

Partial reform of partial defences: Developments in England and Wales

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Abstract

The offences of murder and manslaughter have been the subject of several Law Commission reviews in England and Wales but no wholesale reform. The two major difficulties with the law of murder have been the continuing commitment to the mandatory penalty and the impossibility of capturing culpability in a nuanced way through the mechanics of the mental element of 'intention to cause death or serious bodily harm'. The long accepted solution to these difficulties has been the use of partial defences of diminished responsibility and provocation to reduce murder to manslaughter in some circumstances, despite the defendant clearly having satisfied the mental element. In 2006, the Law Commission proposed a new architecture of homicide offences which would have resulted in partial defence killings being in the second of three categories of killing. This would have located them in the same bracket as killings accompanied by either intention to cause serious injury or an intention to cause injury coupled with a serious risk of causing death. Rather than adopt this new scheme, the government fast tracked reform of partial defences but retained the current bifurcation between murder and manslaughter. While diminished responsibility was retained, albeit cast in slightly different terms, provocation was replaced by a defence of 'loss of control'. In this article we analyse these changes, consider the statutory consolidation of the law of self-defence, and point up the continuing incoherence and confusion in this area.

Keywords

diminished responsibility, homicide, law reform, loss of control, self-defence

Fatal violence and the structure of homicide

Fatal violence is relatively rare in England and Wales with 636 homicides recorded in 2010/11. This figure has remained fairly stable as have statistics in relation to the character of victims. The majority of homicide victims are male (68% of victims) and female

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victims are more likely to have known their killer: over three-quarters (78%) of female victims knew the main suspect compared with over half (57%) of male victims. In the case of partner killings there is often a history of marital discord and violence, particularly male violence. One characteristic of male killers is that they are often separated from their partner and the killings arise from disputes about exclusivity and child custody. Women, on the other hand, do not usually kill from jealousy or following the termination of a relationship. When they kill, there has usually been a high degree of violence within an ongoing relationship and a so-called 'slow burn loss of control' (Huss et al., 2006). In terms of intimate violence, according to the 2010/11 British Crime Survey, seven per cent of women and five per cent of men experienced domestic abuse in the last year, equivalent to an estimated 1.2 million female and 800,000 male victims. Female victims of partner abuse were more likely than males to suffer from non-physical abuse, threats and sexual assault, but apparent differences between the sexes for abuse involving force and stalking were not statistically significant (Home Office, 2012).

In terms of criminal law, cases of fatal violence in England and Wales are generally classified into the two types of homicide: murder or manslaughter. Various specific forms of homicide also exist such as causing or allowing the death of a child or vulnerable adult and causing death by dangerous driving.¹ The two major difficulties with the law of murder have been the continuing commitment to the mandatory penalty of life imprisonment and the impossibility of capturing culpability in a nuanced way through the mechanics of the mental element of 'intention to cause death or serious bodily harm'. While the law of homicide has been the subject of numerous reviews (Royal Commission, 1953, Law Commission, 2004, 2006, to mention a selection), governments have been unwilling to abandon the rigidity of the mandatory life sentence for murder. This is based on the view that the life sentence carries public support, despite some empirical evidence which calls this into question. Mitchell and Roberts in their survey and focus groups based on hypothetical scenarios found 'varying degrees of public support for a range of murder cases, but generated no evidence of overwhelming or widespread public support for automatically sending all convicted murderers to life imprisonment' (2011: 467). While this research alone is unlikely to shift what has become an entrenched policy of life imprisonment for murder, it has been identified by the Homicide Review Advisory Group, a multidisciplinary group convened on the initiative of Sir Louis Blom-Cooper QC and Professor Terence Morris, as a step forward in terms of public education about punishing murder (HomRAG, 2011). Whatever fully informed views government ministers might privately hold, they would fear that any attempt to abandon the life sentence for murder would be a red rag to the (largely right wing) bull of the popular press. In the sensitive arena of criminal sentencing policy, there is an inevitable disconnect between views of the public as tested in surveys and 'public opinion' in political reality. And as Horder reminds us, governments have long failed to engage citizens in the law reform process (Horder, 2012: chapter 1). We would therefore be surprised to see any change to the mandatory life sentence for murder in the foreseeable future.

