Should Anger Mitigate Murder? An examination of the Doctrine of Loss of Control

MCAVINEY, VINCENT,PATRICK

Should Anger Mitigate Murder?

An Examination of the Doctrine of Loss of Control

By Vincent Patrick McAviney

Submitted for Master of Jurisprudence

Durham Law School

2011

Should Anger Mitigate Murder?
An Examination of the Doctrine of Loss of Control

By Vincent Patrick McAviney

On the 4th October 2010 the law of murder in England and Wales changed dramatically when the partial defence of Provocation was abolished by the Coroners and Justice Act 2009 and replaced with a new partial defence of Loss of Control. Until its abolition, the doctrine of Provocation was deeply entrenched within the criminal law. A feature in the legal systems of many other jurisdictions, Provocation was the law's concession that passion aroused in a person can become so over-powering that they lose their self-control and become a killer.

Provocation had thus been said to occupy a unique role in making such a concession in the law of homicide for 'human frailty'. But in spite of being a well-developed concept to make allowance in the law of homicide for heightened emotions and human frailty, Provocation was a perennial source of problems for the courts of England and Wales for it was born out of a violent society in the infancy of the criminal justice system.

This thesis explores the origins of Provocation and in particular how the Loss of Control doctrine has developed since its introduction in the 19th century into a fully-fledged partial defence. The aim of this thesis is to answer the following questions: 1) Why, if the criminal law is meant to do its utmost to dissuade people from killing one another, did we have a partial defence grounded in loss of control which permitted lethal retaliatory anger as a response? 2) What does having a new partial defence of loss of control based on anger and now fear really mean and what impact will it have? 3) Is it appropriate for the new statutory provisions to partially excuse/justify murder on grounds of loss of control?

Table of Contents

Thesis Introduction

On the 4th October 2010 the law of murder in England and Wales changed dramatically when the partial defence of Provocation was abolished by the Coroners and Justice Act 2009 and replaced with a new partial defence of Loss of Self-Control. Alongside the much younger Diminished Responsibility, Provocation was one of two partial defences to murder comprising the category of so-called 'voluntary manslaughter'. Until its abolition, the doctrine of Provocation as a partial defence was deeply entrenched within criminal law of England and Wales. In *R v Mawgridge*[1], the court famously stated:

> "Where a man is taken in adultery with another man's wife, if the husband shall stab the adulterer or knock out his brains this is bare manslaughter: for jealousy is the rage of man and adultery is the highest invasion of property".

However, the origins of the old defence of Provocation can be traced even further back than 1707 to the verdicts of medieval juries which considered such spontaneous killings as *se defendendo* thus avoiding a murder verdict[2]. Provocation was therefore a well-established partial defence in the common law; whereas diminished responsibility is a "creature of the law's imagination"[3] first prescribed by the Homicide Act 1957 for mentally abnormal killers, Provocation had existed for centuries in the common law to make an allowance for 'human frailty'[4].

---

[1] [1707] Kel 119

[2] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) Ch1

[3] Wells, C. 'Provocation: The Case for Abolition' in Ashworth & Mitchell *Rethinking English Homicide Law* (OUP, 2000) p85

[4] *R v Hayward* [1833] 6 C&P 157, R v Kirkham [1836] 8 C&P 114 cited by Clough, A. 'Loss of Self-control as a Defence: The Key to Replacing Provocation' (2010) *J.C.L.* 74 (118)

Provocation had been said to "occupy its own iconic role"[5] in making such a concession in the law of homicide for this 'human frailty'. A feature in the legal systems of many other jurisdictions, Provocation was the law's concession that anger aroused in a person could become so over-powering that they lose their self-control, react violently and kill their provoker. Without this ability to control oneself, in order to serve justice, legal responsibility was thus partially negated, and a charge of murder would be reduced to manslaughter in light of the circumstance.

Under Section 3 of the Homicide Act 1957, Provocation could be divided down into three key elements: 1) a provocative act, 2) resulting in a loss of self-control, 3) which would have caused a reasonable person to kill in response. The classic formulation of this loss of control requirement as espoused by Devlin J. in *R v Duffy* was a "sudden and temporary loss of self-control"[6]. By reducing the crime to manslaughter judges were given the freedom to determine the appropriate length of sentence; Provocation was thus much sought after by defendants wishing to avoid the mandatory death sentence[7] and then the mandatory life sentence[8].

[5] Ibid.

[6] [1949] 1 All E.R. 932

[7] Prior to s.5 of the Homicide Act 1957 (now repealed) creating a distinction between capital and non-capital murder, the latter carried a mandatory life sentence.

[8] S.1.1 Murder (Abolition of Death Penalty) Act 1965

Provocation's Problems

Despite being a well-developed concept, Provocation was a perennial source of problems for the courts of England and Wales for it was born out of a violent society in the infancy of the criminal justice system. Criticism of Provocation had been primarily aimed at the loss of control doctrine, regarded as being gender biased and outdated[9], and the objective test which, despite being affirmed in the recent Privy Council case of *AG for Jersey v Holley*[10], has been deemed by some commentators as too restrictive a test[11]. Certain fundamental questions about the defence, which I shall explore in this thesis, abounded: what was a sufficiently provocative act to make one lose their self-control? How could loss of control be identified correctly? And crucially is loss of control an allowance for 'human frailty', or simply the frailty of men?

With the law in such turmoil the Law Commission was consequently asked to review not just Provocation but the law of homicide as a whole to address these issues[12]. Further, with an average of two women being killed every week by a violent partner, constituting 40% of all female homicide victims[13], the Government requested that this review crucially, "have particular regard to the

[9] Wells, C. 'Provocation: The Case for Abolition' in Ashworth & Mitchell 'Rethinking English Homicide Law' (OUP, 2000) p85-87

[10] [2005] UKPC 23

[11] Mitchell, B.J., Mackay R.D. & Brookbanks W.J. 'Pleading for provoked killer: in defence of Morgan Smith' [2008] *L.Q.R.* 124, 675-705

[12] Request made by Home Secretary David Blunkett in June 2003, para 1.2 Law Commission 2003 'Partial Defences to Murder: Final Report'

[13] Povey, (ed.), 2005; Home Office, 1999; Department of Health, 2005

impact of the partial defences in the context of domestic violence."[14] Thus the Law Commission declared[15] its intent to focus on abused women who kill pursuant to the perceived difficulty of battered women who attempted to use the partial-defence in cases such as *R v Ahluwalia*[16] and *R v Thornton (No.2)*[17] during the 1990s.

Whilst some commentators, like Jeremy Horder and Celia Wells, had called for the outright abolition of provocation because it was "bound to encourage and exaggerate a view of human behaviour which is sexist, homophobic and racist"[18] the Law Commission believed there was one particularly troublesome element of the defence which needed abolishing. After consultation papers in both 2003 and 2005 the Law Commission came to the conclusion, *inter alia*, that the loss of self-control doctrine should be scrapped from Provocation[19]. However, pursuant to a Home Office review of murder, the Government published contradictory proposals in 2008 which proposed abolishing Provocation and enacting a new partial defence of Loss of Self-Control[20]. This reform proposal was incorporated into the Coroners and Justice Act 2009 which abolished Provocation and elevated Loss of Control doctrine into a fully-fledged partial defence to murder in its own right.

---

[14] 'Partial Defences to Murder' [2003] (LCCP173), 3.75

[15] 'Partial Defences to Murder' [2003] (LCCP173), 3.76

[16] [1992] 4 All ER 859 (CA)

[17] (Sara Elizabeth) (No.2) [1996] 2 Cr App R 108

[18] Wells, C. 'Provocation: The Case for Abolition' in Ashworth & Mitchell 'Rethinking English Homicide Law' (OUP, 2000) p85

[19] 'Murder, Manslaughter and Infanticide' Law Commission Report No 304, 9.17

[20] Murder, Manslaughter and Infanticide: proposals for reform of the law' Ministry of Justice Consultation Paper, 28 July 2008, p. 9

Nevertheless the retention of loss of control remains extremely controversial. In both its 2003 and 2005 consultation papers the Law Commission had identified the loss of self-control requirement as being both overly inclusive where violent males are concerned and overly exclusive for battered women forced to kill their partners/husband. The elevation of anger above other emotions such as fear was heavily criticised for having an inherent gender bias which failed to protect those in society currently most in need of the defence, battered women who kill their abusive partners. Due to these deep concerns over what has now become a replacement partial defence for Provocation, the concept of loss of self-control will be the primary focus of this thesis.

The key aim of this thesis is thus to answer the following questions: 1) Why, if the criminal law is meant to do its utmost to dissuade people from killing one another, did we have a partial defence grounded in loss of control which permitted lethal retaliatory anger as a response? 2) What does having a new partial defence of loss of control based on anger and now fear really mean and what impact will it have? 3) Is it appropriate for the new statutory provisions to partially excuse/justify murder on grounds of loss of control?

Thesis Structure

In order to answer these key research questions this thesis is split into four chapters; Chapter One investigates the early history of the partial defence of

Provocation and how it was established under certain social conditions of commonplace violence, honour and anger. It goes on to explore the emergence of the loss of self-control and the reasonable man concepts in the 19th Century, demonstrating how the former in particular was gendered towards the acceptability of angry masculine violent responses in prescribed circumstances.

Despite loss of control being a questionable component of Provocation, this Chapter Two explores how that the partial defence was still viewed as an acceptable limit on the ambit of the offence of murder, and indeed was expanded significantly over the course of the 20th Century to accommodate more of those in need. Yet, the chapter concludes at the beginning of the 21st Century with the law having been widened to such an extent in order to accommodate these varied incidences of 'human frailty' that the appropriate ambit of the defence, consistently debated by academic commentators, law reform bodies and the appellate courts, created uncertainty over its future.

Chapter Three moves on to explore in further detail the fortunes of Provocation and loss of self-control over the last decade as reform switched to the legislature rather than common law development after the controversial decision in *R v Smith (Morgan)*[21]. This decision, which although praised in some quarters[22] was also considered by others to be the most damaging to

[21] [2001] 1 A.C. 146 (HL)

[22] Mitchell, B.J., Mackay R.D. & Brookbanks W.J. 'Pleading for provoked killer: in defence of Morgan Smith' [2008] *LQR*, 124, 675-705

provocation in the 60 years since the defence had become statutory,[23] was the final straw which prompted the Law Commission to declare the partial-defence to be "hopelessly compromised"[24] and embark on this period of review. The Law Commission identified the loss of self-control requirement as being both overly inclusive where violent males are concerned and overly exclusive for abused women forced to kill their partners/husband. The elevation of anger above other emotions such as fear was heavily criticised for causing this inherent gender bias which failed to protect those in most in need of the defence. This chapter will explore these concerns in depth in order to understand why the Law Commission recommended abandoning loss of self-control as a component in its own reformed partial defence of Provocation.

Chapter Four analyses the reforms to the partial defence made in the Coroners and Justice Act 2009. Whilst the Government did follow some of the Law Commission's recommendations, their decision to abolish Provocation and create a new partial defence of Loss of Self-Control was contrary to the Law Commission's position of abandoning the concept of loss of control. The Act creates a new Loss of Self-Control' defence based on two qualifying triggers, a 'justifiable sense of being wronged' and (for the first time) 'a fear of serious violence'. This chapter first examines the 'fear of serious violence' trigger to evaluate whether it adequately reflects the experience of battered women who kill, questioning in particular the appropriateness

[23] Macklem, T. & Gardner, G. 'Compassion without respect? Nine fallacies in R v Smith' [2001] *Crim. L.R. 623*

[24] 'Partial Defences to Murder' [2003] (LCCP173), 12.1

of retaining the concept of 'loss of control' to describe the reaction of women in this situation. This chapter then looks at the dubious 'justifiable sense of being wrong' trigger to see how it differs from the previous law.

Finally in Chapter Five, whilst some of the calls for the outright abolition of Provocation because it "[was] bound to encourage and exaggerate a view of human behaviour which is sexist, homophobic and racist"[25] were convincing I shall argue that the new 'fear of serious violence limb' should be solely retained, though crucially with the 'loss of self-control' element removed, in order to protect battered women who kill their abusive partners properly. Specifically I shall argue that it is only the 'justifiable sense of being wronged' limb of the new defence that needs to be abolished completely, for why should it still acceptable for the law to provide an excuse for killings carried out (primarily by men) in anger? Instead of trying to differentiate between acceptable and non-acceptable murders resulting from angry reactions we should simply make a stand and say that it is never an appropriate response to kill in anger. This chapter will conclude that as other jurisdictions such as New Zealand are recognising, the law must no longer condone this masculine overreaction to provocation.

[25] Wells, C. 'Provocation: The Case for Abolition' in Ashworth & Mitchell's 'Rethinking English Homicide Law' (1st edn, Oxford University Publishing, 2000)

Chapter One:
On the Origin of Provocation and Loss of Control

"An honorable murderer, if you will;
For naught I did in hate, but all in honor." - Othello 5.2, William Shakespeare

1) Chapter Introduction

Provocation has been described as the quintessential 'crime of passion' defence[26]. Having emerged to accommodate a tolerance for 'human frailty',[27] at a time when men bore arms and retaliated to affronts on their honour[28], it had, by the time of its abolition, developed into one of the most complex doctrines in English and Welsh criminal law. In this chapter I shall investigate the origins of Provocation and the specific concept of loss of control underpinning it, in order to answer my first research question: Why, if the criminal law is meant to do its utmost to dissuade people from killing one another, did we have a partial defence grounded in Loss of Control which permitted lethal retaliatory anger as a response?

In order to answer this question chapters one and two will divide the history of the partial defence of Provocation into four periods. In this chapter I shall discuss the first of these periods, the 'Pre-Codification Era', which focuses on the furtive origins of Provocation in medieval judgments, to the adoption of

[26] Coss, 'The Defence of Provocation: An Acrimonious Divorce from Reality' *Current Issues in Criminal Law* Vol.18.1 [2006] p.51

[27] *R v Hayward* [1833] 6 C&P 157, *R v Kirkham* [1836] 8 C&P 114

[28] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p.4

the four categories in *R v Mawgridge*[29], to the emergence of the loss of control and the reasonable person standard in the 18th and 19th Century culminating in the Royal Commission on Capital Punishment[30].

2) Pre-Codification Era

2.1 Anger and Hot Blood in Medieval Times

The doctrine of Provocation, as it came to be formally identified in the 17th Century[31], first arose in the infancy of the criminal justice system and has continuously evolved in conjunction with the development of the law of homicide. In essence the doctrine is concerned with trying to apportion what legal responsibility should stem from fatal violence committed by defendants who have been cajoled by their victims into angry retaliation[32]. Though this thesis is primarily concerned with the concept of loss of control, it is necessary to first identify the early seeds laid in the law which lead to the development of its parent doctrine Provocation in the 17th Century. This analysis of the roots of the doctrine will shed light on why such an indulgence was made for retaliatory anger.

In early Anglo-Saxon times, up until the middle of the 12th Century, violent death was commonplace in a society prone to brawling,[33] this lead to, "a

[29] [1707] Kel 119

[30] 1949-1953, "the Royal Commission"

[31] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) Ch.2

[32] Sullivan, G.R. *Anger and Excuse: Reassessing Provocation* (Clarendon Press, 1992) p.421

[33] Green, T.A. 'The Jury and the English Law of Homicide, 1200-1600" [1976] 74 *Michigan LR* 414 p415-416 as cited by Cross, G. ' "God is a righteous judge, strong and patient: and God is

need for discriminating between deliberate cold-blooded killings, which were capital offences, and unintentional slayings, for example in the heat of passion."[34] Consequently a distinction in the law between killings by stealth, judged capital offences, and other kinds of homicide, judged 'emendable' were created[35]. These so called 'emendable' homicides were remedied not via state punishment but through compensation to the victim's family[36]. It is important to note the use of the term 'heat of passion' which suggests that the mind of the defendant was perceived to be in an altered state due to their emotions. Accordingly this could be interpreted as an early form of the concept of loss of control.

However by the 13th Century this had changed, with Royal jurisdiction being extended in principle to all cases of homicide, not just those committed by stealth, and all 'felonious' homicides were made capital offences[37]. A felonious homicide was one committed with *malitia praecogitata*, malice aforethought, which was a feature of homicide up until the 19th Century[38]. This term encompassed not only premeditated murder but also all intentional killings, either with the intent to kill or cause grievous bodily harm (GBH)[39]. This ended the practice of defendants who were guilty of felonious homicide simply making

---

provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] 13 *Sydney Law Review* p570

[34] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] 13 Sydney Law Review p570

[35] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p6

[36] Green, T.A. [1976] 'The Jury and the English Law of Homicide' 74 *Michigan LR* p420

[37] Hurnard, N. [1969] *The King's Pardon for Homicide* Clarendon Press p8-9

[38] Brown, B.J. 'The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law' *The American Journal of Legal History* (October 1963) Vol.7.4 p312

[39] Ibid.

their peace with the victim's kin to end the matter. From this point on in English legal history, to escape execution under the mandatory capital sentence the defendant would need to obtain from the King a discretionary pardon[40].

In the criminal law, defences are divided into justifications and excuses. This distinction stems from justifiable and excusable homicide, the two original categories of non-felonious homicide[41]. Justifiable homicide included killing outlaws resisting arrests and thieves in the act of escape and if established in court would lead to an acquittal. On the other hand excusable homicide was divided into homicide *per infortunium* (accidental killing) and homicide *se defendendo* (killing in self-defence). Defendants who killed accidently or in self-defence were not acquitted like those who committed justifiable homicide but instead the accused required a royal pardon. These categories of homicide remained mostly fixed in this form until the middle of the 16th Century[42]. Therefore it can be said that the criminal law has a long history of showing understanding, perhaps even compassion, for some fatal circumstances.

The first of these, "embryonic traces of the defence,"[43] can be found in the judgments of medieval juries. It was in the mid 14th Century that Horder claims the first identifiable cases involving Provocation passed through the courts[44].

---

[40] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p6

[41] Dressler J. 'Provocation: Partial Justification or Partial Excuse' *The Modern Law Review* [1988] Jul. Vol.51 No.4 467-480, p468

[42] Ibid. p7

[43] Sullivan, G.R. *Anger and Excuse: Reassessing Provocation* (Clarendon Press, 1992) p.422

[44] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press ,1992) p8

Green has cited the following two cases as the pseudo parents of Provocation[45]. In the 1320s in a case against William de Walynford the coroner found that the defendant had argued with the victim Simon de Parys. The victim then followed the defendant home and threatened him. The defendants forbade the victim to insult him in his master's house before immediately obtaining a knife and killing the victim. This does not seem like killing 'with sorrow of heart'[46] qualifying as the last resort against a murderous attack *se defendendo*. Despite this, a sympathetic trial jury found that the victim had attacked the defendant with a knife as they stood in the highway, the defendant then fled to his master's house, and that he had only killed the victim when he was cornered and in mortal danger. Thus the jury instead of finding a felonious killing determined self-defence.

Secondly, in 1341 Robert Brousserman returned home to find John Doughty having sex with his wife. Brousserman then killed Doughty with a hatchet. Again however the jury told a contradictory story; its members claimed that the victim had entered the defendant's home as a trespasser while the defendant and his wife lay sleeping. The defendant's wife arose and slipped silently into bed with the victim. The defendant was then awoken by the noise the pair made and arose to find the victim having sex with his wife. The jury then claimed that the victim had attacked the defendant with a knife and wounded him. Moreover they also espoused that the victim had blocked the wounded

[45] Green, T.A. '*Verdict According to Conscience: Perspectives on the English Criminal Trial Jury: 1200-1800'* (University of Chicago Press, 1985) p.38

[46] Ibid.

defendant's exit from his home and continued to fight him until the defendant was forced to strike the victim, killing him with a single blow to the head with a hatchet[47]. Green and Horder believe these two cases are the origin of provocation,

> "Such a verdict according to conscience would pave the way for the pardoning *de cursu* of a defendant with whose actions in killing in hot blood the jury had sympathized."[48]

These extraordinary retellings of the facts by juries meant that provocation cases were presented as a form of understandable self-defence. Given these facts it is clear that Provocation's origin lies in an attempt by the courts to allow juries to prevent their fellow man from being executed for something they believed justifiable.

In comparison there was another important category in which juries of the time would bend the facts to suit their understanding of what justice required. This was when the accused had acted in defence of his kinsmen cited by Green[49] in the late 14th Century case of *Colles*. In this case Colles and his son were talking to the victim when a fight erupted and the victim struck the elder Colles. Whilst the coroner recorded that Colles's son killed the victim with a knife the jury found that the victim had begun the argument and struck the elder Colles before turning on his son who fled, was pursued and cornered was forced to kill the victim. Green argues that this early criminal law, which focused on culpability being constructed on the notion of purity of will, resulted in, "creating

---

[47] Green, T.A. *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury: 1200-1800* (University of Chicago Press, 1985) 42-43

[48] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p9

[49] Green, T.A. *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury: 1200-1800* (University of Chicago Press, 1985) 43-44

a de facto classification roughly similar to the later legal distinction between murder and manslaughter".[50] Similarly Horder puts forward that when the doctrine of Provocation finally took shape in the 17th Century, and which endured for just over two centuries, it was, "fashioned almost exactly in accordance with the medieval juries' understanding of what was excusable homicide and what was not".[51] There is strong evidence in support of these claims. The four acceptable categories of Provocation established in the 17th Century (which I shall explore in more detail in the next section) make exception for exactly these type of situations. For example in the case against William de Walynford, going on the true facts, the defendant could have pleaded the first category, the general grossly insulting assault. Likewise Brousserman would fall under the forth category of seeing a man in the act of adultery with one's wife and similarly the case of *Colles* would fall under the second category broadly, seeing a friend, relative of kinsmen being attacked. The allowances made by early medieval juries in these cases certainly shaped the subsequent decision in the 17th Century as to what could constitute acceptable provocation.

2.2 Honour and Categorisation in the 17th Century

In the 17th Century two important developments are credited with the foundation of the modern doctrine of Provocation. The first was the confirmation that the doctrine was no condescension to deliberate killings out of pure cold-blooded revenge for a provocation given. Only provoked killings in the heat of

[50] Green, T.A. *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury: 1200-1800* (University of Chicago Press, 1985) p33

[51] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p9

blood were within the scope of the mitigation (the factual or subjective criterion)[52]. The second development was the gradual emergence of four distinct categories of Provocation thought sufficiently grave to warrant the reduction of a charge of murder to manslaughter of a hot-blooded intentional killing (the evaluative or objective criterion)[53].

The four categories were: 1) general grossly insulting assault; 2) broadly, seeing a friend, relative or kinsmen being attacked; 3) seeing an Englishman unlawfully deprived of his liberty; and 4) seeing a man in the act of adultery with one's wife. Ashworth has suggested that the reason for these categories of Provocation being deemed so grave as to negate murder to manslaughter is the link of the element of 'unlawfulness' in the provoker's action[54]. In the first and second categories there is the unlawfulness of the use or threat of violence whilst in the third category there is the unlawfulness of false imprisonment and in the fourth category the canon law breach of adultery. What is more likely, as Horder contends, is that simple 'unlawfulness' is not the basis for their selection as in *R v Mawgridge*[55] the court deemed unlawful behaviour such as defamation and trespass to be insufficient provocation[56]. Thus Horder argues that the actual basis for these categories was the early modern concept of honour[57].

---

[52] Horder, J. 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25 O.J.L.S. 127, 130

[53] Ibid.

[54] Ashworth, A 'The Doctrine of Provocation' (1976) *35 Cambridge Law Journal* 292

[55] (1707) Kel 119

[56] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p24

[57] Ibid.

2.2.1 Honour

The influence of the concept of honour in English morality and politics from the later medieval times right up until the late 19th Century cannot be overstated. The historian Andrew's research[58] on this topic shows that over this long period the importance of honour and society's conception of it changed dramatically. During this period so-called 'honour theorists' propagated the concept of honour by advising men on how best to live an honourable life[59]. Starting in the early modern period where these theorists distinguish between 'acquired' honour and 'natural' honour[60], Horder has examined their research in his work[61] in order to understand it as a basis for Provocation.

Acquired honour is the classic Aristotelian concept of reward for great deeds, namely fame, glory and reverence, obtained through the practice of virtue.[62] It is a rather uncodifiable, romantic notion and fortunately the law of provocation is more concerned with natural honour which is more easily definable. Natural honour is perhaps comparable to modern civic respect in that it was the good opinion of others founded in the assumption that the person honoured by the good opinion was morally worthy of such esteem and respect[63]. Thus whereas acquired honour had to be earned in heroic and gentlemanly

---

[58] Andrew, D. 'The Code of Honour and it Critics' *Social History* [1980] 5(3), 409-34

[59] Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' *S.L.T.* [2006], 30, p198

[60] The distinction is well explored by the 16th Century theorist Romei and examined by Kelso, R. 'The Doctrine of the English Gentleman in the 16th Century' *University of Illinois Studies in Language and Literature* [1929] 14(1-2)

[61] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) Ch.2

[62] Ibid. p25-26

[63] Ibid. p26

deeds to elevate you above others, natural honour is a common courtesy afforded to all men from birth,

> "Man ... bringeth with him honour from his mother's womb, because he is borne with that inward supposition that he is good; neither is it requisite, that to preserve this supposition, he labour greatly, in that it sufficeth only, that he never extremely offend against any principal virtue. And for that of this supposition, in the end groweth opinion in him honouring, which is honour..."[64]

Ergo natural honour is established negatively, it was purely a man's due if he had not failed in any principle virtue.

Provocation became based in the concept of offending natural honour which could be done in a variety of ways such as treating a man with irreverence, disdain or contempt, poking fun at him or accusing him (even in jest) of failing in point of virtue. Put another way

> "it was to undermine or disregard the supposition, at the heart of natural honour, that he was not deficient in any principal virtue."[65]

In the face of such an affront, the only proper response from a 'man of honour' was to retaliate in order to protect his natural honour from the threat posed by this slight[66]. The logic of the time deemed that retaliation would 'cancel out' the impact of the affront as it would show the victim was not cowardly and not 'lacking spirit' in Aristotle's words[67]. Thus the need to avenge an affront was deemed one of the most important 'laws' of honour[68].

---

[64] Romei, A. *The Courtier's Academie* [1597] 110 as cited by Horder, J. 'Provocation and Responsibility' (1st Edn, Clarendon Press, 1992) p26

[65] Dressler, J. 'Why Keep the Provocation Defence? Some reflections on a Difficult Subject' [2002] 86 *Minnesota LR* 959

[66] Ibid.

