dr Collins explained that Kay's condition was 'analog[ous] to a pot of hot water simmering

140 *Dietchmann* [2003] 1 AC 1209 [41] (Lord Hutton) 41.

141 *Wood* (n 113 above) (emphasis added). See also *Richardson* [2016] EWCA Crim 577.

142 *Stewart* [2009] EWCA Crim 593 (emphasis added).

143 *Joyce; Kay* (n 132 above).

144 Ibid [20] (emphasis added).

away (schizophrenia) brought to boiling point by the intoxication', whereas Dr Barlow was of the view that Kay's schizophrenic condition was stable, and the psychotic state was induced by voluntary intoxication.[145]

Second, evidence of 'choice' in taking alcohol or drugs may in some instances be illusory and related in large part to the condition (ie self-medication).[146] This observation was addressed by the Sentencing Council in the distinct but related context of the Definitive Sentencing Guideline for Manslaughter by Diminished Responsibility in 2017.[147] In terms of assessing culpability, the guideline stipulates: 'where an offender exacerbates the mental disorder by *voluntarily* abusing drugs or alcohol [("self-medication")] or by *voluntarily* failing to follow medical advice this will increase responsibility' ('medication non-compliance').[148] Respondents to the consultation were concerned that this clause alone was insufficiently nuanced, and further clarification was provided in the published guideline:

> In considering the extent to which the offender's behaviour was voluntary, the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be relevant.[149]

The above observation further highlights the complexity of the task jurors are expected to engage in when separating voluntary intoxication from intoxication directly related to the condition. In addition to being relevant to the culpability assessment in the Sentencing Guidelines, the aggravating factor, 'Commission of offence whilst under the influence of alcohol or drugs',[150] was similarly amended following respondents' concerns:

> … *drugs can sometimes be used to 'self-medicate' to try and reduce symptoms*. It should also be noted that patients with serious mental illness may have little insight into their disorder which leads them into behaviour that can exacerbate their condition. They may stop their treatment as a consequence of symptoms such as auditory hallucinations or paranoid beliefs leading them to believe they are being poisoned. Although the Court may wish to consider the role of drugs and alcohol

145 Ibid.

146 There was evidence to suggest that Kay was 'well aware' that '[d]rug use (particularly amphetamines) … led to acute episodes, including at least one psychotic episode', and that he had previously 'refrained from taking amphetamines, because he recognised that they had a markedly deleterious effect on his behaviour': ibid [5].

147 For discussion of the Sentencing Guideline, see Martin Wasik, 'Reflections on the Manslaughter Sentencing Guidelines' [2019] 4 Criminal Law Review 330–332.

148 Sentencing Council Consultation, Sentencing Guideline: Manslaughter by Diminished Responsibility (SC 2018) 38 (emphasis added).

149 Sentencing Council, Manslaughter Guideline: Response to Consultation (2018) 17. See, generally, *Edwards* [2018] EWCA Crim 595.

150 Sentencing Council Consultation (n 148 above).

> before sentencing, we advocate against enshrining this as an aggravating factor in these circumstances.[151]

To address these observations, the Sentencing Council added the following caveat to the aggravating factor: 'the extent to which a mental disorder has an effect on offender's ability to make informed judgments or exercise self-control will be a relevant consideration in deciding how much weight to attach to this factor'.[152] The Sentencing Guideline highlights the complexity in assessing prior fault issues where the defendant suffers from a recognised medical condition and either self-medicates or fails to comply with a prescribed medication regimen. These issues are not exclusively the domain of the sentencing judge. By implication, an ostensible choice to self-medicate may potentially relate directly to D's condition, further highlighting the mental gymnastics jurors are required to engage in when assessing whether the intoxication is a direct result of the illness in determining diminished responsibility.

The Court of Appeal also alluded to the problem of medication non-compliance, noting that Kay had been in 'contact with mental health services', but had 'not responded meaningfully to the many offers that were made to help him'.[153] The relevance of medication non-compliance on diminished responsibility is arguably negligible given that the focus should be on the mental impairment, and, as such, the court did not explore the potential impact of medication non-compliance that exacerbates a pre-existing recognised medical condition. However, D's lack of 'meaningful' engagement with mental health provision is viewed pejoratively, notwithstanding that a variety of factors, for example, 'certain medications, religious beliefs, paranoia, side effects, and depression', may contribute to an offender's apparent *choice* not to engage meaningfully with such services.[154] The Definitive Guideline adopts a similarly negative view of medication non-compliance by only addressing circumstances where D's 'mental disorder was undiagnosed and/or untreated … For example: – where an offender has sought help but not received appropriate treatment this may reduce responsibility'.[155]

As a final point of note, given this more detailed exposition of interpretation of voluntariness/involuntariness (in the sense of a

151 Sentencing Council Consultation Response (n 149 above) 18 (emphasis added).

152 Ibid.

153 *Joyce; Kay* (n 132 above) [5].

154 Arlie Loughnan and Nicola Wake, 'Of blurred boundaries and prior fault: insanity, automatism and intoxication' in Alan Reed, Michael Bohlander, Nicola Wake and Emma Smith (eds), *General Defences in Criminal Law Domestic and Comparative Perspectives* (Ashgate 2014) 131.

155 Sentencing Council Consultation Response (n 149 above) 17.

direct link to the dependence syndrome rather than automatism) and recognising that self-medication may be inextricably linked to the medical condition, it seems that the flexibility referred to by Hallett LJ is likely to continue to be tested in future cases, particularly in light of the increased medicalisation of the partial defence. Such disputes between medical experts will undoubtedly make it more difficult for jurors to reach a verdict.[156]

In the Australian case of *Woutersz*,[157] there was discussion of whether prior fault should be considered in assessing whether a manslaughter verdict is appropriate. The Crown submitted that in assessing culpability/moral responsibility:

> the court must consider not just the level of the offender's impairment but also the offender's moral responsibility for the development of the abnormality of mind, or the acute episode of that abnormality, that resulted in the impairment of the person's 'mental responsibility'.[158]

The argument was that the defendant's conduct 'is "more blameworthy" if the psychosis, or the psychotic episode, that resulted in the killing was caused by her drug use'.[159] In effect, there should a discount on the reduction in her culpability 'for the contribution made to the mental impairment by Ms Woutersz' drug use'.[160] The prosecution also argued that the reduced culpability should be discounted (or rather her culpability raised) because of the tension between Woutersz and her mother, and Woutersz arguing with her mother contributed to the killing.[161] The defence disagreed, claiming that 'the person's culpability is to be assessed by reference to the degree of impairment and not by reference to the offender's responsibility for the development or existence of the mental impairment'.[162] Penfold J rejected the argument of the Crown and emphasised that the authorities suggest that 'what is relevant in assessing the person's culpability is the degree of impairment, not the origins of the impairment'.[163] Her Honour was of the opinion that 'looking for the real origin or the first cause of a mental impairment is so fraught with problems that it could produce nothing on which an assessment of culpability could fairly be based'.[164]

156 Olivia Quick and Celia Wells, 'Getting tough with defences' [2006] Criminal Law Review 117.
157 [2018] ACTSC 36.
158 Ibid [168].
159 Ibid [168].
160 Ibid [169].
161 Ibid [179].
162 Ibid [173].
163 Ibid [240].
164 Ibid [241].

Developmental immaturity and learning difficulties

Notwithstanding the foregoing observations regarding the problems associated with the ICD and DSM in the context of intoxicated offending, the British Government initially considered the breadth of the classificatory systems a benefit. The Ministry of Justice (E&W) explained that the classificatory systems would encompass 'conditions such as learning disabilities and autistic spectrum disorders which can be particularly relevant in the context of juveniles', albeit conceding that this labelling is inappropriate, and disappointingly declining to extend diminished responsibility to developmentally immature offenders.[165] The Law Commission (E&W) proposals would have included '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'.[166] Policy concerns regarding addressing developmentally immature defendants continue to the present date with the current Government recently asserting that '[v]ictims of serious crimes committed by 10 and 11 year-olds must feel assured that those responsible can be proceeded against by the courts'.[167] The Government's position is unwavering despite five Bills in five consecutive parliamentary sessions adopting a single clause which would raise the minimum age of criminal responsibility from 10 to 12.[168] The current Age of Criminal Responsibility Bill 2019–2021 is tabled, but even if the Bill were to receive the royal assent,[169] there remains a need for an in-depth review of how the criminal justice system deals with children with developmental delays/neurodevelopmental disorders.[170]

Research shows that there is a higher prevalence of young people with neurodevelopmental disorders in the juvenile justice sector than in the general population.[171] In an Australian context, the Royal

165 MoJ (n 94 above) paras 52–55.

166 Law Commission (n 87 above) para 9.20 (emphasis added).

167 'Age of Criminal Responsibility Bill' HL Deb 8 September 2017, vol 783, col 2211 (Baroness Vere of Norbiton (Con)).

168 The single clause in the Bill would substitute '12' for '10' in s 50 of the Children and Young Persons Act 1933 (age of criminal responsibility).

169 This is unlikely given the current Government's intention to maintain the *status quo*, not to mention its current focus on Brexit and the Covid-19 pandemic.

170 Nicola Wake, Raymond Arthur, Thomas Crofts, and Sara Lambert, 'Legislative approaches to recognising the vulnerability of young people and preventing their criminalisation' (2021) 1 Public Law 145–162.

171 Office of the Children's Commissioner (United Kingdom), Nobody Made the Connection: The Prevalence of Neurodisability in Young People who Offend (October 2012) para 3.1. See also Royal Commission into the Protection and Detention of Children in the Northern Territory vol I (2017) 135; Eileen Baldry, Damon Briggs, Barry Goldson and Sophie Russell, '"Cruel and unusual punishment": an inter-jurisdictional study of the criminalisation of young people with complex support needs' (2018) 21 Journal of Youth Studies 636, 640–641.

Commission into the Protection and Detention of Children in the Northern Territory echoed these concerns and particularly noted that the rate of developmental vulnerability in Aboriginal children was twice that of non-Aboriginal children.[172] The Royal Commission, therefore, found that it was essential to recognise and treat neurodevelopmental disorders when children are young in order to divert them 'from a potential trajectory into the youth justice system'.[173]

In NSW the minimum age of criminal responsibility is 10 as in E&W,[174] but in NSW from 10 until the age of 14 the presumption of *doli incapax* applies.[175] The NSW Law Reform Commission notes that this presumption has repercussions both for fitness to plead and the defence of mental illness (and by extension substantial impairment).[176] To rebut the presumption in NSW, the prosecution must prove beyond reasonable doubt that the child understood their behaviour to be seriously wrong as opposed to merely naughty or mischievous.[177] In recent years there have also been calls for an increase in the age of criminal responsibility in Australia.[178] In response to such calls, a Working Group initiated by the Attorney General's Department and chaired by the Department of Justice, Western Australia, was set up in 2019 to examine whether there should be a change in the age of criminal responsibility across Australia.[179] At its meeting on 27 July 2020 the Working Group 'identified the need for further work to occur regarding the need for adequate processes and services for children who exhibit offending behaviour' and deferred making any decisions about raising the age of criminal responsibility.[180]

The United Nations (UN) Committee on the Rights of the Child now recommends that states set the minimum age of criminal responsibility at 14.[181] The UN Committee has also commented that children with

172 Royal Commission (n 171 above).

173 Ibid.

174 Children (Criminal Proceedings) Act 1987 (NSW) s 5.

175 See, for example, *RP v The Queen* [2016] HCA 53. The presumption was abolished in E&W in 1998; Crime and Disorder Act 1998, s 34.

176 NSW Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System* (Consultation Paper 11, 2010) para 5.2.

177 *C v DPP* (1996) AC 1, 38; *RP v The Queen* (n 175 above) [9]; for further discussion of proof in relation to the presumption of *doli incapax*, see Thomas Crofts, 'Prosecuting child offenders: factors relevant to rebutting the presumption of doli incapax' (2018) 40(3) Sydney Law Review 339–365.

178 For discussion, see Thomas Crofts, 'Will Australia raise the minimum age of criminal responsibility?' (2019) 43(1) Criminal Law Journal 26–40.

179 Council of Attorneys-General, 'Age of Criminal Responsibility Working Group Terms of Reference'.

180 Council of Attorneys-General, 'Communiqué'.

181 United Nations Committee on the Rights of the Child, General Comment No 24 (2019): on children's rights in the judicial system (UN Doc CRC/C/GC/24) [22].

developmental delays or neurodevelopmental disorders should not be in the criminal justice system.[182] Increasing the minimum age of criminal responsibility might not go far enough and there is a case for wholesale review of the approach to youth offending.

It could be argued that meritorious cases absent a medical basis, such as, developmental immaturity, should (as the Law Commission (E&W) contends in relation to mercy killings) 'be addressed openly [as a separate defence or via appropriate social service routes] rather than disguised as issues of diminished responsibility',[183] which has become synonymous with mental disorder rather than 'normal' developmental immaturity.

Fair labelling and mercy killers

In terms of the moral veracity of the partial defence, the fair-labelling issue is pertinent. That the mercy killer could only avoid the mandatory life sentence through 'connive[ance]' between the parties and medical experts was described as 'a blight on [the] law'.[184]

Mercy killers and other 'deserving cases' may potentially be afforded a partial defence through benevolent plea bargaining (as above), or through compassionate psychiatrist and/or jury determinations (considered further below).[185] The loss of control defence may be (potentially) benevolently applied in mercy-killing cases, dependent upon the specific facts of the case, as predicted by Livings[186] and reaffirmed in *Knight*.[187] The most effective way to address the stretching of partial defences in this context, however, has less to do with reform to diminished responsibility and much more to do with the implementation of appropriate defence(s)/diversionary schemes. The lack of additional defences in cases that garner public sympathy could result in further stretching of the partial defence, which may (again) depend largely on whether the decision is legal, medical or normative.

The foregoing analysis indicates that the 'recognised medical condition' requirement appears to raise more questions than it resolves. The broader issue regarding the limits of the 'recognised medical condition' requisite remain open to conjecture, whilst the classificatory systems provide a veritable shopping list of potential conditions that might be tried by defence counsel. This is arguably antithetical to Parliament's intention to clarify the law. Further, it

182 Ibid [28].

183 Law Commission (n 4 above) para 5.94.

184 Ibid para 2.34.

185 Gibson, (n 4 above) 177-200.

186 Livings (n 5 above).

187 Jessica Carpani, 'Son who threw his terminally ill 79-year-old mother to her death spared jail' (*The Telegraph*, 20 September 2019); and Clough, 'Mercy killing, partial defences' (n 5 above).

highlights that the level of legal, medical and juror input will differ depending on policy issues pertinent to the particular case, with the genuine risk of inconsistent application and outcomes in diminished responsibility cases.

The NSW Law Reform Commission recommended that the phrase 'underlying condition' be changed to 'mental health or cognitive impairment' for substantial impairment by abnormality of mind (and the defence of not guilty by reason of mental illness).[188] Based on this recommendation, the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) replaced the term 'by abnormality of mind' with 'because of mental health impairment or a cognitive impairment' and has defined these terms.[189] A mental health impairment covers 'a temporary or ongoing disturbance of thought, mood, volition, perception, or memory [that] would be regarded as significant for clinical diagnostic purposes, and the disturbance impairs the emotional wellbeing, judgment or behaviour of the person'. A non-exhaustive list of such impairments includes anxiety disorder, affective disorder, psychotic disorder and substance-induced mental disorders that are not temporary – this excludes substance use disorders (addiction to substances) or the temporary effects of ingesting substances.[190] A cognitive impairment is defined as where a person has: 'an ongoing impairment in adaptive functioning, and ... an ongoing impairment in comprehension, reason, judgment, learning or memory, and the impairment results from damage to or dysfunction, developmental delay or deterioration of the person's brain' that may arise from a range of conditions. These conditions include, but are not limited to intellectual disability, borderline intellectual functioning, dementia, acquired brain injury, drug or alcohol-related brain damage (including foetal alcohol spectrum disorder) or autism spectrum disorders.[191]

The advantages of this definition are that it covers appropriate conditions (save the comments regarding the exclusion of addiction (dependence syndrome) considered above), is consistent with the definition recommended in other areas of law, reflects contemporary psychological and psychiatric understandings, is respectful of people with such impairments, and is tighter and more precise than the current outdated terminology.[192]

188 NSW Law Reform Commission (n 11 above) recommendation 3.2, para 3.88, and recommendation 4.1, para 4.65.

189 Ss 4 and 5.

190 Mental Health and Cognitive Impairment Forensics Provisions Act 2020 (NSW), s 4.

191 Ibid s 5; Crimes Act 1900 NSW, s 23A(8) and (9).

192 NSWLC Report 138, 2013 (n 11) para 3.50.

THE ROLE OF THE PSYCHIATRIST

As noted, the role of the psychiatrist has been expanded under revised section 2(1) HA 1957 (E&W). Under the old law, it was recognised that medical experts sometimes entered into a benign conspiracy regarding the applicability of diminished responsibility.[193] The ultimate issue, namely whether D's responsibility had been substantially impaired, was frequently commented on by experts despite it not being within their province under the law.[194] The unenforced restriction on psychiatric testimony on the ultimate issue under the old law has effectively been repudiated under the new law since 'most, if not all of the aspects of the new provisions relate entirely to psychiatric matters'.[195] As identified in *Brennan*, it is often 'both legitimate and helpful' for an expert psychiatrist to comment on whether the defendant's abilities are substantially impaired.[196] Mackay and Mitchell observe that experts commenting on the ultimate issue has increased under the new law (72.7 per cent providing a positive view, and 18.2 per cent holding a negative view, compared to 69.7per cent and 8.5 per cent respectively under the old law). In only 11 out of 100 reports, the expert stipulated that the ultimate issue was for the jury.[197] As Hallett observes, 'the medicalisation of the Diminished Responsibility defence adds to the role confusion' between legal, medical and normative determinations by 'encourage[ing] psychiatrists to comment on the ultimate issue and to tread on the domain of the jury'.[198] This runs the risk that in some cases a verdict will be reached based on who the 'jury find more convincing—the expert testimony provided on behalf of the defence or that provided for the Crown'.[199]

The ambit of the role of the psychiatrist was clarified in *Brennan*: '[w]here there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so'.[200] The ruling highlights that 'in criminal trials cases are decided by juries, not by experts' but 'juries must base their

193 Empirical research by Mackay suggests that in 69.7% a positive view was expressed, and 8.5% admitted a negative view; Law Commission (n 4 above) para 2.34.

