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A Critical Analysis of the UK Court's Approach to Battered Women
Who Kill

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Independent Study

10.05.2021

Psychologist *Lenore Walker* established a theory of Battered Woman Syndrome¹ to dismiss theories surrounding domestic violence against women. These theories typically attacked the passivity of women.² The area of law surrounding battered women who kill their abuser has always been problematic and flawed. The case of *Duffy*³, laid the principle of the common law on provocation under the Homicide Act 1957.⁴ This essay will explore the area of law surrounding battered women, and how well it has developed. As well as analysing the provisions the old law of the Homicide Act 1957 and how well the new law provided in the Coroners and Justice Act 2009 protects battered women. Further to this, this essay will look into how the scope of domestic abuse has widened to accommodate to less obvious instances of domestic abuse such as coercive and controlling behaviour as outlined in the Serious Crime Act 2015. In addition to statutory provisions, this essay will further analyse judgements of leading cases and consider if the partial defences of provocation or diminished responsibility have been available for battered women to use.

Before the Coroners and Justice Act 2009 was the Homicide Act 1957, under this legislation battered women were not protected as adequately as they should have been, nor did the legislation extend to them like it should have. The argument of self-defence was said to not be applicable or extendable in cases such as ones concerning battered woman syndrome, as the majority of defendants who killed their abuser would act when there would be no immediate threat present.⁵

Section 3 of the Homicide Act 1957 had proven to be quite problematic. These components required for a loss of self-control and objective element to the defence, that a reasonable man would have committed the same actions to have been satisfied. The reasonable man test is devised of what a reasonable person with capacity and one of sound mind would do in a certain situation. It is unusual to suggest that the reasonable man test would be applicable when dealing with battered women as it can be argued that in a lot of cases the courts have seen these defendants are not of sound mind.

Within the case of *Duffy*, Lord Justice Devlin provided a definition of provocation;

*“Provocation is 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, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind.”*⁶

Furthermore, academics have attempted to define the partial defence of provocation, it can also be defined as the following;

“...the provocation must have caused the defendant to lose his or her self-control suddenly and temporarily. This is the subjective condition. Secondly, the provocation must be such that the reasonable person might have reacted to it in the same way as the defendant. This is the objective condition. This condition is, however, qualified, since it is possible to imbue the

¹ The Battered Woman Syndrome. 1979. Lenore E. Walker.

² Elizabeth Kenny. Battered Women Who Kill: The Fight Against Patriarchy. 13 UCL Jurisprudence Rev. 17 (2007)

³ *Duffy* [1949] 1 All ER 932

⁴ Susan Edwards Justin Devlin’s Legacy: *Duffy* – a battered woman “caught” in time. Crim L.R. 2009, 851-869

⁵ Amanda Clough Battered Women: Loss of Control and Lost Opportunities. 3 J. Int’l & Comp.L. 279 (2016)

⁶ [1949] 1 All ER 932

*reasonable person with relevant characteristics of the defendant, to see whether a reasonable person with such characteristics might have killed had he or she been provoked.”*⁷

The case of *Duffy* was the first case that provided the definition. With specific reference to ‘*sudden and temporary loss of self-control*’ indicating that there must not be a delay between the provocation and the act. Lord Justice Devlin stated within this case;

*“a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation... circumstances such as a history of abuse which induce a desire for revenge are inconsistent with provocation.”*⁸

The Court of Appeal supported this statement, excluding battered women from using the provocation defence. The Law Commission recognised that the subjective test explained within the case of *Duffy*, “*perpetuates male violence.*”⁹ Furthermore, within the case of *Holmes*¹⁰, it was stated that;

*“it is hardly necessary to lay emphasis on the importance of considering, where the homicide does not follow immediately upon the provocation, whether the accused if acting as a reasonable man, had ‘time to cool’.”*¹¹

The common law ruling derived from the case of *Duffy*, had consistently remained the bedrock for the partial defence of provocation for Section 3 of the Homicide Act 1957, albeit it had proven to be a controversial one. In the case of *Camplin*,¹² Lord Diplock, stated that the ruling of *Duffy* followed the earlier case of *Lesbini*.¹³ His Lordship stated;

*“At least from as early as 1914 the test of whether the defence of provocation is entitled to succeed has been a dual one; the conduct of the deceased to the accused must be such as (1) might cause in any reasonable or ordinary person and (2) actually causes in the accused a sudden and temporary loss of self-control...”*¹⁴

However, the case of *Lesbini* did not refer to the words ‘sudden and temporary’.¹⁵ The case of *Thornton*¹⁶ saw a challenge of the sudden and temporary loss being applicable for use as a partial defence to victims of long-standing abuse. Lord Gifford for the appellant presented the court with the argument that Lord Justice Devlin’s ruling of provocation was no longer appropriately applicable in the case of reaction by a person subjected to a long course of provocative conduct. As recognised in the Canadian case of *Lavallee*,¹⁷ and as argued by Aileen McColgan;

⁷ Graham Virgo. “Defining Provocation”. The Cambridge Law Journal, Vol. 58, No.1, 1999, pp 7-10

⁸ Ibid.