[67] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p27

[68] Mandeville, B. *Fable of the Bees* (1714) p180 as cited by Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p27

Further this retaliation was meant to be an instant, automatic, snap response in anger, "Unto him that is valiant of courage, it is a great peine and difficultee to susteine injurie, and not be forthwith revenged."[69] This could be interpreted as an early form of 'loss of self-control'. This need for swift retaliation is made clear by honour theorists such as Ashley, who stated that "honour amongst most men [was] of great estimacion"[70] and Romei who even prescribed the precise retaliation proportionate to the degree of the offense:

> "They… that intreate of Combate … have set it down for a certaine rule that injury in words is taken away by injury of deed, and that a lie is falsified with a boxe on the eare, or any blow with what else thing soever, they alleging this proposition for a maine, unto which no answer can be made, that one injury, by another greater than that is taken away, and that the injury of deeds is greater that that of words."[71]

In essence we can derive from this that, depending on the affront, the appropriate response to the threat to natural honour in early modern England escalated from a mere assault to a full duel – the 'combate'.[72]

Though it may seem a quaint notion the duel was very much a part of acceptable society from the latter part of the 16th Century until even as late as the mid 19th Century and was even given special recognition in the law[73]. Indeed lawyers of the time understood that the duel was, as Horder terms it a 'bilateral combat',[74] based on Holt CJ's statement that each participant, "run[s] the hazard

---

[69] Elyot, T. *The Governour* [1531] 170

[70] Ashley, R. *Of Honour* [1600] 50

[71] Romei, A. *The Courtier's Academie* [1957] 151 as cited by Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' [2006] *S.L.T.* 30, P199

[72] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p27

[73] Horder, J. 'The Duel and the English Law of Homicide' [1992] *O.J.L.S.* Autumn Vol.12 419-430, p419

[74] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press,1992) p28

of his life at the same time".[75] Accordingly it formed a sort of contractual agreement, quite opposed by the modern case of *R v Brown*[76], in which the participants consented to whatever harm they met and was therefore an extremely common means of seeking to extinguish an insult to one's natural honour.

Consequently, a manslaughter case involving Provocation was a case in which the defendant had committed a 'unilateral attack' on the provocative victim who was, crucially, unprepared to defend themselves[77]. Horder argues that despite no 'martial courage' being shown in the retaliation to obliterate the threat to natural honour, as there was little risk to the attacker, the gravity of the provocation meant he was still deserving of mitigation from murder to manslaughter[78]. Further Romei's prescribed "boxe on the eare" in the above passage[79] might well be enough, if carried through with enough force to the right spot, to kill, though this may or may not have to be the express intention. Hence the law recognised that due to the high importance society placed at the time on protecting natural honour, a provoked defendant's actions should have been mitigated from murder to manslaughter,

> "If one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter; for the peace is broken by the person killed, and with an indignity to him that received the assault."[80]

---

[75] *R v Mawgridge* [1707] Kel. 119, 131

[76] [1994] 1 AC 212

[77] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p29

[78] Ibid.

[79] Romei, A. *The Courtier's Academie* [1957] 151 as cited by Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' [2006] *S.L.T.* 30, P199

[80] *R v Mawgridge* [1707] Kel. 119, 135

Though this extract from Holt CJ's judgment only mentions assault as the kind of grave provocation warranting mitigation from murder to manslaughter Horder argues that all four categories of sufficient provocation were based on natural honour[81]. Having explored the concept of honour in the early modern period we can now track the emergence of the four circumstantial categories sufficient for successfully pleading Provocation in the 17th Century.

2.2.2 Emergence of the Four Categories

In 1604 the Statute of Stabbings was passed in an attempt to counter the escalation in killings arising from quarrels[82]. It stated that manslaughter would not be found where the victim was suddenly stabbed to death whilst unprepared for an attack, having given no or little provocation. It can be discerned from the passing of the Statue of Stabbings that King James I's government regarded all hot-blooded, unilateral, and intentional killings, whether on great or trivial provocation, were murder at the beginning of the 17th Century. [83] This had already been established in the common law with the case of *Watts v Brains*[84] in which the provocative victim had made a rude gesture at the defendant who immediately pursued the victim and hit him in such a way that he fell down dead[85]. At appeal the court held that the killing was murder by implied malice for the preceding circumstances were insufficient[86],

---

[81] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p30

[82] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] *Sydney Law Review* 13 p573

[83] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p30

[84] [1600] Cro. Eliz. 778

[85] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] 13 *Sydney Law Review* 13 p574

> "If one make a wry distorted mouth, or the like countenance upon another, and the other immediately pursues and kills him, it is murder: for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient to pretence for a quarrel."[87]

It has been argued that this judgment proves that, even before the Statute of Stabbings, the court analysed cases of attacks in the heat of blood in terms of the sufficiency of the provocation which instigated them[88]. This analysis continued throughout the 16th Century and established a discernible 'doctrine' which culminated in 1707 with Holt CJ's definitive judgment of provocation in the Pre-Codification Era in *R v Mawgridge*[89]. However, foremost the four categories which emerged in the 17th Century need to be explored further in order for us to understand how qualifying triggers for the concept of loss of control became rooted in the common law.

2.2.3 Acquaintance Attack Provocation

Interestingly the initial category of the four to emerge in three cases from the early 17th Century was that of seeing a friend, relative or master being attacked. The first of these cases was an anonymous unreported cases arising from a dispute over a game of bowls in 1612 in Great Marlow,

> "Divers men paying at bowls at Gt. Marlow in the county of Kent, two of them fell out, and quarrelled the one with the other; and the third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; this was held to be manslaughter for this, that it happened upon a sudden motion in revenge of his friend."[90]

Though this vague account does not provide details as to whether or not the defendant's friend was having an argument or being attacked by the victim on

---

[86] Gough, S. 'Taking the Heat out of Provocation' [1999] *O.J.L.S.* Vol.19 p.482

[87] [1600] Cro. Eliz. 778, 778-779

[88] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p31

[89] [1707] Kel 119

[90] Coke, Rep 67.

the bowling green it is an important starting point. The account refers to the action being taken out of 'revenge' which arguably suggests there may have been a physical attack. Due to the lack of proper judgment we can only speculate however the crucial point regarding this case is that the final sentence is explicit on the point that this was sufficient provocation to reduce a sentence of murder to manslaughter[91].

The subsequent cases of *Royley*[92] and *Cary*[93] affirmed however that the friend or relative in question must have been physically being attacked, not merely verbally accosted, to constitute sufficient provocation. In *Royley's* case[94] the defendant's son returned home bloody from having been in a scrap with another child. The defendant, upon hearing of his son's beating, picked up a cudgel, ran three-quarters of a mile and killed the boy who fought with his son with the weapon. Croke reports:

> "And all the court resolved, that it was but manslaughter; for he going on the complaint of his son, not having any malice before, and in that anger beating him, of which stroke he died, the law shall adjudge it to be upon the sudden occasion and stirring of blood, being also provoked at the sight of his son's blood, that he made that assault, and will not presume it to be upon any former malice, unless it be found."[95]

This judgment has been criticised for being rather lenient[96], particularly given that the father did not actually bear witness to the attack. Croke's rationalisation

---

[91] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p32

[92] [1612] 12 Co. Rep 87; also [1612] Cro. Jac. 296

[93] [1616] this case is described by Stephen, J *History of Criminal Law* (3 vols) [1877] p221, reprinted by Burt Franklin, New York [1982]

[94] [1612] 12 Co. Rep 87; also [1612] Cro. Jac. 296

[95] Ibid.

[96] Horder, J. 'The Problem of Provocative Children' [1987] *Crim LR* p657

of the judgment sheds light on the formation of the hurdle for this category of Provocation[97].

Similarly in the case of *Cary*, A and B were fighting in a field due to a quarrel when C, A's kinsman who was passing on horseback, rode in and ran his sword through B killing him,

> "Coke C.J. and the rest of the court agreed that his is clearly but manslaughter in him and murder in the other, for the one may have malice and the other not."*98*

Horder argues that the recognition of these three decisions in the judgment of *R v Mawgridge*[99], constitutes a distinctive directive that, what I would term, 'acquaintance attack provocation' was a recognisable category. Further, Horder argues that Holt CJ rightly traced the category's legal-historical origins back to the *Salisbury* case the facts of which also involved the defendant coming to the aid of a relative in an affray.[100]

2.2.4 Liberty Deprivation Provocation

This category of sufficient provocation was based on seeing a man unlawfully deprived of his liberty:

> "If a man be unduly arrest or restrained of his liberty by three men, altho' he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends but strangers also for common humanity sake, as Lord Bridgman said, to endeavour a rescue."*101*

---

[97] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] 13 *Sydney Law Review* p574

[98] [1616] this case is described by Stephen, J. *History of Criminal Law* (3 vols) [1877] p221, reprinted by Burt Franklin, New York [1982]

[99] Holt C.J. [1707] Kel 119

[100] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p33

[101] [1666] Kel. 59, 60

This extract from the celebrated case of *R v Hopkin Hugget*[102] outlines the crux of this category. The defendant in this case was accused of murdering the victim, a press master who was pressing men into service for the wars against the Dutch. At the time of the killing the victim was taking away pressed men when the defendant and his followers stopped him from taking them away and demanded an explanation. When the victim produced a faked warrant the defendant and his band drew their swords and attacked the victim and his party. The question of whether the defendant, who had killed the victim in the resulting melee, was guilty of murder or manslaughter was reserved for the consideration of judges who eight to four found in favour of a verdict on manslaughter.

This judgment has been seen by some as a controversial one including Horder[103] who highlights the dissenting judgment of Kelying:

> "And we thought it to be of dangerous consequence to give any encouragement to private men to take upon themselves to be the assertors of other men's liberties, and to become patrons to rescue them from wrong; especially in a nation where good laws are for the punishment of all such injuries, and one great end of law is to right men by peaceable means, and to discountenance all endeavours to right themselves, much less other men, by force".[104]

This category was again subsequently confirmed in *R v Mawgridge*[105], with Holt CJ describing Huggett as, "acting out of compassion" for those "injuriously treated, pressed, and restrained of [their] liberty".

The majority in *R v Hopkin Hugget*[106] drew analogy to the previous category of Provocation, that of 'acquaintance attack', as the concept of honour is

---

[102] [1666] Kel. 59

[103] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p33

[104] [1666] Kel. 59, 61

[105] [1707] Kel. 119, 136-7

directly relevant. Whereas the previous category was concerned with what Mervyn James' termed the "the solidarities of honour…lordship, kingship, friendship"[107] this category is about how the man of honour deals with the injustice of false imprisonment of Englishmen. Horder asserts that:

> "Such an injustice done to another, before the eyes of a man of honour was a direct challenge to the latter's natural honour. Were he to see this but do nothing, an inference of cowardice would be drawn".[108]

His assessment is based on the following extract from the early 17th Century honour theorist Segar: "He is accompted valiant, that … never doth shun and generous action tending to publique benefit, or his own private reputation".[109] It was thought at the time that upon finding someone, even a stranger, being deprived of his or her liberty was an occasion for a man of honour to prove himself by rescuing the detained.

This idea is judged to underlie the third category in Holt CJ's decision in the case of *R v Tooley*[110]. In this case a constable who had taken a woman into custody on illegal grounds. She had therefore been unlawfully deprived of her liberty. However the defendant who tried to rescue her was not aware of the illegality as those in *Hopkin Hugget*[111] had been. During the defendant and his company's attempt to rescue the woman one of the constable's assistants was killed resulting in Tooley being charged with murder. However the majority in

---

[106] [1666] Kel. 59

[107] James, M. 'English Politics and the Concept of Honour' *Past and Present*, suppl. 3,1 [1978] p5

[108] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p34

[109] Segar, W. *Honour: Military and Civil* [1602] p124

[110] [1709] Holt KB 485

[111] [1666] Kel. 59

the case, lead by Holt CJ, were of the opinion that he was guilty of manslaughter and not murder for:

> "the question is whether or not they had a sufficient provocation? I take it they had. If a man is oppressed by an officer of justice, under a mere pretence of an authority, that is a provocation to all the people of England … I would fain know, when a man is concerned for the laws of the land, and for Magna Charta, whether that is not a provocation?"[112]

Cross argues that the obvious criticism that undermines this decision is that the 'honourable' defendant and his company were completely unaware of the illegality of the arrest[113]. However as an explanation for this category, Holt CJ's justification provides us with a good outline of the rationale, which reveals:

> "a society in which men's concern to protect their natural honour required them, if they were to avoid any implication of cowardice, to show anger at injustice and a willingness to avenge it".[114]

2.2.5 The Grossly Indecent Assault

Whilst in the modern law an assault is deemed to be any physical contact the court makes exception when it comes to contact in day-to-day life. In the 16th and 17th Centuries however a common source of provocation was from pedestrians jostling in the crowded streets. Whilst this may seem like a most peculiarly specific category Horder points out:

> "Particularly irksome were attempts by pedestrians to secure for themselves (at the expense of others) a position right by a wall adjoining the street, in order both to avoid being splashed by passing coaches and to obtain the protection of the overhang from waste thrown from windows".[115]

The primary authoritative direction on this came in Hale's account of *Lanure's Case*:

---

[112] [1709] Holt KB 485, Holt CJ 489-490

[113] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] 13 *Sydney Law Review* p576

[114] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p35

[115] Ibid.

> "If A be passing the street, and B meeting him, (there being convenient distance between A and the wall) takes the wall of A and thereupon A kills him, this is murder; but if B had justled A this jostling had been a provocation, and would have made it manslaughter, and so it would be, if A riding on the road, B had whipt the horse of A out of the track, and then A had alighted, and killed B it had been manslaughter".[116]

Again this category of provocation was given authoritative approval by Holt CJ in *R v Mawgridge*[117]. This is arguably the most justifiable category for pleading Provocation, if one is seriously assaulted and you are left in fear for your life then it is right that you are protected by the law if you attempt to protect yourself. This allowance has been maintained right through to the modern day, however obviously in order to prevent violent over reactions to the smallest of assaults it was curtailed over time to ensure public safety.

2.2.6 Cuckolded Jealousy

Finally the fourth category of jealousy was catching a man in the act of adultery with one's wife. As with the previous three, confirmation of this final category came in the landmark decision of *R v Mawgridge*[118] with Holt CJ stating:

> "When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of the man, and adultery is the highest invasion of property ... If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other".[119]

The acceptance of this as a basis of provocation to reduce murder to manslaughter began with *Manning's Case*[120] in which the defendant returned home to find the victim in the act of adultery with his wife, though he lost his self-control and killed the man the King's Bench decided, "It was but

---

[116] [1642] A PC 455

[117] [1707] Kel. 119, 136-7

[118] [1707] Kel. 119, 136-7

[119] [1707] Kel 119, 137

[120] or *Maddy's Case* [1672] 1 Vent 159,86 ER 108

manslaughter, the provocation being exceeding great, and … there was no precedent malice".[121] This case was continuously cited even in the last century as being one of the leading cases on Provocation.[122]

Of all of the challenges to honour in the early modern period this is by far the gravest, trumping all of the other categories[123]. In line with the connected emphasis on revenge to repair and restore honour, in 1817 Bosquett an honour theorist stated:

> "I have never known a man whose heart was in the right place bring an action for damages against another for seducing a beloved wife, a daughter etc… For these and such like offences the law can make no adequate retribution – in such a state life is a burthen, which cannot be laid down or supported, till death wither terminates his own existence or that of the despoiler of his peace and honour".[124]

It is clear from this extract that during this period in which there was much more unrest in society and with no police force enforcing the law that it was viewed as not just acceptable but appropriate to seek revenge in taking a life. Adultery itself was one of the crimes of immorality punishable by the ecclesiastical courts and in the context of the strict Christian beliefs of abstinence prior to marriage and fidelity once married during this period it is understandable that such an affront was given special allowance[125]. This was coupled with the view at the time that daughters and wives were the property of the man and this therefore represented an invasion or property.

---

[121] [1617] 1 Vent 158, 159

[122] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] 13 *Sydney Law Review* p576

[123] Gough, S. 'Taking the Heat out of Provocation' [1999] O.J.L.S. Vol.19 p.483

[124] Baldrick, R. *The Duel* (1965, Chapman & Hall); cited by Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p37

[125] Ashworth, A. 'The Doctrine of Provocation' [1976] *Cambridge Law Journal* 35(2) Nov. p294

The four categories can be seen as a precursor to the qualifying triggers which could trigger a loss of control in the ordinary reasonable person. As we shall explore, although the first category, that of liberty deprivation ceased to be recognised, assaults on both oneself and ones kin have maintained their position with Provocation. This accommodation for the degree of dishonour in being cuckolded in the early modern period has survived far beyond this time even though society abandoned this concept of honour. Indeed in it was not until the Coroners and Justice Act 2009 that an allowance for this was finally abolished and as we shall see in Chapter Three even then the move was fiercely opposed by the House of Lords.

The judgment in *Mawgridge*[126] represents a defining moment in the development of Provocation. Though the Statue of Stabbings had the desired effect of reducing the number of people carrying sidearms in public which contributed to the decline of *Chance Medley*, commentators largely also credit the popularity of Provocation in leading to it's abolition in 1828[127]. This popularity stemmed from the clarification of the law of Provocation in *Mawgridge*[128] and the creation of the four categories as well as the five which were explicitly deemed unacceptable: retaliation upon words alone, retaliation in the face of affronting gestures, killing a simple trespasser, inappropriate correction of children or servants, and killing upon breach of a

[126] [1707] Kel. 119, 136-7

[127] Brown, B.J. 'The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law' *The American Journal of Legal History* (October 1963) Vol.7.4 p314

[128] [1707] Kel. 119, 136-7

promise[129]. With the abolition of *Chance Medley* this new approach in the law recognised that for a crime as sever as murder a stricter regime was required for the good of society[130].

2.3 The Rise of the 'Loss of Control' and the 'Reasonable Person Standard' in the 18th and 19th Centuries

Throughout the 18th Century the court continued to maintain Holt's four acceptable categories of provocation. As explained above this was based on the established societal code that the angered man of honour was expected to react in such a way[131]. However, judges in the 19th Century were forced to adapt Provocation to suit the needs of Victorian society. There were two aspects to the development of the defence in the 19th Century. The first was that judges "preferred to look upon provocation as something which temporarily deprives the accused of their reason", rather than a legitimate basis for the expression of moral outrage.[132]. Second, Horder argues that during this period rising criticism of the code of honour which had glorified violent outbursts greatly intensified in courts and society[133]. Trivial provocation, which had previously fallen into the four categories, began to become unacceptable and only provocative acts which could make the 'reasonable person' temporarily 'lose their self control' were permitted.

---

[129] [1707] Kel. 119, at 130-135

[130] Brown, B.J. 'The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law' *The American Journal of Legal History* (October 1963) Vol.7.4 p314

[131] Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' *S.L.T.* [2006], 30, P200

[132] *R v Smith* [2001] AC 146 at 160 as per Lord Hoffmann

[133] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p71

2.3.1 Loss of Control

The most important change to Provocation and the one I am most concerned with in this thesis was the creation of the 'loss of self-control' doctrine. In *Pleas of the Crown*, published in 1803 and described by Coss as a "forerunner of the modern day textbook"[134], Sir Edward Hyde East outlined the law's emerging perception of provoked killings as being: "not the result of a cool deliberate judgment and previous malignity of heat, but imputable to human infirmity alone."[135] In the 19th Century the birth of this loss of control doctrine marked a shift from the previous anger as outrage model to a focus on the mind of the person provoked[136].

Horder argues that the origin of the concept of 'Loss of Control' originates from the changes in the way that male state of mind was conceptualised in the 18th and 19th centuries, and specifically the notion that when a man was calm they were able to exercise reason within their soul[137]. Powerful metaphors like "an ungoverned storm"[138] were used in judgments to describe the type of provoked anger that could break the control men had over their actions when their blood was "cool"[139]. This kind of imagery denotes a change of thought

---

[134] Cross, G. ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' [1991] *Sydney Law Review* 13 p579

[135] *A Treatise of Please of the Crown* 1803 Vol 1 at 232 as cited by Ibid.

[136] Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' [2006] *S.L.T.* 30, p201

[137] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p73

[138] Baron Jenner in *Walters* [1688] 12 St. Tr. 114 as cited by Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p74

[139] *R v Lynch* [1831] 5 C & P 325 as cited by Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p74

regarding the relationship between anger and reason. It is grounded in the idea that anger is able to subdue or "eclipse"[140] rationality in the mind.

In his writings on the subject of provocation at the dawn of the 19th Century Sir Edward Hyde East evaluated the emergence of the concept of loss of control in the previous century as being centred on "human frailty"[141]. It has been suggested by Casey that the first sign of this shift was indeed present in the judgment of *R v Mawgridge*[142] when Holt CJ talked of jealousy being "the rage of a man" [143]. The doctrine made an exception in the law for the power of emotions to overrule a provoked person's reasonable thought which results in killing. This change of conception was next most evident in the case of *Oneby*[144] in which, in close approximation to *Walters*[145], the jury is advised to consider that:

> "the Law of England is so far peculiarly favourable … as to permit the excess of anger and passion (which a man ought to keep under and govern) in some instances to extenuate … the taking away of a man's life; yet in those cases it must be such a passion as for the time deprives him of his reasoning faculties; for if it appears reason has resumed its office … which cannot be as long as the fury of passion continues, the Law will go no longer … except him … so as to lessen [the offence] from murder to manslaughter."[146]

This is a major change in the formulation of Provocation as the concept of loss of control is employed to break away from the previous rigid four category approach.

---

[140] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p74

[141] *A Treatise of Please of the Crown* [1803] Vol 1 at 234

[142] [1707] Kel. 119, 136-7

[143] Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' [2006] *S.L.T.* 30, p202

[144] [1727] 2 Ld. Raym. 1485

[145] Baron Jenner in *Walters* [1688] 12 St. Tr. 114 as cited by Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p74

[146] Lord Chief Justice, Lord Raymond [1727] 2 Ld. Raym. 1494-96

In a swift succession of subsequent cases in the 19th Century including *Hayward*[147], *Thomas*[148] and *Fisher*[149], which all reference this "human frailty", the loss of control concept was embedded further into Provocation. In the case of *Kirkham*[150] Coleridge J stated, "The law… has at once a sacred regard for human life and also a respect for man's failings, and will not require more from an imperfect creature than he can perform".[151] In order to sympathise for human weakness and extreme emotion the law moved towards analysing the mind of the defendant rather than just the expected impact on their honour. This continues with the tradition set forth in the four categories of acceptable provocation but begins the process of reining in the use of the partial defence. The doctrine meant that no longer could a defendant simply say that seeing a person deprived of their liberty meant that they could kill instead of merely stopping the deprivation for instance. Instead in order to appropriately remedy for human frailty a test was put in place to show that the circumstances had such a profound affect on the defendant that they were not in control of their actions and therefore could not be held fully legally responsible.

2.3.2 The Reasonable Person Standard

Returning to Sir Edward Hyde's writings at the beginning of the 19th Century, he evaluated the creation of the concept of loss of control in the previous century as being centred on "human frailty":

[147] [1833] 6 C&P 157

[148] (1835) 173 ER 356

[149] (1837) 173 ER 452

[150] (1837) 173 ER 422

[151] Ibid at 422

> "In those cases where the mercy of the law interposes in pity to human frailty, it will not try the culprit by the rigid rule of justice, and examine with the most scrupulous nicety whether he cut off the exact pound of flesh."[152]

This leads us to the second major change to the law of Provocation at this time which was the generalising of what could constitute sufficient provocation[153] with the adoption of the objective or reasonable person standard. This standard was adopted in order to bring a gauge of 'proportionality' to Provocation[154].

In *R v Hayward*, Tindal C.J. told the jury that the defence of provocation was derived from the law's "compassion to human infirmity"[155]. At around the same time as this shift in the development of provocation the 'Reasonable Man Standard' began to develop. The first appearance in the 19th Century of this was not in a Provocation case but in *Vaughan v Menlove*[156] which defined the standard as follows:

> "Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

By the middle of the 19th Century provocation began to move away from assessing what would provoke the 'man of honour', to what would provoke a response from the reasonable man[157].

---

[152] *A Treatise of Please of the Crown* [1803] Vol 1 at 239

[153] Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' [2006] *S.L.T.* 30, p201

[154] Ashworth, A. 'The Doctrine of Provocation' *Cambridge Law Journal* [1976] 35(2) Nov. p295

[155] [1833], 6 C. & P. 157, p158

[156] 132 ER 490 [1837]

[157] Casey, J. 'Gillon v HM Advocate: Provocation, Proportionality and the Ordinary Person' S.L.T. [2006], 30, P201

The law came to recognise that not all acts done in the heat of passion should be permissible for provocation and that instead the act would have to be sufficient to excite an ordinary reasonable person to do the same under the circumstances.This is supported by Coleridge J who directed the jury in *R v Kirkham* that:

"though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions,"[158]

This passage emphasises the distinct shift away from insults to a man's honour forming the basis for Provocation as it reiterates the allowance for "human frailty" expressed in the earlier case of *Hayward*[159]. Nevertheless Ashworth has argued that the reasonable man is the "generalised successor" to the previous categories of provocation based on honour.[160]

Subsequently, in the case of *R v Welsh*[161], the reasonable man test was first adopted in order to gauge an appropriate response to provocation. Keating J stated that Provocation would be sufficient if, "something which might naturally cause an ordinary and reasonably minded man to lose his self control and commit such an act,"[162] and that this test should now form the basis of provocation:

> "The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion."[163]

---

[158] (1836) 8 C&P 114, p119

[159] [1833] 6 C&P 157

[160] Ashworth A. - 'The Doctrine of Provocation' (1976) 33 *Cambridge Law Journal* 292, p299

[161] (1869) 11 Cox CC 336

[162] Ibid. p386

[163] Ibid. p388

However no definition of this theoretical 'ordinary' or 'reasonable' man (used interchangeably) was offered up by the courts and it was expected that the term would simply be understood by juries.

3) Chapter Conclusion

In an attempt to answer the first research question set in the introduction of this thesis this first chapter has investigated the history of the partial defence of Provocation from its emergence in a violent society to one fixated on the idea of honour and then in the infancy of its modern legal system. The emergence of loss of self-control and the reasonable man concept in the 19th Century will shape much of the debate around the defence of Provocation in the next chapter as our exploration of the partial defence's history shifts to the 20th Century. As we shall explore in Chapter Two both the incorporation of loss of self-control, which created a partial defence gendered towards the acceptability of angry masculine violent responses, and the reasonable man proved to create great difficulties for defendants, legal academics and the courts themselves.

Chapter Two: Provocation and Loss of Control in the 20th Century

"I saw the flickering shadows of love on her blind
She was my woman
As she deceived me I watched and went out of my mind
My, my, my, Delilah
Why, why, why, Delilah
I could see that girl was no good for me
But I was lost like a slave that no man could free
At break of day when that man drove away, I was waiting
I cross the street to her house and she opened the door
She stood there laughing
I felt the knife in my hand and she laughed no more"
- 'Delilah' Tom Jones

1) Chapter Introduction

In this chapter I shall continue to investigate the development of Provocation and the specific concept of loss of control underpinning it, in order to answer my first research question: Why, if the criminal law is meant to do its utmost to dissuade people from killing one another, did we have a partial defence grounded in Loss of Control which permitted lethal retaliatory anger as a response?