194 Law Commission (n 4 above) appendix B. See also, Mackay and Mitchell (n 2 above).

195 *Brennan* (n 57 above) [49], [51].

196 Ibid.

197 Mackay and Mitchell (n 2 above) 23.

198 Hallett (n 35 above).

199 Nicola Wake, 'Psychiatry and the new diminished responsibility plea: uneasy bedfellows?' (2012) 76(2) Journal of Criminal Law 122–129.

200 *Brennan* (n 57 above) [44]. See also *Matheson* [1958] 1 WLR 474; *Bailey* [1961] Crim LR 828; (1978) 66 Cr App R 31.

conclusions on the evidence'.[201] Similarly, in *Blackman* it was noted that *Golds* had placed emphasis 'not only on the prosecution's right (if not duty) to assess the medical evidence and to challenge it, where there is a rational basis for doing so, but also on the primacy of the jury in determining the issue'.[202] As Gibson identifies, where medical 'experts offer uncontradicted and unchallenged evidence—including that which is *sympathetically motivated*—the jury must accept it'.[203] Yet, the number of cases in which 'uncontradicted and unchallenged evidence'[204] is advanced is limited. Mackay and Mitchell's empirical research highlights that 54 to 52 expert reports were supported by the defence and prosecution, respectively, compared with 160 and 129 respectively under the old law.[205]

Similarly, the NSW Law Reform Commission noted that there was concern under the pre-1997 version of the defence that allowing experts to give evidence on whether or not they consider the accused's mental responsibility to be substantially impaired opens the door to the jury abdicating their duty to decide this issue in favour of a reliance on expert opinion.[206] To overcome this problem the NSW Law Reform Commission recommended that 'the definition of diminished responsibility omit the term "substantial impairment of mental responsibility" and focuses instead on the question of whether there was a sufficiently substantial effect on the accused to warrant reducing the charge to manslaughter'.[207] It was felt that this would make clear that ultimately the question was one for the jury as it 'is not a medical question but one of culpability and liability'.[208] Therefore, expert evidence is not relevant to the ultimate issue. Instead, expert evidence would only be admitted to help determine:

> (a) whether or not there was an abnormality of mental functioning arising from an underlying condition and the relationship of that abnormality to the accused's capacity to understand events, or to judge whether his or her actions are right or wrong, or to control himself or herself; and (b) assessing the effects of self-induced intoxication under our proposed subsection (2).[209]

201 *Brennan* (n 57 above) [43].
202 *Blackman* [2017] EWCA Crim 190 [43].
203 Gibson (n 4 above), emphasis added.
204 *Brennan* (n 57 above) [44]. See also *Matheson* (n 200 above); *Bailey* (n 200 above).
205 Mackay and Mitchell (n 2 above) 12.
206 NSW Law Reform Commission (n 24 above) para 3.61.
207 Ibid para 3.63.
208 Ibid para 3.63.
209 Ibid para 3.63.

Following these recommendations, the second limb of the partial defence in NSW, expressly provides that expert evidence is inadmissible to determining whether there was a sufficiently substantial effect on the accused to warrant reducing the charge to manslaughter.[210] This makes clear that the ultimate question is for the judge or the jury. It is also a question of fact not a medical question.[211] *Potts*[212] gave guidance on how this issue should be determined by the jury:

> It has been said that the issue under s 23A(1)(b) is a task for the tribunal of fact, which must approach that task in a broad commonsense way, involving a value judgment by the jury representing the community, and not a finding of medical fact.[213]

It was commented that 'the distinction between murder and manslaughter is both a legal distinction and a moral one' with manslaughter being regarded as less morally culpable.[214]

In NSW the question of whether a decision by the judge or jury must be consistent with expert evidence was addressed in *Ukropina*.[215] In *Ukropina*, it was argued that the judge had erred in finding that appellant 'was not impaired to an extent that was significant beyond that required to make out the partial defence of substantial impairment by abnormality of mind' and had failed to provide adequate reasons for this finding.[216] The basis for the appeal was that the sentencing judge's finding 'was not consistent with the body of psychiatric evidence tendered by both the Crown and the applicant'.[217] The finding therefore 'amounted to a rejection of the unchallenged opinions of relevantly qualified experts' and it was submitted that 'it was not open to his Honour to reject this evidence without providing adequate reasons'.[218] The applicant relied on the Western Australian case of *Hone v State of Western Australia*[219] in which the Court of Appeal of Western Australia found that a judge or jury should not reject or ignore medical opinions which were honest, competent and unchallenged. Alternatively, the applicant argued that if the finding was inconsistent with the uncontradicted opinions of expert witness then this required the judge to give reasons for that finding.[220] The NSW Court of Appeal

210 Crimes Act 1900 (NSW), s 23A(2).
211 *Trotter* (1993) 35 NSWLR 428, 431.
212 [2012] NSWCCA 229.
213 Ibid [33].
214 Ibid [34] (Kirby J directions to jury).
215 [2016] NSWCCA 277.
216 Ibid [28].
217 Ibid [30].
218 Ibid [30].
219 [2007] WASCA 283.
220 *Ukropina* (n 215 above) [32].

agreed with the applicant and allowed the appeal on the basis that reasons should have been given for a finding which was apparently inconsistent with the expert evidence.[221] The basis on which jurors reach such a finding, however, remains elusive as jurors do not have to provide reasons for their determination.[222]

Despite the differences in approach in E&W and NSW, the ultimate decision in the vast majority of cases continues to reside with the jury. As Davis LJ explained, in *Brennan* (E&W), 'a defence of diminished responsibility which is unequivocally supported by reputable expert evidence but ... not contradicted by any prosecution expert evidence should ... become relatively uncommon'.[223] In contested trials, increased reliance on expert testimony regarding all aspects of the plea 'should be taken as an encouragement for the Crown to adduce its own expert evidence to support its stance'.[224] If the Crown rejects a plea, the most compelling evidence to do so is (arguably) expert evidence which contradicts the defence.[225] Even in the absence of conflicting expert testimony, it remains within the province of the jury to 'properly assess all relevant circumstances preceding, and perhaps preceding over a very long period, the killing as well as any relevant circumstances following the killing', providing a significantly broader temporal period in which to assess liability.[226]

Implicit within *Brennan* is the potential to seek expert testimony that supports the case of the respective party *pre-trial*. The potential issue is that parties with more resources (arguably) have a better chance of locating and funding the costs of an expert supportive of their stance.[227] This issue was poignantly highlighted in *Foy*[228] where the Court of Appeal refused to adduce fresh expert witness evidence in support of diminished responsibility after the appellant's psychiatrist at the initial trial had been adverse to such a plea.

Foy had stabbed the victim to death whilst suffering 'a substance-induced psychotic' episode, after imbibing large amounts of alcohol and cocaine.[229] The first psychiatrist approached by the defence prior to trial was not instructed because the Legal Aid Authorities declined

221 Ibid [38].
222 See Laird's comments in the context of s 2 HA 1957 regarding the desirability of such a position (n 58 above).
223 *Brennan* (n 57 above) [67].
224 Ibid.
225 Quick and Wells (n 156 above).
226 *Conroy* (n 56 above) [32].
227 Thank you to Natalie Wortley for making this point. See also Wortley (n 113 above).
228 *Foy* (n 113 above)
229 Ibid [25].

to agree the fee.[230] No dispute was raised regarding the 'qualifications, competence or expertise' of Dr Isaac who was subsequently instructed.[231] Dr Isaac concluded pre-trial that the paranoid psychosis experienced by Foy was insufficient without the voluntarily consumed intoxicants to substantially impair Foy's ability to form a rational judgment and/or exercise self-control.[232] The defence, therefore, were not in a position to advance diminished responsibility and the only issue at trial was that of intent.[233] The jury convicted.

Post-trial, Foy's family raised sufficient funds to instruct Dr Philip Joseph, the psychiatrist who had been approached by the defence team pre-trial.[234] Upon reviewing the relevant evidence, including Dr Isaac's reports, and interviewing Foy, Dr Joseph was of the opinion that diminished responsibility was available based upon an emerging psychotic disorder, independent of the voluntarily consumed intoxicants.[235]

The issue on appeal was whether the fresh evidence should formally be admitted in evidence.[236] The Court of Appeal explained that there was

> ... no question of any legal oversight or legal error at trial ... the issue of diminished responsibility was fully examined; the opinion of a reputable psychiatrist obtained; and the legal view that, in the light of that opinion, a defence of diminished responsibility could not be made out was correct.[237]

The court were effectively left with two opposing expert opinions based on 'essentially the same material'.[238] Dr Joseph accepted that Dr Isaac had all of the relevant material before him, that he had not missed anything, and that his view was a reasonable one that any responsible psychiatrist could hold.[239] Dr Blackwood, for the Crown, agreed that Dr Joseph's conclusion was equally tenable.[240] The Court of Appeal concluded that it was not in the interests of justice to allow the fresh evidence. LJ Davies stated:

> ... this case is, in its fundamentals, a case where, following conviction, an attempt has been made to instruct a new expert with a view to securing

230 Ibid [22].
231 Ibid.
232 Ibid [35].
233 Ibid [36].
234 Ibid [40].
235 Ibid [41].
236 Ibid [49]. See also, Criminal Appeal Act 1968, s 23.
237 Ibid [51].
238 Ibid [52].
239 Ibid.
240 Ibid [89].

> – as has happened – an opinion on diminished responsibility different from that of the previous expert instructed before trial. It is, bluntly, expert shopping.[241]

LJ Davies noted that, if there had been any dissatisfaction with the report obtained pre-trial, funds could have been raised to obtain a second report.[242] As Thomas notes, the ruling is designed to prevent 're-litigat[ion]' and aligns with numerous authorities 'pronouncing that the Court of Appeal will not lightly permit the admission of "fresh" evidence on the basis of a mere difference in opinion'.[243] Differences of opinion between experts 'can be resolved by the trial process'[244] and, as such, the outcome is a sensible one. Notwithstanding these observations, the case highlights that 'expert shopping' may occur, but it must do so pre-trial.[245]

Foy also indicates the potential for an increase in cases where medical experts disagree. As Judge LJ explained in *Cannings*, where 'the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed'.[246] The Law Commission (E&W) expressed concern that when expert evidence is presented as scientific 'there is a danger that juries will abdicate their duty to ascertain and weigh the facts and simply accept the experts' own opinion evidence, particularly if the evidence is complex and difficult for a non-specialist to understand and evaluate'.[247] Alternatively, as Gibson suggests, jurors may engage in a 'benign conspiracy' by rejecting 'unfavourable evidence in place of amenable expert testimony'.[248]

Jurors may go further by rejecting unanimous expert evidence, where there is 'some rational evidential basis for doing so'.[249] For example, in

241 Ibid [60]. Relying on Hallett J's observation in *Challen* [2019] EWCA Crim 916, LJ Davies explained: 'As a general rule, it is not open to a defendant to run one defence at trial and, when unsuccessful, to run an alternative defence on appeal relying on evidence that could have been available at trial. This court has set its face against what has been called expert shopping…'.

242 Ibid.

243 Mark Thomas, '"Expert shopping": appeals adducing fresh evidence in diminished responsibility cases' (2020) 84(3) Journal of Criminal Law 249–254, 252–253.

244 *Evans* [2009] EWCA Crim 2243 (Thomas LJ) [71] cited in Thomas (n 243 above) 253.

245 Thank you to Natalie Wortley for making this point.

246 *Cannings* [2004] 1 All ER 725 (Judge LJ).

247 Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales* (Law Com No 325, 2011) para 1.9.

248 Gibson (n 4 above) 192.

249 *Hussain* [2019] EWCA Crim 666, 2019 WL 01645639: 'there must be some rational evidential basis for challenging agreed expert evidence but the decision as to whether a defendant falls within the provisions of section 2 is for the jury not the doctors to determine'.

Hussain, jurors rejected unanimous expert evidence that the defendant suffered from diminished responsibility based on the Crown's assertion, *inter alia*, that evidence of planning, concealing the weapon, and lying to the police negated the partial defence. Lady Justice Hallett explained, however, that jurors should be cautioned against turning 'themselves into amateur psychiatrists'[250] and the Crown should not 'simply ... invite the jury to convict of murder without suggesting why the expert evidence ought not to be accepted'.[251] Laird notes that the trial judge has 'an onerous obligation' in ensur[ing] that the Crown outlines the grounds for inviting jurors to reject expert evidence and ensuring that those grounds are appropriate.[252] Jurors may engage in 'nullification', on benevolent grounds or otherwise, provided there is a rational evidential basis.[253] The ruling highlights that, despite the medicalisation of the plea, the ultimate decision rightfully resides with jurors, so it remains unfortunate that this position was not made clear in the legislation, as in NSW.

A more controversial aspect of the ruling in *Hussain*[254] is the practice of *constituit iudicem legi* (judicial activism) operating within the Court of Appeal, as identified by Krebs and Percival,[255] which highlights the extent to which the court is prepared to protect normative evaluation in diminished responsibility cases. Defence counsel argued that there was no proper rational evidential basis for rejection of the partial defence, and the case should have exceptionally been withdrawn from the jury.

The Court of Appeal ruling in *Brennan* confirmed that trial judges may withdraw a murder charge on three grounds: no jury, properly directed, could be satisfied that the Crown has proved the relevant offence beyond reasonable doubt; where medical evidence is uncontradicted and no other evidence rebuts the partial defence; and, where 'other evidence' is 'too tenuous or ... insufficient (set in the light of the uncontradicted expert evidence) to permit a rational rejection of the defence'.[256]

Defence counsel's submission was rejected based on the Supreme Court's *obiter* ruling in *Golds* which affirmed that there must be some 'rational evidential basis' for rejecting uncontradicted medical evidence, but a murder charge ought not to be withdrawn 'simply on the basis the medical evidence points one way'.[257] According to the

250 Ibid.
251 *Golds* [2016] UKSC 61 [49].
252 Laird (n 58 above).
253 Gibson (n 4 above) 192-193
254 *Hussain* (n 249 above) and the earlier judgment in *Blackman* (n 202 above).
255 Krebs (n 3 above). See also, Percival (n 3 above) 2-3.
256 *Brennan* (n 57 above) [65].
257 *Hussain* (n 249 above), citing *Golds* (n 251 above) [50].

Court of Appeal, reliance should no longer be placed on any decision pre-dating the *obiter* ruling in *Golds*, including *Brennan*.

At a procedural level, Krebs notes:

> Commentators will be divided as to whether this development is deeply concerning (from a procedural propriety, rule of law and separation of powers perspective) or to be welcomed (as a means of keeping the common law tidy and updated, when legal aid cuts might prevent cases that raise the issue directly from making it to the appellate courts).[258]

At a practical level, the judgment highlights the importance of the normative evaluation of juries and the extent to which the Court of Appeal will protect the role of jurors in diminished responsibility determinations.[259] *Golds* and *Hussain* also imply that any potential engagement in a benign conspiracy with experts regarding the application of the partial defence is secondary to maintaining the primacy of the role of jurors in making the ultimate determination.

Substantial impairment

The ultimate issue in diminished responsibility is whether the defendant's abnormality substantially impaired their responsibility (formerly) or their ability to: understand the nature of D's conduct; and/or, form a rational judgment;[260] and/or exercise self-control (latterly).[261] As confirmed in *Conroy*,[262] the 'ultimate issue' remains one for the jury. The Supreme Court, in *Golds* (E&W) explained that 'substantial impairment' means 'an impairment of consequence or weight … and not any impairment which is greater than merely trivial'.[263] According to *Golds*:

> the judge need not direct the jury beyond the terms of the statute and should not attempt to define the meaning of 'substantially.' Jurors are expected to understand the term is an ordinary English word, that it imports a question of degree, and that whether in the case before it

258 Krebs (n 3 above).

259 Mackay (n 8 above).

260 The term has been described as 'a considered decision based on reason'; *Conroy* (n 56 above) [27]. The example posited in *Conroy* is as follows: 'There may be cases where an entirely "irrational" decision may be taken: for example, to kill one's neighbour because of a fixed belief that he is an alien from Mars intent on blowing up innocent people in the village. But that decision and the motivation for it may then be accompanied, in terms of giving effect to the decision, by ostensibly logical and rational decisions with a view to carrying out the intended killing: for example by buying a knife, by waiting for the neighbour to be at home alone and so on.' [30]

261 HA 1957 (as amended Coroners and Justice Act 2009, s 52) s 2(1) (1A).

262 *Conroy* (n 56 above) [6].

263 *Golds* (n 251 above) [29].

> the impairment can properly be described as substantial is for it to resolve.[264]

A similar approach applies in NSW. In *Antaky*, it was stated that:[265]

> Some impairment may be gross, some may only just fall within the description of 'substantial' so as to warrant the reduction. The presence and relative weight of other factors has also to be taken into account.[266]

Direction in E&W may be provided in cases involving confusion, but no model direction was articulated.[267] In contrast, the NSW Bench Book provides a standard suggested oral direction: '"Impaired" has its ordinary meaning and requires proof of a capacity less or lower than the normal range. "Substantial" also has its ordinary meaning of being of substance and not slight or insignificant.'[268] A standard model in E&W might ensure more consistent application of the provision.

The Court of Appeal appeared to accept a lower threshold test regarding the meaning of the term substantial in the case of *Squelch*:[269]

> 'Substantially' is an ordinary English word on which you will reach a conclusion in this case, based upon your own experience of ordinary life. It means less than total and more than trivial. Where you, the jury, draw the line is a matter for your collective judgment.[270]

The Court of Appeal suggested that the initial trial judge's direction, which pre-dated *Golds*, 'commendably' complied with Lord Hughes' ruling in *Golds* which advocated for no undue elaboration to the term and 'an appreciable impairment' rather than something more than trivial where further guidance is sought.[271]

The trial judge's direction in *Squelch*, however, appears to imply that, depending on the nature of the case, a lower threshold test than that advocated in *Golds* might be applied. The Supreme Court's suggestion in *Golds* that it was 'neither necessary nor appropriate … to mandate a particular form of words in substitution for the language used by Parliament'[272] and may result in jurors applying different threshold tests depending upon whether additional elucidation is provided or not, and in cases where it is, based upon the nature of the

---

264 Ibid [29].
265 [2007] NSWSC 1047.
266 Ibid [35].
267 Ibid [41].
268 Criminal Trial Courts Bench Book, Substantial Impairment by Abnormality of Mind [6.580].
269 [2017] EWCA Crim 204, 1753 WL 86.
270 Ibid [36].
271 *R v Squelch* [2017] EWCA Crim 204 [38].
272 *Golds* (n 251) [40].

language used. A specimen direction, akin to that in the NSW Crown Court Bench Book might have been preferable.