The long-accepted solution to the difficulties surrounding defining and punishing murder has been the use of partial defences to reduce murder to manslaughter in some circumstances, despite the defendant clearly having satisfied the mental element.

If successfully pleaded, the statutory defences of diminished responsibility and loss of control (which replaced provocation in 2009) avoid the label and the mandatory sentence of a murder conviction. As before, the prosecution bears the burden of proof in cases of loss of control, whereas this shifts to the defence (on a balance of probabilities) with diminished responsibility. This reversal of the probative burden has not in itself been controversial but is confusing in cases where defendants plead both partial defences.

The revised scope of these partial defences resulted from government initiated reviews by the Law Commission in 2004 and 2006. The terms of reference of the 2004 report were limited to considering retention or reform of provocation and diminished responsibility and the possible introduction of a partial defence of excessive force in self defence. This review was a response to the general consensus that provocation was ill equipped to accommodate the circumstances of domestic abuse. Gender politics have clearly played a major role in both identifying problems with the old law and in designing the reformed defence. Significantly, the main political figures advocating reform were women: Justice Minister Maria Eagle, Attorney General Baroness Scotland, Solicitor General Vera Baird and Harriet Harman, Minister for Women and Equality. The report also coincided with confusion about the inter-relationship between provocation and diminished responsibility, particularly as the common law appeared to blur the distinction.² A broader review to consider the 'various elements of murder, including the defences and partial defences to it, and the relationship between the law of murder and the law relating to homicide (in particular manslaughter) followed (Law Commission, 2006: 1). This review was constrained from the outset by the instruction that the recommendations had to 'take account of the continuing existence of the mandatory life sentence for murder'. The final report recommended a three tier structure for homicide: first degree murder, second degree murder, and manslaughter (Law Commission, 2006). The mandatory penalty would apply only to first degree murder.

However, despite improving the fairness and clarity of the structure of homicide, the Commission's proposals failed to meet all the existing criticisms. First, the recommendation to retain the much criticised 'serious harm rule' for first degree murder signalled a reversal of the commission's earlier position in its consultation paper (2005). The commission was persuaded by the moral equivalence of killings where *death* is intended and those where a *serious injury* (undefined) is intended so long as this is coupled with an awareness of the serious risk of causing death (2006: para 2.57). While this would tighten the current position, under which intent to cause serious (but not necessarily life threatening) harm such as a broken limb, would suffice for murder, it remains vulnerable to the criticisms that intention itself continues to bear an overly broad 'oblique' meaning. The proposed second-degree murder category was an extremely broad category made up of five separate heads of liability. This would extend the powerful label of murder to cases of individuals intending to cause 'fear or risk of injury' coupled with an awareness of serious risk of causing death. This for example must be fairly commonplace when applied to most deaths caused by medical error, which surely the commission would not feel comfortable upgrading from their current (controversial) position within involuntary manslaughter (Quick, 2006). Similarly, with cases of successful pleas of partial defences and suicide pacts, does the label murder,

albeit in the second degree, fit the bill? In the end, the government's decision to fast track reform of partial defences (rather than homicide as a whole) in the *Coroners and Justice Act* 2009 rendered this proposed upgrade redundant. The picture then is one of recognition that the current law of homicide is a mess but reluctance by the government to do more than make partial changes or attempts at clarification. Even if the 2009 changes had brought about clarity, on which most commentators agree they have manifestly failed, (Miles, 2009; Norrie, 2010; Withey, 2011), piecemeal reform is never going to address the underlying contradictory premises, expectations and inherent structural weakness of the law of murder and manslaughter.