I shall begin with the 'Post Codification Era' in which I will explore the period just after the Second World War until the 1990s, encompassing the adoption of the law into statute in the Homicide Act 1957. This section will analyse the impact of Section 3's interpretation of the concept of loss of control and the impact the law had on the objective standard it was measured by. In the third period, the 'Era of Judicial Expansion', I will explore the relaxation of the objective standard in what I have termed the 'quartet of syndrome cases'[164] in

[164] R v Ahluwalia [1992] ALL ER 889 , R v Thornton (No.2) [1996] 2 Cr App R 108, R v Humphreys [1995] All ER 1008 and R v Dryden [1995] 4 All ER 387

the 1990s and the impact on the concept of loss of control. Finally in the 'Era of Judicial Ambivalence' I will delve into the climax of Provocation's development in the common law it strained under the interchanging of the objective and subjective standard by the courts before legislative reform was required.

2) Post Codification Era

2.1 The Royal Commission on Capital Punishment

Freedman argues that the Royal Commission on Capital Punishment modified, but did not codify or replace, provocation when it drafted the Homicide Act 1957[165]. He continues that in keeping with the "pattern of progressive evolution of the provocation principle" the Commission provided a revised structure for the application of the defence.

2.1.1 Section 3 Homicide Act 1957

Shortly after the end of the Second World War in 1945 a review of the common law relating to Provocation took place. In 1949 Lord Goddard CJ commented on the partial defence of Provocation being born out of the social circumstance in which it had operated:

> "At a time when society was less secure and less settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when dueling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken to-day when life and property are guarded by an efficient police force and social habits have changed". [166]

[165] Freedman, C.D. 'Restoring Order to the Reasonable Person Test in Defence of Provocation' [1999] *King's College Law Journal* Vo.10.1, p26

[166] *R v Semini* [1949] 1 KB 405

The Royal Commission on Capital Punishment 1949-1953 subsequently began a review of the entire law of homicide which would encompass Provocation in order to bring it up to date.

Following the important case of *R v Duffy*[167], the Royal Commission attempted to tackle the partial defence of Provocation. *Duffy*[168], described as the 'first port of call'[169] because of Devlin J's famous 'classic definition'[170], set forth that:

> "Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused, a sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or her not master of his mind."[171]

This judgment was unequivocally accepted by the Court of Appeal and superseded the earlier decision in *Hayward*[172] that the state of mind of the defendant must be, "smarting under a provocation so recent and so strong that he might not be considered at the moment the master of his own understanding"[173]. The above extract from Devlin J's summing up provided the jury with a reasonably clear charge where provocation sufficient to reduce murder to manslaughter was pleaded[174]. Thus in determining an acceptable plea of provocation the law attached importance to: 1) whether there was what is

---

[167] [1949] 1 All ER 932

[168] Ibid.

[169] Holton, R & Shute, S. 'Self-Control in the Modern Provocation Defence' [2007] *O.J.L.S.* 27(1), p49

[170] As per Lord Taylor CJ in *R v Ahluwalia* [1992] 4 All ER 889

[171] [1949] 1 All ER 932

[172] [1833] 6 C&P 157

[173] [1833] 6 Car & P 157 Assizes

[174] See Edwards, S. 'Justice Devlin's Legacy: Duffy – a battered woman "caught" in time' [2009] *Crim. L.R.* 12, 851-869

sometimes called time for cooling, that is, for passion to cool and for reason to regain dominion over the mind; 2) The retaliation in provocation - that is to say, whether the mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. This therefore excluded: 1) Circumstances which merely predispose to a violent act; 2) severe nervous exasperation or a long course of conduct causing suffering and anxiety; 3) circumstances which induce a desire for revenge, or a sudden passion of anger; from amounting to plausible provocation in the law's eyes.

The Royal Commission found that this interpretation of the partial-defence was, in some respects, too rigid and exclusionary. It summarised the law as being comprised of:

> "Two fundamental conditions must be fulfilled in order that provocation may reduce to manslaughter a homicide which would otherwise be murder. First, the provocation must be gross and must be such as might cause a reasonable man to lose his self-control and use violence with fatal results. [Lesbini [1914] 3 KB 116; Mancini v DPP [1942] AC 1] Secondly, the accused must in fact have been deprived of his self-control under the stress of such provocation and must have committed the crime while so deprived. [Mancini v DPP and Holmes v DPP [1946] AC 588, 597. It is for the Judge to decide whether, on a view of the evidence most favourable to the accused, there is sufficient material for a reasonable jury to form the view that he acted under such a provocation. If the Judge is satisfied that there is no sufficient material, it is his duty to direct the jury as a matter of law that the evidence cannot support a verdict of manslaughter".[175]

It recommended certain revisions to Provocation which were largely adopted by Parliament in the provisions of the Homicide Act 1957. The review clearly stated that:

> "Provocation can never render an unlawful homicide excusable or justifiable; but if the act by which death is caused is done in the heat of passion caused by provocation, this may reduce the crime from murder to manslaughter".[176]

[175] Royal Commission on Capital Punishment 1949 – 1953 Report (1953) Cmd 8932, para 126

[176] Ibid. para 124

The use of the phrase 'heat of passion' by the review develops the conceptualisation of loss of control in the 18th and 19th centuries. As we saw in the last section anger is the main emotion to which the law is attempting to cater.

Slightly adjusted from the previous common law, Provocation was made statutory in Section 3 of the Homicide Act 1957:

> "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."

This section supplements the common law and confirmed that the partial-defence mitigated a charge murder to manslaughter thus avoiding a capital sentence which was yet to be abolished. Subsequent to the abolition of capital punishment the mandatory life sentence was introduced for murder[177]. The lesser offence is still therefore much desired by defendants as sentencing for a charge of manslaughter is at the judge's discretion.

Section 3 was a landmark moment in the development of Provocation and particularly the concept of loss of control. As explored in the previous sections of this chapter, the defence had been steadily developing in the common for centuries. In finally passing it into statute the defence was elevated and it was hoped that in properly defining it there would be greater consistency of judgments, however as we shall see this only lead to even greater confusion in the second half of the 20th Century.

[177] Criminal Justice Act 2003 s224-230

2.1.2 The Two Tests

Section 3 effectively broke down provocation into two tests, the subjective and the objective. To pass the subjective/factual element it was essential that a defendant pleading provocation shows first that he or she was provoked[178] by something said or done (or both)[179] to lose his or her self control[180]. It was for the jury to determine whether or not this has occurred and to consider whether the defendant satisfied the objective/factual element. To pass this test it must have been proved that a reasonable person would have done the same thing as the defendant considering: a) assessment of the gravity of the situation; and b) application of external standard of control.

2.1.3 The Subjective Test

If we break down this element we find that there were three components: i) the Defendant must be provoked; ii) provoked by something said or done; and iii) they must lose self-control.

2.1.4 The Causative Act

It has been said that the gravity of Provocation is, "historically and culturally bound,"[181] and that, "common law principles in matters such as this must to some extent be controlled by the evolution of society"[182] as can be seen with the development of Provocation. Prior to the enactment of Section 3 judges

[178] *Acott* [1997] 2 Cr App R 94

[179] *Acott* [1997] 2 Cr App R 94, *Doughty* [1986] 83 Cr App R 319, *Bennett* [2004] 1 Cr App R (S) 65

[180] *Cocker* [1989] Crim LR 740 (CA), *Duffy* [1949] 1 All ER 932

[181] Edwards, S. 'Justice Devlin's Legacy: Duffy – a battered woman "caught" in time' [2009] *Crim. L.R.* 12, 851-869, p852

[182] as per Viscount Simon in *Holmes v DPP* [1946] A.C. 588 HL at 600

had two restrictions on the availability of the partial defence despite evidence that the defendant had killed in a state of anger induced by provocation. Firstly, what might constitute adequate provocation viewable to the jury was constrained by judicial discretion. This led to only violent acts or acts of adultery witnessed by the defendant being submitted to juries as examples of provocation. 'Mere words' were deemed insufficient to constitute provocation[183]. Secondly even if the defendant had responded to conduct which was a recognised form of provocation back then, his plea would nevertheless be simply dismissed by the Judge's decision that the response was disproportionate.

The first two components of Section 3 reaffirmed that the Provocation must arise from human agency. However, the provision expressly removed the aforementioned restrictions in the common law and Provocation was now allowed to take the form of 'anything said or done'. Prior to this 'mere words' had always been excluded; in the case of *Pearson*[184] for instance the court stated that 'ocular inspection' of the defendant's victim's adultery had been required. However, later in the 19th Century, the court relaxed this position; in *Rothwell*[185] the court regarded a sudden confession of adultery as being equivalent to discovering the act itself. These issuing of certain words was thus regarded as "performative" of the act itself. However only a confession of adultery on the part of a wife was an acceptable "wounding" word[186].

---

[183] *R v Holmes* [1946] AC 1, 9.

[184] [1835] 2 Lew 216, at 217 as per Parke B.

[185] [1871] 12 Cox C.C. 145

[186] Edwards, S. 'Justice Devlin's Legacy: Duffy – a battered woman "caught" in time' [2009] *Crim L.R.* 12, 851-869, p851

Yet by the 20th Century this verbal allowance had been reneged by the court in *Alexander*[187], *Palmer*[188] and *Ellor*[189]. It was deemed in these cases that confessions of adultery, unless accompanied by exceptional circumstances, were not sufficient provocation contra to *Rothwell*[190]. This was further affirmed by the decision in *Holmes v DPP*[191], in which the victim had said: "[w]ell if it will ease your mind I have been untrue to you. I know I have done wrong, but I have no proof that you haven't – at Mrs. X's". This was the last case prior to the 1957 Act in which the court prevented 'mere words' from constituting sufficient provocation by withdrawing the defence from the jury.

Subsequent to the enactment of Section 3 words were again allowed to constitute provocation. However in his judgment in *R v Browne*[192], Lowry LCJ established that the provocation must be, "something unwarranted which is likely to make a reasonable person angry or indignant".[193] In the same year, the Privy Council in *R v Edwards*[194] stated *obiter* that the act in question could not constitute provocation if it was the probable response to the actions of the defendant. The court in *R v Acott*[195] affirmed that there must at least be some evidence of the something said or done which triggered the disproportionate reaction. But once there is credible evidence of provocation, it is for the jury and

[187] [1913] 9 Cr App. R. 139 CCA

[188] [1913] 2 K.B. 29 CCA

[189] [1920] 15 Cr. App. R.41

[190] [1871] 12 Cox C.C. 145

[191] [1946] A.C. 588

[192] (1973) NI 96

[193] Lowry LCJ, *R v Browne* [1973] NI 96, 108

[194] [1973] A All ER 152 (PC)

[195] [1996] 4 All ER 443 (HL)

not the judge to decide on the issue of proportionality by deciding whether the reasonable man would have responded in the same way as the defendant.

Thus Section 3 significantly altered the previous common law position. It was designed to widen the scope of conduct which could amount to provocation by incorporating for the first time things said and done not just the latter. In another respect, by removing the original first requirement that the instigating act be 'provocative' the scope for pleading the defence has been incredibly expanded on by the courts since.

In *R v Doughty*[196], the defendant was charged with having murdered his 17-day-old baby because of its persistent crying. At first instance the judge ruled, in line with the aforementioned *obiter* statement of the Privy Council in *Edwards*[197], that: "natural episodes or events such as the baby crying could not be evidence of provocation". He refused to leave the issue of provocation to the jury on these ground. However on appeal the court ruled that even the morally blameless act of a baby crying could amount to provocation if it caused the defendant to lose their self-control. This case seemingly revived the precedent from the 17th Century in which defendants who were provoked in 'the heat of passion to kill due to the misbehaviour of children were granted successful pleas of Provocation'[198].

[196] [1986] 83 Cr App R 319

[197] [1973] AC 648

[198] Horder, J. 'The Problem of Provocative Children' [1987] *Crim L.R.*, 655-662, p 656

Similarly, in *Johnston*[199] the dictum was not followed and in the later case of *R v Dryden*[200] the entirely lawful act of imposing planning regulations was deemed sufficient provocation. Hence the Judicial Studies Board's specimen direction to a jury being that "provoked" meant no more that "caused"[201]. Finally on the basis of *R v Davies*[202] the court stated: "acts and words which could amount to provocation [are] not excluded because they emanated from some one other than the victim,"[203] thus provocation no longer even has to be committed by the deceased.

As we have seen in this chapter already what can be considered an acceptable causative act has developed over time from something which offends a defendant's honour, to the four prescribed categories and now to words or actions that would make the reasonable person lose their self-control. As I shall explore in the next section the doctrine of loss of self-control was very much at the centre of the defence in the 20th Century before ultimately superseding Provocation and becoming a fully-fledged defence in the 21st Century.

---

[199] [1989] 2 AER 839

[200] [1995] 4 All ER 987

[201] The Judicial Studies Board specimen direction to the jury of April 2003 as to the "special meaning" meaning of provocation in this defence is as follows: A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been [said and/or done] by [X and/or others].

[202] [1975] QB 691

[203] Ibid.

2.1.5 Loss of Self-Control

Turning to the third component of the subjective test in Section 3, loss of self-control, the court had previously stated in *Duffy*[204] that this must be: "sudden and temporary loss of self-control rendering the accused so subject to passion as to make him or her not master of his mind." This famous definition espoused by Devlin J placed loss of control right at the centre of the provocation defence in the 20th Century, a view given legislative approval by the enactment of Section 3[205].

2.1.6 'Sudden Loss'

This means that the violent response must be spontaneous in nature and the defendant must have had "no time to think or to reflect"[206]. For loss of self-control by its nature leads to a sudden and immediate reaction[207]. Any indication of a plan or design to kill the victim would amount to premeditation and would thus sit uncomfortably with a plea that the killing was beyond the defendant's control.

This requirement stems from decision in *R v Hayward*[208], in which Tindal C.J. stated that a defendant must have killed, "Whilst under a provocation so recent and so strong that he might not be considered at the moment the master

---

[204] [1949] 1 All ER

[205] Holton, R. & Shute, S. 'Self-Control in the Modern Provocation Defence' [2007] *O.J.L.S.* 27(1), p49

[206] *R v Duffy* [1949] 1 All ER at 932

[207] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p68

[208] [1833] 6 C&P 157

of his own understanding."[209] This element of immediacy to the third component of the test was confirmed in the courts in the case of *R v Ibrams & Gregory*[210], in which the defendants had been terrorised by the victim for some time and carried out their plan to kill him five days after the last act of provocation. The Court of Appeal dismissed the appeal against conviction on the grounds of: 1) the substantial time lapse between the provocation and the killing; 2) the lack of provoking act just prior to the killing; and 3) the formation of a plan presented no evidence of loss of self-control at the relevant time. Whilst the court here has effectively stated that the longer the "cooling period" between the provocation and the killing, the less likely the success of the defence, a lapse of time will never itself defeat the plea outright.[211]

Though the temporal relationship was significantly adjusted in a plethora of subsequent cases in which the presiding judge has allowed the jury to determine what is a significant amount of time between instigating act and killing, particularly *Ahluwalia*[212] and *Thornton(No.2)*[213] (which will be explored more thoroughly in the period, 'Feminist Advocacy Era'), *Ibrams*[214] still had a great effect.

[209] Ibid

[210] [1982] 74 Cr App R 154 (CA)

[211] [1982] 74 Cr App R 154 (CA)

[212] [1992] 4 All ER 859 (CA)

[213] (No.2) [1996] 2 Cr App R 108

[214] [1982] 74 Cr App R 154 (CA)

However, Horder asserts that the decision in this case and indeed in *R v Duffy*[215], were wrongfully decided as there had never actually been a common law requirement for loss of self-control to be sudden as well as temporary. He cites the case of *R v Hayward*[216] in which Tindal C.J. stated that a defendant must have killed, "Whilst under a provocation so recent and so strong that he might not be considered at the moment the master of his own understanding."[217] This extract was cited by the Court of Appeal in their decision in *R v Thornton*[218]. However, Horder argues that the passage is simply a reminder that if provocation has been contemplated or if it was trivial, it may (but not must) be that the defendant did not kill following genuine loss of self-control. It did not impose a requirement for suddenness when placed with other remarks made by Tindal C.J. in the case, for he stated that the key matter was: "Whether there had been time for the blood to cool, and for reason to resume its seat…in which case the crime would amount to willful murder."[219]

2.1.7 'Temporary Loss'

In the case of *R v Cocker*[220], the defendant's wife suffered from an incurable disease causing her to fall into a state of depression. She repeatedly asked her husband to kill her and one morning, having deliberately kept him awake most of the night, she woke him by clawing his back and demanded that he kill her. The defendant smothered his wife with a pillow and in

[215] [1949] 1 All ER

[216] [1833] 6 C&P 157

[217] Ibid.

[218] [1992] All ER 306

[219] [1833] 6 C&P 157, p159

[220] [1989] Crim LR 740 (CA)

evidence stated that her final request and her repeated pleas had become too much for him. However appeal against conviction was refused on the grounds that the trial judge had been right in declaring there to have been no evidence of Provocation.

The less violent killing by method of smothering suggested that there had been calculation and purpose, rather than temporary loss of self-control which was integral for a successful plea. For capacity for rational thought means that a person has full legal responsibility for their actions and a charge of murder cannot be reduced to one of manslaughter.

2.2 The Objective Test

Helena Kennedy has advocated that, "The reason for this element of objectivity is to prevent people who fly off the handle at the slightest affront invoking the defence".[221] In the objective test we consider whether the reasonable man, he of Greer LJ's Clapham omnibus[222], would have acted as the defendant did. This was included by Devlin J in his classic description of loss of control in *R v Duffy*[223]:

> "some act, or series of acts, done [or words spoken] ... which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control".[224]

In *R v Camplin*[225], Lord Diplock directed to imagine the 'reasonable man' of the Section 3 as:

---

[221] Kennedy, H. *Eve Was Framed* (Vintage, 2nd edn, 2005) p136

[222] *Hall v. Brooklands Auto-Racing Club* [1933] 1 KB 205

[223] [1949] 1 All ER 932

[224] Ibid. p

> "the ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today".[226]

Still the question remained if this standard characterisation was fixed or if it could vary; a distinction developed in the case law between characteristics which may be relevant to or aggravate the provocation and characteristics that may affect the defendant's capacity for self-control in general.

Prior to the Homicide Act 1957, for fear of putting the objective standard in jeopardy, the court refused to allow any characteristics of the defendant to be factored into the reasonable man. For instance, the House of Lords in *Bedder v DPP*[227] was asked if the reasonable man was an impotent hunchback. In this case the defendant, who possessed an "unusually excitable" and "pugnacious temperament", was teased by the victim, a prostitute, for being unable to perform intercourse. He continued to attempt the act in vain despite her jeering, until she tried to leave at which point the defendant attempted to restrain her. The victim fought the defendant, slapping him and punching him in the stomach, before he drew a knife and stabbed her. The defendant pleaded that the deceased had provoked him sufficiently to reduce the charge of murder to manslaughter. However the Lords found that the judge in his summing-up had rightly ignored the personal physical peculiarities of the defendant and taken as the test the response of the hypothetical reasonable man. This affirmed the court's earlier position in *Mancini v DPP*[228].

---

[225] [1978] AC 205

[226] Ibid. p717

[227] [1954] 2 All ER 801

[228] [1942] AC 1

Post Section 3 and prior to the Coroners and Justice Act 2009, the court had to balance allowing a limited level of characteristic ascription from the defendant to the reasonable man whilst protecting he objective standard[229]. This began with the case of *Camplin*[230] in which the fifteen-year-old male defendant had lost his self-control and killed the victim who had sexually assaulted him and taunted him about it. The defendant was convicted of murdering his abuser on a direction to the jury that, in deciding on whether these were the actions of the reasonable man who had lost their self-control, the reasonable man was a reasonable adult. The defendant successfully appealed the decision arguing that the test was the reasonable person of the same age. The DPP appeal to the House of Lords was then dismissed with Lord Diplock stating:

> "a proper direction to a jury … should state … the reasonable man … is a person having the same power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would effect the gravity of the provocation to him; and the question is not merely whether such a person would in like circumstance be provoked to lose his self-control but also whether he would react … as the accused did".[231]

Thus when it comes to the capacity for self-control the ratio from *Camplin*[232] was that sex and age are the only additional factors to be composite with the reasonable man.

This was somewhat clarified and curtailed in *R v Ali*[233], in which the defendant stabbed the defendant to death during an affray. His pleas of self-

---

[229] Naeem Rauf, N. 'The Reasonable Man Test in the Defence of Provocation: What are the Reasonable Man's Attributes and Should the Test be Abolished?' [1987] *Criminal Law Quarterly* 30, p76

[230] [1978] AC 205

[231] Ibid. p217

[232] Ibid.

[233] [1989] Crim LR 736

defence and provocation both failed but at appeal against his murder conviction the defendant argued that the judge had misdirected the jury on provocation by failing to draw attention to his age as a factor affecting his reasonable response. Nevertheless the court held that that the judge had not erred in this omission as there was no difference between the defendant's age of 20 and a reasonable person of any other age. In the judgment the case is distinguished from *Camplin*[234], presumably because the defendant was a minor, which suggests that the deciding factor not affording the exception in *Ali*[235] was his being a legal adult.

In *R v Newell*[236], the chronic alcoholic defendant whose girlfriend had just left him was drinking with the male victim. The victim disparaged the defendant's former girlfriend and made sexual advances towards him. The defendant responded by repeatedly bludgeoning the victim with an ashtray until he had killed him. Medical evidence proved that the defendant was intoxicated at the time leading to his overreaction and quickening his loss of self-control. The defendant's initial plea of provocation was unsuccessful. The Court of Appeal dismissed the defendant's appeal against conviction which was based upon a contention that the jury had been misdirected as to provocation. The court stated that a relevant characteristic was required to be something of sufficient gravity and permanence such that it might make the defendant, "a different person from the ordinary run of mankind"[237]. The court was strongly influenced by New

[234] [1978] AC 205

[235] [1989] Crim LR 736

[236] [1980] 71 Cr App R 331

[237] Ibid. p339

Zealand case law, specifically the test in *R v McGregor*[238], in deciding that the jury was correctly directed and that the defendant's alcoholism was unconnected with the nature of provocation.

In just a short space of time after Provocation had been passed into statute the defence was beginning to expand due to the ambiguity of it's drafting. As is clear from this case law the defence continued to prize the anger of men and make pardon for gross overreactions to provocation. However as we shall see in the next period women were at first not enjoying the same good fortune with the partial defence.

3) The Feminist Advocacy Era

3.1 The Quartet of Relaxation Cases

In the 1990s a subset of four principal cases: *Ahluwalia*[239], *Thornton (No.2)*[240], *Humphreys*[241] and *Dryden*[242], relaxed the strict objective standard in order to provide justice for defendant's suffering from personality disorders and mental impairments, not incorporated under the partial defence of diminished responsibility, but which nevertheless affect their level of self-control. Common to all four of these cases was expert testimony indicating, "that these conditions

[238] [1962] N.Z.L.R. 1069

[239] [1992] All ER 889

[240] (No.2) [1996] 2 Cr App R 108

[241] [1995] 4 All ER 1008

[242] [1995] 4 All ER 387

were beyond the normal range of personality variation and constituted discrete syndromes".[243]

Two cases concerning battered women, *Ahluwalia*[244] and *Thornton (no.2)*[245], triggered this relaxation of the previously strict objective standard[246]. In *Ahluwalia*[247], the defendant had killed her husband after years of abuse and violence. He threatened her and when he fell asleep she threw petrol into his room and set fire to it. The victim later died in hospital and the defendant was charged with murder. At trial she pleaded a lack of intent and provocation as alternatives. She was convicted but appealed against the direction on provocation. A retrial was ordered which also considered evidence of diminished responsibility.

The court in *Ahluwalia*[248] had directed, in line with *Ibrams*[249], regarding the 'cooling period': "the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation." But the Court of Appeal took a more accommodating approach accepting that, "the subjective element in the defence of provocation would not … be negatived simply because of the delayed

[243] Simester & Sullivan *Criminal Law: Theory and Doctrine* (3rd Edn, Hart Publishing, 2007) p362

[244] [1992] All ER 889

[245] (No.2) [1996] 2 Cr App R 108

[246] 'Case Comment' *Criminal Law Review* [1996] Aug 597-599, p598

[247] [1992] All ER 889

[248] Ibid.

[249] [1982] 74 Cr App R 154 (CA)

reaction".[250] This direction was then followed in *R v Baillie*[251] in which the appeal judge held that the court had taken too austere an approach to the 'cooling period'.

In a second case involving a battered wife, *Thornton(no.2)*[252], the judgment in *Ahluwalia*[253] was affirmed. 'Battered women's syndrome' was again deemed to be a characteristic attributable to the 'reasonable man' with regards to what was to be the expected standard of self-control, where it constituted a specific personality syndrome established by medical evidence[254].

Battered Women Syndrome (BWS) was first coined by Dr Lenore Walker in the 1970s[255], once published the hypotheses quickly caught on however it was not empirically validated through scientific research and so was not a disease in international classificatory terms[256]. This means that the condition is termed a syndrome, which is defined in Collin's Medical Dictionary as "the aggregate of signs, symptoms or other manifestations considered to constitute the characteristics of a morbid entity; used especially when the cause of the condition is unknown". BWS did however qualify as a type of abnormality of mind prescribed under Section 2 of the Homicide Act allowing for a successful

[250] [1992] All ER 889

[251] [1995] 2 Crim. App. R. 31

[252] (No.2) [1996] 2 Cr App R 108

[253] [1992] All ER 889

[254] [1996] 2 Cr App R 108

[255] Walker, L.E. *The Battered Woman* (1979, Harper and Row, New York)

[256] Eastman, N. 'Abused Women and Legal Excuses' *New Law Journal* [1992] 142, p.1549

plea of Diminished Responsibility[257]. Nevertheless a problem arose whereby women were reluctant to use it in this manner as it stigmatised the battered woman as having a mental illness. The syndrome was therefore deemed relevant in consideration of Provocation for:

> "Many women who have been chronically battered, it is argued, develop a state of 'learned helplessness'. This amounts to a disordered perception (loosely defined) of their realistic options, which determines their failure to leave the home, for example. Hence the women's general perspective is so distorted as to determine an abnormally low threshold for killing as a solution. Delay in killing beyond the last provocative abuse is also explained, it is argued, by their degree of perceived helplessness"[258].