An explanation for the killing

As explained by their Lordships in *Golds*, whilst 'the effect of the changes in the law has certainly been to emphasise the importance of medical evidence, causation (in the context of the partial defence and not in the sense of whether an offence had been committed, as above) is essentially a jury question',[273] as is 'whether the impairment of relevant ability(ies) was substantial'.[274] The final requirement of section 2 HA 1957 (E&W) requires that the abnormality of mental functioning provides an explanation for D's acts or omissions in doing or being a party to the killing. '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.'[275]

In NSW, in contrast, there is no express requirement of establishing a causal connection between the mental health impairment or cognitive impairment and the act or omission causing death. Rather, it must be shown that the impairment was operating or relevant at the time of killing. It should be kept in mind, however, that the final requirement for the defence to succeed is that the jury find that the impairment was sufficient to warrant liability being reduced to manslaughter. It is arguably unlikely that jurors will find in favour of the defence where there is little or no connection between the impairment and commission of the fatal act.

The NSW Bench Book makes clear the value judgement that jurors are required to undertake, in particular they should be reminded to apply 'prevailing community standards', keeping in mind that the 'community places less blame and condemnation upon a person guilty of manslaughter than of murder'.[276] This approach is preferable to the causal requirement in E&W which at best offers little where all other elements of the partial defence are established. At worst, it creates a further hurdle for the defendant in diminished responsibility cases depending upon how it is applied by jurors. The approach in NSW to the distinction between the role of medical experts and jurors would have gone some way in preventing the role confusion that currently operates in the context of the partial defence in E&W.

---

273 Ibid [50].

274 Ibid. For further discussion on the impairment requirements, see Mackay, 'The impairment factors' (n 8 above).

275 HA 1957 (as amended), s 2(1B).

276 Criminal Trial Courts Bench Book (n 268 above) [6.580].

CONCLUSION

In 2010, Mackay queried whether we 'through the back door, not just updated but also made our plea stricter', particularly in the light of the influence of NSW on the reforms combined.[277] The NSW model for substantial impairment by abnormality of mind was driven by a concern to narrow down cases in which the defence can be raised to serious cognitive and mental health conditions. It is perhaps unsurprising, therefore, that the changes to section 2 HA 1957 have made the partial defence more difficult to plead, as in NSW, but unlike NSW have also produced role confusion in the interpretation, operation and application of the partial defence.

A key feature of the NSW model is that the role of the jury is made central to the defence and that there is a clear division of the roles of judge/jury and expert. This centrality is made clear in the ultimate question of whether the impairment was so substantial as to warrant liability for murder being reduced to manslaughter being reserved solely for the jury. For this question, expert evidence is expressly excluded, and therefore there is no confusion about who is to make this decision and on what basis. This is not a medical question it is one of culpability and liability and should be determined by applying community values. It is disappointing that, after being so heavily influenced by section 23A CA 1900, greater consideration was not given to the 'pervasive' question regarding whether the charge ought to be reduced from murder to manslaughter. The explicit direction within the legislation regarding the ambit of the role of the jury and medical experts, respectively, serves to prevent the role confusion that is manifest in the operation of section 2 HA 1957 (E&W), in NSW. Further, it highlights the importance of jurors as moral arbiters in such cases.

Beyond the above observation, there remains some room for improvement in both the E&W and NSW provisions. In respect of the former, the 'recognised medical condition' requirement is beneficial in its flexibility, but greater consideration ought to have been given to the categories of medical condition that are or ought to be excluded from the partial defence. Specific exclusionary clauses pertaining to abnormal states of mental functioning, such as intoxication, ought to be provided. Deserving conditions/circumstances that do not, *prima facie*, fall within diminished responsibility without its definitional elements being stretched, such as, mercy killing and developmental immaturity, ought to be reviewed and alternative diversionary/defence models considered, as appropriate. Clear judicial guidance should be provided on how jurors should be directed in relation to 'substantial impairment' with such provision being utilised consistently in each

277 Mackay (n 2 above) 19.

case. The causal mandate should be repudiated on the basis that it offers very little in respect of the partial defence, particularly where all remaining defence elements are established. Finally, a specific clause stipulating that medical experts should not comment on the ultimate issue, which is a jury determination, ought to be provided.

In respect of NSW, the fact that a substantial proportion of cases proceed on the basis of trial by judge alone or by negotiated plea somewhat undermines the aim of making the jury as representatives of the community central to determinations of liability. However, requiring that the prosecution consider community values inherent in the requirement of section 23A mitigates this concern somewhat. Further guidance could be provided in respect of how the Prosecutor should manage this assessment. Replacing the term 'abnormality of mind' with 'cognitive impairment or mental health impairment' and including a definition of mental impairment as recommended should also improve the clarity about what sort of impairments are sufficient to found the defence. Nevertheless, this approach is not without its problems. Whilst the exclusion introduced by the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) on substance abuse/use disorders (including addiction) aligns with the NSW Law Reform Commission's aim to restrict the partial defence, it remains fundamentally at odds with medical and emerging legal understanding of addiction (dependence syndromes) and how they ought to be treated in the context of mental condition defences.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 363–388
Article DOI: 10.53386/nilq.v72i2.884

Rationales: rejected, imagined and real – provocation, loss of control and extreme mental or emotional disturbance

Vera Bergelson*

Rutgers Law School, Rutgers University
Correspondence email: verber@law.rutgers.edu

ABSTRACT

What makes intentional killing under provocation less reprehensible than murder? The answer to this question determines the rationale for the law; and the choice of the primary rationale – justificatory or excusatory – determines the scope and fundamental features of the partial defence.

In this article, I attempt to parse through two reforms – one promulgated by the Model Penal Code (MPC), the other by the Law Commission for England and Wales – and compare their versions of the defence both to each other and to the 'loss of self-control' defence of the Coroners and Justice Act 2009 in the hope of determining and appraising the governing rationales for each version of the defence. I conclude that the largely justificatory defence of provocation developed by the Law Commission (and to a lesser degree the 'loss of self-control' defence) is legally and morally preferable to the largely excusatory defence proposed by the MPC.

Keywords: justification; excuse; provocation; loss of self-control; extreme mental or emotional disturbance; manslaughter; partial defence.

INTRODUCTION

The major revisions of the law of homicide proposed by the Law Commission for England and Wales (the Law Commission)[1] were a response to the perceived inadequacy and injustice of the traditional law and its application. By the time of the launch of the reform, the partial defence of provocation had expanded greatly since it first entered

* Distinguished Professor of Law, Robert E Knowlton Scholar, Rutgers Law School. I am grateful to my research assistant Andrew Hoy for his outstanding research and editorial help.

1 The Law Commission was set up by s 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

the statute books in the Homicide Act 1957 (the 1957 Act).[2] The Law Commission, in a series or Consultation Papers,[3] commented that the law of provocation no longer had clear boundaries or moral basis;[4] that courts were in disagreement about the scope of the defence; and that legal scholars were highly critical of the defence's logic and moral foundation.[5] These developments have made it necessary to rethink the very essence of the defence.

The most fundamental question the Law Commission had to address involved the rationale for the defence: what makes intentional killing under provocation less reprehensible than murder?[6] Is it the lesser wrongfulness of the provoked killing or the lesser culpability of the provoked killer? If the answer is the former, then provocation is a partial justification; if the latter, it is a partial excuse. In the words of the Law Commission,

> The essence of the justificatory basis is that a killing should be regarded as morally less reprehensible than murder where the victim carries responsibility for making the defendant lose his or her temper. The essence of the excusatory basis is that the killing should be regarded as morally less reprehensible than murder where (with or without any blameworthiness on the part of the victim) the defendant was in such a state as not to be able to exercise self-control and therefore not fully responsible for his or her actions.[7]

In its search for the correct rationale, the Law Commission has turned to various sources, including one of the most influential doctrinal projects in criminal law, the Model Penal Code (MPC). The MPC experience was particularly valuable to the Law Commission not only because the MPC drafters in their rethinking of the defence of provocation had dealt with essentially the same issues as the Law Commission half-a-century

---

2 The Act, at s 3, reads: '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.'

3 Law Commission, *Partial Defences to Murder* (Law Com No 173, 2003) 11; Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004); Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006).

4 Law Com No 173 (n 3 above) para 1.52; Law Com No 304 (n 3 above) para 1.46 ('the scope of the defence has become unclear'); Law Com No 290 (n 3 above) para 3.21 ('The rationale underlying the defence of provocation is elusive').

5 Law Com No 173 (n 3 above) para 1.21: quoting Lord Hoffman that 'it is impossible to read even a selection of the extensive modern literature on provocation without coming to the conclusion that the concept has serious logical and moral flaws'.

6 Ibid para 12.5.

7 Law Com No 173 (n 3 above) para 12.6.

later, but also because the legislative changes resulting from the MPC reform and their judicial application have revealed the strengths and weaknesses of the MPC choices.

After a profound consideration of the MPC version of provocation conceptualised as the actor's 'extreme mental or emotional disturbance' (EMED), the Law Commission has rejected it.[8] Instead, the Law Commission proposed to frame provocation as a partial defence to a killing committed in response to either gross provocation which caused the defendant to have a justifiable sense of being seriously wronged or fear of serious violence (or both).[9]

The law, as enacted by the Coroners and Justice Act 2009,[10] differed from the Law Commission's proposal in that it replaced the defence of provocation with the defence of 'loss of control' in the circumstances very similar to those recommended by the Law Commission for the defence of provocation but, as the name of the defence suggests, retained the requirement of loss of self-control rejected by the Law Commission.[11]

The three approaches – the MPC, the Law Commission's and the 'loss of control' defence of the Coroners and Justice Act 2009 (the latter two, together, the 'UK Reform') – represent different doctrinal visions of the defence. While all three possess some elements of the excusatory and the justificatory rationales, the different balance of these elements makes the meanings of these defences dramatically different.

In this article, I parse through the defences envisioned by the MPC and the Law Commission and compare them to each other and to the Coroners and Justice Act 2009 with the purpose of determining and appraising the governing rationales for each version of the defence – provocation, EMED and loss of control. The comparative analysis serves three main goals: it helps to reveal the moral, logical and structural strengths and weaknesses of the different versions of the defence; it highlights the strong intrinsic presence of the justificatory

8 Law Com No 290 (n 3 above) para 3.59: 'We would not recommend importing a defence based on EMED. We think that it is too vague and indiscriminate.'

9 Law Com No 304 (n 3 above) para 5.11.

10 Coroners and Justice Act 2009, s 54.

11 The Coroners and Justice Act 2009 uses both terms, 'loss of control' and 'loss of self-control', without defining either. See eg Tony Storey, 'Court of Appeal: "sufficient evidence" (again) *R v Gurpinar; R v Kojo-Smith* [2015] EWCA Crim 178, Court of Appeal' (2015) 79 Journal of Criminal Law 154: 'The phrase [loss of self-control] appears in the CJA 2009 on seven occasions (in s. 54(1)(a) and (b), s, 55(2), (3), (4), (5) and (6)), and the phrase "loss of control" also appears (in s. 54(2)).' Neither 'loss of self-control' nor 'loss of control' is defined anywhere in the legislation. In this article, 'loss of control' is used to refer to the name, while 'loss of self-control' is used to refer to the meaning, of this partial defence in the Coroners and Justice Act 2009.

component in the defence; and it contributes to the critical assessment of the attempts to reform the defence of provocation in Anglo-American jurisprudence.

WHY DOES THE RATIONALE MATTER?

Let's begin with an underlying question: why does it matter what should be the rationale for the defence? Whether defined as a partial justification or partial excuse, it does the same job: reduces the highest form of homicide to a lower one.[12] Why shall we spend any time determining the moral meaning of each version of the defence?[13] Here is why.

Political reasons

The reason for exculpation matters because criminal law closely follows societal normative judgments. A criminal sentence is a condemnation of a wrongful act and of the actor who committed the act. Conversely, a criminal defence supplies a conclusive reason for foregoing such condemnation. Just as the court owes an explanation to defendants as to *why* they deserve punishment, it also owes explanation to society as to *why* it should not punish a particular defendant despite the fact that the defendant overstepped a valid criminal prohibition. If this explanation goes against the public perceptions of right and wrong often enough, the authority of the criminal law and the criminal justice system is likely to suffer.[14] If this explanation is unclear, the meaning of the law becomes unclear too. In its Consultation Paper No 290, the Law Commission has acknowledged that one of the major criticisms it has received with respect to the earlier Consultation Paper No 173 was that the 'provisional conclusions failed adequately to explain the *rationale underlying [the] proposed approach*.'[15]

---

12 Under the Law Commission's proposal, the defence would reduce first degree murder to second degree: Law Com No 290 (n 3 above) para 1.13. Under the MPC and the Coroners and Justice Act 2009, the mitigation is from murder to manslaughter. Model Penal Code, s 210.3(1)(b); Coroners and Justice Act 2009, 54(7).

13 See eg Gabriel J Chin, 'Unjustified: the practical irrelevance of the justification/excuse distinction' (2009) 43 University of Michigan Journal of Law Reform 79.

14 Paul Robinson and John Darley, 'The utility of desert' (1997) 91 Northwestern University Law Review 453, 456; Vera Bergelson, 'Victims and perpetrators: an argument for comparative liability in criminal law' (2005) Buffalo Criminal Law Review 385, 427–432.

15 Law Com No 290 (n 3 above) para 3.62 (emphasis added).

Moral and communicative reasons

Justifications and excuses provide morally distinguishable rationales for withholding punishment: justifications focus on the wrongfulness of an act; excuses focus on the culpability of the actor. A partial justification renders the act less wrongful, and a partial excuse renders the actor less blameworthy, compared to the actor's culpability in the absence of the mitigating circumstance.[16]

Accordingly, if we reduce murder to manslaughter on the theory of partial excuse, we wholly condemn the defendants' conduct and merely give them a break because of their reduced volitional or cognitive capacity. In contrast, if we reduce the defendants' offence based on the theory of partial justification, we treat them as fully responsible agents and acknowledge that what they did was to some extent right or at least not entirely wrong because there were adequate reasons that caused them to behave in a certain, normally reprehensible, way.

The message addressed to the defendant and the public at large is important. Consider, for instance, killings committed by battered spouses in non-confrontational settings. If such a killing is to be manslaughter rather than murder, would the reason for the mitigation not say a lot about that society's values, biases and power dynamics? In early cases of this kind, women often relied on the 'battered wives' syndrome and pleaded an excuse based on their cognitive or volitional abnormality. Even when this strategy was successful, its success came at a price: to avoid the pain and stigma of harsh punishment, the woman had to embrace 'another kind of stigma and pain: she [had to] advance an interpretation of her own activity that label[led] it the irrational product of a mental health disorder'.[17] A completely different message is sent by a law, under which evidence of systematic abuse can be used to 'establish the gravity of the wrongdoing and the *justifiable* sense of being seriously wronged which would have been experienced by *any person of normal tolerance and self-restraint*.'[18]

Coherence and consistency

Identifying the proper reason for exculpation is important for the inherent coherence of the defence and its consistency with other defences and the fundamental principles of criminal law. For example, if the provoked killing is deemed morally less reprehensible than murder because 'the defendant was in such a state as not to be able

16 Douglas N Husak, 'Partial defenses' (1998) 11 Canada Journal of Law and Jurisprudence 167, 170.

17 Anne M Coughlin, 'Excusing women' (1994) 88 California Law Review 1, 7.

18 Alan Norrie, 'The Coroners and Justice Act 2009 – partial defences to murder (1) loss of control' [2010] Criminal Law Review 275, 286 (emphasis added).

to exercise self-control and therefore not fully responsible for his or her actions',[19] then it is not clear why the same logic is not applied to coerced killings committed under duress or any killings committed under the influence of intoxication.

Scope and boundaries

Finally, the moral basis for the defence determines its scope and boundaries. As the Law Commission has acknowledged, if the moral basis for provocation is justificatory, the scope of the defence would be limited, and the 'focus would be on the wrongful conduct of the victim which, by provoking the defendant, "justified" the defendant's outburst which led to the killing'.[20] On the other hand, if the moral basis for the defence is excusatory, the defendant would be able to claim it regardless of the source of the defendant's loss of self-control. As a result, 'the ambit of the defence would be much broader'.[21]

Now, keeping in mind these reasons, let us consider the versions of the partial defence of provocation envisioned by the drafters of the MPC in the middle of the twentieth century in the United States (US) and the Law Commissioners some 50 years later in the United Kingdom. What was the meaning of each version and what did each choice entail?

THE MPC REVISION OF THE PROVOCATION DEFENCE: EMED AS PARTIAL EXCUSE

By the time of the MPC reform, American states by and large followed the common law version of the defence of provocation, or heat-of-passion, which reduced murder to manslaughter if the defendant killed under the influence of provocation, and that provocation was such as likely to deprive a reasonable person of self-control.[22] Traditionally, the defence was available when the killing happened in response to a few enumerated triggers: (1) an aggravated assault or battery; (2) mutual combat; (3) a serious crime – chiefly violent or sexual assault – committed against a close relative of the defendant; (4) illegal arrest; and (5) sudden discovery of adultery.[23]

In many ways, the law of provocation pre-dating the MPC reform in the US was similar to its equivalent in the 1957 Act. Conceptually, it was based on the philosophy of retributivism, and it combined elements

19 Law Com No 173 (n 3 above) para 12.6.
20 Law Com No 290 (n 3 above) para 12.17.
21 Ibid para 12.18.
22 See MPC, s 210.3, cmt S(a).
23 Ibid.

of partial justification and partial excuse.[24] The MPC rejected that law and provided an alternative theory of provocation:

> Criminal homicide constitutes manslaughter when . . . a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.[25]

The MPC has made two significant changes to the prevailing law. Firstly, it removed all common law obstacles to the use of the defence. Under the MPC, there are no limitations involving the source of provocation (human or other); the form of provocation (eg words); the identity of the victim; the defendant's fault in being the initial provoker; the cooling-off time etc. As long as the defendant acted 'under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse', he was entitled to mitigation from murder to manslaughter.