⁹ Law Commission, Partial Defences to Murder, Consultation Paper No 173 (London, The Law Commission, 2003)

¹⁰ *Holmes v DPP* [1946] A.C 588

¹¹ Ibid. [597]

¹² *DPP v Camplin* [1978] Q.B 254 CA.

¹³ *Rex v Lesbini* [1914] 3 K.B. 1116 CCA.

¹⁴ *DPP v Camplin* [1978] Q.B 254 CA.

¹⁵ Susan Edwards. Justin Devlin’s Legacy: *Duffy* – a battered woman “caught” in time. Crim L.R. 2009 851-869

¹⁶ *R v Thornton* [1992] 1 A.11 E.R 306 CA

¹⁷ *R v Lavallee* [1990] 1 S.C.R 852

“Wilson J expressed the view that the defendant had had to choose between using force against her partner when he was vulnerable or accepting ‘murder by instalment’ by postponing any use of force until an attack upon her was already under way. ‘Society gains nothing’ from requiring such a delay ‘except perhaps the additional risk that the battered woman will herself be killed.’”¹⁸

Sara Thornton’s first appeal on the ground that the trial judge misdirected the jury on the law of provocation was rejected on the basis that the;

“distinction drawn by Devlin J, is just as, if not more, important in this kind of case to which Lord Gifford referred...in every such case the question for the jury is whether at the moment the fatal blow was struck the accused had been deprived for that moment of the self-control which he or she had been able to exercise.”¹⁹

The courts’ reluctance to appropriately accommodate battered women’s domestic violence history²⁰ proved to be a problem in many more high-profile cases to follow and saw an outrage with particular reference to many feminist groups. In spite of the need of a reform²¹ reluctance to move forward with the law was showcased through Sara Thornton’s case. It had therefore come as a surprise²² when the court’s saw a shift in attitude towards battered women and the law of provocation in the case of *Kiranjit*.²³ Cases of this nature began to see some minor progress being made towards the courts accepting a delayed response, as opposed to a sudden and temporary loss of self-control as battered women may be slower to arouse to anger, but once enraged the fire may smoulder and burn longer.²⁴

In the case of *Kiranjit*, the defendant was handed down a life sentence for the murder of her abusive husband despite being the victim of horrific acts of physical and mental abuse for many years. At her appeal three grounds were argued. The first two being jury misdirection’s on the subjective and objective conditions of provocation and the final ground being that there was now fresh evidence of diminished responsibility.

As already discussed, the ‘sudden and temporary loss of self-control’ left battered women at a disadvantage, as battered women tend not to react instantly. They learn that by reacting instantly will in most cases likely lead to a more severe act of abuse.²⁵ They typically respond when their abusive partner would least expect it and when at his most vulnerable, all whilst allowing the fire to smoulder and burn longer. The decision held for *Kiranjit* saw a move towards leniency when allowing the partial defence of provocation to be used when there had been a delay in loss of self-control. At the appeal the Lord Chief Justice stated the following;

¹⁸ Aileen McColgan, In Defence of Battered Women who Kill, 13 OXFORD J. LEGAL, Stud. 508 (1993).

¹⁹ R v Thornton [1992] 1 A11 E.R 306 CA (118)

²⁰ Rebecca Bradfield, “Women Who Kill: Lack of Intent and Diminished Responsibility as the Other ‘Defences to Spousal Homicide” (2001) 13 Current Issues Criminal Justice 143.

²¹ Celia Wells, ‘Domestic Violence and Self-Defence’ (1990) 140 N.L.J

²² Donald Nicholson and Rohit Sanghvi. Battered Women and Provocation: The Implications of R v Ahluwalia Crim L.R. 1993, Oct, 728-738

²³ R v Ahluwalia (Kiranjit) [1992] 4 A11 E.R. 889

²⁴ Alix Kirsta, *Deadlier than the Male: Violence and Aggression in Women* (London: HarperCollins, 1994)

²⁵ R. Emerson Dobash and Russell P. Dobash, “The Nature and Antecedents of Violent Events” (1984) 24 B.J. Crim. 269, 278-9.