This reasoning of the syndrome bears resemblance to some of the psychology surrounding loss of control in men, for instance that the fear of abuse can lead to a 'low threshold for killing' is akin to the idea that men's anger can become so over powering that they lose their self-control and kill.

As I have explored in earlier sections of this chapter, given the very unique nature of the crime of murder and the severity of punishment, Provocation has existed in one form or another to allow compassion for 'human frailty' or 'human weakness'. Whilst consistency of judgment is important to ensure fair justice it seems only right that some accommodation should be made in Provocation to allow women in these dire situations some reprieve when they are forced to kill and protect themselves. For if sexual infidelity could be accommodated in Provocation then it seems only fair that women suffering long-term physical and physiological abuse should have been shown compassion by the relaxation of the strict objective standard for loss of self-control.

[257] Ibid.

[258] Ibid. p1550

In *Humphreys*[259], the court was faced with a defendant with abnormal immaturity and self-harming attention seeking tendencies. The defendant had been abused for years by the victim who had taunted her about repeated suicide attempts. Finally the defendant believed that the victim was going to rape her causing her to kill him. She was convicted of murder however her appeal was allowed and manslaughter submitted on the basis that the judge in directing the jury on loss of control should have analysed the various strands of "cumulative" provocation. Crucially though, the court conclude that the defendant's aforementioned characteristics were relevant and should be taken into consideration[260].

In *Dryden*[261], which has been discussed briefly above, the court was faced with a defendant with an obsessive and eccentric nature. This defendant had built a bungalow without planning permission from the local authority after being advised by the victim, the chief planning officer, that approval was unlikely. The local council obtained a demolition order which upset the defendant who made a number of violent threats against the victim. When the victim visited the defendant to seek his cooperation in leaving the property the defendant shot and killed the victim and injured his council co-worker. At trial the defendant, charged with murder and attempted murder, raised the defences of diminished responsibility and provocation. Expert evidence was adduced as to the defendant's eccentric and obsessive personality and the charge was reduced

[259] [1995] 4 All ER 1008

[260] 'Case Comment: Provocation: Abnormal Attention-Seeking Character Trait' [1996] *Criminal LR* Jun 431-434, p432

[261] [1995] 4 All ER 387

to manslaughter as the permanent characteristics which distinguished the accused were to be taken into account by the jury.

4) The Era of Ambivalence

At the end of the 1990s and beginning of the 2000s there was much confusion in the courts over whether or not the objective standard should be applied strictly or if a subjective standard should be adopted instead. I have therefore entitled this period as being one of ambivalence as Provocation was successfully used for a myriad of personal circumstances of defendants before the Law Commission was forced to step in and sort out the defence. In this section we shall see the judicial confusion which resulted in this course of action being necessary.

The next judgment to undermine the objective self-control and cast much doubt[262] on the persuasive authority of the Court of Appeals' much discussed *obiter* statements[263] in *R v Ahluwalia*[264] was *R v Morhall*[265] the 'mysterious case of the reasonable glue sniffer'[266]. The defendant was addicted to solvents and

[262] Horder, J. 'Provocation's "reasonable man" reassessed' [1996] *Law Quarterly Review* 112 (Jan), p36

[263] As per Lord Taylor in *Ahluwalia*: "English cases concerned with the "reasonable man" element of provocation, and examples given by judges, have tended to focus on physical characteristics. Thus age, sex, colour, race, and any physical abnormality have been considered. However, the endorsement of the New Zealand authority in *Newell* [[1980] 71 Cr. App. R. 331] shows that characteristics relating to the mental state or personality of an individual can also be taken into account by the jury, providing they have the necessary degree of permanence."

[264] [1993] 96 Cr. App.R 133

[265] [1996] AC 90

[266] Norrie, A 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' [2002] *The Modern Law Review* Jul. Vol.65 No.4 538-555

convicted of murder in a fight which was sparked by the victim's rebuking of the defendant's glue sniffing. At first instance the judge directed the jury that under Section 3 they could not factor in the defendant's addiction to the hypothetical reasonable man. The defendant appealed on the grounds that his solvent sniffing was a relevant characteristic to be taken into account when considering the gravity of the provocation.

The appeal was allowed with the court holding: 1) that the addiction was a characteristic of particular relevance to the provocation in the instant case, the jury should have been directed to consider the effect of the provoking words on a person with an ordinary amount of self-control but who had the defendant's characteristics, history and circumstances insofar as the jury thought those would affect the gravity of the provocation. 2) The fact that the characteristic was discernible did not exclude it from consideration on the grounds it was incompatible with the reasonable man. The verdict was quashed and reduced to manslaughter affirming *Camplin*[267] with regard to the relevance of the characteristics of the defendant pertaining to the gravity of provocation.

Ashworth has argued that it is a fallacy to believe in a hypothetical reasonable person and that:

> "It is a self-contradictory proposition that a reasonable man could intentionally and unjustifiably kill someone, and to suggest that there is a hypothetical figure, "normal" in every respect, whose reactions are taken to determine the sufficiency of provocation."[268]

[267] [1978] AC 205

[268] Ashworth, A. 'The Doctrine of Provocation' (1976) 33 *Cambridge Law Journal* 292, p299

Lord Goff's judgment in *Morhall*[269] has been deemed, "very valuable in clarifying the nature of the extenuation at work in provocation",[270] because of his explanation that in this area of the law, the reasonable person is in no sense an exemplary one. Lord Goff's recognition of the circumstance and history of the defendant being potentially relevant is in direct contradiction to the previous case of *Newell*[271] and *Bedder*[272]. The judgment in *Morhall*[273] consequently redefined the criteria of admissible characteristics to include the categories of race, sexual orientation, and physical features or disabilities.

4.1 Switching Between the Standards

The uncertainty which had been created by these conflicting interpretations of the 'reasonable man' has led the court in recent years to fluctuate between the re-assertion of the objective standard before returning to the subjective and then returning to the objective in a dizzying series of judgments pitting the Privy Council against the House of Lords despite being comprised of the same judges.

4.1.1 The Re-Assertion of Objectivity

After this wave of liberalising Court of Appeal cases, Lord Goff sitting in the Privy Council criticised the admission of personality syndrome evidence in the

[269] [1996] AC 90

[270] Simester & Sullivan *Criminal Law: Theory and Doctrine* (3rd Edn, Hart Publishing, 2007) p359

[271] [1980] 71 Cr App R 331

[272] [1954] 2 All ER 801

[273] [1996] AC 90

case of *Luc Thiet Thuan v Queen*[274]. Lord Goff stated that, though mental infirmity may be taken into account in terms of assessing the gravity of the provocation:

> "this is a far cry from the defendant's submission that the mental infirmity of a defendant impairing his power of self-control should as such be attributed to the reasonable man for the purpose of the objective test."[275]

This case marked a return to the objective standard with a majority holding that the defendant's brain damage, which caused violent responses to slight provocation, could not be factored in to the hypothetical reasonable man when considering the expected standard of self-control[276].

4.1.2 Swing Back to Subjectivity

But subjectivity returned in the House of Lords decision in *R v Smith (Morgan)*[277] with Lord Clyde stating:

> "I consider that justice cannot be done without regard to the particular frailties of particular individuals where their capacity to restrain themselves in the face of provocation is lessened by some affliction which falls short of a mental abnormality."

This decision has been hotly debated; on the one hand subjectivists praise it for taking the defendant as you find them[278] and on the other objectivists have decried it as an "evaluative free for all"[279].

---

[274] [1997] AC 131 (PC)

[275] [1997] AC 131 (PC)

[276] 'Luc Thiet Thuan Case Comment' [1996] *Criminal LR* Nov 820, p821

[277] [2001] 1 A.C. 146 (HL)

[278] Mitchell, B.J., Mackay R.D. & Brookbanks W.J. 'Pleading for provoked killer: in defence of Morgan Smith' [2008] *LQR*, 124, 675-705

[279] Gardner, J. & Macklem, T. 'Compassion without Respect? Nine Fallacies in *R v Smith*' [2001] *Crim. L.R.* 623

Subjectivists[280] believed the support for their position in *R v Smith (Morgan)*[281] made it easier for juries to understand and relaxation can include battered women who kill as Lord Clyde bore reference to:

> "I would not regard it as just for a plea of provocation made by a battered wife whose condition falls short of mental abnormality to be rejected on the ground that the reasonable person would not have acted to the provocation as she did. The reasonable person in such a case should be one who is exercising a reasonable level of self-control for someone with her history, her experience and her state of mind."

However, despite reassurance from Lord Hoffmann that, "Male possessiveness and jealously should not today be an acceptable reason for loss of self-control leading to homicide," objectivists counter argue that the re-adoption of the subjective standard might also be broad enough to include jealous men.

In reference to subjectivity in *R v Smith (Morgan)*[282], Ashworth argued that, "The evaluative free for all is largely borne out by *Weller.*[283]"[284]. Further Smith and Hogan asserted: "The objective test designed by Parliament has been completely undermined and juries are left to apply their own moral judgments…the increased risks of inconsistency and arbitrariness are obvious."[285] However the decision can be seen as a positive step in opening the defence of Provocation up to battered women as Lord Hoffmann went on to state that:

> "There are people (such as battered wives) who would reject any suggestion that they were 'different from ordinary human beings' but have undergone experiences which without any fault or defect of character on their part, have affected their powers of self-

[280] Mitchell, B.J., Mackay R.D. & Brookbanks W.J. 'Pleading for provoked killer: in defence of Morgan Smith' [2008] *LQR*, 124, 675-705

[281] [2001] 1 A.C. 146 (HL)

[282] Ibid.

[283] [2003] *Crim LR* 724 [2003] EWCA Crim 815

[284] Ashworth, *Case Note* [2003] Crim LR 724-727

[285] Smith & Hogan, *Criminal Law* (12th Edn, OUP, 2008), p456

> control. In such cases the law now recognises that the emotions which may cause loss of self-control are not confined to anger but may include fear and despair."[286]

This statement by the court on the allowance of emotions other than anger was a milestone in the development of Provocation and as we shall see in the following two chapters it helped pave the way for the new partial defence of Loss of Control.

4.1.3 U-turn to Objectivity Again

Subsequently in *AG of Jersey v Holley*[287], there was a return to the objective standard with Lord Nicholls stating:

> "'Whether the provocative act or words and the defendant's response met the "ordinary person" standard prescribed by the statute is the question the jury must consider, not the altogether looser question of whether, having regard to all the circumstances, the jury consider the loss of self-control was sufficiently excusable."[288]

In addressing the lingering concern over abused women who kill the decision directs juries to decide:

> "Whether in their opinion, having regard to the actual provocation and their view of its gravity for the defendant, a woman of her age having ordinary powers of self-control might have done what the defendant did."[289]

Despite being a theoretically inferior Privy Council decision, *Holley*[290] overruled[291] *Smith (Morgan)*[292] and was followed in the subsequent cases of *R v Mohammed(Faqir)*[293], *R v James*[294] and *R v Karimi*[295]. The most important change

---

[286] [2001] 1 A.C. 146, At 168

[287] [2005] UKPC 23; [2005] 3 WLR 29

[288] [2005] UKPC 23 para 22

[289] Ibid. para 25

[290] [2005] UKPC 23; [2005] 3 WLR 29

[291] Simester & Sullivan, *Criminal Law: Theory and Doctrine* (3rd Edn, Hart Publishing, 2007) p359

[292] [2001] 1 A.C. 146 (HL)

[293] [2005] EWCA Crim 1880

[294] [2006] EWCA Crim 14

[295] [2006] EWCA Crim 14; [2006] 2 WLR 887

to focus on for the purpose of this thesis was the affect on Loss of Control, namely that there would be a much stricter reasonable person standard operated.

5) Chapter Conclusion

The flip-flopping between the objective and subjective test in provocation had dragged the partial defence into, "a confusing mixture of common law rules and statute"[296]. Ashworth argued that the decision in *Holley*[297] was not conclusive end to the debate over Provocation and was to be regarded as only an "interim stage, pending thorough reform of the law"[298]. The defence was strongly criticised for being unworkable particularly for abused women who kill and while the courts in "doing justice"[299] by relaxing the subjective test to incorporate them, they have, "extended the defence … as far as it [can] stretch"[300].

Unfortunately for battered women self-control has been constrained almost exclusively to a state of anger and rage as recognised by the Law Commission, "The defence of provocation elevates the emotion of sudden anger above

---

[296] Law Commission 'Murder, Manslaughter and Infanticide, Project 6 of the Ninth Programme of Law Reform: Homicide' LC No.304 28th November 2006, para 5.3

[297] [2005] UKPC 23; [2005] 3 WLR 29

[298] Ashworth, A. 'Murder" Provocation – Homicide Act 1957 S.3' *Criminal Law Review* [2005] Dec. p968

[299] Edwards, S. 'Abolishing Provocation and Reframing Self Defence' (2004) Mar *Criminal Law Review* 181-197 p182

[300] Baird, V. QC, Solicitor-General 'More male partners will be convicted of murder after reform of laws, minister says' *The Times* 19/07/08

emotions of fear, despair, compassion and empathy"[301]. Jeremy Horder has called this "the loss of self-control dilemma"[302] as the concept is limited only to "stereotypically male, violent reactions to provocation"[303] to the exclusion of female reactions such as despair and fear. The universalising of the angry response thus presets the standard as inexorably male[304].

At a more basic level Dressler asserts that much of the defence's confusion stems from courts being unable to determine whether Provocation based on Loss of Control is an excuse or a justification defence[305]. As a concession for 'human frailty' requiring that the defendant acted in the 'heat of passion' it would appear to be an excuse. However on the basis that it is caused by a trigger of wrongful conduct towards the defendant it can be seen as justificatory[306].

At the beginning of the 21st Century the Law Commission decided that it was finally time to reassess provocation as part of a review of homicide as a whole. This chapter has been intended to provide the reader with the historical background of Provocation and the Loss of Control doctrine. In the next chapter

---

[301] p163 para. 4, Law Commission, Consultation Paper No.173

[302] Horder, J. 'Reshaping the Subjective Element in the Provocation Defence' [2005] 25 *O.J.L.S.* 127, 140

[303] Ibid. p136

[304] Edwards, E. *Sex and Gender in the Legal Process* (1st edn, Blackstone Press, 1996) p361

[305] Dressler J. 'Provocation: Partial Justification or Partial Excuse' [1988] *The Modern Law Review* Jul. Vol.51 No.4 467-480, p467

[306] Ibid. p480

we will discuss the proposals for reform provocation and assess whether or not they deal with the problems of the partial defence.

Chapter Three: Provocation Under Review

"Acts proceeding from anger are rightly judged not to be done of malice aforethought; for it is not the man who acts in anger but he who enraged him that starts the mischief. Again, the matter in dispute is not whether the thing happened or not, but its justice; for it is apparent injustice that occasions rage." – Aristotle[307]

1) Chapter Introduction

The partial defence of Provocation has been a controversial area of the criminal law for the last sixty years. As I explored in Chapter Two this period has been filled with reviews, legislation, two Privy Council and several House of Lords judgments and a plethora of other decisions which had all failed to produce an adequate, consistent and clear partial defence of Provocation based on 'Loss of Self-Control'.

By the end of the 1990s the strain that had been put on Provocation to accommodate those like battered wives who juries believed should be shown some compassion in the law because of their 'human frailty' was evident and the need for proper reform pertinent:

> "Its reference to acting in the heat of passion, and before there is time for the accused's passion to cool sounds more like a bad romance novel than the measure tones of the homicide provisions of our Criminal Code."[308]

As this extract from editorial in the Criminal Law Quarterly at the time conveys quite bluntly, Provocation was out of date and out of step with the modern criminal law.

307[307] *Nicomachean Ethics*, Bk V. 8

[308] 'Editorial: Provocation and Mandatory Life Imprisonment' [1998] *The Criminal Law Quarterly* Dec. Vol.43 No.3, p.273

In this Chapter Three I will be moving on to explore in further detail the debate on Provocation and Loss of Self-Control over the last decade as reform of the partial defence switched to legislative rather than common law development after the controversial decision in *R v Smith (Morgan)*[309]. As I discussed in Chapter Two it was this decision, praised in some quarters[310] but also considered by others to be the most damaging to provocation in the 60 years since the defence had become statutory, [311] which proved to be the final straw that prompted the Law Commission to declare the partial-defence to be "hopelessly compromised"[312] and embark on this period of review.

I shall therefore review the Law Commission's proposals and Reports and those of the Ministry of Justice which lead to the abolishment of Provocation[313] and the creation of the new partial defence of Loss of Control[314] based on two qualifying triggers of fear and anger in the Coroners and Justice Act 2009. This was however a particularly surprising result given that the Law Commission repeatedly criticised the Loss of Control doctrine for being both overly inclusive where violent males are concerned and overly exclusive for abused women forced to kill their abusive partners. The elevation of anger above other emotions such as fear was heavily criticised for creating an inherent gender bias which

---

309 [2001] 1 A.C. 146 (HL)

310 Mitchell, B.J., Mackay R.D. & Brookbanks W.J. 'Pleading for provoked killer: in defence of Morgan Smith' [2008] *L.Q.R.* 124, 675-705

311 Macklem, T. & Gardner, G. 'Compassion without respect? Nine fallacies in R v Smith' [2001] *Crim. L.R.* 623

312 'Partial Defences to Murder' (2003) (LCCP173), 12.1

313 CJA 2009 S.56(1)

314 CJA 2009 S.54 and S.55

failed to protect those identified as most in need of the defence, battered wives. This chapter will explore these concerns, as well as those surrounding use of the defence in honour killing cases, in depth in order to understand why the Law Commission recommended abandoning 'Loss of Self-Control' and why this was overturned by the Government resulting in it becoming a fully fledged partial defence in itself.

2) Issues Faced in the Consultation

Before delving into thorough analysis of the various consultation papers I believe it is important to first identify some of the wider concerns which shaped the Law Commission's review of Provocation and Loss of Self-Control in order to put them into context.

2.1 Human Rights Concerns

The Human Rights Act 1998 (HRA) was a key aspect which had to be taken into account when reconstructing the partial defence as it engages with Convention rights. Murder is the intentional lawful killing of another person. To commit murder is to break the most fundamental of rights, the right to life. For this reason murder is considered to be the worst offence against society, and is punished by a uniquely severe mandatory life sentence. Under Article 2 of the European Convention on Human Rights (ECHR) which was adopted under the HRA the State is under a positive obligation to protect citizens' right to life including against deprivation by other citizens. This obligation requires the Government to secure the right to life by putting in place effective criminal law provisions to deter people from murder. In the mean time the State must also protect citizens against inhuman or degrading treatment and protect their

physical integrity. Correct formulation of the Partial Defence was therefore very important to ensure it operated fairly and was not subject to abuse as had happened in the past.

If provocation were to have been drawn too widely, for instance with the subjective reasonable person standard, then it may interfere with the right to life in Article 2 ECHR because it does not provide sufficient protection for victims. On the other hand if it is drawn too narrowly, with a strict objective standard, it may interfere with other competing rights like Article 3 protection from inhuman or degrading treatment and Article 8 which provides for respect for one's private and family life, by providing insufficient protection for the Article 2 right served by the defence.

These concerns were addressed in the Explanatory Notes to the eventual Coroners and Justice Bill and in the Justice Minister Jack Straw's reply to a letter from the Human Rights Joint Committee. In the letter Mr Straw explained that the Government accepted that the Bill's provisions for reforming Provocation engaged the above balancing of convention rights. However, he argued the Government's proposals which elevated the Loss of Self-Control from doctrine to fully-fledged defence did not in any way reduce the existing high level of protection for the right to life in the comprehensive legal framework of homicide offences. Mr Straw pointed out that partial defences do not operate to determine whether or not criminal liability exists, merely to reduce liability to manslaughter which he argued was still an extremely serious offence carrying a maximum sentence of life imprisonment.

2.2 Domestic Violence

In order to understand why the Law Commission and academics[315] were so concerned with the treatment of battered women under this law, it is first important to put their plight into perspective. Whilst the term 'battered women' has been used without a great amount of thought by the courts and in legal literature a more precise term would be 'abused women'. Whereas battered women implies only physical violence, the term 'abused women' importantly for our purposes incorporates individual who suffer the following forms of domestic violence:

> '[a]ny incident of threatening behaviour or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.'[316]

This term incorporates the plethora of ways in which a woman can suffer at the hands of an abusive partner and more accurately reflects her experience. However as I detailed in Chapter Two 'Battered Women Syndrome' become lodged uncomfortably in Provocation during the 1990s and so much of the literature and commentary uses this term and thus I shall continue to use it.

In the section entitled 'The Feminist Advocacy Era' in the previous chapter I touched upon why there was suddenly such a move to subjectivise the objective standard to protect defendants who were victims of domestic violence.

---

[315] Edwards, S. 'Descent into Murder: provocation's stricture – the prognosis for women who kill men who abuse them.' [2007] *Journal of Criminal Law* 71(2) , 'Justice Devlin's legacy: Duffy – a battered woman "caught" in time' [2009] *Crim. L. R.* 12 851-869; Horder, J. 'Reshaping the Subjective Element in the Provocation Defence' [2005] 1 *OJLS* 123-140; Leigh, L.H. 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law' [2008] *Justice of the Peace* 172; Wells, C. 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) *LS* 266

[316] Home Office, http://crimereduction.homeoffice.gov.uk/dv/dv01.htm

Traditionally domestic violence was something unseen, something silently suffered by a vast number in the UK but which society was reluctant to tackle. In the 1970s this public/private divide which cloaked the problem and, "left women unprotected against unbridled male power and violence in the home, despite its stereotypical construction from a violent world"[317] finally began to fall. This can be attributed to the start of open public discussion of the problem at the time which forced the Police to take action to tackle violence in the home and not simply treat it as, "merely a domestic"[318].

Since this time there have been many public campaigns urging women to stop suffering in silence and to seek help from the relevant authorities like the Police who are no longer complacent about this problem. Still despite the progress that has been made on tackling the issue the British Crime Survey in 2004 found that 50% of all adult women have experienced domestic violence, sexual assault or stalking[319]. Currently in the UK an average of two women per week are killed by violent partners; 93.72% of female victims are killed by a current or former sexual partner in comparison to 19.1% of male victims[320].

---

[317] Nicolson, D. 'Criminal Law and Feminism' in Nicolson, D. and Bibbings, L. *Feminist Perspectives in Criminal Law* (1st Edn, Canvendish Publishing, 2000) p8

[318]Fox, M. 'Legal responses to Battered Women Who Kill' in Bridgeman and Mills *Law and Body Politics*' (1st edn, Dartmouth Publishing, 1995) p172

[319] www.homeoffice.gov.uk/rds as cited by Loveless, J. 'Criminal Law: Texts, Cases and Materials' (2nd Edn, OUP, 2010) p272

[320] Law Commission Report 'Partial Defences to Murder' Appendix A, Table 5, as cited by Loveless, J. 'Criminal Law: Texts, Cases and Materials' (2nd Edn, OUP, 2010) p272

In instances of domestic violence, which account for one quarter of all violent crime in the UK[321], murder is often the final act in a relationship characterised by a long history of abuse[322]. As the statistics above show it is predominantly women and their children who are most at risk of being killed and not their abusive partner. In instances where a partner is killed however, there is a great discrepancy in the courts between conviction rates of male and female defendants in these cases with the former receiving much more lenient sentences[323]. Yet in recent years there has been an attempt by defendants who are battered women to use the partial defence and claim that they were provoked into killing their abusive victim.

As I shall explore in this chapter, this sentencing gap is in part a product of the gendered nature of the partial defence for Provocation based on Loss of Self-Control for it prioritises male anger, the very emotion at the route of most domestic violence. These spontaneous, short, overpowering bouts of anger are not the typical response of women when faced by violent provocation for research has shown, "They lack not only the strength but also the psychological make-up"[324]. Battered women are more often overcome with feelings of fear and despair and resort to having to wait until they possess some kind of physical advantage over their abuser such as in the case of *R* v Ahluwalia[325] where the defendant had to wait until her husband was asleep. This resulted in female

[321] Home Office, http://crimereduction.homeoffice.gov.uk/dv/dv01.htm

[322] Dobash etc al 'Not an ordinary killer – just an ordinary guy' [2004] *Violence Against Women* Vol. 10 No. 6, 577-605 at 597-598

[323] Loveless, J. 'Criminal Law: Texts, Cases and Materials' (2nd Edn, OUP, 2010) p273

[324] Ibid.

[325] [1992] 4 All ER 859 (CA)

defendants who had suffered domestic violence falling outside of the scope of Provocation as Loss of Control had to be 'sudden' and temporary' and could only be based on anger.

As I shall detail below these concerns for battered women discriminated against by Loss of Self-Control's sexist operation were rightly at the forefront of the reform process.

3) The Proposals for Reform

3.1 2003 - Law Commission 'Partial Defences to Murder, Consultation Paper'

In this first consultation paper, the Law Commission acknowledged that it, "has long considered that the law of murder is overdue for review,"[326] but had chosen instead to limit its terms of reference. Given the continued reappearance of Provocation before the House of Lords and the Privy Council[327] it is little surprise that the Law Commission conducted this review, Lord Hoffman in *R v Smith (Morgan)*[328] said, "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"[329]. And indeed it was this case and the controversy which followed that prompted the Law Commission to finally review provocation on the basis of the problems discussed in Chapter Two of this thesis.

---

[326] para.1.1

[327] See previous chapter for details

[328] [2001] 1 A.C. 146 (HL)

[329] Ibid. p159

In June 2003 the Home Secretary requested that the Law Commission report on the operation of the partial defences as prescribed by Section 2 (Diminished Responsibility) and Section 3 (Provocation) of the Homicide Act 1957 with particular regard to their impact in the context of domestic violence[330]. The Home Secretary asked the Commission outright whether or not the defences should continue to operate at all[331] before setting the parameters for retaining and reforming them should they be kept[332]. Some of the ideas put forward by the Commission were to combine the partial defences[333] or to reform them individually[334]. A specific concern, given the outcry for the partial defences to protect battered women properly was:

> "(3) Whether there should be a partial defence to murder in circumstances in which the defendant, though entitled to use force in self-defence, killed in circumstances in which the defence of self-defence is not available because the force used was excessive.
>
> (4) If so, whether such a partial defence should be separately provided for and in what terms, or should be subsumed within a single partial defence such as is referred to in (2)(b) and (d) above."[335]

The question of whether the partial defences should be combined was the subject of some academic discussion at the time by Mackay and Mitchell[336] for instance. This idea seems to have stemmed from the uncertainty over the objective standard and the 'syndrome cases' which brought the two partial defences closer together.