And, secondly, the MPC has introduced a 'potentially radical subjectivity'[26] into the determination of reasonableness of such explanation or excuse. This determination is to be made from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. Such individual circumstances as 'blindness, shock from traumatic injury, and extreme grief are all easily read into the term "situation"'.[27] Besides, even more idiosyncratic features, such as 'exceptionally punctilious sense of personal honor or an abnormally fearful temperament' may also not be 'wholly irrelevant to the ultimate issue of culpability'.[28]

Consider an example of a case decided under the law modelled after the MPC.[29] In *People v Sepe*,[30] the defendant was convicted of second degree murder for beating his girlfriend to death with a baseball bat after she refused to cancel a large family dinner. At trial, the defendant

---

24 Vera Bergelson, 'Justification or excuse? Exploring the meaning of provocation' (2009) 42 Texas Tech Law Review 307.

25 MPC, s 210.3(1)(b).

26 Sanford Kadish, 'The Model Penal Code's provocation proposal and its reception in the state legislatures and courts of the United States of America, with comments relating to the partial defenses of diminished responsibility and imperfect self defense' in Law Com No 290 (n 3 above) appendix F, 272.

27 MPC, s 210, cmt at 62.

28 Ibid.

29 New York is among five states (along with Arizona, Arkansas, Connecticut and Kentucky) that adopted the MPC provocation provision almost verbatim, replacing, however, the EMED requirement with 'extreme emotional disturbance' (EED). See Kadish (n 26 above).

30 111 AD 3d 75 (NY 2013).

relied on the affirmative defence of extreme emotional disturbance (EED) and presented evidence of long-term depression and anxiety related to financial setbacks to his business as well as the upcoming Easter family dinner. The defendant maintained that he had reached his breaking point and lost control of his actions when his girlfriend had rebuffed his suggestion that they cancel the planned gathering.[31]

The appellate court overruled the jury verdict, reversed the defendant's conviction of murder in the second degree, and reduced it to manslaughter. The court concluded that, based on the weight of the credible evidence, the jury was not justified in concluding that the defendant was not acting under the influence of an EED for which there was a reasonable explanation when he attacked and killed his girlfriend.[32] According to the court, both prongs of the defence were satisfied: the defendant in fact acted under extreme emotional disturbance; and, from the defendant's perspective, there was a reasonable explanation for that disturbance. As proof of the first prong, the court cited the following facts:

> With respect to the subjective element, the evidence overwhelmingly demonstrates that the defendant, who was in a fragile mental state, was actually influenced by an extreme emotional disturbance when he attacked Carlucci, with whom he had previously shared a loving relationship. The defendant's assault upon Carlucci was unquestionably brutal, with the defendant striking her repeatedly with an aluminum baseball bat to a point beyond redundancy … Carlucci was struck a minimum of 18 times, with enough force to cut her fingertip off, fracture her entire skull, and leave her brain matter entirely eviscerated from her skull. Most of her injuries occurred as the defendant continued to strike her while she was already on the ground. In our opinion, as described by the forensic experts, the attack was nothing short of a barbaric frenzy, and thus indicative of the defendant's loss of self-control.[33]

> The defendant's conduct in the aftermath of the homicide supports the conclusion that he was overtaken by an extreme emotional disturbance when he attacked Carlucci. [T]he defendant made no real effort to conceal his actions, leaving the murder weapon beside Carlucci's body, and leaving physical evidence connecting him to the crime throughout the house. The defendant made no effort to evade capture.[34]

For the second prong, the court called attention to the defendant's history of depression and anxiety; it observed that, in the six months preceding the incident, multiple stressful events had caused the

31 Ibid 76–77.
32 Ibid 92.
33 Ibid 88.
34 Ibid 89.

defendant's condition to deteriorate and resulted in significant mental trauma and sleep deprivation.[35] The court concluded:

> This defendant's unique feeling … of overwhelming pressure of 'all [his] problems, all [his] stuff,' was compounded by the pressure of having to host 'all these people,' his fear that he couldn't 'talk to all these people' when he 'couldn't talk to one,' and then, albeit innocently, by being asked by his loving companion if he was 'crazy.' We are of the opinion that this defendant did in fact act under an extreme and uncontrived emotional disturbance, for which there was a reasonable explanation.[36]

The *Sepe* decision demonstrates the dramatic difference between the MPC and the UK Reform versions of provocation. What was a successful defence under the MPC would be unthinkable under the UK Reform for several reasons. First, under the Law Commission's proposal, the defendant has to act under the 'gross provocation' resulting in 'a justifiable sense of being seriously wronged'.[37] Similarly, under the Coroners and Justice Act 2009, the defendant's loss of self-control has to be attributable to acts or words which 'constituted circumstances of extremely grave character' and caused the defendant to have 'a justifiable sense of being seriously wronged'.[38] Furthermore, under the UK Reform, the defendant's reaction to the provocation has to be evaluated from the perspective of a man of the defendant's age and ordinary tolerance and self-restraint.[39]

In *Sepe*, the victim's refusal to cancel a family dinner party clearly does not rise to the level of a 'serious wrong', not only because of the trivial reason for the quarrel but also because the victim acted within her rights and did not violate any rights of the defendant (or anyone else). Additionally, the defendant's depression, stress and anxiety may not be taken into account as a qualifying trigger under the UK Reform. Under both the Law Commission's proposal and the Coroners and Justice Act 2009, the trigger must be something *said or done* to the defendant and not just the defendant's personal emotional state.[40]

35 Ibid 90.

36 Ibid 91.

37 See Law Com No 304 (n 3 above) para 5.11.

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

39 Law Com No 304 (n 3 above) paras 5.33–5.46. The Consultation Paper explains that individuals incapable of normal self-restraint due to a 'recognized medical condition' should invoke the defence of diminished responsibility instead. Ibid. 5.42 and 86 (fn 35); Coroners and Justice Act 2009, s 54 (1)(c) (the defence is available only if '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').

40 See Law Com No 304 (n 3 above) para 5.11 (requiring 'words or conduct or a combination of words and conduct') and Coroners and Justice Act 2009, s 55(4) (requiring that 'D's loss of self-control [be] attributable to a thing or things done or said (or both)').

The two different outcomes – under the MPC and the UK Reform – are a function of two different models of the defence of provocation. The MPC's model is firmly grounded in the rationale of *excuse*,[41] although it would be simplification to say that it lacks *any* elements of justification. Despite the rather extreme subjectivity of its 'reasonable person' test, the EMED defence in the end requires the jury to evaluate the defendant's condition objectively.[42] Objective reasonableness is an element of justification, not excuse (it would be silly to talk about a 'reasonably insane' or 'reasonably intoxicated' person). However, on the whole, the balance of the excusatory and justificatory elements in the MPC version of provocation is heavily skewed in favour of excuse, which is not surprising considering the overarching utilitarian philosophy of the MPC with its main objective 'to deter criminal conduct and, in the event this failed, to diagnose the correctional and incapacitative needs of each offender'.[43] Focused primarily on pragmatic goals, the MPC drafters understood the defence of provocation as 'a concession to human weakness and perhaps to non-deterrability'.[44]

One strong example of the excusatory meaning of provocation under the MPC is the MPC's rejection of the doctrine of 'misdirected retaliation' which denies mitigation from murder to manslaughter in cases in which the victim did nothing to provoke the attack.[45] The MPC commentary explains that the perpetrator's emotional distress does not have to arise from some 'injury, affront, or other provocative act' attributable to the deceased. Anyone or anything can bring about the defendant's EMED. A person in the condition of EMED is not as deterrable as a rational agent to whom the law directs its commands;

41 Law Com No 290 (n 3 above) para 3.51: 'The defence is rooted in the excuse based category of defences, founded on the defendant's state of mind (whatever may have caused it).'

42 MPC, s 210.3, cmt 3 at 50: 'The ultimate test, however, is objective; there must be "reasonable" explanation or excuse for the actor's disturbance.'

43 Paul H Robinson and Markus D Dubber, 'The American Model Penal Code: a brief overview' (2007) 10 New Criminal Law Review 319, 325. Yet, it has been pointed out that Herbert Wechsler, the primary author of the MPC reform, despite his own utilitarianism, was mindful that 'no criminal code should drift too radically from the public's sense of wrongful behavior and of degrees of wrongdoing'. See Kent Greenawalt, 'A few reflections on the Model Penal Code commentaries' (2003) 1 Ohio State Journal of Criminal Law 241, 241.

44 MPC, s 210.3, cmt 5(a) at 55.

45 Compare Rollin M Perkins, *Perkins on Criminal Law* 2nd edn (Foundation Press 1969) 69: if 'one who has received adequate provocation is so enraged that he intentionally vents his wrath upon an innocent bystander, causing his death, he will be guilty of murder'; and MPC, s 210.3 cmt 5(a): 'By eliminating any reference to provocation in the ordinary sense of improper conduct by the deceased, the MPC avoids arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter.'

thus it would be pointless and wasteful to spend the full amount of the judicial and correctional resources on such an offender.

For illustration, consider *People v Spurlin*, in which the defendant killed his wife after an intense argument over their mutual infidelities and then killed their sleeping nine-year-old son.[46] At trial, the judge gave the jury the 'provocation' instruction for the killing of the defendant's wife but refused to give it for the killing of the child. Was the judge wrong? Under the MPC rule, he certainly would have been. A commentary to the MPC explicitly says that mitigation may be appropriate where the actor 'strikes out in a blinding rage and kills an innocent bystander'.[47]

From the perspective of the excusatory rationale, the MPC position is fully warranted, and, had the case been tried in an MPC jurisdiction, the *Spurlin* defendant should have been allowed to plead the defence. Indeed, what can prove his EMED better than a deadly attack directed at an innocent child? And since the judge found sufficient evidence of a 'reasonable explanation or excuse' for the defendant's condition to issue the EMED instruction in the wife's case, logically, the same instruction should have been given in the child's case too. Moreover, had the defendant killed a few more people – his baby daughter, his neighbours, the paramedics, and the police officers who arrived at the scene of the crime – he should have been entitled to the same jury instruction for all these killings. Under the excusatory rationale, it does not matter how many innocent lives the defendant takes. If the reason for the defence is the killer's inability to control his rage, the defence should apply to everyone killed in that rage: 'Once an accused loses his self-control it is unreal to insist that his retaliatory acts be directed only against his provoker. When his reason has been dethroned a man cannot be expected … "to guide his anger with judgment".'[48]

The MPC position with respect to EMED is fully consistent with its position with respect to other defences. In the largely utilitarian universe of the MPC, killing an innocent is not forbidden. In fact, under the choice-of-evils defence,[49] such killing is *not even wrongful*, provided it has averted killings of more people. A commentary to the MPC explains: 'The life of every individual must be taken in such a case

46 *People v Spurlin*, 202 Cal Rptr 663, 665 (Ct App 1984). See also *People v Verdugo*, 236 P 3d 1035, 1061 (Cal 2010), holding that '[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim'.

47 MPC, s 210.3, cmt 5 at 61.

48 R S O'Regan, 'Indirect provocation and misdirected retaliation' [1968] Criminal Law Review 319, 323.

49 MPC, s 3.02.

to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act.'[50] Similarly, any mass atrocity is excusable under the MPC if the perpetrator was coerced to commit it by the use or threat of violence which a person of reasonable firmness in his situation would have been unable to resist.[51]

The EMED provision has not been particularly influential among states. Of the 34 jurisdictions that revised their criminal codes in the post-MPC era, only five have enacted EED defences matching the EMED[52] and only a dozen more adopted some features of the EMED, but with significant changes.[53] The MPC position on misdirected retaliation has proven to be even more problematic. At least one-half of American jurisdictions explicitly allow the defence only when the homicide is a result of the victim's provocation,[54] but there may be more such jurisdictions (including those describing provocation in the EED terms).[55] In *Spurlin*, for instance, the court admitted that the California Penal Code is silent on the source of provocation.[56] Nonetheless, citing common law principles and interpretations of those principles adopted by several other jurisdictions, the court concluded that, for the provocation defence to be available, 'the deceased must be the source of the defendant's rage or passion'.[57]

The moderate success of the MPC in this area of law is understandable. The significant expansion of the defence promulgated by the MPC would inevitably lead to the outcomes that are inconsistent with the prevailing moral and legal norms. After all, in the Anglo-American legal tradition, intentional killing of an innocent non-aggressor is an absolute

50 Ibid s 3.02, cmt 3 at 15.

51 Ibid s 2.09.

52 Kadish (n 26 above) 272.

53 The changes included adding the requirement of a provocative act and rejecting the 'actor's situation' language in favour of the general 'reasonableness' standard: Kadish (n 26 above) 272.

54 See Bergelson (n 24) 311–312, fn 30: some states allow mitigation, in addition, if the person killed was mistaken for the provoker or associated with the provoker.

55 See eg *State v Stewart*, 624 NW 2d 585, 590–591 (Minn 2001). The state statute was based on the MPC. However, the court noted that 'a heat of passion that provokes an assailant to kill the provocateur will not necessarily satisfy the subjective or objective elements of heat-of-passion manslaughter as to other victims' and concluded that the situation at bar was such a case. Ibid.

56 *People v Spurlin*, 202 Cal Rptr 663 (Ct App 1984).

57 Ibid.

taboo.[58] In the famous case of *Regina v Dudley and Stephens,* two starving men, after many days in a lifeboat without food, killed a boy to save their lives by feeding on his flesh.[59] At trial for murder, they raised necessity as their defence. Despite the empathy for 'how terrible the temptation was; how awful the suffering', the court found them guilty of murder saying that there was no defence to taking the life of an innocent unoffending person.[60] The *Dudley and Stephens* holding is still good law on both sides of the Atlantic. Similarly, in the vast majority of common law jurisdictions, duress does not exonerate[61] or even mitigate[62] the intentional killing of an innocent. Nor are people justified in defending themselves against a deadly attack if, while doing so, they have to kill not only the offender but also an innocent bystander.[63] These legal rules are inherently interconnected as they are rooted in the same deontological principle that forbids certain harmful, exploitive and demeaning acts regardless of their beneficial consequences.[64]

In sum, the defence of EMED is predominantly grounded in the excusatory rationale. In the closed universe of the MPC, this defence is doctrinally consistent with the general MPC goals and structure. However, in a broader moral and legal universe, the defence of EMED is in conflict with important values and principles governing Anglo-American criminal jurisprudence.

THE UK REFORM: PARTIAL JUSTIFICATION OR PARTIAL EXCUSE?

In contrast to the largely utilitarian philosophy of the MPC, the UK Reform has put individual *blameworthiness* in the foundation of

58 The closest a common law court has ever come to breaking this taboo is *Re A (Children)* [2001] Fam 147, in which an English court authorised surgical separation of two conjoined twins which was likely to save the life of one twin but practically certain to kill the other. The case has inspired a lot of soul-searching and debate regarding the role of courts in resolving complicated moral dilemmas. See eg John Fitzpatrick, 'Jodie and Mary: whose choice was it anyway?' (*Spiked Liberties*, 19 June 2001).

59 *R v Dudley* [1884] 14 QBD 273, 273–274, reprinted in (1881–1885] All ER Rep 61.

60 Ibid.

61 *American Jurisprudence* 2nd edn (2020) vol 40, s 107: 'It is generally held that neither duress, coercion, nor compulsion are defenses to murder.'

62 Ibid, stating that duress does not mitigate murder to manslaughter.

63 See eg Larry Alexander, 'Propter honoris respectum: a unified excuse or preemptive self protection' (1999) 74 Notre Dame Law Review 1475, 1482, noting that the law will not allow one to employ deadly force to save himself if doing so will cause the death of an innocent third party.

64 See Larry Alexander, 'Deontological ethics' (*Stanford Encyclopedia of Philosophy*, 17 October 2016).

the defence of provocation. Rejecting the MPC approach, the Law Commission explained:

> We favour as the moral basis for retaining a defence of provocation that the defendant had legitimate ground to feel seriously wronged by the person at whom his or her conduct was aimed, and that this lessened the moral culpability of the defendant reacting to that outrage in the way that he or she did.[65]

This explanation strongly indicates preference for the justificatory rationale for the defence. To see that, compare this excerpt with another one, quoted at the beginning of this article, in which the Law Commission explains to its consultees the meaning of the justificatory rationale: 'The essence of the justificatory basis is that a killing should be regarded as morally less reprehensible than murder where the victim carries responsibility for making the defendant lose his or her temper.'[66]

The two quotes are almost identical, and yet, the Law Commission has shied away from admitting its reliance on the justificatory rationale for the proposed defence, saying instead: 'It is the justification of the sense of outrage which provides a partial excuse for their responsive conduct.'[67] This message is uncomfortably confusing: why would a *justification* provide an *excuse*? The two categories – justification and excuse – traditionally have been viewed as mutually exclusive: 'a defendant cannot both be excused and justified because an excused action presupposes that the action was wrong and therefore unjustified'.[68]

It is possible that, in identifying the nature of the defence of provocation, the Law Commission has relied on the views of Victoria Nourse[69] whose work it cites extensively. Nourse has argued that we must distinguish between acts (which may be wrong, unjustified) and emotions (which may be warranted and justified).[70] For example, 'we may easily say that passionate killings are not justified even if we believe that the emotions causing some killings are, in some sense, the "right" emotion'.[71]

---

65 Law Com No 290 (n 3 above) para 3.59.

66 Law Com No 173 (n 3 above) para 12.6.

67 Law Com No 290 (n 3 above) para 3.59.

68 Victoria Nourse, 'Passion's progress: model law reform and the provocation defense' (1997) 106 Yale Law Journal 1331, 1394.

69 Law Com No 290 (n 3 above) paras 3.52 and 3.59, favourably quoting Nourse's view that provocation provides 'a partial excuse (but not a justification) for the defendant's over-reactive response' and almost verbatim repeating same view in the Law Commission's recommendations.