*“We accept that the subjective element in the defence of provocation would not as a matter of law be negative simply because of the delayed reaction in such cases, provided that there was at the time of killing a “sudden and temporary loss of self-control” caused by the alleged provocation. However, 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.”*²⁶

This legal development was a step in the right direction for battered women to be able to exploit and use to their advantage when dealing with situations like this. The ruling relegates a time delay from being a legal issue to an issue of being able to provide evidence that self-control was lost. If this was the case, it no longer mattered that there was a delay in the last act of provocation and the time of the fatal act.²⁷ Further to this, the small development within this appeal provided battered women with some assistance by linking the requirement of suddenness to the nature of the loss of control itself instead of, the relationship in time of the provocation and the loss of control.²⁸ With this appeal, Lord Justice Taylor left open the possibility that specific disorders for example post-traumatic stress disorders or battered woman syndromes, may amount to relevant characteristics as long as they were of ‘permanence’. This specific reference to permanence was derived from the requirement laid down in the case of *Newell*²⁹. The Court of Appeal held in this case that only characteristics which were sufficiently permanent and relating to the provocation could be taken into account. The Court of Appeal endorsed this requirement from the New Zealand case of *McGregor*.³⁰

Furthermore, in the case of *Rossiter*,³¹ the courts saw appeal against a conviction for murder on the grounds that the jury had been misdirected, as the judge had not asked them to consider the issue of provocation. The original verdict was deemed as unsafe and unsatisfactory, the appeal was allowed as the trialling judge had erred in not allowing the jury to determine the issue and the murder conviction was substituted for manslaughter on the grounds of provocation. This resulted in the defendant’s immediate release. Within the judgement the Lord Justice cited a passage from the case of *Bullard*.³² Within this case Lord Tucker stated;

“It has been long settled law that if on the evidence, whether of prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not the accused has said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked.”

This case had been another example of battered women who kill, the victim had been abusive to the defendant in the past prior to the fatal act. The judgement of this appeal made further small steps towards progress for battered women. It can be suggested that with the judgment in this appeal the defence of provocation should always be raised and put to the jury if there

²⁶ R v Ahluwalia (Kiranjit) [1992] 889 (896)

²⁷ Donald Nicholson and Rohit Sanghvi. Battered Women and Provocation: The Implications of R v Ahluwalia Crim L.R. 1993, Oct, 728-738

²⁸ Aileen McColgan, In Defence of Battered Women who Kill, 13 OXFORD J. LEGAL, Stud. 508 (1993).

²⁹ Newell (1980) 71 Cr App R

³⁰ McGregor [1962] NZLR 1069.

³¹ R v Rossiter (Ethel Amelia) (1992) Cr. App R. 326

³² Bullard v R. [1957] A.C. 635

is any material evidence amounting to provocation regardless of how tenuous the judge may think it be.

With the above timeline of battered women who kill cases, there seems to be a small shift in law in allowing the defence of provocation to be raised in aid of these women, despite in most cases there is a delay in reaction. However, to further understand the injustice these women were facing in this era of law, cases of male defendants using the same defence of provocation must be compared to the judgements of these women who faced years of physical, emotional and mental abuse.³³ In 1991, *Joseph McGrail* was handed down a two year suspended sentence after he was found guilty of manslaughter on the grounds of provocation. The defendant killed his wife after he claimed she had sworn at him as well as being an alcoholic. The trialling judge sympathised with the defendant and stated that *“This lady would have tried the patience of a saint.”*³⁴ As well as the case of *Thomas Corlett* in 1987, who was given a three year sentence for manslaughter after murdering his wife who put the mustard on the wrong side of his plate.³⁵ Further to this, the gruesome acts of Nicholas Boyce in 1985 resulted in a 6 year sentence, with the defence of provocation being allowed, after he murdered and dismembered his wife’s body. In addition to this, Boyce cooked parts of her body so they did not look like flesh. He murdered his wife for nagging him. The judge in his case stated;

*“Before these dreadful events, you were hard-working, of good character... you were simply unable to get on with your wife... a man of reasonable self-control might have been similarly provoked.”*³⁶

Although there was progression in the partial defence of provocation now being extendable to battered women, this did not come out without controversy and a need for further reform. This was seen in the case of *Humphreys*.³⁷ This case concerned a young girl who had been exposed to a very complex upbringing. She had been convicted of murdering her violent partner, who was a significantly older, at the age of 17. Her appeal was allowed on the basis that the judge should have left to the jury the characteristics of immaturity and attention seeking as characteristics for the partial defence of provocation. With particular emphasis on the appellant’s attention seeking, this was a psychological illness or disorder, which was found to be an abnormal permanent condition, which had also been endorsed by a registered psychiatrist. The second ground being that the judge gave no guidance to the jury of the complex nature of the appellant’s and victim’s relationship. Guidance of the potentially provocative conduct building up from the beginning of the relationship to the final explosive act should have been given. This guidance was not given.