---

[330] para 1.2(1)

[331] para 1.2(2)(a)

[332] para 1.2(2)(b-d)(3)(4)

[333] para 1.2(b)

[334] para 1.2(c) and (d)

[335] para 1.2

[336] Mackay, R.D. & Mitchell, B.J. 'Replacing provocation: more on a combined plea' [2004] *Crim. L.R.* Mar 219-223

The Law Commission recognized that Provocation based on Loss of Control is an area of the law with which many other legal systems as well as our own have had a great deal difficulty[337]. Following the request by the Government "to have particular regard to the impact of the partial defences in the context of domestic violence,"[338] the Commission declared its intent to focus on abused women who are forced to kill their abusers[339]. Largely born out of *Ahluwalia*[340] and the subsequent wave of cases, the Commission recognised that:

> "The law must deal with [domestic violence] in a way which is fair and shows proper respect for human life. At the same time it would be wrong to introduce special rule relating to domestic killings unless there is medical or other evidence which demonstrates a need and a proper basis on which to do so.
>
> In this context we are seeking the assistance of psychiatrists, in particular about the current state of medical opinion concerning battered woman syndrome (BWS)".[341]

The Commission subsequently posed two key questions to be answered in its review: 1) should "mitigated murder" be a separate offence (or group of offences) from murder or should mitigating factors simply be taken into account, as in other offences, in assessing the sentence? And 2) If mitigated murders are to be classed as separate offences from murder, should there be a unified form of mitigated murder which may take into account a variety of matters or should there be separate forms of mitigated murder?[342].

---

[337] para 1.4

[338] para.1.4.2

[339] para 1.17

[340] [1992] 4 All ER 889

[341] para 1.67-1.68

[342] para 1.18

3.1.1 Problems Identified

The Commission considered the problems associated with Provocation such as the dropping of the original first criteria of a provocative act. The Commission goes as far as calling 'Provocation' a misnomer[343] on this basis. It also highlights the victim's families who consider the reduction a travesty of justice because they cannot comprehend the rationale[344]. It also recognized that Provocation based on Loss of Control reflected an essentially male view of society[345] and was ultimately an unworkable mess:

> "the boundaries of the defence of provocation have expanded greatly since the 1957 Act. It no longer has (if it ever did have) clear boundaries or a clear moral basis. The act no longer has to be provocative in the ordinary sense; the response no longer has to be on the spur of the moment; and the response no longer needs to be that which would be expected of an ordinary person."[346]

Thus the Commission decided to consider the options which had been proposed, either: 1) to abolish the defence and the mandatory sentence; 2) to retain the defence but in a more restricted form; or 3) to retain the defence where presently available but to abolish the 'reasonable man' test and possibly merge the two partial defences which, as stated above, had already been growing closer through the expansion of provocation.[347]

The Law Commission found provocation to be inherently contradictory:

> "Introduced as a concession to human frailty, this partial defence has internal contradictions. It suffers the defects of compromise. It raises the question whether a reasonable person should ever respond to provocation by killing".[348]

It was particularly concerned with the confusion surrounding the objective test,

[343] para 1.48

[344] para 1.48

[345] para 1.50

[346] para 1.52

[347] para 1.53

[348] para 4.162

particularly following *Smith (Morgan)*[349] citing a vast body of academics[350] in coming to its conclusion that there are fundamental problems with the concept of the "reasonable man".

Next the Law Commission found the meaning of conduct capable of provoking a defendant to kill was effectively limitless under section 3 of the 1957 Act. It took issue with completely innocent acts of the deceased, particularly the crying of a baby in *R v Doughty*[351], being sufficiently admissible.[352]

The Commission questioned whether it was morally sustainable for 'sudden' anger to be the basis of a partial defence to murder. It questioned why in the first place sudden anger should be elevated above emotions of fear, despair, compassion and empathy, "The idea that a "reasonable person" could kill when seeing red is one that jars. Even as a partial defence, it shows a degree of acceptance of killing in those circumstances".[353] The Commission questioned whether, morally, a killing is necessarily less culpable just because the defendant

[349] [2001] 1 A.C. 146

[350] Elliott, C. "The Partial Defence of Provocation: the House of Lords Decision in Smith" [2000] 64 Journal of Criminal Law 594; John Gardner and Timothy Macklem, "Compassion without Respect? Nine Fallacies in R v Smith" [2001] Crim LR 623 and "Provocation and Pluralism" [2001] 64 MLR 815; Susan Edwards, "The Erosion of the Objective Test in Provocation: Leaving it to the Jury? R v Smith: Towards a just law of Provocation?" [2001] 23 Journal of Social Welfare and Family Law 227; Neil Gow, "Provocation and the Reasonable Man" [2000] 48 Criminal Law Bulletin 7; Russell Heaton, "Anything Goes" [2001] 10 Nottingham Law Journal 50; J E Stannard, "Towards a Normative Defence of Provocation in England and Ireland" [2002] 66 Journal of Criminal Law 528.

[351] [1986] 83 Cr App R 319

[352] para 4.163

[353] para 4.165

lost the emotional control expected by society and killed in a state of provoked anger. Whilst this might have been acceptable in the 17th and 18th centuries the Law Commission questions whether the public would today believe it to be appropriate.

Furthermore, the Law Commission became concerned with the inbuilt sexual bias of Loss of Control recognising that sudden anger resulting in a violent reaction was a decidedly male trait. Provocation based on Loss of Control is not suitable for defendants suffering from BWS because they act out of fear for their and their children's lives and are forced to kill in despair. This is not recognised by the defence which favours the emotional responses of men stemming from its origins with male honour explored in Chapter One.

The modern concern of Provocation being pleaded in cases of gangland revenge killings was also judged by the Law Commission to be a serious one[354]. Finally, the Law Commission considered the victim who cannot in any of these cases defend their provocative actions because they have been killed for them. Provocation blames the victim for the defendant's inability to exercise their self-control and greater concern for them and their families is required in reforming the defence.[355]

[354] para 4.168

[355] para 4.169

3.1.2 Options Put Forward by the Law Commission

After presenting all of the information on provocation and highlighting its flaws the Law Commission asked consultees which of the following options they preferred: 1) abolition of the defence of provocation, whether or not the mandatory sentence is abolished; 2) abolition of the defence of provocation, conditional upon abolition of the mandatory sentence; or 3) retention of the defence of provocation, whether or not the mandatory sentence is abolished. The Law Commission acknowledged that all three of these option presented problems because of the clash between competing public interests:

> "On the one hand there is the need to protect and respect human life – and therefore not to condone, even partially, the actions of those who kill through failure to control their emotions. On the other hand, people are sometimes provoked to kill in circumstances which call for a degree of compassion".[356]

But the time had come to either abolish the partial defence of provocation or modify its existing form, the latter being the more preferable option.

3.2 2004 – Law Commission 'Partial Defences to Murder: Final Report'

After consulting on the above three proposals for the future of provocation the Law Commission was surprised to find that the respondees favoured the latter two options rather than abolishing Provocation outright. As a result the Commission decided to focus its report on the options for overhauling rather than abolishing provocation.[357]

First, however, the Law Commission made it clear that it needed to conduct a review on the law of murder:

[356] para 12.54

[357] para 1.8

> "The present law of murder in England and Wales is a mess. There is both a great need to review the law of murder and every reason to believe that a comprehensive consideration of the offence and the sentencing regime could yield rational and sensible conclusions about a number of issues. These could include the elements which should comprise the substantive offence; what elements, if any, should elevate or reduce the level of culpability; and what should be the appropriate sentencing regime".[358]

It argued that a review of the whole should be conducted with a view to considering the whole of the offence of murder including the mandatory life sentence in order to properly formulate any partial defences which may be appropriate[359].

The consultees were nearly unanimous that the defence should not be abolished whilst the mandatory life sentence remained on the statute books. As the Government had no plans to abolish this the Law Commission choose to concentrate on reforming the defence under this sentencing regime. Those who supported the retention of the defence believe there are moral and practical reasons for doing so[360].

However, without having this opportunity the Law Commission expressed its wish to reform Provocation by recasting it in a way that would include those cases which involve excessive use of self-defence where culpability is sufficiently reduced to warrant a partial defence[361]. The Commission thus recommended that the partial defence should be available to defendants who acted: 1) in response to both gross provocation (whether by words or conduct or a combination of both) which caused the defendant to have a justifiable sense of

[358] para 2.74

[359] para 1.12

[360] Cook, K. 'Killing in Desperation' *New Law Journal* [2004] Jan. 154 64

[361] para. 1.15

being wrong[362]; and (for the first time), 2) out of fear of serious violence towards themselves or another[363]. A combination of both of these was also allowed for[364].

The Commission confirmed that the stricter objective standard re-adopted by the Privy Council in *AG for Jersey v Holley*[365] was to be used:

> "c) a person of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way. [366]

The proposals went on to clarify that:

> 2) In deciding whether a person of ordinary temperament in the circumstances of the defendant might have acted in the same or a similar way, the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control.

Next the Law Commission stated that the partial defence should not apply when:

> "3) (a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence, or
>
> (b) the defendant acted in considered desire for revenge."[367]

These are two important restrictions as they will prevent abuse of the partial defence which could once again lead it into controversy. The Law Commission further specified that:

> "4) A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence merely because he or she was also angry towards the deceased for the conduct which engendered that fear."[368]

Finally the proposals state that a judge would not be required to leave the defence to the jury unless there was evidence on which a reasonably properly

---

[362] para 1.13(1)(a)(i)

[363] para 1.13(1)(a)(ii)

[364] para 1.13(1)(a)(iii)

[365] [2005] UKPC 23

[366] para 1.13(1)(b)

[367] para 1.13

[368] para 1.13

directed jury could not conclude that it might apply[369]. The Law Commission believed that the adoption of these proposals would greatly improve the law[370].

3.2.1.Critique of the Proposals

The first important change to take note of in these proposals is the recognition by the Law Commission that there was no allowance for other provoked emotions that may cause a defendant to kill. The attempt to rectify this oversight was widely praised:

> "This is precisely the point that campaigners for women like Kiranjit Ahluwalia, Sara Thornton and Emma Humphreys have been making for over a decade… It appears that the claim for justice for women who have killed their abusers may finally be recognised."[371]

The new fear trigger should now accommodate battered women into the partial defence without having to tamper with the objective standard. Turning to the other emotional trigger, the Law Commission has adopted the terms "gross" and "justifiable sense of being wrong" without offering much explanation. These phrases have been criticised for their ambiguity; Mackay and Mitchell point out that a judge directing a jury on the issue may struggle to explain what would constitute "gross" provocation[372].

Most important to note however is that there was no longer a requirement for these two emotional triggers to have caused in the defendant a 'Loss of Self-Control'. The Law Commission had dropped the doctrine from

---

[369] para 1.13 (6)

[370] para 2.10

[371] Cook, K. 'Killing in Desperation' *New Law Journal* [2004] Jan. 154, p64

[372] Mackay, R.D. & Mitchell, B.J. 'But is this provocation? Some thoughts on the Law Commission's report on partial defences to murder' [2005] *Crim. L.R.* Jan 44-55, p47

Provocation as the requirement favoured the typical reactions of men who were prone to losing their temper and resorting to unnecessary violence. In the context of the above statistics on domestic violence this was a very welcome proposed change to the partial defence. It meant that this type of male behaviour would no longer be accommodated for, and anger would only be acceptable in extreme cases such as the classic example of finding your child being abused and not because of a domestic dispute. The lack of the Loss of Self-Control requirement also sat well with the new emotional trigger of fear as losing ones self-control is more of a climax of anger.

Finally the adoption of a much stricter objective standard akin to that of the Privy Council in *AG for Jersey v Holley*[373] should once and for all prevent attempts to widen the defence to accommodate each and every defendant's problems. It will prevent the new defence from falling into controversy and should provide for greater consistency of judgments.

3.3 2005 – Home Office Review of Murder Announced

On the 21st July 2005 Home Office minister Fiona Mactaggart announced the first comprehensive review of homicide law since The Royal Commission. Whilst stating that the government, "Want[ed] to have an open and inclusive debate on the issues before we make firm recommendations on how the law should be reformed." Mactaggart simultaneously stated that the mandatory life sentence would not be up for review:

[373] [2005] UKPC 23

> "Murder is the most serious crime and it is essential that the law reflects this. Whilst the Government remains committed to retaining the mandatory life sentences and the murder principles set out in the Criminal Justice Act 2003, the Review will look at the overall framework of murder to ensure that the Government provides coherent and clear offences which protect the public and enable those convicted to be appropriately punished".

This had been one of the main requests from consultees in the Law Commission's 2004 report however the 'tough on crime' New Labour government refused to even allow the Law Commission to consider the mandatory life sentence for political reasons.

3.4 2005 – Law Commission CP 177 'A New Homicide Act for England and Wales?'

Despite not being allowed to consider the mandatory life sentence, at the announcement of this review the previous year, Sir Roger Toulson, Chairman of the Law Commission had said:

> "We are pleased to have been given the opportunity to carry out this review. There have been calls for this area of the law to be properly reconsidered for the past thirty years, and the decision by the Home Office to invite the Law Commission to undertake a review of the law is very welcome."

The radical proposal the Law Commission did come up with in its consultation paper was to restructure the homicide offences into a two-tier system: first degree murder and second degree murder.

In discussing the problems associated with provocation the Law Commission reiterated just how fractured the defence has become:

> "Provocation is also an example of the continuing uncertainty in the law of murder. Although the essential ingredients of the offence of murder were settled by the end of the seventeenth century, the exact scope of the partial defence is a matter of controversy. The two highest judicial bodies in the land, the House of Lords and the Privy Council, have disagreed over a key element of the defence".[374]

[374] para 4.11

The Commission then determined that the key element of provocation to be tackled was the objective element: whether some or all of the defendant's characteristics should be taken into account when judging how the reasonable man might have responded to the provocation.

The Commission argued that under any reform, the partial defences, if successfully pleaded should have exactly the same mitigating effect. However, the Commission also had to incorporate the defence into its new offences structure. It proposed that provocation would only be available to a defendant charged with first degree murder because it required the intention to kill:

> "Although under the present law, provocation and diminished responsibility reduce murder to manslaughter, the offence of "first degree murder" that we are proposing would be confined, unlike the present offence of murder, to intentional killings. Intentional killings, even if committed under provocation or diminished responsibility, are very serious offences. We believe that such killings ought to be graded and labelled in a way that marks them out as more serious offences than those that we are proposing should be manslaughter.
>
> Putting such cases into the category of "second degree murder" recognises that they are a form of murder but not in the top tier. Mitigated murder is still a type of murder".[375]

The consultees were thus first asked whether there were any better proposals than the two-tier structure to homicide proposed and whether it was agreed that partial defences should only reduce first to second degree murder rather than manslaughter.[376]

Jeremy Horder came out in favour of this aspect of these proposals arguing that the two-tier structure was no longer able to meet the increasing demands being made upon it as a result of developments in the partial defences. When the existing structure was devised roughly 400 years ago Provocation was

[375] para 5.74 and 5.75

[376] para. 6.8

the only partial defence available but in the following period two further partial defences, diminished responsibility and suicide pacts, have emerged. Horder asserts that the key issue the Commission is try to tackle with its new three tier structure is one of 'fair labelling':

> "The question is whether better 'labelling' of offenders who may have intended to kill but have an excusatory partial defence can be achieved. An obvious solution is to place them in a new offence category with those who, whilst they lack the fault element for the highest category of homicide offence, are significantly more blameworthy than those committing manslaughter as a substance offence."

Support for the new structure also came from Mackay and Mitchell who cited a small public opinion survey Mitchell had conducted from August to October 2003 which found "that the public was in favour of separate homicide offences to reflect the varying degrees of culpability and differing circumstances in which murders are committed"[377]. The pair therefore determine that there appears to be some public support for the principle of fair labelling that the Commission has attempted to address with the proposed three-tier structure[378].

However with regards to Provocation the pair are very critical of the Commission which they feel have got nowhere near adequately addressing the issue:

> "the reformulated provocation plea suggested by the Commission with its emphasis on the need for a " justifiable sense of being seriously wronged" rather than some form of " emotional disturbance" sends out the wrong message. It does so by laying emphasis on the fact that D must feel justified in acting as he did. This in turn is likely to focus attention on the behaviour of the victim".[379]

---

[377] 'But is this Provocation? Some thoughts on the Law Commission's Report on Partial Defences to Murder' (2005) *Criminal LR* 44, p45

[378] Ibid.

[379] Ibid. p55

Mackay and Mitchell contend that Provocation is no longer concerned with justification or excuse but the effect of reducing the defendant's responsibility for their actions taken when they had lost control. In their view the Commission failed to address the impact of emotions on behaviour and take issue with the abandonment of loss of control[380]. They point out that it would be difficult to measure whether "gross provocation" and/or "fear of serious violence" without a resulting mental or emotional disturbance akin to loss on control and therefore question why the Commission has even retained the term Provocation for its revised partial defence[381].

3.5 2006 – Law Commission 304 'Murder, Manslaughter and Infanticide' Project 6 of the Ninth Programme of Law Reform: Homicide

In this report the Law Commission strongly recommended a new Homicide Act for England and Wales to replace the Homicide Act 1957. The new act would for the first time provide clear and comprehensive definitions of homicide offences and the partial defences[382]. However, the proposals have been described as significantly less ambitious[383] than the scheme which the Law Commission put forth in its '*A New Homicide Act for England and Wales?*' consultation paper.

[380] Ibid. p48

[381] Ibid. p55

[382] para. 1.63

[383] Ashworth, A. 'Principles, Pragmatism, and the Law Commission's recommendations on homicide law reform' [2007] Crim. L.R. May, p333

Importantly, the Law Commission still decided to recommend a three-tier structure of general homicide to replace the current two-tier structure of murder and manslaughter. Under the new proposals murder would be a split into first and second degree murder. First degree murder, carrying a mandatory life sentence, would encompass intentional killings and killings with the intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death

> "1) intentional killings, and
> 2) killings with the intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death."[384]

Second degree murder, carrying a discretionary sentence with a maximum of life, would encompass:

> 1) killings intended to cause serious injury; or
> 2) killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or
> 3) killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact".[385]

On Provocation the Law Commission saw no compelling reason to depart from their 2004 recommendations detailed above. Most importantly the Commission again argued for the removal of Loss of Self-Control from the partial defence:

> "the provocation defence is currently only available when there is evidence that D was provoked to lose his or her self-control. The defence is concerned with angry, spur-of-the-moment reactions to provocation. It is not concerned with reactions prompted by fear, unaccompanied by a loss of self-control, even if the fear in question was that the victim would have inflicted serious violence on D if the victim had not been killed."[386]

---

[384] para 2.42

[385] para 2.70

[386] Law Commission No.304, 'Murder, Manslaughter and Infanticide' [2006] para 5.49

But their proposals for reform of the defence did differ slightly; firstly Provocation would reduce a charge of first degree murder to one of second degree murder. Secondly the Commission attempted to clarify what could constitute as "gross" provocation by stating that this could be words or conduct or a combination of both[387].

These proposals attempt to address the gender bias with provision a)ii) aiming to help women suffering from BWS. The proposals give a clear definition as to what the objective standard will encompass when assessing if the defendant acted as the reasonable person would have in 2). 3) a) has been designed to prevent provocation being knowingly used as a defence to gangland revenge killings, a concern which had been expressed in the consultation paper.

3.6 Creation of the Ministry of Justice

In 2007, under then Home Secretary John Reid, the Ministry of Justice was created taking responsibility for courts, prisons and probation in England and Wales from the Home Office. In December of 2007 Jack Straw, Minister for Justice, announced that the second stage of the review would begin. Further, Mr Straw made it clear that having considered the Law Commission's recommendations carefully the Government had decided to proceed on a step-by-step basis and not a full overhaul of the law of homicide.

[387] para 5.11

3.7 2008 – Government Proposals – 'Murder, Manslaughter and Infanticide: proposals for reform of the law' Ministry of Justice Consultation Paper, 28 July

This paper was published at the end of the Government's protracted review of the law of murder. It dismissed the radical recommendations of the earlier 2005 and 2006 Law Commission reports which, *inter alia*, proposed a recasting of the law of homicide by splitting of the offence into two degrees of murder with the mandatory life sentence being restricted to only first degree murder. In a 2008 editorial in the Criminal Law Review this backtracking was criticized, "This imaginative and progressive idea has clearly proved too radical for the government". This consultation paper jettisons this earlier recommendation and proceeds on the assumption that murder will remain a unitary common law offence, with all the same elements including importantly the mandatory life sentence.

What this consultation paper did propose though was legislation to adjust the boundaries of liability for murder which relate to partial defences and complicity. The biggest change put forward was the abolition of Provocation and its replacement with two new partial defences which would both have had the effect of reducing murder to manslaughter. Both were lineal descendants of the common law of Provocation in the sense that they would require the defendant to have lost self-control, although the requirement for a "sudden" loss of self-control was dropped, and the defendant's reaction would continue to be evaluated against that of a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint. A further limiting condition was that the

'qualifying trigger' for the loss of self-control should not be predominantly attributable to the defendant's own prior criminal conduct.

The first new defence would be killing in response to a fear of serious violence. The Law Commission proposed this in its *Partial Defences* report, arguing that it would help battered women who killed their abusers in circumstances where they could not rely on self-defence because of the lack of an imminent attack, and householders put in fear by a burglar who then use disproportionate force on them. The government was content here to adopt this proposal as it stands.

The second of the new defences would be killing in response to words and conduct which caused the defendant to have a justifiable sense of being seriously wronged. This again was proposed by the Law Commission, but the Government narrows the proposal by saying that the defence should apply 'only in exceptional circumstances'. Importantly these will not include sexual infidelity by a partner, this will be expressly excluded by the legislation. In addition the draft clauses state that "a sense of being seriously wronged by a thing done or said is not justified if D incited the thing to be done or said for the purpose of providing an excuse to use violence". This proposition has been criticized for confusing justification and excuse[388]. What will count as "an exceptional happening" to constitute the "qualifying trigger" is to be left undefined. So there will be much work for the courts in delimiting this particular boundary.

[388] Dyson, M. 'Reply to Ministry of Justice consultation paper "Murder, manslaughter and infanticide: proposals for reform" [2008] Cambridge Law Faculty Response Paper, p.2-3

This approach to what the Law Commission termed "gross provocation" is intended to provide much more limited defence than the present law of provocation. The emotion of anger as a basis of partial exculpation for murder will no longer be privileged, so some enraged men who kill their partners for infidelity or other perceived faults will in future have no defence. This sounds defensible, but it has been argued that the CP needs to think harder about the relationship of emotions to culpability. Emotions are frequently complex phenomenon. Great anger may be mixed with great fear, shock, despair, frustration and so on. All of these intense emotions are forms of severe stress which can trigger an explosive loss of self-control.

3.8 2009 – Coroners and Justice Bill

The Coroners and Justice Bill proposed a radical makeover of provocation by essentially abolishing it[389] and replacing it with two 'loss of control' defences[390] in response to the 'defendant's fear of serious violence from the victim'[391] or to a 'thing or things done or said (or both)'[392] which constituted circumstances of an extremely grave character[393] and caused the defendant to have a justifiable sense of being seriously wrong[394].

Though the Bill did not abandon the loss of control requirement, it aimed to help abused women by removing the need for a 'sudden' loss of self-control so

[389] Section 43

[390] Section 41

[391] Section 42(3)

[392] Section 42(4)

[393] Section 42 (4)(a)

[394] Section 42 (4)(b)

that the defence is more easily accessible where there is a delay between the qualifying trigger and the response[395]. Though this may create ambiguity as to the temporal link, section 41(1)(c) instructs the jury to consider the delay objectively, would the reasonable man in the same circumstances have responded in that same way that the defendant did.

By incorporating fear[396] as well as anger[397] (or both[398]) as qualifying triggers the Bill attempts to make provocation more understanding of abused women forced to kill. This means that abused women would now have an adequate basis to use the defence rather than having to fit into one designed for the emotional reactions of men.

Also in order protect women being killed by partners or former partners, which occurs to on average two women per week in the UK[399], adultery would no longer be considered an adequate qualify trigger[400]. This is an extremely important shift in provocation, of the four categories from the early modern period affirmed in *R v Mawgridge*[401] this was the only one which had remained.

The second qualifying trigger allowed for a loss of self-control attributable to things said or done or both which were 'of an extremely grave

---

[395] Section 41 (2)

[396] Section 42 (3)

[397] Section 42 (4)

[398] Section 42 (5)

[399] Law Commission Report 'Partial Defences to Murder' Appendix A, Table 5, as cited by Loveless, J. 'Criminal Law: Texts, Cases and Materials' (2nd Edn, OUP, 2010) p272

[400] Section 42 (6)(c)

[401] [1707] Kel 119

character'[402] and 'caused the Defendant to have a justifiable sense of being seriously wronged'[403]. It is thought that this would allow 'cumulative provocation' to be pleaded by abused women who strike back after years of abuse.

The objective test is confirmed as the appropriate standard when judging the reaction of the defendant[404]. The Bill made clear that the only characteristics to be taken into account when considering the defendant's capacity for loss self-control are sex and age. No other questionable individual characteristics like addiction were to be considered. This therefore also seemed to prohibit consideration of BWS yet Section 41 allowed for consideration of the circumstance of the defendant so the adjusted objective standard could assist abused women. This is because the impact of the abuse will be considered avoiding a reliance on syndrome evidence which was deemed too problematic by earlier consultees.

4) Chapter Conclusion

In this chapter I have focused on the various provisions that have been put forth to update the partial defences and bring Provocation based on Loss of Self-Control into line with the modern age. The biggest problems with Provocation that these proposals have identified and attempted to address were that: 1) there has been a lack of judicial control over what could constitute as

[402] Section 42 (4)(a)

[403] Section 42 (4)(b)

[404] Section 41 (1)(c)

provocation; 2) the requirement that loss of self-control be 'sudden' and 'temporary'; and 3) this loss of self-control could only have stemmed from anger and the equally overwhelming emotion of fear.

In the Chapter Four I shall analyse whether the result of this decade of review, the new Coroners and Justice Act 2009 which abolished Provocation[405] and replaced it with a new partial defence of Loss of Control[406], addresses these problems properly.

[405] Coroners and Justice Act 2009 S.56(1)

[406] Coroners and Justice Act 2009 S.54-55

Chapter Four: A New Partial Defence

"All anger is not sinful, because some degree of it, and on some occasions, is inevitable. But it becomes sinful and contradicts the rule of Scripture when it is conceived upon slight and inadequate provocation, and when it continues long." – Wilson Mizner

1) Chapter Introduction

In this chapter I shall analyse the abolition of Provocation by the Coroners and Justice Act 2009[407] (henceforth "the Act") and its replacement with a new partial defence of Loss of Self-Control[408]. Having dealt in the first two chapters of this thesis with the first question set out in the introduction on the origin of loss of control it is now time to turn to the second: 2) What does having a new partial defence of Loss of Self-Control based on anger and now fear really mean and what impact will it have?