70 Ibid.

71 Ibid.

I agree that we should distinguish acts and emotions; I doubt, however, that this distinction has the normative force Nourse has envisioned. If the passionate killing is merely excused, then what matters is the magnitude of the defendant's cognitive or volitional impairment, not whether the defendant's emotions are 'justified'. Moreover, it is less than clear how the concept of justifiability should apply to human emotions – and to *what* emotions, because it is necessary to differentiate between the immediate emotional response (eg anger), which is essentially uncontrollable and thus cannot be either justified or unjustified, and the consequences of this emotional response, such as loss of self-control. Only the latter is an element of the defence of provocation.[72] But one's loss of self-control is a poor candidate for justification either. As Richard Holton and Stephen Shute have persuasively argued,

> Either one thinks of [loss of one's self-control] as something that one does, in which case it is surely not justified. Or one thinks of it as something that just happens to one, in which case talk of it being either justified or unjustified is inappropriate (as one is neither justified, nor unjustified, in sneezing). And this surely entails that if the truth is somewhere between the two models – if losing one's self-control is something that happens to one, but that one could, with sufficient effort, resist – then we should not think that it is ever justified.[73]

Furthermore, the loss of self-control may be produced by an emotion that is not 'right' or 'justified' in any way (eg anger or jealousy based on a mistaken perception of facts). Think of Othello and Desdemona. If the defence of provocation were only a (partial) excuse, then Othello should be entitled to it – as in fact, he would be under the MPC. In contrast, the Law Commission has emphatically denied Othello any mitigation and concluded instead that he should be 'guilty of murder, even if Iago's insinuations had been true'.[74] This is not an excusatory conclusion, and it shows that (with or without Nourse's influence) the Law Commission may have mischaracterised its proposed defence.

The Law Commission's struggle with explaining the rationale for provocation goes through the entire project.[75] On the one hand, the Law Commission sees this rationale in the lessened moral culpability of the defendant due to the wrongdoing committed by the provoker;

72 Richard Holton and Stephen Shute (2007) 'Self-control in the modern provocation defence' 27(1) Oxford Journal of Legal Studies 49, 70–71.

73 Ibid 70.

74 Law Com No 290 (n 3 above) para 3.145.

75 One possible explanation for this lack of clarity is an intentional ambiguity chosen by the Law Commission in view of the divided responses of the consultees regarding the proper rationale for the defence. In addition, 'a good number of respondents were unhappy with [the Law Commission's] use of the labels justificatory and excusatory.' See Law Com No 290 (n 3 above) para 3.23.

on the other, it suggests that 'provocation' may be a misleading name for the defence because it 'implies blameworthiness on the part of the provoker'.[76] On the one hand, it underscores the elements typical for justifications (recall the Law Commission's position regarding Othello's killing of Desdemona); on the other, in those rare instances in which it refers to the defence by name, the Law Commission calls it a partial excuse.[77]

The view of provocation as a partial excuse certainly has a long history. At the time of the 1957 Act, 'there was theoretically an excusatory rationale of sorts, namely that the defendant had suddenly and temporarily lost his or her self-control as a result of provocation which might have caused a reasonable person to do the same'.[78] However, as the Law Commission acknowledged, 'this rationale did not bear too close scrutiny'.[79]

The excusatory explanation of provocation has also long dominated academic discourse.[80] The adherents of this view have argued that society puts too high a value on human life to justify, even partially, an intentional killing of a mere wrongdoer.[81] This explanation, however, is not entirely compelling. The law often takes the decedent's wrongful or harmful acts into account in reducing or eliminating the killer's punishment: the law of self-defence fully justifies killing of aggressors, even 'innocent aggressors'; assisted suicide is treated as a lesser offence than murder; the victim's consent to, or participation in, the homicide

76 Law Com No 173, para 12.18.

77 See eg Law Com No 290 (n 3 above) para 3.59: 'It is the justification of the sense of outrage which provides a partial excuse for their responsive conduct'; see also ibid para 3.63, explaining exclusion of situations when the defendant's response was considered because there are 'strong policy reasons for the law not to treat vendettas as *partial excuses*' (emphasis added).

78 Law Com No 290 (n 3 above) para 3.21.

79 Ibid.

80 See eg Joshua Dressler, 'Provocation, explaining and justifying the defense in partial excuse, loss of self-control terms' in Paul Robinson, Kimberly Ferzan and Stephen Garvey (eds), *Criminal Law Conversations* (Oxford University Press 2009); C Lee, 'Reasonable provocation and self-defence: recognizing the distinction between act reasonableness and emotion reasonableness' in ibid 427; Joshua Dressler, 'Rethinking heat of passion: a defense in search of a rationale' (1982) 73 Journal of Criminal Law and Criminology 421, 442; Markus Dirk Dubber, 'The victim in American penal law: a systematic overview (1999) 3 Buffalo Criminal Law Review 3, 11; Reid Griffith Fontaine, 'Adequate (non) provocation and heat of passion as excuse not justification' (2009) 43 University of Michigan Journal of Law Reform 27.

81 See eg Dressler, Rethinking heat of passion' (n 80) 458; see also Suzanne Uniacke, *Permissible Killing: The Self-Defense Justification of Homicide* (Cambridge University Press 1996) 13, rejecting justificatory rationale of provocation and criticising Dressler for 'conced[ing] too much to the claim that provocation functions as a partial justification'.

is a mitigating factor for the purposes of capital punishment in the majority of the US death penalty jurisdictions.[82] Likewise, the high value assigned to human life should not by itself defeat the justificatory rationale for the defence of provocation.

A different widely shared reason to deny provocation its justificatory rationale lies in the reluctance to 'blame the victim' for the victim's own death. Consider the following argument:

> If provocation were a justification, a provoked act would be the right thing to do in the circumstances, or at least (given that provocation does not completely exonerate) more right than wrong. If provocation were a justification, the law would, in effect, be saying that homicidal violence was right – whether the victim was an abused spouse, a person who made a homosexual advance, or someone who insulted the accused in a bar. Provocation would blame victims. If that were provocation's meaning and effect, it would not belong in our criminal law.[83]

This argument reveals a serious misconception, a belief that a partial justification may be successful only if the harmful conduct is 'the right thing to do in the circumstances' or at least 'more right than wrong'. This is a misconception because those are requirements of a complete, not partial, justification. Unlike complete justification (eg self-defence), partial justification does not make a killing 'right' or acceptable; it merely makes it 'less wrong' compared to what it would have been without provocation. Even with partial justification, the killing remains wrongful and punishable.

Finally, a defence does not have to be based on a single underlying principle. A product of historical tradition, political compromise and changing cultural norms, the law often combines elements of more than one rationale. Provocation unquestionably includes elements of excuse. It is only available to a person who, temporarily, is not capable of acting fully rationally.[84] However, for all the reasons cited above,[85] it is important to acknowledge that excuse is not the only rationale for this defence. Indeed, regardless of the Law Commission's characterisation, the version of the provocation defence advocated by the Law Commission is based predominantly on the justificatory rationale. Its justificatory character is underscored by the following features.

---

82 See Bergelson (n 14 above) 120–121, 153–155.

83 W N Renke, 'Calm like a bomb: an assessment of the partial defence of provocation' (2009–2010) 47 Alta Law Review 729, 750.

84 See Law Com No 304 (n 3 above) para 5.11(3) at 79: the defence is not available to the defendant who 'acted in *considered* desire for revenge' (emphasis added).

85 See above under the heading 'Why does the rationale matter?'.

First and foremost, the Law Commission has eliminated the traditional requirement of *loss of self-control*.[86] Naturally, the defence is not available if the defendant acts in bad faith (inciting provocation for the purpose of killing the provoker) or in 'considered desire for revenge';[87] but in all other circumstances, the defence may be invoked by the killer even in the absence of any cognitive or volitional impairment typical for excuses. This feature alone is a clear indication of a strong justificatory component of the defence.

Secondly, while acknowledging that granting a defence for acting in anger may be ethically problematic, the Law Commission nevertheless concluded that 'a killing in anger produced by serious wrongdoing is ethically less wicked, and therefore deserving of a lesser punishment, than say, a killing out of greed, lust, jealousy or for political reasons'.[88] *Reasons for action* belong to the sphere of wrongdoing, not culpability. To mitigate a wrongdoing, the defendant needs to establish a partial justification; partial excuses mitigate only culpability. Had the Law Commission envisioned the defence as a mere excuse, the reasons for killing would have been immaterial.

Thirdly, the defence is available only for *responsive* actions[89] of the defendant *caused* by some grossly provocative words or conduct. The italicised words emphasise the defendant's reduced responsibility for the ultimate wrongdoing.

As a matter of *causation*, responsive conduct carries little weight and often does not break the chain of causation leaving the original wrongdoer responsible for all the ensuing harm.[90] For example, when a woman, in response to a sexual assault, had taken poison and later died, the court held the defendant guilty not only of the sexual crimes but also of murder.[91] Describing the rule in general, Joshua Dressler has commented: 'This outcome is justifiable. The defendant's initial wrongdoing caused the response. Since he is responsible for the

86 Law Com No 290 (n 3 above) para 3.20: 'The concept of loss of self-control has proved to be very troublesome. The supposed requirement of a sudden and temporary loss of self-control has given rise to serious problems, especially in the "slow burn" type of case.'

87 Law Com No 304 (n 3 above) para 5.11(3) at 79.

88 Law Com No 290 (n 3 above) para 3.38.

89 Law Com No 304 (n 3 above) para 5.11 (1)(a) at 78: 'the defendant acted in response to gross provocation or fear'.

90 H L A Hart and Tony Honore, *Causation in the Law* 2nd edn (Oxford University Press 1985) 149: 'When defendant's conduct causes panic an act done under the influence of panic or extreme fear will not negative causal connection unless the reaction is wholly abnormal.'

91 *Stephenson v State*, 179 NE 633 (In 1932).

presence of the intervening force, the defendant should not escape liability unless the intervening force was bizarre and unforeseeable.'[92]

The Law Commission's proposal explicitly includes the causative element: the defence is available when the grossly provocative words or conduct *caused* the defendant to feel seriously wronged.[93] Naturally, in cases of provocation, the provoker is not the only (or the main) cause of the killing. Using Dressler's words, the provoker is 'responsible for the presence of the intervening force', but the provoker cannot be said to have unilaterally caused the defendant's actions – the defendant is an autonomous human being – thus the defence is only partial.

In addition, reactive actions are *less wrongful* than independent ones. They are less wrongful because the provoker carries partial responsibility for the resulting *harm*. Harm is an element of wrongdoing; not culpability. Only justifications, not excuses, have the power to affect one's wrongdoing. The Law Commission's proposal affords the defence only when the ultimate harm falls on the provoker (not an innocent bystander),[94] in other words, when the defendant is not *solely* responsible for the harm. The resulting mitigation of the defendant's wrongdoing is a clear indication of a partial justification at work.

Furthermore, the Law Commission's proposal explicitly limits the defence to the situations when the defendants acted because they had a *justifiable* sense of being seriously wronged.[95] The justifiability of the sense of being seriously wronged is to be determined by the jury from the objective perspective, in addition to the defendant's subjective perception.[96] Had the defence been only excusatory, it should have been available to any defendant who honestly, albeit unreasonably, felt seriously wronged.

The Law Commission sees the moral basis for the defence in that 'the defendant had a *legitimate* ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed'.[97] As

---

92 Joshua Dressler, *Understanding Criminal Law* 8th edn (Carolina Academic Press 2018) 182.

93 Law Com No 290 (n 3 above) para 3.69 at 46: 'the words or conduct should have caused the defendant to have a sense of being seriously wronged and therefore to react as he or she did'.

94 Ibid para 3.72: 'Except in [cases of mistake or accident], we are satisfied that where D kills V in response to provocation by a third party the objective test would preclude this defence. No person of ordinary tolerance and self-restraint would deliberately respond to provocation from one person by using violence to another.'

95 Law Com No 304 (n 3 above) para 5.11(1)(a)(i) at 78.

96 Law Com No 290 (n 3 above) para 3.70: 'we do not intend the test to be purely subjective, i.e. what the defendant thought'.

97 Ibid para 3.68 (emphasis added).

an example, one consultation paper cites the following hypothetical authored by Jeremy Horder: suppose the defendant holds a strong racist belief that it is a grave offence for a Black person to speak to a White man unless spoken to first, and suppose the defendant became enraged and killed a Black person for speaking to him in this way – is the jury to be directed to take his beliefs into account in judging the gravity of the provocation?[98] Horder demands: 'Would not such a direction be an outrageous compromise of society's commitment to racial tolerance?', and the Law Commission emphatically agrees with Horder.[99] This is important because the evaluation of what is 'a legitimate ground to feel strongly aggrieved' is conducted from the viewpoint of *societal* values, to the full exclusion of the defendant's own viewpoint, which once again strongly supports the justificatory, rather than excusatory, rationale for the Law Commission's defence of provocation.

Fourthly, the Law Commission has expanded the traditional defence of provocation by making it available in response not only to gross provocation but also to 'fear of serious violence toward the defendant or another'.[100] The expansion was dictated by the recognised need to make the defence available to victims of abuse who kill their abusers in non-confrontational circumstances.[101] This new reason behind the defendant's actions has moved the defence closer to the realm of self-defence and defence of others, the ultimate defences of justification. The Law Commission commented on the link between the two defences, saying that, under the proposed rules, the defendant would have a choice between self-defence and provocation: 'If D is not so confident that the jury will find his or her actions to have been *fully justified*, he or she can plead provocation – in the form of a fear of serious violence – instead of or alongside a plea of self-defence.'[102] The very wording hints that the proposed defence of provocation, unlike self-defence, which is a *complete* justification, is merely a *partial* justification, but justification nevertheless.

---

98 Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992) 144.

99 Law Com No 290 (n 3 above) paras 3.70, 3.71: 'Our answer to the question posed in the last sentence is yes. No fair-minded jury, properly directed, could conclude that it was gross provocation for a person of one colour to speak to a person of a different colour. In such a case the proper course would therefore be for the judge to withdraw provocation from the jury.'

100 Law Com No 304 (n 3 above) para 5.11(1)(a)(ii) at 78.

101 Susan S M Edwards, 'Loss of self-control: when his anger is worth more than her fear' in Alan Reed (ed), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2016) 79: 'Recognition in law of the fearful state of mind is intended to bring women who kill violent partners within law's ambit and mercy and so correct a habituated historic injustice.'

102 Law Com No 304 (n 3 above) para 5.56 (emphasis added).

Finally, even though the Law Commission has not explicitly excluded killings done upon discovery of sexual infidelity from the protection of the defence (that was done in the Coroners and Justice Act 2009 upon the Government's initiative),[103] it was critical of treating sexual infidelity as a qualifying 'wrongdoing' giving rise to the defence. This position would make little sense had the Commission seen the rationale for the defence as merely excusatory. As an evidentiary matter, the discovery of sexual infidelity can certainly produce strong feelings of betrayal and resentment and can lead to one's loss of self-control and rash violent outbreak.[104]

In sum, the provocation defence proposed by the Law Commission had a predominantly justificatory character.

THE ADVANTAGES OF THE UK REFORM OVER THE EMED

The Law Commission's proposal versus the EMED standard

Compared to the EMED promulgated by the MPC, the defence of provocation proposed by the Law Commission had several important advantages.

Public perceptions of right and wrong

Unlike the largely utilitarian, almost exclusively excusatory EMED model, which went against many established moral norms and expectations,[105] the Law Commission's proposal proved to be in accord with the public perceptions of justice and fair play. Numerous interviews with individuals representing 'a wide cross-section of backgrounds and personal circumstances'[106] have shown that there 'appears to be widespread recognition that provocation mitigates the

103 Coroners and Justice Act 2009, s 55(6)(c); see also, Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (CP No 19/08, 2008) para 2.

104 Oliver Quick and Celia Wells, 'Partial reform of partial defences: development in England and Wales' (2012) 45 Journal of Criminology 337, 344: 'The sexual infidelity clause (now s 55(6)(c)) was added during the Bill's passage through Parliament and was not subject to any meaningful public consultation (Horder, 2012). This is a controversial aspect of the new law, but perhaps unsurprising given the background view that sexual jealousy should not be a legitimate reason to plead provocation.'

105 See above, discussion at the end of the section entitled 'The MPC revision of the provocation defence: EMED as partial excuse'.

106 Barry Mitchell, 'Brief empirical survey of public opinion relating to partial defences to murder' in Law Com No 290 (n 3 above) appendix C, 180.

seriousness of a homicide; respondents commonly expressed sympathy and empathy for those who react emotionally to a stimulus, either through anger or fear or (cumulative) stress'.[107] The fact that the sympathy and empathy were expressed with respect to those who were somehow wronged suggests that the interviewed individuals viewed the element of 'provocation' as morally significant. Characteristically, almost all consultees welcomed the extension of provocation to cover cases in which the killing was motivated by a fear of serious violence.[108]

Coherence and consistency

Even though the philosophy of EMED is very much in accord with the general philosophy of the MPC, from a larger perspective, the mostly justificatory provocation proposed by the Law Commission is more consistent with other criminal law doctrines (particularly other defences) than the largely excusatory EMED proposal. Just like the doctrines of consent and self-defence, the doctrine of provocation recognises the active role of the putative victim in reduction of the defendant's wrongdoing. As a matter of autonomy – both the defendant's and the victim's – this vision of the partial defence is more consistent with the criminal law philosophy than the unilateral, excusatory, 'medicalised' version of the MPC, which focuses merely on the defendant's emotional or mental disability and ignores the victim's partial responsibility for the ultimate harm.

Narrowing the scope of the defence

Mitigation from murder to manslaughter due to provocation has long been perceived as morally controversial.[109] There has been considerable movement for the abolition of the defence.[110] In this regard, a narrower version of the defence is preferable to a broader one. The provocation defence proposed by the Law Commission is significantly narrower than the open-ended EMED promulgated by the MPC.

Normativity

The Law Commission's version of the defence is available only if 'a person of the defendant's age and of ordinary temperament' in the defendant's circumstances might have reacted in the same or similar way. This standard is much more objective than the extremely individualised

107 Ibid 195.

108 Law Com No 304 (n 3 above) para 5.60.

109 See eg Vincent McAviney, 'Coroners and Justice Act 2009: replacing provocation with loss of control' (*Inherently Human*, 28 October 2010): 'Instead of trying to differentiate between acceptable and non-acceptable murders we should simply make a stand and say that it is never an appropriate response to getting angry.'