Partial defences to murder

Provocation has been controversial because it deflects some attention away from the defendant's behaviour onto the victim's, and can play to ugly notions that 'he or she asked for it', whether this be a controlling/abusive partner or an unfaithful one. Historically, provocation existed at common law (Horder, 1992) but was partially defined by section 3 of the *Homicide Act* 1957 which provided that:

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 the reasonable man.

This focused attention on two questions: first, did the provocation cause the defendant to lose their self-control (the subjective element) and second was the provocation such that a reasonable person would have acted similarly (the objective element). Section 3 supplemented rather than replaced the common law of provocation, and this hybrid construction contributed to the uncertainty surrounding its operation. While Section 3 was silent on this, the requirement that the loss of control should be 'sudden and temporary' appeared to survive this reform.³ In addition, this phrase was interpreted narrowly to include only loss of control immediately following the provocation. This led to criticism of gender bias of the defence: in that it more readily accommodated 'typical male', short-fuse, responses to provocative circumstances. Through a series of high-profile cases in the 1980s, appellate courts struggled to deal with the newly acknowledged social reality of domestic violence, including the fact that women sometimes kill their abusive partners after years of abuse. In fact, the debate surrounding provocation has been driven by cases involving killings by women who have been subjected to long-term abuse by their husbands or partners. In particular, the cases of Kiranjit Ahluwalia and Sara Thornton, two women who killed their abusive partners illustrated the 'hidden gender' in the development of the provocation defence.⁴ Ahluwalia killed her husband after suffering 10 years of domestic abuse and unsuccessfully argued against the need for a 'sudden' loss of control. Her appeal was allowed on grounds of fresh medical evidence with regard to diminished

responsibility with the Court affirming that the requirement of suddenness in the sense of immediacy was not a rule of law. She had served 40 months by then. Sara Thornton sharpened a carving knife and stabbed her husband after enduring an abusive 18-month relationship. The trial judge had said that the provocation had to cause a sudden and temporary loss of self-control and the Court of Appeal rejected the argument that Section 3 removed the requirement for the loss of control to be 'sudden'.

In terms of the reasonable person, Lord Diplock's suggested direction in *Camplin* (1978)⁵ that s/he is 'a person having the 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 affect the gravity of the provocation to him', prompted much judicial and academic debate. Despite legitimate doubts about whether these two issues of 'provocability' (one's self control) and 'provocativeness' (the gravity of the provocation) are susceptible to such neat separation (Norrie, 2002), two sets of cases exposed a clear interpretive divide. *Morhall* (1995)⁶ and a majority of the Privy Council in *Luc Thiet Thuan* (1997)⁷ favoured the restrictive objective approach disallowing evidence of individual frailties in assessing the reasonable person's self-control. *Humphreys* (1995),⁸ *Thornton* (1996) and *Dryden* (1995)⁹ exemplified the broader approach which clothed the reasonable person with relevant individual characteristics of the defendant. This division reached its climax in *Smith* (2000),¹⁰ where a majority of the House of Lords preferred the more personalised approach to provocation, by holding that depression was a relevant characteristic that the jury should consider for the purposes of the reasonable man test. In other words, characteristics other than age and sex were relevant not only to the gravity of provocation but also to the standard of self control expected. In effectively abandoning the so-called *Camplin* distinction, this left the defence of provocation with little reference to the reasonable person. It left the door open for a free for all in which partners could be excused from a conviction for murder when they had lashed out in a fit of sexual jealousy.