As I explored in Chapter Three, in drafting the new provisions there has been a policy shift away from just indulging or partially condoning anger to placing the emphasis on fear of serious violence as a partial defence. Prior to the passing of the Act the doctrine of loss of self-control had been heavily criticized for being both overly inclusive and overly exclusive[409]. The former judgment being made due to the ease of enraged men were able to utilise the defence whilst the later reflects the difficulty of women deserving mitigation to plead it successfully in its previous form[410].

---

[407][407] CJA 2009 Section 56

[408] CJA 2009 Section 54

[409] 2003 Law Commission 'Partial Defences to Murder, Consultation Paper'

[410] Ibid. para 1.67-1.68

The Act creates a new Loss of Control defence[411] based on two qualifying triggers, a 'justifiable sense of being wronged'[412] and (for the first time) 'a fear of serious violence'[413]. This chapter first analyses the two qualifying triggers in turn; I shall assess the 'fear of serious violence' trigger to evaluate whether it adequately reflects the experience of abused women who kill, questioning in particular the appropriateness of the retained concept of loss of control to describe the reaction of women in this situation. To what extent will the trigger protect the women who need it most? I will then review the 'justifiable sense of being seriously wronged' trigger to see whether the changes that have been made to it are sufficient. Next I shall review the formulation and role of the loss of self-control in the new partial defence before exploring whether the new objective test of "a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint"[414] will prove as problematic as it did in the old law of Provocation.

2) A New Partial Defence

The Coroners and Justice Bill was introduced in the House of Commons on the 14th January 2009, it received Royal Assent on the 12th November 2009 and the Coroners and Justice Act 2009 came into effect on the 4th October 2010. The Act was created with the intention, *inter alia,* of reforming and clarifying the law on homicide, in particular the partial defences. Jack Straw, the then Justice Secretary stated: "This Act continues the government's drive to improve the

[411] CJA 2009 Section 54

[412] CJA 2009 Section 55 (4)

[413] CJA 2009 Section 55 (6)

[414] CJA 2009 Section 54 (1) (c)

justice system. We are putting the focus clearly on the needs of victims."[415] In instances of provoked killings though the real victim may not be the deceased but the battered women who was forced to kill, a group who as discussed in the previous chapter were of a particular concern for the defence's drafters[416].

The product of the last decades' reviews and consultation is Sections 54-56 of the Act which abolishes Provocation replacing it with a new partial defence based on the loss of self-control. As with Provocation this new defence will be uniquely available to defendants charged with murder seeking to have their sentence reduced to one of manslaughter[417] to avoid the mandatory life sentence.

In Section 54 the new partial defence is broken down into three sections: 1) the defendant must actually lose their self control because of a triggering event (subjective test)[418]; 2) the event which caused the loss of self-control must qualify under either of the two prescriptive triggers[419]; and 3) a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint would have lost their self-control in the same situation (objective test)[420].

[415] 12/11/09 http://www.justice.gov.uk/news/newsrelease121109b.htm (accessed 27/11/10)

[416] Established in 2003 Law Commission 'Partial Defences to Murder, Consultation Paper' para 1.2(1) and reiterated in every subsequent consultation paper and report.

[417] Section 54(7), Coroners and Justice Act 2009

[418] Section 54 (1)(a)

[419] Section 54 (1)(b)

[420] Section 54 (1)(c)

Section 54(5) places the burden of proof on the prosecution to disprove the defence once the evidential burden has been met. A jury must assume that the defence is satisfied unless the prosecution can prove beyond a reasonable doubt that it is not[421].

Before assessing each of these components in turn it is first worth addressing the most obvious change to the partial defence, the new nomenclature. Although the Law Commission had retained the name 'Provocation' for the partial defence in its recommendations the Government decided that due to its "negative connotations"[422] it should be abandoned and rebranded as 'Loss of Control'. Whilst the Government did follow some of the Law Commission's recommendations, their decision to abolish provocation and create this new partial defence based on the concept of loss of self-control was contradictory to the Law Commission's position of abandoning the doctrine. However Clough argues that the new partial defence continues with the essence of Provocation which was that the loss of self-control is an acknowledgement of 'human frailty'[423].

3) Qualifying Triggers

The new law expands the "qualifying triggers" for the partial defence from solely anger by incorporating a separate loss of self-control due to fear of violence. Whilst the Law Commission had recommended the incorporation of anger and fear into the Act, it had sought to remove the concept of loss of control

[421] Withey, C. 'Loss of Control' *Criminal Law & Justice Weekly* [2010] 174 JPN 197 p197

[422] Ministry of Justice, 'Murder, Manslaughter and infanticide: proposals for reform of the law' CP 19/08 [2008] para 34

[423] Clough, A. 'Loss of Self-Control as a Defence' [2010] *JCL* 74 (118), p122

from the defence. This continuation is in contradiction to the Law Commission's review proposals in which rejection of loss of control was integral[424]. However in this section I will stick to reviewing the new triggers before critiquing the loss of control requirement in a later section.

Section 54(1)(b) of the Coroners and Justice Act 2009 requires "qualifying triggers" which are set out in Section 55 of the Act as being: 1) " ...loss of self-control [being] attributable to D's fear of serious violence from V against D or another identified person"[425] and 2) ...loss of self-control [being] 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"[426] or a combination of both. Despite continuing with the loss of self-control as the basis for the defence the fact that anger is not the sole qualifying trigger for the defence is very welcome. As explored in the last chapter the main aim of the reform process over the past decade has been to break the male default of the defence's operation and to accommodate women whose emotional responses to these situations is extremely different. Whilst there are foreseeable problems with a defence based both on anger and fear, the creation of a qualifying trigger which recognises that another emotion can cause a loss of self-control is to be praised for it will support battered women, such as those in the past cases of *Ahluwalia*[427] and *Thornton (No.2)*[428], who are forced to

[424] Norrie, A. 'The Coroners and Justice Act 2009 – partial defences to murder (1) loss of control' [2010] *Crim. L.R.* 4, p275

[425] s.55(3)

[426] s.55(4)

[427] [1992] 4 All ER 889

kill their partners not out of anger but out of fear[429].

3.1 Fear of Serious Violence

Section 55(3) of the Coroners and Justice Act defines the first qualifying trigger as being 'loss of self control attributable to the defendant's fear of serious violence from the victim against the defendant or another identified person'. This is an entirely new basis of a partial defence to murder and allows defendants who are likely to fail in a plea of self-defence because they have acted disproportionately with excessive force to a threat from the deceased some leniency.

This qualifying trigger was created specifically to assist women who fear violence at the hands of an abusive partner causing them to kill. The explanatory notes explain that it cannot be a fear that the victim will in future use serious violence against people generally, but specifically against the defendant[430]. The explanatory notes to the Act also explain that s.55(3) is a subjective test. This means that the defendant's fear of violence does not have to be reasonable but only genuinely held. Withey[431] has therefore likened it to self-defence in

[428] [1992] 1 All ER 306

[429] Edwards, S. 'Descent into Murder: provocation's stricture – the prognosis for women who kill men who abuse them.' (2007) 71(2) *JCL* 342, p344

[430] Withey. C. 'Loss of Control' *Criminal Law & Justice Weekly* [2010] 174 JPN 197 p198

[431] Ibid. p198

Gladstone Williams[432] where an honest mistaken belief in the need to use force is sufficient.

Following the Law Commission's recommendations in its 2006 report 'Murder, Manslaughter and Infanticide' the Government envisages the new defence of loss of control as a response to fear of serious violence will cover two scenarios: 1) where a victim of sustained abuse kills their abuser in order to thwart an attack which is anticipated but not immediately imminent; and 2) where someone overreacts to what they perceive as an imminent threat[433]. The first question to be asked of the new 'fear of serious violence' trigger is whether it adequately reflects the experience of abused women who kill?

3.1.1 Emotional Response

As explored in Chapter Two, vocal support was given to permitting incorporation of other emotions aside form anger by Lord Hoffmann in *R v Smith (Morgan)*[434] resulting, as detailed in Chapter Three, in the move being given serious consideration in the consultation. The previous prizing of anger coupled with the suddenness requirement meant that battered women had "for a long time fallen between a number of stools" in being unable to plead Provocation or Self-Defence[435]. Battered women were left with the last resort of claiming an "abnormality of mind", with all the stigma that that attaches, in order to

[432] [1984] 78 Cr.App.R 276, as clarified by s.76(3) of the Criminal Justice and Immigration Act 2008

[433] Ministry of Justice, CP 19/08, para. 28 cited by Clarkson and Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p675

[434] [2001] 1 A.C. 146, At 168

[435] Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p676

successfully plead diminished responsibility[436] however they often failed in this attempt too as they were not found to have suffered from a serious mental disorder[437].

Under the new partial defence, quite simply, no longer will killing out of anger be morally privileged over killing through fear and despair, these being the most likely emotional responses of battered women. This approach is to be supported for it is right that emotions other than anger should allow for mitigation in homicide cases where a concession for human frailty is warranted. As Clarkson and Keating argue, "Just because one can trace the law back to much earlier notions of outraged honour it does not mean that anger should continue to be a privileged emotion."[438]. Several other commentators echo this support including Simester and Sullivan who welcome the widening of emotional triggers "without reservation"[439]. They argue that the new trigger is "entirely suitable"[440] to cover cases of domestic violence such as *Thornton(No.2)*[441] and *Ahluwalia*[442] and that it corrects the "failure in English law" to provide some leniency for having to use excessive defensive force not allowed under self-defence[443].

---

[436] Ibid. p673

[437] Eastman, N. 'Abused Women and Legal Excuses' [1992] *New Law Journal* 142, p.1549

[438] Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p672

[439] Simester & Sullivan *Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing 2010) p398

[440] Ibid

[441]] (No.2) [1996] 2 Cr App R 108

[442] [1992] 4 All ER 889

[443] Ibid

Another protection in the new partial defence provided for battered wives is the extension of the fear of serious violence to others such as their children. As I explored in Chapter One, cases like *Royley*[444] and *Cary*[445] show that there was a long tradition of Provocation of the partial defence incorporating the overpowering of emotions for the welfare of family members. The first of the four categories of Provocation created in the 18th Century by *R v Mawgridge*[446], termed Acquaintance Attack Provocation, made specific provision for loss of control triggered by seeing a friend or relative attacked. Many battered women are likely to also be mothers, highly likely to have the safety and well being of their children in the forefront of their minds, as was the case in *Ahluwalia*[447].

It is only right that the new partial defence makes specific provision for these women as maternal instincts can be extremely overpowering and children, particularly if they do not belong to the women's current abusive partner, are at a substantial risk of being harmed due to their physical inferiority.

3.1.2 Critique of the Trigger

The problem with this new defence is that merely fearing such violence is not a sufficient trigger. The fear has to have caused in the defendant a loss of self-control. As the trigger only requires there to have been a 'fear' of violence in the defendant the victim does not need to have committed any violent act yet. So the

[444] [1612] 12 Co. Rep 87; also [1612] Cro. Jac. 296

[445] [1616] this case is described by Stephen, J *History of Criminal Law* (3 vols) (1877) p221, reprinted by Burt Franklin, New York (1982)

[446] [1707] Kel 119

[447] [1992] 4 All ER 889

possibility arises that the defendant may believe incorrectly that they are about to suffer violence. Coupled with the requirement that the 'fear' must be of 'serious' violence it is difficult to envisage how someone who has lost their self-control could accurately judge whether they were about to receive minor or fatal violence.[448]

Edwards has been critical of the way in which fear has been perceived in the creation of the new partial defence highlighting the gulf in the clinical and legal understanding of how it operates in the context of Battered Women's Syndrome (BWS)[449]. As previously explored in this Chapter Two of this thesis BWS has been a recognised condition within the British classification of mental illness since 1994 but there is still no universal agreement on the nature of the condition. In the legal system there has been an attempt to determine whether the fearful battered woman has a lowered threshold of self-control and, if so, is this factor a relevant to *mens rea*. Edwards argues that the legal arena has jumped the gun as it were and without thorough clinical study of the symptomatology and diagnosis it will be difficult to assess its impact on criminal responsibility[450].

Furthermore no definition of the term "serious" violence is offered in the provisions of the statute. The Government decided, despite there being calls for greater clarity of distinction between serious and non-serious violence in its

[448] Withey, C. 'Loss of control, loss of opportunity' [2011] *Crim. L.R.* 263, p.270-272

[449] Edwards, S. 'Battered Women – In Fear of Luc's Shadow' (1997) Denning Law Journal, p91

[450] Ibid,

consultation paper, that the question of severity should be left to juries to decide on a case by case basis[451]. Though Clarkson and Keating argue that it is proper for juries to determine this[452] I would still argue that it might result in inconsistencies in the decisions that are reached.

Whilst 'loss of self-control' is thoroughly connected to emotions of anger, the two being natural partners, 'loss of self-control' based on fear does not sit well. Clarkson and Keating point out that whilst a few women such as Ahluwalia may have lost their self-control in the past, the vast majority will have only acted rationally but used more force than was strictly necessary in a commotion of events[453].

Jonathan Herring argues that the prosecution in similar cases in future might argue that a defendant's actions before the killing might reveal she was acting in a calm and deliberate way rather than in the way one would expect a person who had lost their self-control[454]. Indeed they might even argue she was acting in revenge, something that is banned outright in the Coroners and Justice Act[455]. Whilst 'angry loss of self-control' might reveal itself in shouting and stamping, loss of self-control based on fear will manifest itself differently. These

---

[451] Ministry of Justice, 'Murder, Manslaughter and Infanticide: proposals for reform of the lad: Summary of responses and Government position' CP(R) 19/08 [2009] Para 28 as cited by Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p676

[452] Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p676

[453] Ibid.

[454] Herring, J. 'Criminal Law: Texts, Cases and Materials' (4th edn, OUP, 2010) p246

[455] Section 54(4)

ways would be less identifiable. Would the defendant have to cry, plead and wail for instance to show that they had lost their self-control? Whilst there will evidently be signs of fear displayed by the defendant trying to test whether they are sufficient evidence of loss of control will be a challenge.

Holton and Shute have attempted to offer some guidelines for what could constitute as evidence of loss of self-control due to fear[456]. They suggest that if the defendant acts without having any concern for their long-term welfare, for example by giving no thought to the fact that they might be caught and imprisoned, this might be sufficient. They also point out a distinction in the actions of a defendant who simply sharpens a knife or loads a gun to make sure they are successful to one who wears gloves in order to prevent finger prints from appearing on their weapon of choice. Though the former would appear to be acting rationally in preparing in these ways they do so knowing modern forensic science will identify them quite easily as the murderer which can be construed as evidence of loss of control. The latter on the other hand shows clears signs of premeditated killing for the purposes of revenge.

As Dressler[457] argues, whilst we have always been easily able to attribute loss of self-control to anger due to the external signs and 'snap' responses, fear based responses are less detectable and identifiable. With these issues in mind I would argue that the Law Commission was correct when it deemed it

[456] Holton & Shute 'Self Control in the Modern Provocation Defence' *OJLS* [2007] 26(1) 49 as cited by Clough, A. 'Loss of Self-Control as a Defence' *JCL* [2010] 74 (118)

[457] 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) *The Journal of Criminal Law & Criminology* Vol.73, p421-470

inappropriate for the concept of 'loss of self-control' to be retained as it does not accurately describe the reaction of women in this situation. Thus it may not be capable of protecting the women who need it most as the new defence is only open to those who can show in a way that is far from certain that their fear of violence caused them to lose their self-control.

Conversely the defence has also been criticised for perhaps being too accessible by both Clough and Leigh who highlight the fact that the Act does not require evidence of the defendant having sought out any help from the authorities prior to the killing. Clough deems the lack of this requirement "problematic" as it allows for the fear trigger defence to be used without any real evidence that the defendant had no other option but to kill[458]. These concerns were echoed by Leigh during the consultation period; he argued that seeking help from the authorities prior to the killing should be a relevant factor in deciding whether the defence should be available for

> "A dilatory or otherwise unsatisfactory response by the authorities to a request for assistance would be strong evidence that the person who feared the attack lacked choice. It would also serve as evidence that the person actually feared such an attack."[459]

However he did not go as far as to call upon it being an absolute requirement of the new law but drew comparisons with duress in concluding that it should be a relevant fact in determining the defence's availability.

[458] Clough, A. 'Loss of Self-Control as a Defence' (2010) *JCL* 74 (118), p120

[459] Leigh, L.M. 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law' *Justice of the Peace* [2008] 172 JPN 700, p701

Turning again to Lenore Walker's original work on 'Battered Women Syndrome' in the 1970s and 1980s however offers up some argument against this idea. Whilst most people sitting on a jury might instinctively question at first why the defendant did not simply walk out the door when the abuse and violence began Lenore puts forward the idea of 'learned helplessness'[460] to explain away this inability to exit. In her work Lenore argues that there are three stages in the cycle of domestic violence: 1) the tension building phase; 2) an acute battering phase; and 3) a loving respite phase[461]. This repeated pattern is endemic in the domestic violence and works to destroy a victim's self-belief, self-confidence and self-trust creating a situation of 'learned helplessness'. Believing that she is 'beyond the grasp of the law'[462] or the authorities from helping her the battered women feels trapped in a deadly situation in which she may fight back with lethal consequences for her abuser[463].

Furthermore Lenore argues that the most dangerous time for an abused woman is when she decides to leave[464]. The fight or flight survival instinct is extremely strong, it would appear that in this situation when the battered women has finally decided to take flight, a course of action which may not have seemed obvious due to the third stage of cycle, the fear will take over and she will fight back without thought to the consequence in order to escape.

---

[460] Walker, L. '*The Battered Woman*' (1979, 1st Edn, Harper Pub, USA,) p42

[461] Ibid. p55

[462] Ibid. p64

[463] Justice for Women '*Battered Women's Syndrome: Help or Hindrance?*' http://www.justiceforwomen.org.uk/BWS.HTM

[464] Walker, L. '*The Battered Woman*' (1st Edn, Harper Pub, 1979) p103

However after the passing of the Act Leigh still lamented the lack of measure requiring this evidence stating that without it courts, "in determining what may be relevant to such a plea, will have much to work out."[465] The lack of this kind of restrictive measure could lead to abuse of the partial defence in future and result in a backlash to the move to incorporate fear as a qualifying trigger; this could lead to battered women once again being left without a usable partial defence because judges and juries may be less willing to support their plea.

3.2 Justifiable Sense of Being Wronged

Turning now to the second trigger, Section 55(4) of the new Act states that a defendant's loss of self-control can be attributable to a thing or things said or done (or both) which constituted circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged. However a sense of being seriously wronged is not justifiable if the defendant incited the victim to say or do such things in order to provide an excuse to attack and kill them[466].

This provisions has been drafted very closely to the previous defence of Provocation allowing for things both said and done (or both) to be qualifying triggers, however the new requirement for "extreme graveness" and a "justified sense of being wronged" make the trigger much more restrictive than the previous partial defence. Whilst it is clear that this new trigger makes the Loss of

[465] Leigh, L.M. 'Two New Partial Defences to Murder' *Criminal Law & Justice Weekly* [2010] 174 JPN 53

[466] s.55(6)(b)

Control defence much more limited that the old common law of Provocation I would argue that it is still too accommodating. It must be asked why the trigger has been retained. And why is it still acceptable for the law to provide an excuse for killings carried out (primarily by men) in anger?

3.2.1 Critique of the Qualifying Trigger

The phrasing used in this qualifying trigger, "extremely grave character" and "justifiable sense of being wronged", is somewhat vague and with some going as far as calling them "troubling"[467]. Herring suggests that these words are to be interpreted as covering extraordinary situations "not part of the normal trials and disappointments of life"[468]. He contends that these must not be events that the reasonable person would regard as trivial offering the examples of being bumped into on a busy street or being sworn at as not 'grave' circumstances[469].

Further Clarkson and Keating[470] argue that though the term "extremely grave character" is an improvement on their original proposals, the Government is optimistic in its assertion that:

> "This formulation should ensure that the defence is only available in a very narrow set of circumstances in which a killing response to things said or done should right be classified as manslaughter rather than murder".[471]

For there may be interpretive problems as juries may struggle to determine if there were "circumstances of an extremely grave character"[472].

---

[467] Simester & Sullivan *Criminal Law: Theory and Doctrine* (4th edn, Hart Publishing, 2010) p399

[468] Herring, J. *Criminal Law: Texts, Cases and Materials* (4th edn, OUP, 2010) p247

[469] Ibid.

[470] Clarkson & Keating *Criminal Law: Texts and Materials* (7th edn, Sweet & Maxwell, 2010) p677

[471] Ministry of Justice CP(R) 19/08, para 40 as cited by Clarkson & Keating *Criminal Law: Texts and Materials* (7th edn, Sweet & Maxwell, 2010) p677

Also it has been suggested that this wording may leave the defence open to those who kill in order to protect their family and property when they discover a burglar in their home[473]. This criticism seems fair as a defendant in such a situation could argue that theft, burglary or damage was something of an extremely grave character which caused them to have a justifiable sense of being wronged. Further they could plead fear of violence against themselves or any other family members in the property upon finding an intruder in their property with unknown motives. Withey seems critical of the defence allowing for this however, the adage, 'an english man's home is his castle' still resonates strongly with the public and maybe a welcome change.

3.2.2 Revenge Attack Exclusion

An important consideration during the drafting of the Bill was that defendants who commit revenge attacks some time after the provocative act should not be allowed to use the defence. With the removal of the 'sudden' requirement there was a concern that this might be more possible. However Section 54(4) requires that the defendant did not act in a "considered desire for revenge" but fails to explain what exactly is meant by "considered".

3.2.3 Sexual Infidelity Exclusion

As explored in Chapter One sexual infidelity is closely tied to the origin of provocation; it was one of the four original categories of acceptable provocation and had remained a qualifying trigger up until the passing of this legislation.

---

[472] Ibid.

[473] Withey, C. 'Loss of Control' *Criminal Law and Justice Weekly* [2010] 174 JPN 197, p198

Horder argues that this was because challenges to a man's self-image and sexual prowess have almost always been regard in the law as being, "substantial, or even as 'extreme' or the 'grossest' provocation"[474]. Although it may seem upon first glance that the new defence might continue to make an allowance for sexual infidelity, as it could be argued the defendant had a justifiable sense of being wronged because of the betrayal, a specific provision has been inserted to end this tradition.

This exclusion was not included in the Law Commission's recommendation however the Government took a strict stance on the matter stating:

> "It is quite unacceptable for a defendant who has killed an unfaithful partner to seek to blame the victim for what occurred. We want to make it absolutely clear that sexual infidelity on the part of the victim can never justify reducing a murder charge to manslaughter. This should be the case even if sexual infidelity is present in combination with a range of other trivial commonplace factors."[475]

Section 55(6)(c) of the Act states that sexual infidelity is to be disregarded as a qualifying trigger. This was seen as a key factor in curbing men's use of 'loss of self-control' with Harriet Harman, then Minister for Women, stating when the measure was first announced:

> "For centuries the law has allowed men to escape a murder charge in domestic homicide cases by blaming the victim. Ending the provocation defence in cases of 'infidelity' is an important law change and will end the culture of excuses."

This proved to be an extremely contentious matter during the Bills passage through Parliament, particularly in the male dominated House of Lords where there was a serious challenge[476]. Similarly Lord Philips, the then Lord Chief Justice of England and Wales and now the President of the Supreme Court, even

[474] Horder, J. 'Sex, Violence and Sentencing in Domestic Provocation Cases' *Criminal Law Review* [1989] Aug. p547

[475] Ministry of Justice (2009: para. 32)

[476] Hansard, House of Lords, November 11, 2009

stated at the time that he was quite 'uneasy' about this particular exclusion[477]. Nevertheless the section was retained and the bill was passed to wide praise.

3.2.4 Measures Against Honour Killings

It has been suggested that other triggers aside from sexual infidelity could have been blocked in the Act such as honour killings which were a particular concern of the Law Commission during its review. Withey[478] highlights the cases of *Mohammed (Faqir)*[479] in which a Muslim father stabbed his daughter to death having discovered a young man in her bedroom as the daughter's conduct in this case could count as qualifying trigger under s.54(4).

Though the new objective standard to be applied in the defence might make it difficult in identifying a justifiable sense of being seriously wronged it would have been better for the law to be conclusive on the point. In response to this issue during the consultation, and despite agreeing that honour killings should not be able to reduce murder to manslaughter, the Government stated:

> "[We] believe that the high threshold for the words and conduct limb of the partial defence will have the effect of excluding situations which might be characterized as 'honour killings' because such cases will not satisfy the requirements that the circumstances were of an extremely grave character and caused a justifiable sense of being wronged."[480]

The Government also contended that the specific exemption for "a considered desire for revenge" would ensure honour killers do no benefit from the new

---

[477] 'Law Lord Criticises Plan to Scrap Defence of Provocation for Men Who Kill Wives' *The Times,* 07/09/08

[478] Withey, C. 'Loss of Control' *Criminal Law and Justice Weekly* (2010) 174 JPN 197, p199

[479] [2005] EWCA Crim 1880

[480] Ministry of Justice, CP (R) 19/08 para. 56 as cited by Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p679

partial defence. However, as Clarkson and Keating[481] point out, the Government was equally as worried that sexual infidelity would still be accepted under the law and so inserted a specific provision against it. It is unclear why they did not feel the need to include another specific exemption for honour killings to protect women not just vulnerable because of their gender, but often because of being isolated from societies protection in an ethnic minority. With a rise in so-called honour killings it seems there has been a missed opportunity for the new Act to ban the use of a cultural provocation defence outright as it has done with sexual infidelity.

4) Loss of Self-Control

Until now, loss of self-control has been constrained almost exclusively to a state of anger and rage which the Law Commission argued, "elevate[d] the emotion of sudden anger above emotions of fear, despair, compassion and empathy."[482] Jeremy Horder called this "the loss of self-control dilemma" as the concept was limited only to "stereotypically male, violent reactions to provocation" to the exclusion of female reactions such as despair and fear. The universalising of the angry response thus presets the standard as inexorably male.

Under the previous common law defence of provocation, the defendant was required to have lost their self-control due to things said or done. Although the defence developed historically on the basis that the victim, having provoked

[481] Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th edn, Sweet & Maxwell, 2010) p679

[482] 'Partial Defences to Murder' LC CP 163 para 4.163

the defendant, lost some of his claim to be protected by the law, the modern law of provocation did not require that the victim was to blame for the defendant's loss of control, nor that he was even the cause of it.

However, under the new Loss of Self-Control defence the defendant must show that he or she had lost self-control as a result of the aforementioned qualifying trigger and that a person of the defendant's age and sex with a normal degree of tolerance and self-restraint would have reacted in the same way. Section 54(2) of the new Act removes the need for loss of self-control to have been 'sudden'. The new law avoids such controversies which arose from cases like *R v Doughty*[483] in which a babies crying was deemed sufficient provocation, by setting out in more detail what it is that must have caused the defendant to lose their self-control resulting in a narrowing of the partial defence.