110 Law Com No 290 (n 3 above) paras 3.36, 3.44.

'reasonable person' standard of the MPC under which the facts, to a large extent, have to be seen from the defendant's perspective (recall *People v Sepe*). One consultation paper explains the difference:

> The test under our proposal is *not whether the defendant's conduct was reasonable*, but whether it was conduct which a person of ordinary temperament might have been driven to commit (not a bigot or a person with an unusually short fuse). We believe that a jury would be able to grasp and apply this idea in a common-sense way.[111]

By organising the defence this way, the Law Commission avoids the 'chief dangers of the Model Penal Code approach [such as] its extreme individualization of the "reasonable person" test and its willingness to abandon or cloak moral assessments in favor of sympathy for a defendant's purported volitional impairment'.[112]

Clarity

The Law Commission's formulation of the defence is more precise than the MPC's.[113] To a large degree, this is achieved 'by introducing a robust, objective test based on the person of ordinary tolerance and self-restraint as a controlling mechanism', which reduces 'the possibility of the reformulation being used to extend the partial defence beyond its proper boundaries'.[114]

The effect of the changes brought in by the Coroners and Justice Act 2009

The Coroners and Justice Act 2009 has adopted most of the proposals made by the Law Commission – with a few changes.[115] The most important among those changes was the retention of the loss of self-control requirement advocated by the Government in spite of the strong opposition by the Law Commission which described that requirement as 'a judicially invented concept, lacking sharpness or a clear foundation in psychology'.[116] The 'government was worried that

111 Ibid para 3.127 (emphasis added).

112 Carolyn B Ramsey, 'Provoking change: comparative insights on feminist homicide law reform' (2010) 100 Journal of Criminal Law and Criminology 55, 84–85.

113 A majority of judges and academics who responded to the Law Commission's consultations query were opposed to a test of extreme emotional disturbance, principally on the ground that it was too vague: see Law Com No 290 (n 3 above) para 3.49.

114 Ibid para 4.26.

115 In addition to the loss of self-control, other notable changes are: (i) further individualisation of the standard of a person with a 'normal degree of tolerance and self-restraint' to include the defendant's sex (Coroners and Justice Act 2009, s 54(1)(c)); and (ii) explicit exclusion of sexual infidelity as an available trigger (Coroners and Justice Act 2009, s 55.6(c)).

116 Law Com No 290 (n 3 above) para 3.30.

without it there would be a real risk of undeserving cases – such as honour killings, gang-related homicides, and some battered spouse cases – continuing to benefit from the partial defence'.[117] The Law Commission, on the other hand, was opposed to it because of its moral ambiguity[118] and its built-in bias 'privileging men's typical reactions to provocation over women's typical reactions'.[119]

The addition of the loss of self-control requirement (albeit without its 'suddenness' component embodied in the law before the Coroners and Justice Act 2009)[120] has certainly increased the excusatory component of the new defence but has not changed the overall justificatory character of its rationale. As Jonathan Herring has correctly pointed out, the role of the loss of self-control requirement in the Coroners and Justice Act 2009 is 'essentially exclusionary, rather than carrying moral weight as the basis of the defence'. This requirement is intended to exclude those acting out of revenge or in a cold-blooded way, 'rather than being central to the philosophical basis for the defence'.[121]

The requirement of loss of self-control has proven to be a controversial addition, particularly in two respects – its fairness (including public perceptions of right and wrong) and clarity.

Interviews with representatives of different demographic groups have shown that loss of self-control is not considered a morally important criterion.[122] Moreover, as a practical matter, a significant number of respondents, 'including particularly representative bodies

117 Barry Mitchell, 'Loss of self-control under the Coroners and Justice Act 2009: Oh No!' in Reed (n 101 above) 44.

118 A consultation paper observed: 'To ask whether a person could have exercised self-control is to pose an impossible moral question. It is not a question which a psychiatrist could address as a matter of medical science, although a noteworthy issue which emerged from our discussions with psychiatrists was that those who give vent to anger by "losing self-control" to the point of killing another person generally do so in circumstances in which they can afford to do so.' See Law Com No 290 (n 3 above) para 3.28.

119 Law Com No 304 (n 3 above) para 5.18.

120 Coroners and Justice Act 2009, s 54(2): '[f]or the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden'.

121 Jonathan Herring, 'The serious wrong of domestic abuse and the loss of control defence' in Reed (n 101 above) 67.

122 See eg Barry Mitchell, 'Brief empirical survey of public opinion relating to partial defences to murder' in Law Com No 290 (n 3 above) appendix C, 195–196. Similarly, courts have rejected the argument that a reasonable person who has lost self-control cannot be fully responsible for his conduct. For example, in *Phillips v The Queen* [1969] 2 AC 130, Lord Diplock criticised as empirically wrong the premise that 'loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk'.

of the legal profession, women's groups and JUSTICE', preferred the morally imperfect EED test to a test based on loss of self-control.[123]

Many scholars have also commented on the unfairness of applying the loss of self-control requirement to situations where fear is the trigger.[124] Susan S M Edwards has pinpointed the issue:

> The abused woman who kills out of fear, with all its despair, hopelessness, sorrow, helplessness, anguish and trauma, is still required to 'lose self-control' (s 54). And perhaps there is a loss of control but in desperation. But the legal template of loss of self-control s 55(4)(a)(b) remains soldered to a male angered reaction with its outward demonstration embedded in a legacy of 'serious wrongs' and 'justifiable' hubris.[125]

As far as the concern about clarity, the loss of self-control standard has been criticised as ambiguous and confusing.[126] Firstly, there is no definition of 'loss of control' (or 'loss of self-control') in the Coroners and Justice Act 2009,[127] and courts have interpreted that requirement differently. Compare, for instance, *R v Jewell*, in which the loss of self-control was held to mean a loss of the ability to act in accordance with considered judgment or loss of normal powers of reasoning,[128] with *R v Dawes*, in which the 'loss of self-control' jury instruction was denied because the defendant had not killed the victim 'in a rage'; he was 'shocked rather than angry'.[129] In addition, as Nicola Wake has accurately observed, 'the government's decision to qualify the "fear trigger" with the controversial "loss of self-control" conceptualisation has undermined the doctrinal coherence in the Law Commission's recommendations, rendering the partial defence "unnecessarily complex"'.[130]

In sum, the Coroners and Justice Act 2009 has been a significant improvement compared to the state of the law of provocation prior to its enactment. The impressive work conducted by the Law Commission has provided both theoretical and empirical foundations for the law reform. Despite the questionable necessity for the loss of self-control requirement, the Coroners and Justice Act 2009 has also exhibited important advantages over the EMED defence developed by the MPC, such as its stronger moral connection with public perception of right

123 Law Com No 290 (n 3 above) para 3.49.

124 See eg Susan S M Edwards, 'Recognising the role of the emotion of fear in offences and defences' (2019) 83 Journal of Criminal Law 450.

125 Ibid 468.

126 Law Com No 290 (n 3 above) para 3.28: 'The term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control. See also Storey (n 11 above) 154.

127 Storey (n 11 above) 154.

128 [2014] EWCA Crim 414 [23].

129 [2013] EWCA Crim 322 [64].

130 Nicola Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian Perspectives' (2012) 77 Journal of Criminal Law 433, 436.

and wrong; its coherence and consistency with the overarching criminal law philosophy; its narrower scope; its more objective and principled normativity; and its clarity.

CONCLUSION

The law of provocation has long been perceived as legally, morally and politically unsatisfactory. Changing that law required rethinking its rationale and developing a coherent theory that would explain why provoked killing is less deserving of punishment than unprovoked. Justification and excuse, the two competing desert-based rationales, are often present together in a partial defence. The balance of the two rationales, however, significantly determines the meaning and boundaries of the resulting defence. In choosing the rationale for its version of the defence of provocation, each of the MPC and the Coroners and Justice Act 2009 has followed a distinct route.

The MPC has framed its defence as a partial excuse based on the defendant's highly individualised, distraught perception of reality and his inability to act rationally due to a mental or emotional trauma. The EMED defence is inherently consistent with the overarching utilitarian philosophy of the MPC but, at the same time, it is in deep conflict with the overarching deontological moral principles of Anglo-American criminal jurisprudence. It is, thus, not surprising that the Law Commission has rejected the MPC theory. Neither is it surprising that the Law Commission's own theory of provocation, enrooted in the traditional normative morality, should be predominantly justificatory. What is surprising though is the confusion, ambiguity and denial surrounding that choice. The Law Commission's position is uncharacteristically vague and self-contradictory whenever the discussion or recommendations turns to the rationale for the proposed defence.

By critically analysing the essential features of the Law Commission's proposal, I have shown that most of them indicate the reduced *wrongfulness* of the defendant's act, not the reduced *culpability* of the defendant, which reveals the predominantly justificatory character of the Law Commission's defence of provocation. Even the addition of the controversial and, arguably, unnecessary 'loss of self-control' requirement in the final version of the defence embodied in the Coroners and Justice Act 2009 has not significantly changed that balance. Overall, the defence of provocation – so unfortunately renamed 'loss of control' – was a significant doctrinal accomplishment, in part because of its salutary choice of the predominantly justificatory rationale.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 389–396
Commentaries and Notes: DOI: 10.53386/nilq.v72i2.879

R v Westwood (Thomas): diminished responsibility and disposals under the Mental Health Act 1983

Sean Mennim

Northumbria University

Correspondence email: sean.mennim@northumbria.ac.uk

ABSTRACT

This is a commentary on *R v Westwood (Thomas)*, where the Court of Appeal of England and Wales held that the judge had erred in assessing Westwood's 'retained responsibility' as medium to high under the Sentencing Council Guideline for manslaughter by reason of diminished responsibility.[1] Although the sentencing judge concluded that the offending was caused by Westwood's anger, the Court of Appeal found the psychiatric evidence clearly indicated that the most significant factor was Westwood's mental illness and that his anger at the time of the offence was a manifestation of his mental illness. Westwood's responsibility was low, and it was appropriate to impose both a hospital and restriction order.[2]

Keywords: diminished responsibility; extended sentences; hospital orders; manslaughter; mentally disordered offenders; restriction orders; sentencing guidelines.

INTRODUCTION

At the time of writing, *Westwood (Thomas)* is one of the most recent authorities to consider the interpretation and application of the sentencing guideline for manslaughter by reason of diminished responsibility in England and Wales.[3] This case is significant for two interrelated issues: firstly, the judicial assessment of 'retained responsibility' when sentencing manslaughter by reason of diminished responsibility; and, secondly, the importance of a 'penal element' in disposal under the Mental Health Act 1983 (MHA 1983). Notwithstanding the ostensible degree of flexibility afforded under the new sentencing guideline,[4] it will be argued here that the instant case is paradigmatic of sentencing judges continuing to adopt an

1 Sentencing Council, *Manslaughter by Reason of Diminished Responsibility* (2018).

2 MHA 1983, ss 37 and 41.

3 Sentencing Council, *Manslaughter Definitive Guideline* (2018).

4 For further discussion, see M Wasik, 'Reflections on the manslaughter sentencing guidelines' [2019] 4 Criminal Law Review 315–332.

overly mechanistic approach towards sentencing mentally disordered offenders when determining the appropriate disposal under the MHA 1983.[5]

BACKGROUND

Westwood (W) appealed against a 21-year extended prison sentence, comprising a custodial term of 16 years and an extension period of five years. HHJ Lockhart QC also imposed a hospital direction – often referred to as a 'hybrid order'.[6] W also appealed a limitation direction that he should be subject to the special restrictions being imposed following his plea of guilty to manslaughter by reason of diminished responsibility.

W suffered from paranoid schizophrenia and autistic spectrum disorder. Following an argument, W stabbed and killed his mother (S). S suffered 18 areas of sharp force injury to her chest, defensive injuries, and injuries to her heart and one of her lungs. HHJ Lockhart QC heard evidence from two psychiatrists that W was suffering from hallucinations and paranoid delusions which would have impaired his ability to form a rational judgement and exercise self-control. In considering the first step in the sentencing guideline, which required assessment of the degree of responsibility retained by W, HHJ Lockhart QC acknowledged that W's abnormality of mental functioning was grave and longstanding, but considered that a disposal under section 37 (hospital order) authorising the detention of W in hospital for medical treatment with restrictions should be rejected in favour of an order under section 45A. This was strongly influenced by two factors: firstly, his findings that when W killed his mother he was 'angry with her, and as a result of [his] condition, he more readily lost control'; and, secondly, that he had failed to take his medication, knowing this would place her at greater risk. HHJ Lockhart QC concluded that W retained a 'medium to high' level of responsibility for the killing and indicated that a penal element was important in view of his culpability.

THE COURT OF APPEAL DECISION AND COMMENTARY

The issue for the court in the instant case was the same as in *Edwards and others*.[7] The court had to determine whether a hospital order combined with a restriction order under sections 37 and 41 of the MHA 1983 was the appropriate disposal as opposed to whether a sentence

5 See, for example, *R v Fisher* [2019] EWCA Crim 1066; *R v Rendell* [2019] EWCA Crim 621.

6 MHA 1983, s 45A.

7 [2018] EWCA Crim 595; [2018] 4 WLR 64.

of life imprisonment combined with a section 45A order should be imposed. The three crucial questions for the court to determine in the present case were as follows:

1 What was W's 'retained responsibility'?
2 Was W's failure to self-medicate deliberate or part of his condition?
3 What in the public interest was the best disposal available under the MHA 1983?

When addressing the first question, Lord Justice Lindblom held that HHJ Lockhart QC fell into 'significant error' in assessing W's retained responsibility as 'medium to high'.[8] The only realistic conclusion on the evidence was that W's retained responsibility at the time of the offence was 'low'.[9] As indicated by the evidence and subsequent psychiatric reports, the factor of most significance in causing W to commit the offence was his mental illness; he was suffering a psychotic episode when he killed S, and his 'anger at the time was not extraneous to his mental illness, but a manifestation of it'.[10]

In relation to the second question regarding medication non-compliance, Lindblom LJ held that there was no evidence that, in the circumstances, it was a culpable omission.[11] The assertion that W had failed to receive medical treatment seemed hard to reconcile with his discharge by mental health services at a time when he was showing signs of mental instability.[12]

In terms of the third question, Lindblom LJ concluded that a penal element in W's sentence was inappropriate.[13] The psychiatric evidence, taken together with the previous medical evidence, gave no confidence that when W's sentence expired the treatment of his mental illness would have been entirely successful, or that his release into the community could be contemplated.[14] On the facts, there was 'a distinct potential disadvantage' to an order under section 45A, namely that if W was returned to prison 'his mental health would be liable to deteriorate, with a risk that he would then refuse treatment'.[15] The joint expert report concluded that there was 'obvious good sense in [W remaining] ... in a secure inpatient unit for the foreseeable future in order to receive the

8 [2020] EWCA Crim 598 [82].
9 Ibid [89].
10 Ibid [82].
11 Ibid [96].
12 Ibid [65] and [87].
13 Ibid [95].
14 Ibid at [100].
15 Ibid [100].

necessary treatment and rehabilitation'.[16] The Court of Appeal stated that if W were made subject to orders under sections 37 and 41 and if he were ever to be discharged from hospital, the arrangements that would then obtain would provide at least as much and probably more protection for the public than the section 45A regime. If sentenced under section 45A, W could not be compelled to accept medical treatment post-release. The process for his recall could prove slower and more cumbersome than that under sections 37 and 41.[17]

Following consideration of the three expert reports, and hearing live evidence from a consultant psychiatrist, the court concluded that the sentence be quashed and orders under sections 37 and 41 of the MHA 1983 substituted.[18]

DEFINITIVE GUIDELINE ON MANSLAUGHTER: DIMINISHED RESPONSIBILITY

The Sentencing Council issued a definitive guideline on manslaughter in 2018.[19] The guideline applies to all offenders aged 18 and older sentenced on or after 1 November 2018, regardless of the date of the offence.[20] The guideline outlines an 11-step approach to determining sentence. The steps that were considered most pertinent in the instant case are considered in further detail below.

Step one: assessing the level of culpability and responsibility retained

Step one of the guideline, which ordinarily requires a consideration of both harm and culpability, requires only a consideration of the offender's 'retained responsibility' (high, medium, or low): the harm of death (viewed as of utmost seriousness) is factored into all relevant starting points and category ranges.[21] In all such cases, the offender will have the required intent for murder, and their retained responsibility is considered to be the most important factor in assessing culpability.[22] While superficially this approach appears attractive, there is little further assistance for the court in deciding into which category the offender falls beyond enjoining the court to have regard to 'the medical

16 Ibid.
17 Ibid [101].
18 Ibid [103].
19 Sentencing Council (n 3 above).
20 Ibid.
21 Ibid.
22 This reflects the leading decisions in *Chambers* (1983) 5 Cr App R (S) 190 and *Wood* [2009] EWCA Crim 651; [2010] 1 Cr App R (S) 2.

evidence and all the relevant information before the court'.[23] As the instant case and numerous appellate authorities have demonstrated, this approach is often 'fraught with difficulty'.[24]

Psychiatric evidence and the assessment of culpability

It is widely acknowledged that the assessment of culpability in mentally disordered defendants has become increasingly difficult for the court and, in some cases, ethically problematic.[25] Hallett raised concerns that judges have, in some instances, shown no reluctance in asking psychiatrists to comment on issues pertaining to culpability.[26] This, Hallett argues, should be 'resisted both because of non-medical factors involved in the determination of culpability and because even if mental disorder were to correlate with concepts of culpability, it is ultimately a matter for the court'.[27] Notwithstanding these concerns, it would appear that, since the implementation of the revised sentencing guideline for diminished responsibility, the courts have taken a firm approach to ensuring that any assessment of culpability/responsibility retained 'is strictly a matter to be weighed by the judge upon his or her view of the circumstances … and the medical evidence which may bear on the question'.[28]

Medication non-compliance

When assessing the level of responsibility retained, the degree to which the offender's actions or omissions contributed to the seriousness of the mental disorder at the time of the offence may be a relevant consideration.[29] In the instant case, the fact that W had not taken his anti-psychotic medication was taken to be a relevant consideration when justifying the 'penal element' during the sentencing hearing.[30] Despite it being a relevant consideration in assessing the culpability of an offender, Loughnan and Wake have previously noted that there may be numerous reasons for an offender's non-compliance with medication; this may include, *inter alia*, the stigma attached

23 Wasik (n 4 above). See also, Sentencing Council, *Consultation Response: Sentencing Guideline – Manslaughter by Diminished Responsibility* (2018) 17–18.

24 Ibid.

25 J Peay, 'Responsibility, culpability and the sentencing of mentally disordered offenders: objectives in conflict' [2016] 3 Criminal Law Review 19.