Although the appeal had been successful on the grounds of provocation, it can be suggested that the appellant’s case fit the defence of diminished responsibility more so the defence of provocation.³⁸ The definition of diminished responsibility was set out in the now abolished section 2 of the Homicide Act 1957. For a defendant to rely on the defence of diminished

³³ Amanda Clough Battered Women: Loss of Control and Lost Opportunities. (2016) 3:2 JICL 279-316

³⁴ BBC News. Spotlight on Domestic Abuse Laws. 29th July 2008.

³⁵ The Independent: Trial Forced Plight of Battered Wives into The Open: Heather Mills: 30th May 1996

³⁶ The Guardian. And bad character is...? ‘As ‘good character’ seems a factor lower in sentencing, British law is still failing women with violent partners. Cath Elliot. 10th September 2007

³⁷ R v Humphreys [1995] 4 All ER 1008

³⁸ Jeremy Horder. Provocation’s Characteristic Difficulties: R v Humphreys [1994] 4 All E.R 1008; Worcester College Oxford

responsibility, the defendant must exercise an abnormality of the mind that would have substantially impaired his or her mental ability to understand the nature of his or her conduct; affected their ability to form a rational conduct or impair the ability to exercise self-control.

The distinctions between the defences of diminished responsibility and provocation had subsequently become blurred.³⁹ For cases surrounding diminished responsibility to succeed there must be evidence of a gross personality disorder falling short of insanity, there needs to be psychiatric evidence of which is essential. Jeremy Horder also explains that psychiatric evidence is also inadmissible when dealing with provocation defences. When dealing with pleas of both defences together juries are instructed to disregard psychiatric evidence when approaching the provocation defence but to take into account the evidence when dealing with the diminished responsibility plea. Yet contrary to this rule, psychiatric evidence was allowed when dealing with the grounds of appeal in the case of *Humphreys*, evidence provided by a psychiatrist had been submitted in order to aid the plea of provocation when dealing with mental characteristics, such as immaturity and attention seeking. Therefore, it is not unreasonable to suggest that the defence of provocation is heavily flawed and calls for an abolition or at least a reform of this defence were not bizarre.

In the case of *Luc Thiet Thuan*⁴⁰ Lord Goff presented the court with a leading speech in which he reiterated that the courts had blurred the lines between the defences of provocation and diminished responsibility. Lord Goff also stated that the courts had erred in the case of *Newell, Ahluwalia* and *Thornton*. The courts took a wrong turn in allowing mental characteristics to be taken into account when assessing whether a reasonable man would have done as the defendant did, this blurs the lines between provocation and diminished responsibility according to Lord Goff. Further to this the Lord Justice explained that allowing mental characteristics being allowed to support the provocation defence lowers the evidential burden on the defendant, and that mental characteristics may only be taken into account when the provocative behaviour is aimed at the mental characteristics of the individual which will ultimately affect the gravity of the provocation.⁴¹

The case of *Smith*⁴² saw what could be suggested as further blurring the lines of provocation and diminished responsibility. In this case the courts showed a preference to the dissenting opinion of *Luc Thuet Thuan*. The courts had shown a willingness to accept battered woman syndrome as evidence within this case. The court also held that the mental and emotional characteristics which are personal to a defendant are relevant in determining the gravity of provocation. Lord Hoffman accepted that the scope of the law surrounding loss of self-control had widened to allow battered woman to seek protection under it, as it had begun to include emotions such as 'fear and despair'. Furthermore, Lord Hoffman was also of the view that battered women were also the type of people who would benefit from the provocation defence regardless of a direct correlation between provocation and characteristic.⁴³ Alan Norrie highlights, what is in his opinion, the issue with the law surrounding the two defences;

³⁹ Ibid.

⁴⁰ *Luc Thuet Thuan* [1997] AC 131

⁴¹ Susan Edwards Battered Woman. In *Fear of Luc's Shadow*. Denning Law Journal 12 Denning L.J.