Unlike provocation, diminished responsibility did not have a common law history, though like provocation it owes its development to a need to circumvent the harsher effects of mandatory sentencing for murder and mandatory detention in a secure psychiatric facility following a successful plea of the insanity defence. It was thought preferable to plead guilty to murder than to submit to that fate. The *Homicide Act* 1957 introduced a partial defence of diminished responsibility which allowed those with mental disorder to plead not guilty to murder but guilty of manslaughter (Section 2). In practice, prosecutors have been willing to accept pleas of diminished responsibility, with only about 23 per cent of cases being contested (Law Commission, 2004: Appendix 2). The actual numbers of cases in which diminished responsibility is a factor is not altogether clear (Mackay, 2010: 301; Coleman, 2008). However, the terms 'abnormality of mind' and 'substantially impaired' in Section 2 invited discretion and disagreement, represented sites for strategic decision-making, and revolved around the presentation and interpretation of expert evidence, itself something of a troubled area in recent times (Law Commission, 2011). The definition of the defence is in the hands of expert witnesses, whose sympathies understandably rest with defendants struggling with various mental states and the spectre of the mandatory life sentence for murder. It has been subject to re-wording as opposed to radical re-thinking in the *Coroners and Justice Act* 2009.

Reformed partial defences

Loss of control

The culmination of the less than ideal reform process resulted in the abolition and replacement of provocation with a partial defence of 'loss of control' in sections 54–55 of the Coroners and Justice Act 2009.¹¹

Section 54:

(1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if —

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

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

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

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

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

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

Overview

At first glance, this is much more detailed and complex than Section 3 of the 1957 Act. This is something of a trend in recent statutory drafting much of which tends to be convoluted to the point of being impenetrable (Spencer, 2008). These lengthy provisions are sure to offer ample opportunity for appeal. There are three basic elements to the defence: the defendant’s loss of self-control, a qualifying trigger and an objective test. Notably, the new defence shuns any reference to provocation. The Law Commission would have gone further and abandoned the need to prove loss of control (Law Commission, 2004 report 290: para 3.30), but the Ministry of Justice objected to the potential use of the defence for killers ‘in full possession of his or her senses’ (Ministry of Justice, 2008: [36]). Yet the 2009 Act does not define loss of control, nor offer an elaboration in the accompanying explanatory notes, beyond noting that the time between the incident and the killing will remain relevant for the tasks of both judge and jury (Ministry of Justice, 2009: [337]). Subsection 1(a) responds to the gender bias criticism by removing the reference (from the common law) to a *sudden* loss of self control. It remains to be seen where the line will be drawn between non-sudden, or non immediate, loss of control and a ‘considered desire for revenge’ in Subsection 4. The Law Commission did not envisage that revenge would include killings by battered victims where there may be an element of premeditation (2006: para. 5.24), and nor should it, given that this was a prominent driver for reform in the first place. The argument that the term ‘considered’ desire for revenge meant some degree of additional planning or reflection was dismissed in the appeal in *Clinton, Parker, Evans*, (2012).¹² In marked

contrast to its willingness to adopt a contextual approach to statutory interpretation regarding Section 55(6) (which we examine below), the Court of Appeal declined to ‘re-write’ the language of the statute in this respect. But surely the word ‘considered’ must do something? Interestingly, the facts of this case suggest that Evans was a victim of domestic abuse by his wife. Evidence from his children revealed that his wife had admitted to hitting and verbally abusing him. And on the fatal day, she threatened to cut his throat with a kitchen knife and allegedly stabbed the defendant, which would appear to satisfy the trigger of fear of serious violence (discussed below). One wonders whether perceptions about gender stereotypes played a role in the construction of this case as a revenge killing? We might speculate that had this been a female victim, and the case presented clearly as one of domestic violence, the Court of Appeal might have thought more carefully before rejecting the argument that this was not a considered desire for revenge, given the background to the legislative reforms.

Subsection 3 returns us to a modified version of the *Camplin* position whereby the defendant’s circumstances are only relevant to provocativeness not provocablity. The term ‘circumstances’, replacing the previous term ‘characteristics’, would appear to be capable of wider interpretation and is thus odd given the overall aim of narrowing the availability of the defence. We should also note that Subsection 3 makes reference to circumstances whose ‘only relevance’ is to capacity for control, but what if they are relevant to both? For example some sorts of depression could presumably be considered? The issue of which circumstances are legitimate to consider became entangled in the exclusion of sexual infidelity aspect of the qualifying trigger in *Clinton*, as is revealed below.