26 N Hallett, 'To what extent should expert psychiatric witnesses comment on criminal culpability?' (2020) 60(1) Medicine, Science and the Law 67, 72. See also *R v Yusuf* [2018] EWCA Crim 2162; *R v Ozone* [2018] EWCA Crim 1110.

27 Hallett (n 26 above).

28 *R v Rodi* [2020] EWCA Crim 330 [25].

29 Sentencing Council (n 1 above).

30 *Westwood* (n 8 above) [51].

to 'certain medications, religious beliefs, paranoia, side effects, and depression',[31] which may also contribute to an offender's failure to engage with mental health services.[32] Further, the sentencing court's assertion that W would have recognised the risk in failing to take his prescribed medication would also (potentially) incorrectly assume that he had knowledge of any potential consequences of failing to do so.[33] Although the ruling in *Edwards* rightly acknowledged that failure to medicate may be inextricably linked to an offender's mental illness,[34] it is disappointing that this has not been made explicitly clear in the sentencing guideline.

Step four: determining sentence and disposals under the MHA 1983

In view of the conclusion on 'retained responsibility', the most significant and important part of the court's ruling in the present case[35] related to the range of mental health disposals under the MHA 1983. This consideration is reflected in step four of the sentencing guideline which had been revised to reflect respondents' concerns during the Sentencing Council's consultation on the diminished responsibility sentencing guideline and the ruling in *Edwards and others*.[36] This step requires the sentencing court to engage with the criteria for making a hospital order under section 37 (with or without a restriction order under section 41) and a hospital and limitation direction under section 45A. As an emergence of recent appellate cases has demonstrated, the choice to be made between a custodial sentence, a hospital order, and a hospital and limitation direction can be 'notoriously difficult'.[37]

The court ultimately held that there was 'sound reason for departing from the need to impose a sentence with a "penal element"'.[38] According to Taggart, this reveals how an erroneous assessment of retained responsibility may infect the remainder of the sentence and skew the position the sentencing judge takes on the need for a 'penal element'

31 Arlie Loughnan and Nicola Wake, 'Of blurred boundaries and prior fault: insanity, automatism and intoxication' in Alan Reed, Michael Bohlander, Nicola Wake and Emma Smith (eds), *General Defences in Criminal Law Domestic and Comparative Perspectives* (Ashgate 2014) 131.

32 Thomas Crofts and Nicola Wake 'Diminished responsibility determinations in England and Wales and New South Wales: whose role is it anyway?' (2021) 72(2) Northern Ireland Legal Quarterly 323.

33 *Edwards* (n 7 above) [68].

34 Ibid [34.v].

35 Westwood (n 8 above).

36 *Sentencing* Council (n 23 above) p.19.

37 Wasik (n 4 above).

38 *Westwood* (n 8 above) [103].

and, indeed, the overall disposal of the case.[39] Of course, in cases with defendants suffering from mental disorders, the court will also need to consider the nature of the enduring mental illness, the need for long-term treatment in hospital, the gravity of the offence, and also any finding of 'dangerousness' under the Criminal Justice Act 2003.[40]

Step five: factors that may warrant an adjustment in sentence

In order to remedy the difficulty in step four, there is a novel step five, which requires the court to 'review the sentence as a whole' to see 'whether [it] meets the objectives of punishment, rehabilitation and protection of the public in a fair and proportionate way'.[41] Relevant issues will include 'the psychiatric evidence and the regime on release'.[42] On a strict reading, however, it is difficult to see what extra benefit step five provides. For instance, when assessing 'responsibility retained' at step two, the court is already required to identify whether a combination of the specified aggravating or mitigating factors 'or other relevant factors' should result in any upward or downward adjustment from the sentence. According to Wasik, step five's 'oblique reference' to the 'regime on release' conceals some disagreement in the appellate authorities as to whether a hospital order or a hospital and limitation direction affords greater protection to the public given the different criteria which apply in determining the release of the offender from hospital or from prison and the differences inherent in the supervision arrangements following that release.[43] Further, step four already requires the court to consider 'all sentencing options' before imposing a hospital order, and countless sentencing cases in the past, in addition to the other guidelines here, have warned against 'an overly mechanistic approach to sentencing'.[44] Notwithstanding these difficulties, it is arguable that step five allows 'considerable latitude' for the sentencing judge,[45] who is reminded that diminished responsibility manslaughter cases 'vary considerably on the facts of the offence and the circumstances of the offender'.[46]

---

39 J Taggart, 'Sentencing: *R v Westwood (Thomas)*' [2020] 10 Criminal Law Review 973, 976.
40 Ibid.
41 Sentencing Council (n 1 above).
42 Ibid.
43 Wasik (n 4 above).
44 S Walker, 'Sentencing Council's definitive guideline on manslaughter' (2018) CLW/18/30/8.
45 Wasik (n 4 above).
46 Sentencing Council (n 1 above).

CONCLUSION

Although the sentencing guideline represents a positive step in an attempt to achieve greater consistency in manslaughter sentencing,[47] its limitations are becoming increasingly apparent. It is therefore imperative that the Sentencing Council reviews these guidelines in order to prevent a cavalcade of similar cases reaching the appellate courts in the future.

47 To 'regularise practice' as the Sentencing Council put it in the *Manslaughter Guideline Consultation* (2017) 9.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 397–405
Commentaries and Notes: DOI: 10.53386/nilq.v72i2.880

R v Foy (Nicholas): voluntary intoxication, mental health and the case for diminished responsibility

Bethany Simpson

Northumbria University

Correspondence email: bethany.l.simpson@northumbria.ac.uk

ABSTRACT

In *R v Foy*, the appellant sought to adduce fresh evidence based on a difference in expert opinion. Dismissing the appeal, the Court of Appeal in England held that, where there is no solid basis for expert assertions, these appeals must fail. The case highlights the legal complexities intrinsic in diminished responsibility cases in the context of intoxication and mental health issues. This commentary addresses the legal ambiguities that arise under these circumstances.

Keywords: homicide; diminished responsibility; recognised medical condition; mental disorder; voluntary intoxication; fresh evidence; expert opinion.

INTRODUCTION

The appellant (F) sought leave to adduce fresh psychiatric evidence supporting a defence of diminished responsibility. Pre-trial, F's psychiatrist produced an adverse report to such a plea meaning the defence was not pursued. The case presents the opportunity to explore the views expressed by the Court of Appeal (CoA) in England when considering challenging cases in which diminished responsibility is not considered by the jury, but subsequent fresh evidence emerges in support of the plea. The appeal demonstrates the application of section 23 of the Criminal Appeal Act 1968 (CCA), alongside consideration of the vexed questions that can arise *vis-à-vis* killings in the context of voluntary intoxication and mental health issues.[1] The latter will be the focus of this commentary.

The reformed partial defence of diminished responsibility to a charge of murder is contained in section 2 of the Homicide Act 1957 (HA), as amended by section 52 of the Coroners and Justice Act 2009. Under

1 For an in-depth discussion of the application of s 23 of the CCA in the context of diminished responsibility and this case see Mark Thomas, '"Expert shopping": appeals adducing fresh evidence in diminished responsibility cases' (2020) 84(3) Journal of Criminal Law 249.

section 2 the defendant (D) must prove on the balance of probabilities that at the time of the killing:

> (1) D was suffering from an 'abnormality of mental functioning' which—
>
> (a) arose 'from a recognised medical condition',
>
> (b) substantially impaired D's *ability* to: understand the nature of his conduct; form a rational judgment; and/or exercise self-control;[2] and
>
> (c) provides an explanation for D's acts or omissions in doing or being party to the killing.[3]

It is worth noting that section 5 of the Criminal Justice Act (NI) 1966, as amended by section 53 of the Coroners and Justice Act 2009, is identical to section 2 HA (save for the requirement of a 'recognised *mental* condition'[4] as opposed to a 'recognised medical condition' in section 2(1)(a)).[5]

Additionally, where D causes the conditions of his own defence, the doctrine of 'prior fault' will negate a defence of diminished responsibility where D is proved to have formed the necessary *mens rea* of murder before the abnormality of mental functioning arose.[6] The doctrine follows that:

> D's behaviour when acting to directly cause death ... may be defensible in isolation, but when considered in light of h[is] prior fault at the earlier point ... [for example] when choosing to lose partial control or faculty through intoxication ... such exculpation is intuitively much less justifiable.[7]

Application of the 'prior fault' doctrine in light of F's voluntary intoxication will also be examined.

---

2 Homicide Act 1957 (as amended by s 52 of the Coroners and Justice Act 2009), s 1(1A). The criteria listed can be traced back to the judgment in *R v Byrne* [1960] 2 QB 396 under the old law.

3 Under s 2(1B) of the Homicide Act 1957, as amended by s 52 of the Coroners and Justice Act 2009, 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.

4 Criminal Justice Act (NI) 1966, as amended by s 53 of the Coroners and Justice Act 2009, s 5(1)(a) (emphasis added).

5 The distinction between the two appears to be immaterial. Indeed, practitioners and the judiciary use the term interchangeably: see *R v Foye* [2013] EWCA Crim 475 [43] and *R v Lindo* [2016] EWCA Crim 1940. Thus, the judgment in *Foy* provides persuasive value to the courts in Northern Ireland.

6 See *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349.

7 John J Child, 'Prior fault: blocking defences or constructing crimes' in Alan Reed and Michael Bohlander (eds), *General Defences: Domestic and Comparative Perspectives* (Ashgate 2014) 38. See also Alan Reed and Nicola Wake, 'Potentiate liability and preventing fault attribution: the intoxicated "offender" and Anglo-American dépecage standardisations' (2013) 47 John Marshall Law Review 57.

A FRESH OPINION

In the present case, F ingested huge quantities of alcohol and cocaine before fatally stabbing a French tourist (V). F was experiencing a psychotic episode at the time of the attack. F was witnessed gouging at his foot with a knife attempting to remove what he believed was a bomb. F then ran towards V and stabbed him in the stomach. F was arrested and charged with murder.

F accepted he had stabbed V but advanced the defence of lack of necessary *mens rea*, owing to his acute intoxication. Counsel favoured denial of *mens rea* over running a partial defence of diminished responsibility. F suffered from depression, anxiety and paranoia, alongside a history of alcohol and cocaine abuse – albeit not to the extent that it satisfied the requirements for diminished responsibility.[8] On the premise that intoxicated intent is still intent, the jury convicted.

Pre-trial, the defence relied solely on the psychiatric report of 'a very experienced consultant psychiatrist', Dr Isaac.[9] Based on medical records and interviews with F, Dr Isaac ruled out diminished responsibility and insanity, reporting that, although F was suffering from an abnormality of mental functioning at the time of the killing (namely 'a [florid] psychotic episode') this was likely 'caused by a combination of cocaine and alcohol',[10] as opposed to a recognised medical condition. Upon reviewing additional material evidencing F's paranoid mental state, his original conclusion stood.

Post-trial, F's family secured funds to obtain a fresh opinion. An alternative psychiatric report was produced by Dr Joseph who had initially been approached by the defence pre-trial but was not instructed owing to a dispute over fees. In his report, he contested that F suffered from an 'abnormality of mental functioning caused by the recognised medical condition of an acute transient psychotic episode, *possibly exacerbated* by the abuse of cocaine'.[11] He further opined that the abnormality of mental functioning was 'extremely severe', enough to substantially impair F's ability even when discounting intoxication.[12] F appealed his conviction based on the new report.

NO VIABLE DEFENCE

The appeal raised two questions: should the fresh evidence be admitted at all? If so, would it render the conviction unsafe? Rejecting the appeal on both grounds, Davis LJ concluded that the fresh evidence was

8 *R v Foy (Nicholas)* [2020] EWCA Crim 270 [6].
9 Ibid [22].
10 Ibid [26].
11 Ibid [43] (emphasis added).
12 Ibid.

inadmissible; and, had it been admissible, it would not have provided a viable defence to render the conviction unsafe.[13]

An appeal is not a means of re-litigation in the hope that a different outcome is achieved, and the facts here did not amount to an exception to this approach. The evidence had been available at trial, carefully considered, and diminished responsibility rejected. Had there been any dissatisfaction with the initial report, funds should have been raised pre-trial to obtain another. Instead, the defence received Dr Isaac's evidence, disapproved of his conclusions and sought to introduce Dr Joseph's evidence to support their contentions post-trial; which Davis LJ referred to as 'bluntly, expert shopping'.[14] Consequently, the CoA determined that it was not '[necessary or expedient] in the interests of justice' to permit Dr Joseph's evidence to be adduced.[15]

Additionally, Dr Joseph's new evidence could 'not in any event afford a viable defence of diminished responsibility which a jury, properly directed, could accept on the balance of probabilities'.[16] The court was satisfied that the abnormality of mental functioning that F was suffering from was the florid psychotic episode, however, it was not satisfied that the psychotic episode arose from a relevant recognised medical condition absent the intoxicants. Indeed, several possible conditions suggested by Dr Joseph were discharged as not being a recognised medical condition for the purpose of section 2. Reviewing the fresh evidence and excluding the voluntary consumption of intoxicants, there was 'no solid basis for asserting an abnormality of mental functioning arising from a recognised medical condition which *substantially* impaired [F's] ability in the relevant respects and which provided [a statutory] *explanation* ... for his acts'.[17]

Voluntary acute intoxication

The principal concern, *vis-à-vis* diminished responsibility, was the dispute between the psychiatric experts as to the role the combination of voluntary consumption of intoxicants and F's mental state played in the resultant death. Despite intoxicants featuring in the vast majority of homicide cases, the threshold for the disease of alcoholism to amount to a finding of diminished responsibility is 'almost unattainable'.[18]

The current legal position, which *Foy* confirms, is that a defendant who kills whilst in a state of voluntary acute intoxication (alcohol, drugs

13 Ibid [64]–[65].
14 Ibid [60].
15 Ibid [64]. In accordance with s 23(1) CAA 1968.
16 Ibid [65].
17 Ibid [95] (original emphasis).
18 Nuwan Galappathie and Krishma Jethwa, 'Diminished responsibility and alcohol' (2010) 16(3) Advances in Psychiatric Treatment 193.

or a combination), even if the intoxication triggers a psychotic episode, cannot found a defence of diminished responsibility; there is no recognised medical condition.[19] This is despite 'acute intoxication' being listed in the World Health Organization's international classification of diseases (ICD-10)[20] and scholarly commentary suggesting that 'states of acute intoxication *may* satisfy the "recognised medical condition" requirement'.[21] There may, however, be a recognised medical condition giving rise to an abnormality of mental functioning where D suffers from substance addiction and has consumed intoxicants as a result of that addiction.[22] In such cases, it is the addiction ('dependency syndrome') that gives rise to the abnormality rather than the intoxication.

The position differs slightly where there is an abnormality of mental functioning arising from a *combination* of voluntary intoxication and the existence of a recognised medical condition. In such circumstances, the abnormality of mental functioning need not be the sole cause of D's acts: even if D would not have killed had he not taken alcohol, 'the causative effect of the drink did not necessarily prevent an abnormality of mind from substantially impairing the mental responsibility for the fatal acts'.[23] As Wortley notes, ambiguity persists in the application of the law to cases in which an underlying medical condition *relates to* (ie is triggered by) the consumption of intoxicants.[24] This refers to the court's application of the 'prior fault' doctrine which permits a D, whose underlying medical condition is triggered by voluntary intoxication, to plead diminished responsibility, yet denies the defence to a D whose voluntary intoxication triggers a drug-induced psychosis where no pre-existing medical condition prevails. Incidentally, *Foy* fails to clarify this issue.

If the voluntary intoxication and underlying medical condition both substantially impaired D's responsibility, the defence may still

19 *R v Dowds* [2012] EWCA Crim 281; *R v Lindo* (n 5 above). See also, *R v Gittens* [1984] QB 698.

20 For further discussion see Natalie Wortley, 'New cases: evidence and procedure: appeal (fresh evidence): *R v Foy*' (2020) CLW 20/10/1. The court in *Dowds* further acknowledged that 'recognised medical condition' should be interpreted in the legal sense as opposed to psychiatric, [40]. See also *R v Wilcocks* [2016] EWCA Crim 2043 [45]

21 Nicola Wake, 'Recognising acute intoxication as diminished responsibility? A comparative analysis' (2012) 76 Journal of Criminal Law 71, 96 (original emphasis).

22 *Dowds* (n 19 above); *R v Stewart* [2009] EWCA Crim 593. Note that 'drink/drugs dependency syndrome' is most commonly cited.

23 *R v Dietschmann (Anthony)* [2003] UKHL 10; [2003] 1 AC 1209; *Stewart* (n 22 above).

24 Wortley (n 20 above). See also Karl Laird, 'Diminished responsibility: *R v Foy (Nicholas John)*' [2020] 9 Criminal Law Review 840, 842 for discussion of the prior fault doctrine.

be relied upon, but the jury must be directed to disregard the effects of intoxication when considering whether the requirements of section 2 are met.[25] Although the decision in *Foy* confirms this approach, the case illustrates how identifying the existence of such a condition to the requisite legal standard remains problematic amongst medical practitioners; reiterating the concerns of many scholars.[26]

An un-'recognised' medical condition

Under section 2, F was accepted to be suffering from an abnormality of mental functioning at the time of the killing; the 'florid psychotic episode'.[27] The remaining requirements were not as explicit.