⁴² *R v. Smith (Morgan James)* [2000] 3 WLR 654

⁴³ Alan Norrie. *The Coroners and Justice Act 2009. Partial Defences to Murder (1) Loss of Control*. Crim L.R. 2010, 4, 275-289

*“The fateful problem for the modern law is that it is constructed on the basis of a denial of, and need for, substantive moral considerations. The case law has been wrestling with this aporia.”*⁴⁴

Despite what seems to have been a small amount of progress made for battered woman being able to shelter under a very small area of law, the case of *A-G for Jersey v Holley*⁴⁵ overturned all of the progress that had been made. Within this case a defendant’s capacity for self-control had returned to a rigid standard.⁴⁶ The Privy Council’s decision within the case of *A-G for Jersey v Holley* sought to overrule the progression of law that had been made within the case of *R v Smith (Morgan James)*. The decision held that whilst any characteristic may be relevant to assessing the gravity of the provocation, the only relevant factor towards an assessment of the defendant’s capacity for self-control are those relevant to the defendant’s age and gender.⁴⁷ The Privy Council’s main aim was to reiterate the statutory provisions of section 3 of the Homicide Act 1957;

*“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. The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant’s conduct is excusable.”*⁴⁸

Within the decision of the Privy Council, Lord Nicholls for the majority identifies that the decision held in the case of *Smith (Morgan James)* cannot be upheld or regarded as an accurate statement of English Law, as it clearly departs from the statutory provisions.⁴⁹ The Privy Council also recommended that in the case of a defendant suffering from battered woman syndrome, post-natal depression or from a personality disorder, these defendant’s could seek shelter under the defence of diminished responsibility.⁵⁰

Following the decision of the Privy Council, a series of reports and proposals were created as a means to tackle the issues surrounding the law that had been highlighted by the council. The Law Commission produced a report which highlighted recommendations for a reform surrounding key areas that were in need of abolishment or change.⁵¹ These issues were then reiterated in the 2005 report.⁵² The Law commission introduced what they aimed to achieve within the report. Under the Commission’s provisional proposals, the partial defences of provocation and diminished responsibility would reduce ‘first degree murder’ to ‘second degree murder’ but neither of the defences would reduce ‘second degree murder’ to manslaughter, as under the old law both defences reduced the conviction to manslaughter.⁵³

Further to this the Commission stated within their report;

⁴⁴ Alan Norrie, “The Structure of Provocation” (2001) 54 C.L.P. 307.

⁴⁵ *A-G for Jersey v Holley* [2005] 2 AC 580

⁴⁶ Amanda Clough. Battered Women: Loss of Control and Lost Opportunities [(2016) 3:2 JICL 279-316]

⁴⁷ Helen Power. Provocation and Culture. Crim L.R. 2006, Oct 871-888.

⁴⁸ *A-G for Jersey v Holley* [2005] 2 AC 580 (22)

⁴⁹ Helen Power. Provocation and Culture. Crim L.R. 2006, Oct 871-888

⁵⁰ *A-G for Jersey v Holley* [2005] 2 AC 580 (25)

⁵¹ Law Commission, Partial Defences to Murder (2004), Law Com. No.290

⁵² Law Commission Consultation Paper. A New Homicide Act for England and Wales? (20050, No. 177

⁵³ *Ibid.* Para 5.51

“We think it important that provocation and diminished responsibility should, if successfully pleaded, have exactly the same effect. This is because the two defences are frequently run together with the issues involved being inextricably linked. It would be unacceptable for two closely linked defences to have different legal effects, requiring the jury to decide which was decisive when there was no clear answer. There would be a danger of the jury being unable to agree on what defence applied, possibly necessitating a retrial, when the jury was in agreement that, on either view, the defendant was not guilty of ‘first degree murder’.”⁵⁴

In the report the commission proposed that the principals that should govern provocation as a partial defence were;

“ (1) that the defendant must have acted in response to:

- (a) Gross provocation (meaning words or conduct, or a combination of both, which caused the defendant to have a justifiable sense of being seriously wronged)*
- (b) Fear of serious violence towards the defendant or another*
- (c) A combination of (a) and (b) and*

(2) A person of the defendant’s age and ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or similar way.”⁵⁵

Further to this the Commission stated that provocation as a partial defence should be available to defendants that act as a response to fear of serious violence regardless of a time lapse between the provocation and if the defendant had waited till, they were no longer in any imminent danger.⁵⁶

As a response to improving the partial defence of diminished responsibility, the Commission suggested an improvement of the definition of diminished responsibility. It was proposed that the expression “abnormality of mind” be replaced by “abnormality of mental functioning”. The latter was favoured by the Commission as it requires experts to consider the way in which the offender’s mental processes were affected by reason of a mental condition.⁵⁷ Within the report it was proposed;

“... the ‘abnormality of mental functioning’ must arise from an ‘underlying condition’ by which we mean a pre-existing mental or psychological condition.”⁵⁸

This highlights that the Commission have excluded a temporary abnormality of mind which may occur as a result of a temporary state of heightened emotions. Using the Commission’s own example a defendant acting out as a result of ‘road rage’ would not be able to seek shelter under the diminished responsibility defence.