4.1 The Loss of 'Suddenness'

A Further positive change in the law is the removal of the 'suddenness' requirement. In *R v Hayward*[484], Tindal C.J. declared that for Provocation to qualify the defendant must have killed, "whilst smarting under a provocation so recent and so strong that he might not be considered at the moment the master of his own understanding." This requirement for a "sudden" loss of self-control was not included in the Homicide Act 1957, but the precedent existed from the previous case of *R v Duffy*[485] and was still considered good law as it was

[483] [1986] 83 Cr App R 319

[484] [1833] 6 Car & P 157 Assizes

[485] [1949] 1 All ER 932

reaffirmed more recently by the Court of Appeal decision in *R v Thornton(No2)*[486]. Sir James Fitzjames Stephen wrote of the suddenness requirement that:

> "In deciding the question [of provocation] whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death to the time which elapsed between the provocation and the act which cause death, to the offender's conduct during the interval and to all other circumstances tending to shoe the state of his mind"[487].

In *R v Richens*[488], for example, the defendant is described as going "berserk" and in *R v Brown*[489], the defendant is described as having "snapped", "exploded" and "blacked out" because of his anger. As evidence of aforethought would count as murder, loss of self-control based on anger was supposed to be a sudden 'snap' response, likened to the speed of a tennis player playing a "reflex" volley[490], reflecting only the male over-reaction to provocation. The inclusion of the suddenness requirement therefore made it an extremely gendered defence and failed to protect those who required it the most, battered women.

The difficulties faced by battered women attempting to use Provocation have been well documented as I explored in Chapter Two of this thesis. Because of differences in physical strength between the sexes battered women often had to wait until their partners were asleep, as in *Ahluwalia*[491], or until they had some similar advantage thus preventing them from fitting the profile of the usual provoked killer who suddenly loses their loss of self-control. Janet Lovelace

---

[486] (No.2) [1996] 2 Cr App R 108

[487] *Digest of the Criminal Law,* 3rd edn (1993) art.317

[488] [1994] 98 Cr App R 43

[489] [1972] 2 All ER 1328

[490] Horder, J. 'Provocation and loss of self control' [1992] *L.Q.R.* Apr, 108, p192

[491] [1992] 4 All ER 889

argues that the Court of Appeal in *Ahluwalia*[492] assisted battered women who killed by linking the requirement of suddenness to the nature of the loss of control itself rather than to the relationship in time between provocation and the loss of control. However the court's approval of previous authority including *Duffy*[493] and *Thornton*[494], where a delay of seconds was commented unfavorably upon by the judge, still left women in a difficult position prior to the new law.

Nicholson and Sanghvi emphasize the gendered nature of this requirement in their analysis of *Ahluwalia*[495] stating that the:

> "Designation of a 'cooling time', not simply as evidence of cooled passion, but as legally precluding the provocation defence, was clearly premised upon a male-orientated view of behaviour."[496]

The decision in *R v Thornton*[497] was widely and correctly criticised[498] for making it difficult for battered women who suffer prolonged abuse to plead provocation if they kill their husbands[499]. After this decision Jack Ashley MP introduced a Crime (Homicide) Amendment Bill on the 18th December 1991 which sought to remove the suddenness requirement[500]. The Bill had a first reading but later lapsed[501]. However Section 54 (2) of the Coroners and Justice Act 2009 has

---

[492] [1992] 4 All ER 889

[493] [1949] 1 All ER 932

[494] *(Sara Elizabeth)* (No.1) [1992] 1 All E.R. 306 (CA(Crim Div))

[495] [1992] 4 All ER 889

[496] Nicholson & Sanghvi 'Battered Women and Provocation: The Implications of *R v Ahluwalia"* [1993] *Crim. L.R.* 728, p730

[497] *(Sara Elizabeth)* (No.1) [1992] 1 All E.R. 306 (CA(Crim Div))

[498] Horder, J. 'Provocation and loss of self control' [1992] *L.Q.R.* 108 (Apr) p191

[499] 'Case Comment: Homicide Act 1957 S.3: Provocation and Long Domestic History' [1992] *Crim. L.R.* Jan 53-56, p55

[500] Cited by Horder, J. 'Autonomy, Provocation and Duress' [1992] *Crim. L.R.* Oct. p706

[501] Ibid

dropped this requirement[502], in order to block the use of the new loss of control defence based on the qualifying trigger of 'a justifiable sense of being wronged' by easily angered men.

It is a welcome change to the law as it permits the new loss of control defence based on 'fear of serious violence' to be used by battered women. Often in cases such as *Ahluwalia*[503] the 'sudden' requirement was a hindrance because of its gendered nature. Women's responses were much more likely to be steadily mounting emotions of anger or fear. Expressions such as 'slow burning fuses' or 'boiling over' have been used to describe this best and it is expected that defendants who now find themselves in a similar position will be able to rely on the defence.

4.2 Critique of the Redefinition

However, whilst this does at first seem like a radical shift it has been noted by Withey[504] that in the explanatory notes it is stated the judges and juries can still take into account any delay between the relevant incident and then killing in deciding upon loss of control.

Further Simester and Sullivan also contend that whilst this may at first seem like a dramatic change as the qualifying trigger could have occurred days or even weeks before the loss of self control it is in fact not as radical as it might first appear for several reasons. Firstly the common law, particularly in the

[502] Section 54 (2)

[503] [1992] 4 All ER 889

[504] Withey, C. 'Loss of Control' *Criminal Law & Justice Weekly* (2010) 174 JPN 197, p200

1990s as I have explored above, developed so that whilst there was still a requirement for suddenness the jury would decide upon this issue resulting in longer gaps between the trigger and the killing being permitted under Provocation. Secondly the new objective test (explored in more detail below) may be relevant in a jury's decision as to whether or not a normal person would have acted as the defendant did. Finally, as s.54(4) specifically prevents the defence being used by defendants who act with a "considered desire for revenge" Simester and Sullivan suggest that the longer the gap between the trigger and the killing, the more likely a jury will decide that the killing was in revenge.[505]

5) Confirmation and Expansion of the Objective Standard

Section 3 of the Homicide Act 1957 required that only things done or said could be taken into account when determining how the reasonable man might have reacted. As explored in Chapters One and Two the reasonable man has been a perennial problem for the courts as it is an extremely difficult concept to grasp in relation to loss of self-control. Lord Diplock in *DPP v Camplin*[506] famously stated that the reasonable person was, "like an elephant," in that they were difficult to describe but easily recognizable. This direction was of little help to juries however who were left wondering whether or not this fictional reasonable person was the same age, sex, race or possessed other defining characteristics as the defendant who stood before them in the dock. In the years subsequent to the 1957 Act the standard was increasingly subjectivised until finally the court in

[505] Simester & Sullivan *Criminal Law: Theory and Doctrine* (4th Edn, Hart Publishing, 2010) p397

[506] [1978] QB 254 at 258

Smith (Morgan)[507] went too far in allowing characteristics personal to the defendant to be taken into account[508]. This was subsequently reversed by the Privy Council in *Holley*[509] which decided once and for all that for the consistency of justice the capacity for self-control should be fixed and not variable and that such characteristics could only be taken into account when considering the gravity of provocation[510].

Section 54 (1)(c) of the new Act seeks to remedy this definitively by giving a much more coherent and detailed explanation of the reasonable person as "a person of the D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have acted in the same or in a similar way to D"[511]. The phrase 'normal degree' has been designed to prevent those who naturally possess a low level of self-control from using and abusing the new defence[512].

The test is now that of the degree of self-control to be expected of an ordinary person of the age and sex of the defendant with ordinary powers of self-control, i.e., subjective only so far as age and sex are concerned, but objective so far as the normal degree of tolerance and self restraint of a reasonable man is to

---

[507] [2001] 1 A.C. 146 (HL)

[508] Macklem, T. & Gardner, J 'Compassion Without Respect? Nine Fallacies in *R v Smith*' [2001] *Crim. L.R.* Aug. 623

[509] [2005] 2 AC 580

[510] 'Case Comment: Provocation: The Privy Council Re-Enters the Fray' *Criminal Lawyer* [2005] 115 1-3, p2

[511] CJA 2009 Section 54 (1) (c)

[512] Herring, J. *Criminal Law: Texts, Cases and Materials* (4th Edn, OUP, 2010) p247

be expected. It should result in some of the more questionable judgments in which the Provocation defence was successfully used no longer being successful. For instance the case of *R v Doughty*[513], in which a father killed his own baby because it would not stop crying, has been highlighted[514] as a good example of the positive impact of the new law. It is highly unlikely that a court now would agree that a father, though might have felt wronged at being kept awake, would justified in feeling this way and losing control as a result of his own baby's crying as this is an expected part of parenthood[515].

The new test is therefore effectively identical to that which the court in *Holley*[516] prescribed only with slightly different terms such as "reasonable person" and "circumstances" being used[517]. This is a much stricter formulation of the reasonable person and rejects[518] the subjective line of authority which culminated in the decision in *Smith (Morgan)*[519] endorsing instead the decision of the Pricy Council in *Holley*[520]. From now on if a defendant possesses a lower level of self-control and tolerance because of mental illness their behavior will still be compared to an ordinary person of their sex and age. This will end the

[513] [1986] 83 Cr App R 319

[514] Simester & Sullivan *Criminal Law: Theory and Doctrine* (4th Edn, Hart Publishing, 2010) p399 and Clarkson & Keating, *Criminal Law: Texts, Cases and Materials* (7th Edn, Sweet & Maxwell, 2010) p673

[515] Ibid.

[516] [2005] 2 AC 580

[517] Simester & Sullivan *Criminal Law: Theory and Doctrine* (4th Edn, Hart Publishing, 2010) p400

[518] Ibid.

[519] [2001] 1 A.C. 146 (HL)

[520] [2005] 2 AC 580

blurring of the defence with diminished responsibility[521] and also means that characteristics like alcoholism and drug addiction for instance will not be considered.

The word 'tolerance' has been used in the drafting of this provision to prevent defendants who may believe certain actions to be provocative simply because of their own intolerant beliefs. Also the term 'circumstances' has been used in place of 'characteristics'; Clough has welcomed this on the basis that with particular regard to battered women forced to kill it is a departure from portraying them as having a mental illness and:

> "suggests being able to consider prior abuse as an external element rather than having to try and deem it as a characteristic by internalising it as some kind of syndrome or character flaw."[522]

6) Chapter Conclusion

With so many problems having been identified with Provocation during the decade of review there was much pressure on the Coroners and Justice Act 2009 to fix each and every one.

Despite the issues surrounding the 'loss of control' requirement, the allowance for an emotion other than anger in the law is extremely welcome and as I have discussed in this chapter it makes significant progress in helping

[521] Herring, J. *Criminal Law: Texts, Cases and Materials* (4th Edn, OUP, 2010) p248

[522] Clough, A. 'Loss of Self-Control as a Defence' (2010) *JCL* 74 (118), p123

defendants such as those in *Ahluwalia*[523] and *Thornton (No.2)*[524] who were given particular regard by the Law Commission. The new measures can be praised for dropping the requirement of 'suddenness' of loss of self-control. Coupled with the accommodation of fear of serious violence as a qualifying trigger the Act goes a long way in providing a workable defence for battered women forced to kill their abusive partners. However the fact remains that some women who should fall under this new limb having suffered fear of serious violence will not have lost their self-control leaving them unprotected and likely to fall between the gap in the law with self-defence.

When the Law Commission sought first to understand the basis of Provocation in order to reform it the Commission itself decried the rationale underlying the defence as "elusive"[525]. Ultimately, the question still remains as to why killing in anger should still be excused in the criminal law if its main aim is to prevent people from killing one another. Even with the exemptions on sexual infidelity and revenge attacks anger as a qualifying trigger should no longer be accommodated in the law. Furthermore after the Law Commission had argued so forcefully against the retention of loss of control deeming it "unnecessary" and "undesirable"[526] it is unclear as to why it has been retained.

---

[523] [1992] 4 All ER 889

[524] [1996] (No.2) 2 Cr App R 108

[525] Law Commission, *Partial Defence to Murder* (Law Comm.290) [2004] as cited by Clarkson & Keating, 'Criminal Law: Texts, Cases and Materials' (7th edn, Sweet & Maxwell, 2010)

[526] 'Partial defences to Murder' Law Com No.290, paras 3.28-3.30, 3.135-3.137

These problems and inconsistencies were recognised in 2009 by New Zealand which abolished classic provocation based on anger. In the next chapter I shall argue that instead of trying to differentiate between acceptable and non-acceptable murders we should simply make a stand and say that killing is never an appropriate response to getting angry.

Chapter Five: Abolishing Loss of Self-Control

"The man who lacks self-control is like a state which passes all the right decrees and has good law, but makes no use of them"- Aristotle[527]

1) Chapter Introduction

In this final chapter I shall critically analyse the retention of the loss of control doctrine and attempt to show that the Law Commission was correct in proposing not incorporate it into the reformed partial defence. Whilst some of the previous calls for the outright abolition of Provocation because it "[was] bound to encourage and exaggerate a view of human behaviour which is sexist, homophobic and racist"[528] were convincing I shall argue that the new 'fear of serious violence limb' should be solely retained, though crucially with the 'loss of self-control' element removed, in order to protect battered women who kill their abusive partners properly.

Specifically I shall argue that it is only the 'justifiable sense of being wronged' limb of the new defence that needs to be abolished completely, for why should it still acceptable for the law to provide an excuse for killings carried out (primarily by men) in anger? Instead of trying to differentiate between acceptable and non-acceptable murders resulting from angry reactions the law should simply make a stand and say that it is never an appropriate response to kill in anger. This chapter will conclude that as other jurisdictions

---

[527] *NE* 1152 20-1

[528] Wells, C. 'Provocation: The Case for Abolition' in Ashworth & Mitchell's 'Rethinking English Homicide Law' (1st edn, OUP, 2000)

such as New Zealand are recognising, the law must no longer condone this masculine overreaction to provocation.

2) Abandoning Loss of Self-Control

Prior to the Coroners and Justice Act 2009 the courts in this country had since the 19th Century used the reasonable man construct to successfully avoid the key question of whether the defendant could be expected to control the impulse to kill[529]. The doctrine of loss of control had been heavily criticised for inadequately representing the universal psychological response to Provocation. This is understandable considering it was created before modern psychology when Provocation was believed that a sudden and temporary anger created a "boiling of the blood" that could "eclipse"[530] rationality in the mind[531].

However the Government argued for the retention of the loss of self-control on the basis that they were:

> "concerned that there is a risk of the partial defence being used inappropriately, for example in cold-blooded gang-related or "honour" killings. Even in cases which are less obviously unsympathetic, there is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence."[532]

Yet it has been argued by Graeme Cross that the doctrine of Loss of Self-Control is a fallacy[533] when you consider the writings of modern psychologists on anger:

---

[529] Clarkson & Keating, 'Criminal Law: Texts, Cases and Materials' (7th edn, Sweet & Maxwell, 2010) p680

[530] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p74

[531] Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992) p74

[532] Ministry of Justice Consultation Paper No. 19/08, para 36

[533] Cross, G. 'The Defence of Provocation: An Acrimonious Divorce from Reality' Current Issues in Criminal Justice Vol18.1 2006, p52

> "Angry impulses do not so overwhelm us to the point that we become enslaved by them. We are endowed with a high level of choice concerning how we act, even in relation to the most provocative forms of conduct. Those who lash out when confronted with a distasteful experience do not respond in this manner because of an absence of meaningful choice. They do so because they elect to do so … [T]he desire to ensure that a loved one does not die in pain (resulting in an act of mercy killing) might be just as powerful as the anger stemming from a confession of adultery. The latter should enjoy no special privilege in the law … [Loss of control requiring that the accused was] 'so subject to passion as to make [them] not master of [their] mind' [is] more akin to a state of automatism than one with the requisite *mens rea* for murder"[534]

As explored back in Chapter One of this thesis provocation was born out of the idea that killings committed in the haste of an emotionally excited moment were somehow less grievous than those which were committed with malice aforethought. This perception, which was shared for instance by *Chance Medley*, is now anomalous. Yet whereas *Chance Medley* was abolished in 1828, Loss of Self-Control was reaffirmed last year in the Coroners and Justice Act 2009.

I have already discussed at some length in the previous two chapters inbuilt gender bias of Loss of Self-Control. I will not reiterate these arguments again in full but suffice it to say despite the basing one Loss of Self-Control defence in fear, the other based in anger will still be used more often as the doctrine is more easily adapted to men who spontaneously kill others. Statistical evidence shows that this is most often in the home.

3) Abolishing Anger as a Qualifying Trigger

As I have explored in this thesis, because of the unique nature of murder the law has been forced time and again to reassess its position on whether angry killing should be accommodated for. In Chapter One I explored how,

[534] Neal, L. & Bagaric, M. 'Provocation: The Ongoing Subservience of Principle to Tradition', [2003] JCL, Vol 67, p247-248

> "It emerged in recognizably modern form in the late seventeenth and early eighteenth centuries. It comes from a world of Restoration gallantry in which a gentleman…acted in accordance with a code of honour which required insult to be personally avenged by instant angry retaliation… To show anger 'in hot blood' for a proper reason by an appropriate response was not only permissible but the badge of a man of honour. The human frailty to which the defence of provocation made allowance was the possibility that the man of honour might overreact and kill when a lesser retaliation would have been appropriate. Provided that he did not grossly overreact in the extent or manner of his retaliation, the offence would be manslaughter."[535]

In modern society people are expected to take personal responsibility for their acts and live equally under the rule of law. Daily life presents us with many trials and difficulties and no matter how much emotional strain we endure we are still expected to live within the law.

But it is clear now that if a defendant becomes so enraged that they lose their self-control and committed an act of serious violence they should not receive any form of pardon in the law[536]. As explored in Chapter Three this partial acceptance of angry violence comes with an inbuilt gender bias which privileges men who are partial to spontaneous killing often of their partners or former partners:

> "The historical origins of provocation lay in the perception, long discarded as part of our laws, that killings emerging from sudden falling-outs ("chance medleys") were less heinous than killings which were the product of premeditation. From the early modern period the continuation of the defence was reinforced by an acceptance that male honour can (even should) be vindicated by acts of retaliatory violence. These paradigms are unsuited to a modern liberal democracy. They merely strengthen the view that the survival of the defence is an historical anomaly that is acceptable, if at all, only because of the mandatory penalty for murder."[537]

The culpable causing of another human being's death is widely regarded as the most serious offence in criminal law for, "The Harm caused by Homicide is absolutely irremediable, whereas the harm caused by many other crimes is

---

[535] *Smith* [2001] 1 A.C. 146 at 159-160 as per Lord Hoffmann, drawing upon the work of Horder, J. *Provocation and Responsibility* (1st Edn, Clarendon Press, 1992)

[536] Simester & Sullivan 'Criminal Law: Theory and Doctrine' (4th edn, Hart Publishing 2010) p395

[537] Ibid.

remediable to a degree."[538] Ashworth argues because of the finality of death it is only proper to regard it as the most serious harm that may be inflicted on another human being because:

> "Even in crimes of violence which leave some permanent physical disfigurement or psychological effects, the victim retains his or her life and, therefore, the possibility of further pleasures and achievements, whereas death is final."[539]

Instead of trying to differentiate between acceptable and non-acceptable murders resulting from angry reactions we should simply make a stand and say that a defence should be based in anger. For Anger is a criminogenic emotion and the law must do its utmost to prevent the public from committing violence[540]. We should therefore not allow the law to continue to condone killings as a result of anger.

4) Lessons From Abroad

In this thesis I have twice included quotes from Aristotle and one more is appropriate as I draw to a close: "The law is reasons free from passion". Killing in anger has often been called a crime of passion, in the introduction to this thesis I used the following quote from the court in *R v Mawgridge*[541]:

> "Where a man is taken in adultery with another man's wife, if the husband shall stab the adulterer or knock out his brains this is bare manslaughter: for jealousy is the rage of man and adultery is the highest invasion of property".

In the minds of most lawyers this is what the partial defence is synonymous with because as we explored in Chapter One it was the only one of the four defined categories of provocation which was able to perceiver long after the others had become outdated. The principle of loss of control based on anger is entwined

---

[538] Ashworth, A. *Principles of Criminal Law*, (1st Edn, OUP, 2009) p237

[539] Ibid.

[540] Simester & Sullivan 'Criminal Law Theory and Doctrine' (4th Edn, Hart Publishing, 2010)

[541] [1707] Kel 119

with this Romeo and Juliet-esque idea of a passion so overwhelming that it can override all reasons with fatal consequence.

In the introduction to this chapter I used the phrasing that the law should make a stand against the continued attempt to differentiate between acceptable and non-acceptable murders resulting from angry reactions. In New Zealand, following a case in which the defendant argued he was provoked in to stabbing his girlfriend 216 times, the Government decided to do just that and abolish Provocation based on anger. Speaking on his decision to abolish Provocation Justice Minister Simon Power said:

> "It effectively provides a defence for lashing out in anger, not just any anger but violent homicidal rage. It rewards lack of self-control by enabling an intentional killing to be categorised as something other than murder."

This was echoed by the New Zealand Law Commission[542] which put forward a detailed argument for abolishing Provocation:

> "Not only is it volatile; its practical application is also difficult… In our view, appellate courts and juries have struggled (and continue to struggle) to come to grips with the provocation defence for one very simple reason: the defence is irretrievably flawed. Some of the flaws are such that the defence does not in fact fulfill its policy purposes."[543]

The New Zealand commission took aim at the concept of loss of self-control stating that it was only an assumption that such a phenomenon existed and poured scorn on the idea that if so it should be based on anger:

> "We would thus argue that the defence puts a premium on anger – and not merely anger, but homicidally violent anger. This, to our minds, is or should be a central issue in considering whether reform is required: out of the range of possible responses to adversity, why is this the sole response that we choose to partially excuse? Ultimately, issues such as the sexist and heterosexist bias of the provocation defence, that are accorded considerable weight in the literature, strike us as relatively immaterial, when weighed against the larger question of how we, as a society, wish to choose to respond to violence."[544]

---

[542] "The Partial Defence of Provocation", Law Commission Report 98 (NZLC R98), New Zealand Law Commission, Wellington, 2007,

[543] Ibid. p.2

[544] Ibid. p9

New Zealand decided to abolish Provocation based on anger not just because of the practical difficulties of its operation in the courtroom but because as a society it questioned the very nature of it continued existence. When criminal justice systems are designed entirely to protect citizens from harming each other having continuing with a defence for murder based on an emotion which must be conquered and not capitulated to is completely contradictory and anomalous.

5) Chapter Conclusion

As discussed in the earlier chapters of this thesis it is imperative that battered women are given some kind of legal protection aside from diminished responsibility when they are forced to kill their abusive partners. It is therefore right that a partial defence based on a qualifying trigger fear of serious violence should be retained. However the doctrine of loss of control should be removed from the defence and the other qualifying trigger of anger should be abolished for despite Provocation having been created for it the law must no longer condone this masculine overreaction to provocation.

Bibliography

Articles

• Allen, M.J.

-'Provocation's Reasonable Man; A Plea for Self-Control' (2000) Journal of Criminal Law 216

• Archibald, T 'The Interrelationship Between Provocation and Mens Rea: A defence of Loss of Self-Control' (1985-86) Criminal Law Quarterly 454

• Ashworth, A

-'Principals, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform' (2007) May *Criminal Law Review* 333-344

- 'Case Comment: Homicide: Murder – Provocation' (2007) *Criminal Law Review* 569

- 'Case Comment: Murder: defence of provocation not raised – judge declining to leave defence to jury' (2005) *Criminal Law Review* 971

- 'Case Comment: Murder: Provocation – Homicide Act 1957 s.3' (2005) *Criminal Law Review* 966

- 'Criminal Justice Act 2003 Part 2: Criminal Justice Reform - Principles, Human Rights and Public Protection' (2004) *Criminal Law Review* 516

- & C. Barsby 'Case Comment: Homicide Act 1957 s.3 – defence of provocation' (2003) *Criminal Law Review*

- 'Reforming the Law of Murder' (1990) *Criminal Law Review* 75

- 'The Doctrine of Provocation' (1976) 33 *Cambridge Law Journal*, 292

- 'Sentencing in Provocation Cases' (1975) *Criminal Law Review* 552

• Baksi, C 'Coroners and Justice Bill: Bill 'could damage public confidence'' (2009) *Law Society Gazette* 22 Jan, 6 (2)

• Bartlett, P 'Killing gay men, 1976-2001' Brit. J. Criminology. 2007, 47(4), 573-595

• Bigler, B 'Sexually Provoked: Recognising Sexual Misrepresentation as Adequate Provocation' (2006) *UCLA Law Review* 53, 783

• Bradfield, R 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' *University of Tasmanian Law Review* (2000) Vol 19 No 1

• Brett, P 'The Physiology of Provocation' (1970) *Criminal Law Review* 640

• Briggs, A 'Provocation Re-Reassessed' (1996) 112 *Law Quarterly Review* 403

• Brown, B.J. 'The Demise of Chance Medley and the Recognition of Provocation as Defence to Murder in English Law' (1963) *The American Journal of Legal History,* Vol. 7, No. 4 (Oct) pp.310-318

• Brown, H 'Provocation as a Defence to Murder: To Abolish or to Reform' (1999) *Australian Feminist Legal Journal* 12, 137

• Burton, M
- 'Case Commentary: The Human Rights of Victims of Domestic Violence: *Opuz v Turkey*' (2010) *Child and Family Law Quarterly*, Vol.22.1, 131
- 'Case Note: Sentencing Domestic Homicide Upon Provocation: Still 'Getting Away With Murder' (2003) *Feminist Legal Studies* 11, pp. 279-289
-'Intimate Homicide and the Provocation Defence' (2001) 9 *Feminist Legal Studies* 247-258

• Case Commentary, '"Honour" killings: Re B-M.' Fam. Law 2009, 39(May), 455-456.