The second requirement was to ascertain from what recognised medical condition the psychotic episode arose. Dr Isaac opined that F's abnormality of mind arose from voluntary intoxication as opposed to a recognised medical condition; F's account was consistent with a 'substance-induced psychotic disorder'.[28] Ruling out schizophreniform disorder as an alternative, Dr Isaac stressed that 'paranoid thoughts are not necessarily psychotic'.[29] Similarly, Dr Blackwood (for the Crown on appeal) diagnosed F as suffering from a paranoid personality disorder, capable of being classified as a recognised medical condition, but found it not to have any sufficient material contribution to the psychotic episode. On this basis, 'no recognised medical condition [gave] rise to the psychotic episode'.[30]

Paradoxically, Dr Joseph reported that F suffered transient psychotic episodes when not intoxicated resultant of his 'abnormal personality structure'; this diagnosis, however, was deemed not to be a 'recognised medical condition' in the legal sense.[31] Nonetheless, Dr Joseph maintained '[F] was suffering from an abnormality of mental functioning caused by the recognised medical condition of an acute transient psychotic episode';[32] an apparent conflation between what *was* the abnormality of mental functioning (the 'acute psychotic episode') and what *caused* it (later described by the court as 'an "acute transient psychosis"').[33] Dr Joseph conceded that it was 'almost tautological' and accepted the court's understanding of his argument

25 *Dietschmann (Anthony)* (n 23 above); *R v Kay; Joyce* [2018] 1 All ER 881.
26 See Wake (n 21 above).
27 *Foy* (n 8 above) [79]. Consistent with the approach in *Lindo* (n 5 above) and *Kay; Joyce* (n 25 above).
28 Dr Isaac also referred to this as 'cocaine psychosis': *Foy* (n 8 above) [35].
29 Ibid [25]–[26] and [35].
30 Ibid [81].
31 Ibid.
32 Ibid [43].
33 Ibid [88].

for the presence of 'acute transient psychosis', yet this suggestion was deemed not to be a 'recognised medical condition'.[34]

The decision highlights the complex legal position regarding voluntary intoxication and psychiatric issues and further emphasises the friction between the legal and medical nature of section 2 as it presents itself to psychiatric experts, with Dr Joseph suggesting that the distinction between the requirement for both an abnormality of mental functioning and a recognised medical condition is 'slightly artificial'.[35]

Supporting assertions

The third requirement of section 2 was to determine if the psychotic episode (absent intoxication) 'substantially' impaired F's mental ability. In *Golds*, 'substantial' required the jury to be satisfied that D's impairment was 'significant or appreciable'.[36] The meaning was further clarified in the context of diminished responsibility; 'substantial' ought to mean 'important or weighty' as opposed to being 'anything more than merely trivial'.[37] In *Foy*, Davis LJ reiterated that determining

> ... whether the impairment was sufficiently substantial remained a matter of fact and degree for the jury ... it was to be left to the jury to decide whether in any given case the impairment was of sufficient substance or importance to meet the statutory test.[38]

Dr Isaac maintained that even if F's abnormality of mind arose from a paranoid psychosis, it would not have met statutory requirements: 'without the [intoxicants] ... I cannot see that in itself it would have *substantially* impaired his responsibility'.[39] Dr Joseph, however, was confident that F's abilities were substantially impaired. The CoA previously acknowledged that, despite considerable advancements in psychiatry and scientific understanding of how the mind functions, 'it is impossible to provide any accurate scientific measurement of the extent to which a particular person ... could understand or control his physical impulses on a particular occasion'.[40] Since there is no simple scientific test to determine substantial impairment, the jury is to rely on the evidence presented by experts. In this case, there was simply no evidence to support Dr Joseph's assertion that F's responsibility was substantially impaired.

---

34 Laird (n 24 above) 842.
35 *Foy* (n 8 above) [47].
36 *R v Golds (Mark Richard)* [2014] EWCA Crim 748 [70].
37 *R v Golds (Mark Richard)* [2016] UKSC 61; [2016] WLR 5231 [28].
38 *Foy* (n 8 above) [77].
39 Ibid [35] (Dr Isaac's own emphasis).
40 *R v Khan* [2009] EWCA Crim 1569 [18].

Dr Blackwood concluded that the psychotic state 'informed [F's] actions ... but which did not endure'.[41] To the contrary, Dr Joseph maintained that the psychotic episode (discounting the effects of intoxication) provided an explanation for F's acts; described by Davis LJ as a simple assertion.[42] Although the issue of causal link was not raised, it is worth noting that Dr Blackwood stressed the impossibility of 'separat[ing] a psychotic disorder emerging independently from substance misuse from one arising in the context of substance misuse when substance misuse clearly occurred at the material time'.[43] This contention only seeks to raise further concern over the requirement of lay people to separate mental health issues from voluntary intoxication in jury trials.

CONCLUSION

The CoA in *Foy* has once again sought to ensure that, as a ground of appeal, successfully raising the issue of diminished responsibility remains exceptional; one cannot simply employ 'expert shopping' to reattempt litigation. This is especially the case where the new expert testimony falls short of giving rise to a viable defence.

Although the circumstances of *Foy* are distinguishing in nature, albeit not 'unusual' enough to justify admitting the fresh evidence,[44] the case highlights the ongoing potential for experts' opinions to differ based on the same material. The case evidences numerous problematic legal questions within the reformed section 2 defence – specifically, surrounding the role of voluntary intoxication and its relationship to psychiatric conditions/mental health – and fails to clarify the 'levels of gradation of voluntary intoxication that may or may not constitute a "mental abnormality" when a defendant kills while under the influence of alcohol [and/]or narcotics' on which the statutory defence remains silent.[45] The revised plea of diminished responsibility is heavily medicalised, thereby inviting greater input from psychiatric experts who are increasingly likely to hold differing opinions.

The enmeshing of medicine, psychiatrics and law within the complex arena of diminished responsibility allows for the arrival at divergent albeit equally weighted conclusions, but the ultimate decision must

41 *Foy* (n 8 above) [46].
42 Ibid [95].
43 Ibid [46].
44 Ibid [58]–[61]; Thomas (n 1) 254; *R v Challen* [2019] EWCA Crim 916.
45 Wake (n 21), citing A Reed and N Wake, 'Anglo-American perspectives on partial defences: something old, something borrowed and something new' in M Bohlander and A Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 191.

reside with the jury; in this case Dr Joseph's initial opinions should have been presented at trial. Furthermore, experts should be mindful of presenting any overlap between the required elements of section 2, ensuring they explicitly identify relevant recognised medical conditions within the ambit of the law, devoid of vague assertions. Consideration of the onerous task of differentiating between the separate effects of alcohol, drugs and inherent causes would have been a welcome direction from the court.[46]

Finally, it is unfortunate that, despite raising several points of incoherence and ambiguity, the judgment failed to clarify the application of the law in cases in which voluntary consumption of intoxicants triggers drug-induced mental disorders.[47] Re-evaluation of the merits or coherence of the application of the 'prior fault' doctrine remains eagerly anticipated.

46 Galappathie and Jethwa (n 18 above).
47 Laird (n 24 above) 842.

Northern Ireland
Legal Quarterly
Summer Vol. 72 No. 2 (2021) 406–410
Commentaries and Notes: DOI: 10.53386/nilq.v72i2.729

Criminal law pedagogy

Daniel Pascoe*

City University of Hong Kong
Correspondence email: dcpascoe@cityu.edu.hk

The Teaching of Criminal Law: The Pedagogical Imperatives, Kris Gledhill and Ben Livings (eds) (Routledge 2017) 212pp; paperback £31.99/hardback £100.00

> [H]ow we teach criminal law, or indeed any other subject within a law school curriculum, should be informed by reflective choices and research rather than by simply replicating what was done previously.[1]

Even before the COVID-19 pandemic, the pedagogical methods for teaching law in common law jurisdictions had come under renewed debate after a long period of stasis. As part of a broader movement toward approaching law professors' main area of professional competency in a more scientific and systematic manner,[2] several book-length publications during the 2000s and 2010s sought to explore the content of the syllabus, methods of disseminating information to and assessing students, the use of technology in the classroom, and the links between research and teaching.[3] Although such research still stands to impact criminal law teaching as much as any other area (given that criminal law is invariably a compulsory subject in the first law degree in common law jurisdictions), criminal law may also demand a subtly

* Associate Professor, School of Law, City University of Hong Kong.

1 K Gledhill and B Livings, 'Conclusion: looking to the future' in K Gledhill and B Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge 2017) 208.

2 B Livings, 'Context and connection' in Gledhill and Livings (eds) (n 1 above) 139.

3 Including the following works: P Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (Routledge 2007); G Hess, S Friedland, M Schwartz and S Sparrow, *Techniques for Teaching Law 2* (Carolina Academic Press 2011); E Jones and F Cownie (eds), *Key Directions in Legal Education* (Routledge 2020); C Gane and R H Huang (eds), *Legal Education in the Global Context: Opportunities and Challenges* (Routledge 2017); B Golder, M Nehme, A Steel and P Vines (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge 2019); C Sampford and H Breakey, Law, *Lawyering and Legal Education: Building an Ethical Profession in a Globalizing World* (Routledge 2016); R Grimes (ed), *Rethinking Legal Education under the Civil and Common Law: A Road Map for Constructive Change* (Routledge 2018). The latter volume is part of the same Routledge series on Legal Pedagogy, as with Gledhill and Livings (eds) (n 1 above).

different approach from legal educators. What makes criminal law different? Among other aspects, its visibility within popular culture (shaping the prior expectations of students studying it for the first time),[4] its focus on litigation and courtroom decision-making rather than outcomes negotiated away from courts 'in the shadow of the law',[5] its engagement with the most malevolent aspects of human nature, and its direct reflection of the social and political values of the day[6] separate crime from other subjects within the first law degree.

Given such distinct features, is the typical way that criminal law is taught fit for purpose?[7] Kris Gledhill and Ben Livings' 2017 edited collection, entitled *The Teaching of Criminal Law: The Pedagogical Imperatives*, provides a plethora of new perspectives addressing this issue. Of course, whether current teaching methods should be maintained or changed will depend not only on the pedagogical literature, but also on the views of various stakeholders. The individual teacher, the student cohort, the professed goals of the institution and programme, the legal profession, and the society of which the university is a part, each deserve their say.[8] There will be no one 'right' answer. Yet, rather than being prescriptive, Gledhill and Livings' 18-chapter collection, featuring contributions from leading scholars from the UK, Australia, the Republic of Ireland and New Zealand, provides criminal law teachers with a uniquely useful resource to aid pedagogical self-reflection and future conversations with these various stakeholders.

On to the book's content. There is far from enough space here to do justice to all 18 chapters contained within Gledhill and Livings' collection. Indeed, no criminal law educator could, or should,

---

4 Eg A Jackson and K Kerrigan, 'The challenges and benefits of integrating criminal law, litigation and evidence' in Gledhill and Livings (eds) (n 1 above) 116; R A Fairfax, 'Challenges and choices in criminal law course design' (2013) 10 Ohio State Journal of Criminal Law 665, 665.

5 W J Stuntz, 'Plea bargaining and law's disappearing shadow' (2004) 117(8) Harvard Law Review 2548, 2548–2549.

6 S Kilcommins, S Leahy and E Spain, 'The absence of regulatory crime from the criminal law curriculum' in Gledhill and Livings (eds) (n 1 above) 201; K Amirthalingam, 'The importance of criminal law' (2017) 2 Singapore Journal of Legal Studies 318, 319.

7 The typical course is summarised in ch 3, see B Fitzpatrick, 'Using problem-based learning to enhance the study of criminal law' in Gledhill and Livings (eds) (n 1 above) 61; and ch 18, see Gledhill and Livings, 'Conclusion' (n 1 above) 206: 'a black-letter course of lectures structured around several weeks of general principles followed by several weeks of the details of offences of violence and property'.

8 See K Gledhill and B Livings, 'Introduction' in Gledhill and Livings (eds) (n 1 above) 6. See generally F Cownie (ed), *Stakeholders in the Law School* (Hart 2010).

incorporate *all* of the approaches advocated for.[9] Yet, within the volume, several pedagogical themes stand out for their clarity and novelty. Most obvious is the distinction between what substantive offences the typical curriculum covers and the offences most frequently encountered in criminal practice. The former group often begins and ends with violent, sexual and property offences, whereas the latter group tends to be dominated by statutory drugs, driving and other regulatory 'quasi-criminal' offences.[10]

A second recurring theme is the utility of enquiry-based or problem-based learning in criminal law teaching. Here, counterintuitively, students begin their learning with a hypothetical fact-pattern problem, and then proceed to search for the applicable law with only minimal prompting from the instructor.[11] Other chapters deal with novel pedagogical approaches such as inculcating the 'basic principles' of criminal liability (if such a notion indeed exists)[12] exclusively via the teaching of substantive offences, rather than separately at the beginning of a criminal law module;[13] shifting the focus away from criminal liability toward more important areas for practice, such as prosecutorial discretion, pre-trial processes, the laws of evidence and sentencing;[14] and finally, challenging the definitions of 'criminal law' and 'sentencing' within teaching, by considering restorative justice processes, the regulation of anti-social behaviour, state victim compensation schemes and, at the more serious end of the spectrum, state responses to terrorism and international crimes.[15] What each of these approaches have in common is that they seemingly better inculcate the skills and knowledge required for criminal practice, when compared with more traditional teaching models. At a time when

9 See Gledhill and Livings, 'Conclusion' (n 1 above) 207.

10 K Gledhill, 'Choice' in Gledhill and Livings (eds) (n 1 above) 185, 187; F Donson and C O'Sullivan, 'Building block or stumbling block? Teaching *actus reus* and *mens rea* in criminal law' in Gledhill and Livings (eds) (n 1 above) 21; Fitzpatrick (n 7 above) 61; J Gans, 'Teaching criminal law as statutory interpretation' in Gledhill and Livings (eds) (n 1 above) 93, 95; A Steel, 'Shaking the foundations: criminal law as a means of critiquing the assumptions of the centrality of doctrine in law' in Gledhill and Livings (eds) (n 1 above) 110–111; Kilcommins et al (n 6 above) 194–195, 201.

11 J Boylan-Kemp and R Huxley-Binns, 'Turning criminal law upside down' in Gledhill and Livings (eds) (n 1 above) 73–75; see Fitzpatrick (n 7 above) 63–70.

12 See Gledhill (n 10 above) 192; Steel (n 10 above) 107–108.

13 See Donson and O'Sullivan (n 10 above) 22, 27; Gans (n 10 above) 96; J Child, 'Teaching the elements of crimes' in Gledhill and Livings (eds) (n 1 above) 37, 44.

14 See Fitzpatrick (n 7 above) 61–62; Steel (n 10 above) 107; Jackson and Kerrigan (n 4 above) 119–122; P Scranton and J Stannard, '"Crime and the criminal process": challenging traditions, breaking boundaries' in Gledhill and Livings (eds) (n 1 above) 134–135.

15 See Fitzpatrick (n 7 above) 62–63.

several scholars have questioned whether law schools are producing enough 'practice ready' graduates for criminal litigation,[16] this is a laudable goal.

In my view, there are two notable shortcomings relating to the book's content, although these are more a reflection of the fact that it is impossible to cover all examples of pedagogical innovation within a volume limited to roughly 200 pages. The first area of weakness is the book's limited coverage of the role of technology in the classroom, which was a major source of legal literature even before the changes brought by COVID-19.[17] The only two chapters that engage substantively with digital methods of course delivery and assessment are chapter 4 ('Enhancing interactivity in the teaching of criminal law: using response technology in the lecture theatre'), discussing instantaneous polling in the lecture theatre as a means of maintaining student engagement,[18] and chapter 6 ('Turning criminal law upside down'), which advocates for a 'flipped classroom' model, in addition to real-time internet-based research by students.[19] Aside from influencing content delivery and assessment, technology also continues to shape substantive criminal law and procedural norms, via topics like algorithmic sentencing and risk-assessment tools, the increasing importance of computer crimes, and crimes committed by autonomous actors. In both respects, technology will play a crucial role in criminal law teaching moving forward.

A second shortcoming is the relatively narrow range of jurisdictions that have been sampled within the volume. Although ideas developed in one common law context are often adaptable in another, the book might have benefitted from a broader focus on the common law world and further afield, perhaps incorporating chapters from common law Asia, Canada, the English-speaking Caribbean and even from several civil law jurisdictions. Surely the same kinds of pedagogical issues (how

16 A Walker, 'The anti-case method: Herbert Wechsler and the political history of the criminal law course' (2009) 7 Ohio State Journal of Criminal Law 217, 219; see Amirthalingam (n 6 above) 322; A Milner, 'On the university teaching of criminal law' (1963) 7 Journal of the Society of Public Teachers of Law 192, 197.

17 Eg C Denvir (ed), *Modernising Legal Education* (Cambridge University Press 2019). See Fairfax (n 4 above) 666; F Ryan and H McFaul, 'Innovative technologies in UK legal education' in Jones and Cownie (n 3 above); E Rubin (ed), *Legal Education in the Digital Age* (Cambridge University Press 2012); J Vivien-Wilksch, 'Making use of new technology' in W Swain and D Campbell, *Reimagining Contract Law Pedagogy: A New Agenda for Teaching* (Routledge 2019).

18 K J Brown and C R G Murray, 'Enhancing interactivity in the teaching of criminal law: using response technology in the lecture theatre' in Gledhill and Livings (eds) (n 1 above) 49–56.

19 See Boylan-Kemp and Huxley-Binns (n 11 above) 75–76.

to teach general principles, which substantive crimes to include and exclude, which stage of criminal proceedings should be the focus, and whether the approach should be doctrinal, socio-legal, comparativist or critical)[20] arise equally in civil law or mixed common law–civil law jurisdictions. Relatively recent single-authored or edited volumes on clinical legal education, legal education in the global context and the future of the law school have each managed to incorporate a combination of chapters on common law and civil law jurisdictions, thereby facilitating a cross-pollination of ideas.[21]

The good news for the increasing number of criminal law scholars interested in this area is that there remain many more perspectives to take account of, Gledhill and Livings' 2017 text serving as an important catalyst to take the legal pedagogy agenda forward. Reform of syllabus content and teaching methods may even become an existential issue. As the editors note in their concluding chapter, the continued place of criminal law within the undergraduate law curriculum may depend on such pedagogical innovation.[22]

---

20 See Amirthalingam (n 6 above) 322. On critical approaches discussed in the volume, see eg K Quince, 'Teaching indigenous and minority students and perspectives in criminal law' in Gledhill and Livings (eds) (n 1 above) 164–166 and J Tolmie, 'Introducing feminist legal jurisprudence through the teaching of criminal law' in Gledhill and Livings (eds) (n 1 above) 173–175. On socio-legal approaches, see eg Livings (n 2 above) 139–148 and A Loughnan, 'Teaching and learning criminal law "in context": taking "context" seriously' in Gledhill and Livings (eds) (n 1 above) 155–157.

21 See Gane and Huang (n 3 above); Grimes (n 3 above); Jones and Cownie (n 3 above); R J Wilson, *The Global Evolution of Clinical Legal Education* (Cambridge University Press 2018); C Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge University Press 2014); S P Sarker (ed), *Clinical Legal Education in Asia: Accessing Justice for the Underprivileged* (Palgrave Macmillan 2015).

22 See Gledhill and Livings, 'Conclusion' (n 1 above) 209.

Articles

Commentaries and Notes