The ‘qualifying triggers’

Section 55:

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

The terminology of ‘qualifying trigger’ is new, but more significant is the introduction of fear of serious violence in Subsection 3 as a potentially relevant factor. This recognises the close connection between the emotions of anger and fear and thus between provocation and self-defence. And of course, this is clearly designed with domestic abuse cases in mind, given that most killings by women result from fear as opposed to anger. The language of ‘extremely grave’ and ‘seriously wronged’ in Subsection 4 is an attempt to limit the use of the defence following the inappropriate inclusion of a number of undeserving factors such as jealousy and disobedience under the umbrella of the

phrase ‘things done or said’ in the old law. The aim is to prevent illegitimate uses of the defence but this of course begs several big questions such as what is legitimate, what is not, and whether the new statutory formula achieves this objective. Subsection 5 is interesting; it would be otiose unless it is intended that the matters to which it refers are not sufficient on their own to qualify as triggers under subsections 3 or 4.

Partial limitations of loss of control defence

Section 55:

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

The defence is barred when the defendant incited the fear of serious violence or a sense of being seriously wronged for the purpose of providing an excuse to use violence which chimes with the long standing unease with ‘self induced’ provocation.¹³ The sexual infidelity clause (now s 55(6) (c)) was added during the Bill’s passage through Parliament and was not subject to any meaningful public consultation (Horder, 2012). This is a controversial aspect of the new law, but perhaps unsurprising given the background view that sexual jealousy should not be a legitimate reason to plead provocation. However, we question whether it was wise to single out sexual infidelity for special exclusion. Why is it worthy of greater attention – or less – than honour killings, for example? Or other forms of infidelity or breach of trust (such as re-mortgaging the family home to pay gambling debts)? In some circumstances any of these could lead to a justified sense of being seriously wronged but in others not. It seems from *Clinton, Parker and Evans*,¹⁴ the first appellate cases on the new defence, that determining the multiple potential meanings of the sexual infidelity exclusion has led to a sidelining of the critical change introduced in the Coroners and Justice Act, that the judge can assess the evidence and decide that no jury could reasonably find there was a qualifying trigger.

The role of the judge

In contrast with Section 3 of the Homicide Act, the trial judge is now empowered to prevent the defence being put to the jury unless she considers that the jury might reasonably conclude that the defence applies (s 54(6)). Instead of concentrating on this latter point, the Court of Appeal in *Clinton* appears to have led itself through a maze of hypotheticals on the meaning of ‘sexual infidelity’ and ended up overturning a trial judge’s decision not to place the defence before the jury. But the rejection of the old law in relation to provocation is somewhat inconsistent in *Clinton, Parker and Evans* where the Lord Chief Justice states baldly that ‘the new statutory defence is self-contained. Its common law heritage is irrelevant’ (para 2). It is true that the Act ‘abolishes’ the defence of provocation but there is enough similarity in the defence that replaces it to suggest

that a complete erasure of its history is unwarranted. Witness for example how the 'sudden and temporary loss of control' law from the 1949 case of *Duffy* survived the changes brought in by Section 3 of the 1957 Act. It might be said that the 1957 Act was clearly built on the common law and this alone would justify Lord Chief Justice Judge's attempted eradication of the past. The historical and cultural context is not so easily ignored, as the Lord Chief Justice himself found when he came to consider the interpretation of exclusion of 'sexual infidelity' in Section 55 to which we now turn.