As a result of the Law Commission’s recommendations for reform came the Commission’s 2006 report.⁵⁹ This report suggested to not only reform partial defences to murder but to

⁵⁴ Ibid Para 5.52

⁵⁵ Ibid. Para 5.53

⁵⁶ Ibid Para 5.54

⁵⁷ Ibid Para 5.60

⁵⁸ Ibid Para 5.62

⁵⁹ Law Commission, Murder, Manslaughter and Infanticide (2006), Law Com. No. 304

reform the law of homicide as a whole.⁶⁰ As a response the UK Government responded with the 2008 proposals for reform of the law consultation paper,⁶¹ with the means to reform the law of homicide with the Commission's recommendations. Finally, following the Government's final report⁶² came the much anticipated and necessary new legislation within the provisions of the Coroners and Justice Act 2009.

The new act saw the term of provocation replaced with loss of control. Section 54 of the Coroners and Justice Act 2009, Partial defence to murder: loss of control sees the following statutory provisions;

"(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.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.

(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.

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

Ultimately, for a plea of loss of control to succeed the provisions of the act require the defendant to lose control as a result of a qualifying trigger, which have been outlined in

⁶⁰ Amanda Clough Loss of Self-Control as a defence: the key to replacing provocation. J. Crim L. 2010, 74 (2) 118-126.

⁶¹ Ministry of Justice, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law (2008), Consultation Paper, CP No. 19/08

⁶² Ministry of Justice, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position, Response to Consultation CP(R) (19/08) (2009)

Section 55 of the Coroners and Justice Act 2009. The qualifying triggers may consist of the defendant's loss of self-control being attributable to the defendant's fear of serious violence from the victim against the defendant or another identified person, or be attributable to a thing or things done or said (or both) which may have constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.

An issue raised with the trigger regarding an 'extremely grave character', it begs the question what constitutes an extremely grave character. The provisions provided no guidance as to how to approach this trigger, or how it may be accessible for a defendant to use. As suggested the meaning of this term will in most cases differ for each defendant based upon the life experience and culture of the defendant.⁶³

For a battered woman to prove that her acts were 'justifiable' in the eyes of the law, the objective test must be applied to determine this. A test that has been heavily criticised when dealing with battered women as when this would be put to a jury, the defendant will need to persuade the jury that the last and final provocative act, which may have been a relatively small provocative act in comparison to the history of abuse the defendant had endured, but enough to tip the iceberg.⁶⁴ When applying the objective test the new legislation provided no elaboration as to how the defendant's gender may impact her level of tolerance or self-restraint.⁶⁵ Further to this, it has also been noted;

*"The difficulty here is that there are no clear objective or scientific data about consistency in levels of self-control. We do not know how much consistency there is in people's views about when self-control should or should not be exercised, nor do we know the degree of similarity in people's ability to exercise self-control in any given set of circumstances."*⁶⁶

Norrie suggests that the objective test in section 54 of the act allows for the portrayal of the defendant to be one of an ordinary person instead of an abuse victim, and will allow them to paint the portrayal of them being somebody that has been grievously harmed and have reacted with a legitimate sense of anger.⁶⁷ With the objective test requiring the jury to determine whether or not the defendant acted out in the same way a reasonable ordinary person would, it is not absurd to suggest that the test does not fit the mental state of a battered woman. As already established, battered women are not women of sound mind, and in many cases will often have an abnormality of mental functioning. Therefore, a jury would not be able to safely apply the objective test, resulting in an unsafe verdict.

⁶³ Amanda Clough Loss of Self-Control as a Defence: The Key to Replacing Provocation. J. Crim. L. 2010, 74 (2), 118-126

⁶⁴ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74(3) Journal of Criminal Law 223.