• Casey, J 'Gillon v HM Advocate: Provocation, proportionality and the ordinary person' (2006) *Scots Law Times* 193

• Chalmers J. 'Merging provocation and diminished responsibility: some reasons for scepticism' *Criminal Law Review* (2004) Mar 198-212

• Chen, C.P-L. 'Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic" and the Non-Violent Unwanted Sexual Advance Defence' (2000) *Cornell Journal of Law and Public Policy*, Vol.10, 195

• Clough, A. 'Comment: Loss of Self-control as a Defence: The Key to Replacing Provocation' (2010) *Journal of Criminal Law* 74, 118

• Cook, K. 'Killing in Desperation' (2003) *New LJ* 64

• Coss, G.
- 'The Defence of Provocation: An Acrimonious Divorce from Reality' (2006) *Current Issues in Criminal Justice* Vol18.1, 51-78
- ' "God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England' (1991) *Sydney Law Review* 13, 570-604

• Cotton, T 'Comment: The Mandatory Life Sentence for Murder: Is It Time for Discretion?' (2008) *Journal of Criminal Law* 72, 288

• Coughlin, A 'Excusing Women' (1994) 82 *California LR* 1

• Criminal Law Quarterly, Editorial 'Provocation and Mandatory Life Imprisonment' (1998) *Criminal LR* 273

• Criminal Law Review, Editorial 'Sentencing for Manslaughter by Provocation' (2005) *Criminal LR* 509-10

• Davies, MC 'Leaving Provocation to the Jury: A Homicidal Muddle?' (1998) 62 *Journal of Criminal Law* 374

• De Pasquale, S. 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a defence Strategy' (2003) *Melbourne ULR* 6

• Detmold, M 'Provocation to Murder; Sovereignty and Multiculture' (1997) 19 *Sydeny LR* 6

• Dobash, R.P. & Dobash, R.E. 'Women's violence to men in intimate relationships: working on a puzzle' (2004) *British Journal of Criminology* 44(3), 324-349

• Donovan, A. & Wildman, S.M. 'Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defence and Provocation' (1980) *Loyola of Los Angeles Law Review* Vol.14 , pp.435-468

• Dressler, J
- 'Provocation: Partial justification or Partial Excuse?' (1988) 51 *Modern LR* 467
- 'When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances and the 'Reasonable Man' Standard' (1995) 85 *Criminal Law and Criminology* 726
- 'Why Keep the Provocation Defence? Some reflections on a Difficult Subject' (2002) 86 *Minnesota LR* 959
- 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) *The Journal of Criminal Law & Criminology* Vol.73, pp.421-470

• Eastman, N. 'Abused Women and Legal Excuses' (1992) *New LJ* 1549

• Edwards, J
- 'Provocation and the Reasonable Man' (1954) *Criminal LR 898*
- 'Battered Women Who Kill' (1990) 140 *New LJ* 1380

• Edwards, S
- 'Battered Women Who Kill' 140 *New Law Journal* 1380

- 'Abolishing Provocation and Reframing Self Defence: the Law Commission's Option for Reform' (2004) Mar *Criminal Law Review* 181-197
- 'Descent into Murder: provocation's stricture – the prognosis for women who kill men who abuse them.' (2007) 71(2) *Journal of Criminal Law*
- 'Justice Devlin's legacy: Duffy – a battered woman "caught" in time' *Criminal Law Review* (2009) 12 851-869
- 'Battered Women – In Fear of Luc's Shadow' (1997) Denning Law Journal 104

• Elliot, C 'The Partial Defence of Provocation: The House of Lords Decision in Smith' (2000) 64 *Journal of Criminal Law* 594

• English, P 'What Did Section 3 do to the Law of Provocation' (1970) *Criminal Law Report* 249

• Dewhurst K. and Todd J. "The Othello Syndrome: a study in the psychopathology of sexual jealousy" (Journal of Nervous and Mental Disorder, 1955, 122: 367)

• Freedman, C.D. 'Restoring Order to the Reasonable Person Test in the Defence of Provocation' (1999) K.C.L.J. 10, 26-47

• Gardner J. & Macklem T. 'No provocation without responsibility: a reply to Mackay and Mitchell' *Criminal Law Review* (2004) Mar 213-218

• Gorman, W. 'Provocation: The Jealous Husband Defence' (1999) *Criminal Law Quarterly* 42, pp.478-500

• Green, T 'The Jury and the English Law of Homicide' (1976) 74 *Michigan Law Review*

• Greene, J. 'A Provocation Defence for Battered Women Who Kill' (1989) *Adelaide Law Review* 12, pp.145-163

• Herring, J 'Provocation and ethnicity' Crim. L.R. 1996, Jul, 490-493

• Hester M, 'Making it through the Criminal Justice System: Attrition and Domestic Violence' *Social Policy and Society* (2006) 5:1 79-90

• Hester, M and Westmarland, N 'Domestic Violence Perpetrators' *CJM* no.66, Winter 2006/07, 34-35

• Holton R & Shute S 'Self-control in the modern provocation defence' *Oxford Journal of Legal Studies* (2007) 27(1) 49-73

• Horder, J
- 'Reshaping the Subjective Element in the Provocation Defence' (2005) 1 *OxJLS* 123-140
- 'Between Provocation and Diminished Responsibility' (1999) *King's College Law Journal* 10, pp.143-166
- 'Cognition, Emotion and Criminal Culpability' (1990) 106 *Law QR* 469
- 'Provocation and Loss of Self-Control' (1992) 108 Law QR 191
- 'Provocation's 'Reasonable Man' Reassessed' (1996) *Law QR* 35
- 'Sex, Violence and Sentencing in Domestic Provocation Cases' (1989) *Criminal LR* 546
- 'The Problem of Provocative Children' (1987) *Criminal Law Review* 655
- 'The Duel and the English Law of Homicide' (1992) *Oxford Journal of Legal Studies*
- 'Autonomy, Provocation and Duress' (1992) *Criminal Law Review* 706

• Howe, A.
- 'Provoking Polemic – Provoked Killings and the Ethical Paradoxes of the Postmodern Feminist Condition' (2002) *Feminist Legal Studies* 10, 39-64
- 'Reforming Provocation (More or Less)' (1999) *Australian Feminist Law Journal* 12, pp.127-135

-'The Provocation Defence: Finally Provoking Its Own Demise?' (1998) *Melbourne University Law Review* 22, pp.466-490
- 'More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence) (1997) *Sydney Law Review* 19, pp.336-365

• James, A. 'Court of Appeal: Provocation: Sufficiency of Evidence' (2008) *Journal of Criminal Law* 73, 189

• Kennedy, H.G. 'Limits of Psychiatric Evidence in Criminal Courts: Morals and Madness' (2005) *Medico-Legal Journal of Ireland* 11(1) 13-29

• Kenny, E 'Battered Women Who Kill: The Fight Against Patriarchy' (2007) *UCL Jurisprudence Review* 13, pp17-36

• Kerrigan, K 'Provocation: The Fall (and Rise) of Objectivity' (2006) *Journal of Mental Health Law* May, pp.44-52

• Kilmchuk, D 'Outrage, Self-Control and Culpability' (1994) *University of Toronto Law Journal* 44, pp.441-468

• Leigh, L.H.
- 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law' (2008) *Justice of the Peace* 172, p700-705
- 'Two New Partial Defences to Murder' (2010) *Criminal Law & Justice Weekly* 174, pp.53-58

• Leverick, F 'Defending Self-Defence' (2007) *Oxford Journal of Legal Studies* 27, pp.563-577

• Mackay, R.D. 'The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea' (2010) *Criminal Law Review* 4, pp.290-302

• Mackay R.D. & Mitchell B.J.

- 'Replacing provocation: more on a combined plea' *Criminal Law Review* (2004) Mar 219-223

- 'But is this Provocation? Some thoughts on the Law Commission's Report on Partial Defences to Murder' (2005) *Criminal LR* 44

- 'Pleading Provocation and Diminished Responsibility Together; (1988) *Criminal LR* 411

• Mackay R.D., Mitchell, B.J. & Brookbanks, W.J. 'Pleading for provoked killers: in defence of Morgan Smith' L.Q.R. 2008, 124(Oct), 675-705

• MacKlem T & Gardner J

-'Provocation and Pluralism' (2001) 64 *Modern LR* 815

- 'Compassion without respect? Nine fallacies in R. v. Smith' [2001] Criminal Law Review 623.

• Marsack, C 'Provocation in Trials for Murder' (1959) *Criminal LR* 697

• McColgan, A 'In Defence of Battered Women who Kill' (1993) 13 *OxJLS* 508

• McCoy, S.D. 'The Homosexual-Advance Defence and Hate Crimes Statutes: Their Interaction and Conflict' (2001) *Cardozo Law Review* 22, pp.629-663

• McDonald, 'Provocation, Sexuality and the Actions of 'Thoroughly Decent Men'' (1993) 9 *Women's Studies Journal* 126

• Milgate, D.E. 'The Flame Flickers, But Burns On: Modern Judicial Application of the Ancient Heat of Passion Defence' (1998) *Rutgers Law Review* 51, pp.193-227

• Mison, R.B. 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) *California Law Review* 80, pp.133-178

• Mitchell, B
- 'Distinguishing Between Murder and Manslaughter in Practice' (2007) *Journal of Criminal Law* 71, pp.318-335
- 'More Thoughts About Unlawful and Dangerous Act Manslaughter and the One-Punch Killer' (2009) *Criminal Law Review* 7, pp.502-511

• Morgan, J 'Provocation Law and Facts: Dead Women Tell No Tales, Tales are Told About Them' (1997) *Melbourne University Law Review* 21, pp.237-276

• Mousourakis, G.
- 'Cumulative Provocation and Criminal Liability' (2000) *Journal of Criminal Law* 64, pp.332-338
- 'Emotion, Choice and the Rationale of the Provocation Defence' (1999) *Cambrian Law Review* 30, pp.21-30

• Nelson, C.A. '(En)Raged or (En)Gaged: The Implications of Racial Context to the Canadian Provocation Defence' (2001) *University of Richmond Law Review* 35, pp.1007-1083

• Nicolson and Sanghvi 'Battered Women and Provocation: The Implications of R v. Ahluwalia' [1993] *Criminal Law Review* Oct, pp728-738

• Norrie, A
- 'The Coroners and Justice Act 2009 – Partial Defence to Murder (1) Loss of Control' (2010) *Criminal Law Review* 4, pp.275-289
- 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) 65 *Modern LR* 538

• Nourse, V 'Passion's Progres: Modern Law Reform and the Provocation Defence' (1997) *Yale LJ* Vol.106.5, pp.1331-1448

• O'Donovan, K
-'Defences for Battered Women Who Kill' (1991) 18 *JL&S* 219

- 'Law's Knowledge: The Judge, The Expert, The Battered Woman and her Syndrome' (1993) 20 *Journal of Law and Society* 427

• Pasquale, D.P. 'Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy' (2002) *Melbourne University Law Review* 26, pp110-143

• Phillips, A 'When culture means gender: issues of cultural defence in the English courts' M.L.R. 2003, 66(4), 510-531

• Power, H 'Provocation and Culture' [2006] Oct *Criminal Law Review* 871-888

• Quick, O and Wells, C 'Getting tough with defences' [2006] Jun *Criminal Law Review* Jun 514-525

• Quigley, T. 'Battered Women and the Defence of Provocation' (1991) *Saskatchewan Law Review* 55, pp.223-262

• Raday, F 'Culture, religion and gender' I.J.C.L. 2003, 1(4), 663-715

• Rauf, M.N. 'The Reasonable Man Test in the Defence of Provocation: What are the Reasonable Man's Attributes and Should the Test be Abolished?' (1987) *Criminal Law Quarterly* 20, pp. 73-87

• Reddy, R 'Gender, culture and the law: approaches to "honour crimes" in the UK.' Fem. L.S. 2008, 16(3), 305-321.

•Reed, A
- 'Jury Directions on Provocation' (2006) Criminal Lawyer 158, pp.1-3
- 'Case Comment: Provocation: The Privy Council Re-Enters the Fray' (2005) Criminal Lawyer 155, pp1-3
- 'Duress and Provocation as Excuses to Murder: Salutary Lessons From Recent Anglo-American Jurisprudence' (1996) *Journal of Transnational Law & Policy* 6, pp51-92

• Reilly, 'Loss of Self-Control in Provocation' (1997) 21 *Criminal LJ* 320

• Renteln, A.D. 'A Justification of the Cultural Defence as Partial Excuse' (1992) Southern California *Review of Law and Women's Studies* 2, pp.437-526

• Roach, K 'Provocation and Mandatory Life Imprisonment' (1998) 41 *Criminal LQ* 273

• Rozelle, S.D. 'Controlling Passion: Adultery and the Provocation Defence' (2005) *Rutgers Law Journal* 37, pp.197-234

• Rynkowski, M. 'Religion in Criminal Law' Ecclesiastical. L.J. 2009, 11(1), 104-106

• Samuels, A.
-'The Coroners and Justice Act 2009' (2010) *Criminal Law & Justice Weekly* 174, pp250-258
- 'Excusable Loss of Self-Control in Homicide' (1971) *The Modern Law Review* 34, pp.163-171

• Sheely, S, Stubbs, J & Tolmie, J 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 56 *Journal of Criminal Law* 369

• Spencer, J.R. 'Juries and the Life Sentence' (2009) *Criminal Law & Justice Weekly* 173, p165

• Sullivan, G.R. 'Anger and Excuse: Reassessing Provocation' (1993) *Oxford Journal of Legal Studies* Vol.13.3, pp.421-429

• Taylor, R 'The Nature of "Partial Defences" and the Coherence of (Second Degree) Murder [2007] May *Criminal Law Review* 345

• Thomas, D.A. 'Sentencing: Manslaughter – Manslaughter by Reason of Provocation – Manslaughter of Spouse of Partner' (2003) *Criminal Law Review* Jun, pp.414-417

• Tolmie, J 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' (2005) *New Zealand Law Review* pp.25-52

• Turner, A.
- 'Criminal Justice and Television Drama' (2009) *Criminal Law & Justice Weekly* 173, pp658
- 'Murder, Manslaughter and PC Muddle' (2008) *Justice of the Peace* 172, pp.513
- 'Provocation and Infidelity' (2008) *Justice of the Peace* 172, pp.745

• Tyson, D. 'Asking For It: An Anatomy of Provocation' (1999) *Australian Feminist Law Journal* 13, pp.66-85

• Virgo, G
- 'Provocation Restrained' (2005) Cambridge Law Journal 64(3), pp.532-535
- 'Provocation, Muddying the Waters' (2001) 50 Criminal LJ 23

• Volpp, L. '(Mis)Identifying Culture: Asian Women and the "Cultural Defence"' (1994) *Harvard Women's Law Journal* 17, pp.57-101

• Wannop, A.L. 'Battered Woman Syndrome and the Defence of Battered Women in Canada and England' (1995) *Suffolk Transnational Law Review* Vo.19, 251

• Wells, C
- 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) *LS* 266
- 'Domestic Violence and Self-Defence' (1992) 140 *New LJ* 127
- 'Swatting the Subjectivist Bug' (1982) *Criminal LR* 209
- 'The Death Penalty for Provocation?' (1978) *Criminal LR* 688

• Williams, G 'Provocation and the Reasonable Man' (1954) *Criminal LR* 740

• Wilson, W. 'The Structure of Criminal Defences' (2005) *Criminal Law Review* Feb, pp.108-121

• Withey, C. 'Loss of Control' (2010) *Criminal Law & Justice Weekly* 174, p197

• Yeo, S

- 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) *Sydney Law Review* 18, pp.304-322

- 'Power of Self-Control in Provocation and Automatism' (1992) *Sydney Law Review* 14, pp.3-22

- 'Ethnicity and the Objective Test in Provocation' (1987) *Melbourne University Law Review* Vol.16, pp.67-82

Textbooks

• Ashworth A. *'Principles of Criminal Law'* (6th Edn, OUP, 2009)

• Bourne and Derry, '*Women and Law*' (1st Edn, Old Bailey, London, 2005)

• Bridgeman, J and Millns, S '*Feminist Perspectives on Law, Law's Engagement with the Female Body*' (1st Edn, Sweet & Maxwell, London, 1998)

• Buzawa and Buzawa '*Domestic Violence – The Criminal Justice Response*' (3rd Edn, Sage Publishing, USA, 2003)

• Chan, Chunn & Menzies '*Women, Madness and the Law: A Feminist Reader*', (1st Edn, GlassHouse, London, 2005)

• Clarkson C.M.V. & Cunningham S. *'Criminal Liability for Non-Aggressive Death'* (1st Edn, Ashgate Publishing, 2008)

• Counts DA, Brown JK & Campbell JC *'To Have & To Hit: Cultural Perspectives on Wife Beating'* (2nd Edn, University of Illinois Press, 1999)

• Dawson, T.B '*Women, Law and Social Change, Core Readings and Current Issues*' (4th Edn, Captus Press, Canada, 2002)

• Diduck, A and Kaganas, F '*Family Law, Gender and the State: Text, Cases and Materials*' (1st Edn, Hart, Oxford, 2002)

• Dobash, E and Dobash, R '*Rethinking Violence Against Women*' (1st Edn, Sage Publishing, USA, 1998)

• Dobash, R et al '*Not an Ordinary Killer – Just and Ordinary Guy: When Men Murder and Intimate Woman Partner*', http://vaw.sagepub.com.cgi/content/abstract/10/6/577

• Dressler, J 'Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintain Respect for Human Life whilst Killing Moral Monsters' in Shute and Simester, '*Criminal Law Theory*' (1st Edn, OUP, Oxford, 2002)

• Edwards, S
- '*Gender, Sex and the Law*' (1st Edn, Croon Helm Ltd, GB, 1985)
- '*Sex and Gender in the Legal Process*' (1st Edn, Blackstone Press Ltd, GB, 2003)

• Forell, C and Matthews, D '*A Law of Her Own, The Reasonable Woman as a Measure of Man*' (1st Edn, NYU Press, USA, 2001)

• Fox, M 'Legal Responses to Battered Women Who Kill' in Bridgeman, J and Millns, S '*Law and Body Politics: regulating the female body*' (1st Edn, Aldershot, Dartmouth, 1995)

• Foyster E *'Marital Violence: An English Family History 1660-1857'* (1st Edn, CUP, 2005)

• Green, T 'Verdict According to Conscience: perspectives on the English criminal jury 1200-1800' (1985) University of Chicago Press

• Gupta, R 'From Homebreakers to Jailbreakers: Southall Black Sisters' Brit. J. Criminol. 2004, 44(6), 991-993

• Hague G. & Malos E. *'Domestic Violence: Action for Change'* (3rd Edn, New Clarion Press, 2005)

• Hoff, L.E '*Battered Women as Survivors*' (1st Edn, Routledge, GB, 1991)
• Horder, J
- 'Killing The Passive Abuser: A Theoretical Defence' in Shute and Simester, '*Criminal Law Theory*' (1st Edn, OUP, Oxford, 2002)

- Horder, J '*Provocation and Responsibility*' (1st Edn, Clarendon Press, Oxford, 1992)

• Jasinski JL & Williams LM *'Partner Violence'* (1st Edn, Sage Publications, 1998)

• Kennedy H *'Eve Was Framed'* (2nd Edn, Vintage, 2005)

• Lacey, Quick and Wells, '*Reconstructing Criminal Law: Text and Materials*' (3rd, 2003, Lexis Nexis Butterworths, GB)

• Leigh, L.H '*Murder, Manslaughter and Infanticide: Proposals for Reform of the Law: Observations on the Consultation Paper CP19/08*' (2008) 172 JPN 700, 25 October 2008

• Leverick, F '*Killing In Self Defence*' (1st Edn, OUP, Oxford, 2006)

• McColgan, A '*General Defences' in Nicolson, D and Bibbings, L 'Feminist Perspectives in Criminal Law*' (1st Edn, Canvendish Publishing, GB, 2000)

• Meng Heong Yeo, S *'Partial Excuses to Murder'* (1st edn, Federation Press, 1990)

• Nicolson, D 'Criminal Law and Feminism' in Nicolson, D and Bibbings, L '*Feminist Perspectives in Criminal Law*' (1st Edn, Cavendish Publishing, GB, 2000)

• Nicolson, D and Bibbings, L '*Feminist Perspectives in Criminal Law*' (1st Edn, Cavendish Publishing, GB, 2000)

• Noonan, S 'Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (Or (Re)inscribing the Familiar?) in Bottomley, A '*Feminist Perspectives on the Foundations Subjects in Law*' (1st Edn, Cavendish, London, 1996)

• Ormerod, D '*Smith & Hogan, Criminal Law*' (9th Edn, OUP, Oxford, 2006)

• Schechter, S '*Women and Male Violence: The Visions and Struggles of the Battered Women's Movement*' (1st Edn, Pluto Press, London, 1982)

• Schneider, E.M '*Battered Woman & Feminist Law Making*' (1st Edn, Yale University Press, USA, 2000)

• Simester, A.P and Sullivan, G.R '*Criminal Law, Theory and Doctrine*' (3rd Edn, Hart Publishing, Oxford, 2007)

• Ormerod D. *'Smith and Hogan: Criminal Law'* (12th Edn, OUP, 2008)

• Uniacke, S '*Permissible Killing*' (1st Edn, CUP, GB, 1994)

• Walker, L '*Terrifying Love, Why Battered Women Kill and How Society Responds*' (1st Edn, Harper Row Publishing, USA, 1989)

• Walker, L '*The Battered Woman*' (1st Edn, Harper Row Publishing, USA, 1980)

• Walklate, S '*Gender, Crime and Criminal Justice*' (2nd Edn, Willan Publishing, London, 2006)

• Wells, C 'Provocation: the case for abolition' in Ashworth, A and Mitchell, B '*Rethinking English Homicide Law*' (1st Edn, OUP, Oxford, 2000)

• Wilson W. *'Criminal Law: Doctrine and Theory'* (3rd Edn, Pearson Education Ltd. 2008)

• Yllo K. & Bograd M. *'Feminist Perspectives on Wife Abuse'* (1st Edn, Sage Publications, 1988)

Case List

- Watts v Brains [1600] Cro. Eliz 778
- R v Royley [1612] 12 Co. Rep 87
- R v Cary [1616]
- R v Hopkin Huggett[1666] Kel. 59, 60
- R v Mawgridge [1707] Kel 119
- R v Hayward [1833] 6 Car & P
- R v Pearson [1835] 2 Lew 216
- R v Rothwell [1871] 12 Cox C.C. 145
- R v Alexander [1913] 9 Cr. App. R. 139 CCA
- R v Palmer [1913] 2 K.B. 29 CCA
- R v Ellor [1920] 15 Cr. App R. 41
- Mancini v DPP [1942] A.C. 1 HL
- Holmes v DPP [1946] A.C. 588 HL
- R v Duffy [1949] 1 All ER 932
- Bedder v DPP [1954] 1 WLR 1119 (HL)
- R v McCarthy (Michael Dennis) [1954] 2 Q.B. 105 CCA
- Bullard v R [1957] CLY 727
- R v McGregor [1962] N.Z.L.R. 1069
- R v Browne [1973] NI 96

• Edwards (Alias David Christopher Murray) v The Queen Privy Council (Hong Kong) [1973] 1 All ER 152 (PC)

• R v Davies [1975] QB 691

• DPP v Camplin [1978] A.C. 705

• R v Newell [1980] 71 Cr. App R 331

• R v Ibrams & Gregory [1982] 74 Cr.App.R 154

• R v Doughty [1986] 83 Cr.App.R 319

• R v Ali [1989 Crim LR 736

• R v Johnston [1989] 2 All ER 839

• R v Cocker [1989] Crim LR 740 (CA)

• R v Rossiter [1992]

• R v Thornton [1992] 1 All ER 306

• R v Ahluwalia [1992] 4 All ER 889

• R v Cambridge [1994] 1 WLR 971

• R v Brown [1994] 1 AC 212

• R v Humphreys (Emma) [1995] 4 All ER 1008

• R v Dryden [1995] 4 All ER 987

• R v Accott [1996] 4 All ER 443 (HL)

• R v Thornton (Sara Elizabeth) (No.2) [1996] 2 Cr App R 108

• R v Morhall (Alan Paul) [1996] AC 90 (HL)

• R v Parker [1997]

- Luc Thiet Thuan v Queen [1997] AC 131 (PC)
- R v Accott [1997] 2 Cr App R 94
- R v Campbell [1997] 1 Cr App R 199 (CA)
- R v Kimber [2000]
- R v Smith (Morgan James) [2001] 1 AC 146
- R v Weller (David Allen) [2003] Crim LR 724, EWCA Crim 815
- R v Bennett (Michael) [2004] 1 Cr App R (S) 65
- AG of Jersey v Holley [2005] UKPC 23, 3 WLR 29
- R v Mohammed (Faqir) [2005] EWCA Crim 1880
- R v James [2006] EWCA Crim 14
- R v Karimi [2006] 2 WLR 887
- R v Moses [2006] EWCA Crim 1721
- R v Hill [2008] EWCA Crim 76

Hansard Records

- 1st Reading: House of Commons 14 January, 2009
- 2nd Reading: House of Commons 26 January, 2009
- Committee: 1st sitting: House of Commons 3 February, 2009
- Committee: 2nd sitting: House of Commons 3 February, 2009
- Committee: 3rd sitting: House of Commons 5 February, 2009
- Committee: 4th sitting: House of Commons 5 February, 2009
- Committee: 5th sitting: House of Commons 10 February, 2009
- Committee: 6th sitting: House of Commons 10 February, 2009
- Committee: 7th sitting: House of Commons 24 February, 2009
- Committee: 8th sitting: House of Commons 24 February, 2009
- Committee: 9th sitting: House of Commons 26 February, 2009
- Committee: 10th sitting: House of Commons 26 February, 2009
- Committee: 11th sitting: House of Commons 3 March, 2009
- Committee: 12th sitting: House of Commons 3 March, 2009
- Committee: 13th sitting: House of Commons 5 March, 2009
- Committee: 14th sitting: House of Commons 5 March, 2009
- Committee: 15th sitting: House of Commons 10 March, 2009
- Committee: 16th sitting: House of Commons 10 March, 2009
- Report: 1st sitting: House of Commons 23 March, 2009
- Report: 2nd sitting: House of Commons 24 March, 2009

- 3rd Reading: House of Commons 24 March, 2009
- 1st Reading: House of Lords 25 March, 2009
- 2nd Reading: House of Lords 27 April, 2009
- Committee: 1st sitting: House of Lords 9 June, 2009
- Committee: 2nd sitting: House of Lords 10 June, 2009
- Committee: 3rd sitting: House of Lords 23 June, 2009
- Committee: 4th sitting: House of Lords 30 June, 2009
- Committee: 5th sitting: House of Lords 7 July, 2009
- Committee: 6th sitting: House of Lords 9 July, 2009
- Committee: 7th sitting: House of Lords 13 July, 2009
- Committee: 8th sitting: House of Lords 15 July, 2009
- Committee: 9th sitting: House of Lords 21 July, 2009
- Report: 1st sitting: House of Lords 21 October, 2009
- Report: 2nd sitting: House of Lords 26 October, 2009
- Report: 3rd sitting: House of Lords 28 October, 2009
- Report: 4th sitting: House of Lords 29 October, 2009
- 3rd Reading: House of Lords 5 November, 2009
- Ping Pong: House of Commons 9 November, 2009
- Ping Pong: House of Lords 11 November, 2009
- Ping Pong: House of Commons 12 November, 2009
- Royal Assent 12 November, 2009