New law or old law? R v Clinton, Parker, Evans 2012

The first appeals brought under the revised defence of loss of control confirm its highly problematic nature. This was a conjoined appeal from three separate trials, all raising issues under the new law. The case of Clinton is the most interesting as it involved the controversial exclusion of 'sexual infidelity' from the qualifying triggers. Jon-Jaques Clinton killed his wife to whom he had been married for 16 years. Both were depressed and undergoing a trial separation in an unhappy marriage. He said that his wife confessed that she was having an affair and also that she had slept with five men. It was alleged that she went into details about her other relationships and also said that he didn't have the courage to kill himself and that it would have been easier had he done so (he had told her he had been looking on suicide websites). This was the context for his loss of control whereby he attacked her with a wooden baton and strangled her with his belt. The trial Judge directed herself that there was no qualifying trigger in accordance with the statute, and that she had to disregard anything said or done which constituted 'sexual infidelity'. The comments about his contemplating suicide were not regarded as of an 'extremely grave character' giving a 'justifiable sense of being seriously wronged', and thus she did not leave this partial defence to the jury.

Despite expressing reluctance to criticise the trial judge's interpretation of Section 55, the Court of Appeal held that there was no 'blanket exclusion' of sexual infidelity for the loss of control defence. But the decision to quash the conviction and order a re-trial is somewhat inconsistent with the apparently clear terms of the statute and the intention of parliament. While sexual infidelity on its own could not amount to a qualifying trigger, the Court of Appeal determined that it may be relevant when considered alongside other factors as part of a broader context. LCJ Judge explained himself with characteristic confidence:

The idea that, in the search for a qualifying trigger, the context in which such words are used should be ignored represents an artificiality which the administration of criminal justice should do without [para 23]

and

This discussion of the impact of the statutory prohibition in section 55(6)(c) arises, we emphasise, in the context, not of an academic symposium, but a trial process in which the defendant will be entitled to give evidence. There is no prohibition on the defendant telling the whole story about the relevant events, including the fact and impact of sexual infidelity. [para 28]

The Court of Appeal also held that the impact of sexual infidelity is not excluded from the objective component in relation to the loss of self control that:

a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.(s 54 (1) (c))

This is said to be because Section 54 (3) states that 'the circumstances of D' is a reference to 'all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance and self-restraint.' However, this is by no means the most obvious way to interpret section 54 which sets out three requirements for the partial defence: loss of self-control, from a qualifying trigger, in circumstances where a normally restrained person of D's age and sex might have so reacted.¹⁵ The limitations on the qualifying triggers are set out in Section 55 and, as we have seen, exclude the fact of a thing said or done constituted 'sexual infidelity'. The Lord Chief Justice had already decided that this latter exclusion was not to be taken to mean that sexual infidelity expunged the possibility of a qualifying trigger:

The starting point is that it has been recognised for centuries that sexual infidelity may produce a loss of control in men, and, more recently in women as well as men who are confronted with sexual infidelity.¹⁶ (para 36)

He went on to say that this factual link cannot be eradicated by Section 55 (6). Indeed not. The next paragraph in the judgment appears to be something of a non sequitur and is also rather misleading: 'In section 54 (1) (c) and (3) the legislation further acknowledges the impact of sexual infidelity as a potential ingredient of the third component of the defence' (para 37). Those sections make no reference at all to sexual infidelity. A different interpretation would be that, since sexual infidelity has been excluded from the qualifying trigger upon which section 54 (1) (c) is predicated, there is no need for it to be mentioned again in relation to the third component. By this sleight of hand, the Lord Chief Justice concludes that 'to seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is not only much more difficult, but it is unrealistic and carries with it the potential for injustice' (para 39). Given the unlikelihood of sexual infidelity being the only relevant factor in such cases, we may speculate that this interpretation will lead to section 55 (6) (c) proving to be of limited effect. It may be said that the Court was merely giving due regard to the Ministerial statements during the parliamentary passage of the Bill, but we would argue that too little weight was given to section 54(6) which allows the judge to prevent the jury considering the defence unless she considers that the jury might reasonably conclude that that it applies. In ordering a re-trial in *Clinton*, the Court of Appeal removes that discretion. Overall, then, the partial defence of provocation was problematic, the loss of control replacement may prove even worse.