⁶⁵ A Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control' (2010) 4 Criminal Law Review 275, 281

⁶⁶ BJ Mitchel, 'Years of Provocation, Followed by a Loss of Control' in Lucia Zedner and Julian V Roberts (eds), Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth (Oxford University Press, 2012) 122. / Lynn Ellison Coercive and Controlling Men and the Women Who Kill Them. Wolverhampton Law Journal

⁶⁷ A Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control' (2010) 4 Criminal Law Review 275, 281

Although abolishing the sudden loss of control requirement and replacing it with a recognition of women's fear as a trigger and a lapse in time, allowed for the defence to become more accessible for battered women, between the old law and the new law there does not seem to be much difference as defendants suffering from battered woman syndrome still need to be able to prove a loss of self-control.⁶⁸

As a result of this, it has been recognised that 'slow-burn' cases may therefore still be very difficult to prove in front of a jury after a delay in the final provocative act and the fatal act. This appears to narrow the defence as opposed to widen it, as set forth in the Law Commissions objective. Whitey states that the Government appears to 'take back with one hand what it gives with the other'.⁶⁹ With the loss of self-control requirement replacing the suddenness requirement, the law has not evolved in the way that the Commission envisaged it to.⁷⁰ Meaning the defence is not wide enough to extend to battered women who "*still face the formidable loss of self-control hurdle.*"⁷¹

The defence of diminished responsibility also saw a reform within the Coroners and Justice Act 2009. Section 52 of the act amended section 2 of the Homicide Act 1957. The amended provisions, by recommendation of the Law Commission, required the defendant to be suffering from an abnormality of mental functioning arising from a recognised medical condition. The medical condition must also significantly impair the defendant's ability to understand the nature of her conduct, form a rational judgement or exercise self-control.

The partial defence of diminished responsibility comes with its flaw, although revised. A battered woman should not be made to back into a corner into the law of diminished responsibility.⁷² There may be circumstances in which the defendant's mental state diminishes their responsibility, however there may not be a disorder to attach to the defence, and may well have reacted with a 'reasonable' response to what would can be called habituated violence.⁷³ With the diminished responsibility defence now being available for battered women, it has become apparent that this defence is 'inherently unsuitable'. In cases in which the abused murders the abuser it has been argued that it 'medicalises' the defendant through the use of disorders and 'therapeutises' domestic violence.⁷⁴

⁶⁸ Blockley, C. (2014) 'The Coroners and Justice Act 2009: '(A)Mending' the Law on Provocation?' Plymouth Law and Criminal Justice Review,6, pp.127-147

⁶⁹ Carol Whitey. Loss of Control, Loss of Opportunity? Crim L.R. 2011,4,263-279

⁷⁰ Blockley, C. (2014) 'The Coroners and Justice Act 2009: '(A)Mending' the Law on Provocation?' Plymouth Law and Criminal Justice Review,6, pp.127-147

⁷¹ Mackay, R., and Mitchell, B., 'Loss of Control and Diminished Responsibility: Monitoring the New Partial Defences', (2011) 3 Archibold Review 5 at p.6

⁷² A. Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Control' (2010) 4 Criminal Law Review 275, 281.

⁷³ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74(3) Journal of Criminal Law 223.

⁷⁴ Vanessa Bettinson. Aligning Partial Defences to Murder with The Offence of Coercive or Controlling Behaviour. J.Crim. L.2019, 83 (1), 71-86 / Aileen McColgan, In Defence of Battered Women who Kill, 13 OXFORD J. LEGAL, Stud. 508 (1993) / D Nicholson and R Sanghvi, "Battered Women and Provocation: The Implications of *R v Ahluwalia*" (1993) Crim LR 728, 737

It is important to note that battered women do not only suffer from physical violence, but many women suffer from emotional and psychological abuse, which in many cases can become quite difficult to deal with. Psychological abuse, or what is now more commonly known as coercive control under section 76 of the Serious Crime Act 2015 is seen in the appeal case of *Sally Challen*.⁷⁵ In 2011, Challen was convicted of the murder of her husband following years of psychological abuse. The provision outlines that coercive control is understood to be where a person incites a fear that violence will be used against them on at least two occasions or where it adversely affects their life on a daily basis.⁷⁶ The appeal was raised on two different grounds, one for the defence of diminished responsibility and one for loss of control. With regards to the defence of diminished responsibility, Challen argued that there was new evidence of coercive control and abnormality of mind, with psychiatric evidence to support this. When raising the defence of loss of control, Challen argued that the new psychiatric evidence proved that the victim had spent years provoking the defendant to a point where she had lost her self-control and felt the only way out of escaping the abuse would be to murder her husband. Sally Challen's appeal was allowed with the admission of the new psychiatric evidence and a retrial order. The murder conviction had been quashed and a plea of manslaughter on the grounds of diminished responsibility had been accepted by the court.