Diminished responsibility

Despite often being pleaded together, and the common law blurring of the boundaries between them (see (Morgan) *Smith* (2000) above) there are good reasons why diminished

responsibility should be seen as a more appropriate partial defence than provocation or loss of control. However, the option of creating an offence of ‘diminished responsibility killing’ was rejected by the Law Commission largely on the basis of its perceived illogicality for juries having to choose between two different outcomes (2006: para. 5.104). This rests on a lack of faith in juries, when it is neither obvious nor evidenced that separate treatment for diminished responsibility would be beyond the wit of juries to understand. And of course juries already deal with the fact that the evidential burden for diminished responsibility (unlike loss of control) rests with the defence. The Commission favoured minor modifications rather than a major re-design of section 2 of the Homicide Act 1957. ‘Abnormality of mind’ has been replaced with ‘abnormality of mental functioning’. The commission’s proposal to extend this further to include ‘developmental immaturity’ in order to accommodate disordered children who kill has not been taken forward. We can note that this would have risked pathologising young people and potentially unfairly labelling them as mentally abnormal. Reference to the stipulated conditions in section 2 has been replaced by the broader notion of ‘recognised medical condition’ (see generally Mackay, 2010). While this is arguably clearer than the previous reference to ‘abnormality of mind’, the need for expert evidence on a recognised medical condition is likely to ensure the medicalisation of the defence and may also serve to exclude it in certain circumstances, such as mercy killings where the defendant acts out of compassion rather than a medical condition (Kennefick, 2011). The idea of ‘substantially impaired ability’ makes more sense than the previous reference to ‘substantial impairment of mental responsibility.’ Given the modest changes to this partial defence, we do not anticipate the same type of problems which are sure to hamper the application of the loss of control defence.

Self-defence

Homicide is sometimes justified on the grounds of self-defence. As with provocation, self-defence also relies on the notion of reasonableness, a concept which is apparently gender neutral but in reality may discriminate against women – indeed any physically vulnerable person – who is provoked and/or attempts to defend themselves against persistent violence or. Two points need to be emphasised, however: (1) self-defence, unlike loss of control (and diminished responsibility), is not confined to homicide – it can also justify lesser forms of violence; and (2) self-defence, unlike loss of control (and diminished responsibility), is a complete defence; when invoked successfully it results in acquittal. Self-defence goes to an essential element in the definition of crime. Murder and manslaughter involve the unlawful killing of another person. A successful plea of self-defence leads to an acquittal because it renders the defendant’s actions lawful. In pleading self-defence, the defendant is arguing that her action was entirely appropriate in the circumstances. Self-defence covers both the common law right to defend oneself against invasion of person and property, and the statutory right to use reasonable force in the prevention of crime. In most cases of course the two will overlap.

The trial and appeal of Tony Martin, convicted of murder and wounding with intent after shooting two burglars who had broken into his Norfolk farmhouse, offers an interesting insight into the procedural and substantive operation of defences. The intruders were retreating when Martin open fired with an unlicensed pump action shotgun,

killing one and injuring the other. At trial, his defence lawyers failed to persuade the jury that his acts were justified as self-defence. The case re-opened the public debate about the appropriateness of using violence in defending one's person and property, and there was no shortage of populist sympathy for Martin. It also provides an insight into the context and circumstance that surround defences, as well as the interplay between complete and partial defences. On appeal, a newly instructed legal team adduced fresh evidence suggesting that Martin suffered from a paranoid personality disorder and depression which heightened his sense of fear of threats. Something of a scatter-gun strategy was adopted of using this evidence in relation to both self-defence and diminished responsibility. Counsel was unsuccessful in seeking to persuade the court that the more personalised approach to the law of provocation at that time ((Morgan) *Smith* (2000)) also applied to self-defence. However, Martin's appeal against his murder conviction was allowed, and was substituted by a verdict of manslaughter by reason of diminished responsibility.¹⁷

Cases where individuals take the law into their own hands inevitably capture public attention, and Martin's case re-opened the debate about the use of force in protecting one's person and property. In January 2004 listeners of BBC Radio 4 singled out reform to strengthen the law of self-defence as their first choice for a private members bill (*The Times*, 2 January 2004). Yet, this apparent public anxiety is at odds with the reality that cases of householders struggling to plead self-defence are few and far between. In 2005, the Director of Public Prosecutions revealed that during the previous 15 years, only 11 prosecutions were brought against householders for attacking their intruders, and only seven of these involved domestic burglaries.¹⁸ This was hardly the evidence to justify legislative intervention in the form of section 76 of the *Criminal Justice and Immigration Act* 2008, which consolidates, somewhat elaborately, the status quo in relation to the use of reasonable force in self-defence and prevention of crime. It is hard to see how listing well-established common law rules together in one long legislative section serves to clarify the law. Arguably, it expands the potential application of self-defence and thus satisfies the perceived public pressure for greater protection. The reference in subsection 7(a) that a person may not be able 'to weigh to a nicety' the exact measure of any action is an invitation to further subjectivise the decision to use force. And subsection 8 broadens this even further by allowing unspecified 'other matters' to be taken into account. It would be surprising if this did not lead to an increase in pleas of self-defence. And in homicide cases defendants will be able to choose between gambling outright in pleading this complete defence, and hedging their bets on the partial loss of control defence, using the fear of serious violence trigger in section 55 (3).¹⁹ Of course, there is nothing to prevent defendants pleading both defences together, although the justificatory nature of self-defence is at odds with the excusatory basis for loss of control.

Conclusion

Sorrell observes that 'If we are looking for a single qualified principle to take the place of an absolute prohibition [against killing]... then we are likely to be in for a disappointment.' This is because different exceptions arise for quite different reasons. Trying to capture the qualification for a mercy killing in the same principle as that for justified self defence is 'not easy' (1987:3). Hoping to find a perfect form of homicide law via public opinion surveys and 'rational' reconstructions of offence categories while retaining a

mandatory penalty has proved to be the pursuit of a holy grail. But there are degrees of imperfection. Once the Law Commission's attempts to impose a semblance of order on the law of murder and manslaughter had been pushed through the mangle of government cowardice, the resulting legislation was very far from ideal. We now not only have a diminished responsibility plea whose definition no longer contains the word 'responsibility' (Mackay, 2010: 300) but a loss of control defence that no longer contains the word 'provocation'. The Court of Appeal in its approach to the appeals of *Clinton*, *Parker*, *Evans* has ensured however that not much else has changed.

Notes

1. *Domestic Violence, Crime and Victims Act* 2004 s.5; *Road Traffic Act* 1988, ss 1, 2B, 3A, 3ZB.
2. *R v (Morgan) Smith* [2001] 1 AC 290.
3. *Duffy* [1949] 1 All ER 932.
4. *Ahluwalia* [1992] 4 All ER 889, *Thornton* [1992] 1 All ER 306. For discussion see Nicolson (1995).
5. [1978] AC 705.
6. [1996] AC 90.
7. [1997] AC 131.
8. [1995] 4 All ER 1008.
9. [1995] 4 All ER 987.
10. [2001] 1 AC 146.
11. These provisions have been in force since 4 October 2010. The old law applies to events taking place before this.
12. [2012] EWCA Crim 2. This was a conjoined appeal. The revenge point was raised in *Evans*.
13. *Naylor* (1987) 9 Cr App R (S) 302.
14. [2012] EWCA Crim 2.
15. It is not clear either why 'sex' as well as age is thought relevant in terms of self restraint, see Cobb and Gausden (2011).
16. We assume he means that it has more recently been recognised as producing a loss of control in women rather than it has more recently produced in women such a loss.
17. [2001] EWCA Crim 2245.
18. http://www.cps.gov.uk/news/press_releases/106_05/ (Accessed 30 April 2012).
19. See the discussion in Ashworth (2009: 265).

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