The notion of coercive control is governed by the definition provided by sociologist Evan Stark. Stark interprets coercive control as a pattern of behaviours that are intended to undermine and threaten a victim's autonomy. This is typically carried out through the micromanagement and regulation of a victim's everyday normal behaviours, which will often lead to a form of punishment if disobeyed.⁷⁷ For a victim to endure coercive and controlling behaviours, it often leads to the victim's psychological welfare becoming significantly affected. The severity of the psychological welfare being affected is dependent on the nature of the abuse as well as the extent of it, and how well an individual is able or has learnt to cope with it.⁷⁸ A victim may begin to feel emotions such as helplessness or terror, surrendering their ability to be able to take control of their lives.⁷⁹

With the acceptance of coercive control being allowed in the defences of diminished responsibility in the Sally Challen appeal, the courts widened the provisions of the Coroners and Justice Act 2009 further for it to become more accessible for battered women. Prior to the appeal, the Crown Prosecution Service provided guidance for coercive control;

*“Controlling or coercive behaviour can be overlooked as victims might be seen as colluding or consenting to the behaviour. In some circumstances the victim may not be aware or be ready to acknowledge, least of all be ready to report, that they are being abused. Do not assume that compliance, dependence, denial and other responses are collusive. Rather, these reactions might be better understood as ways of coping or adapting to the abuse.”*⁸⁰

⁷⁵ R v Challen (Georgina Sarah) [2019] EWCA Crim 916

⁷⁶ Vanessa Bettinson. Aligning Partial Defences to Murder with The Offence of Coercive or Controlling Behaviour. J.Crim. L.2019, 83 (1), 71-86

⁷⁷ E Stark, Coercive Control: how Men Entrap Women in Personal Life (OUP, London 2007)

⁷⁸ V Bettinson “Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?” (2016) 3 Crim LR 165.

⁷⁹ J Herman, Trauma and Recovery (Basic Books, New York 1997), 34.

⁸⁰ Crown Prosecution Service Legal Guidance, Controlling or Coercive Behaviour in an Intimate or Family Relationship (30 June 2017) Part 7.

The guidance provided by the Crown Prosecution Service ultimately widens the scope of what can be perceived as domestic abuse. The Coroners and Justice Act 2009 did not accomplish what had initially been suggested by the Law Commission for it to accomplish. Albeit, there are some aspects of the legislation that do offer protection and shelter for battered women, there are still yet aspects of it that put battered women at a disadvantage.

The law surrounding battered women has undergone various changes throughout the years. With it beginning as a partial defence of provocation that would not have been available to abused women whom acted out in fear of further violence and seeing these women being convicted of murder. Whilst their male counterparts received convictions of manslaughter on the grounds of provocation for absurd provocative acts that a normal person would not have reacted to in the same manner, as demonstrated in the case of Thomas Corlett in the year 1987.

Following a surge of cases in the 1990's regarding battered women, and seeing a rise in cases of women needing protecting under the law it became apparent to the courts that a desperate reform in law and attitude was necessary for these women to be equally represented in courts as male defendants have been in the past. Recognising that battered women were not going to react instantly after a provocative act but rather wait till their abusers were vulnerable, in fear of more violence being inflicted upon them, was a small but very necessary step in the right direction towards a reform, which eventually led to the Coroners and Justice Act 2009.

The issues with the current law are that despite the 'suddenness' requirement being abolished as a means to extend the law to battered women, this abolishment had been replaced with 'loss of self-control'. This requirement has been noted to be illogical and likely to create problems when put forth to a jury to interpret as time can still be a relevant factor.⁸¹ As well as this there is also the problem as to whether or not the objective test is one to be used when dealing with defendants suffering from battered woman syndrome as there women are not women of sound mind. So far there has been good progress in the area of law surrounding battered women, but there has not been nearly enough. The provisions of the new legislation is still flawed and still has the danger of resulting in miscarriages of justice if not further reformed.

⁸¹ Blockley, C. (2014) 'The Coroners and Justice Act 2009: '(A)Mending' the Law on Provocation?' Plymouth Law and Criminal Justice Review,6, pp.127-147

Bibliography

Cases

- Duffy [1949] 1 All ER 932
- Holmes v DPP [1946] A.C 588
- DPP v Camplin [1978] Q.B 254 CA.
- Rex v Lesbini [1914] 3 K.B. 1116 CCA.
- DPP v Camplin [1978] Q.B 254 CA.
- R v Thornton [1992] 1 All E.R 306 CA
- R v Lavalley [1990] 1 S.C.R 852
- R v Thornton [1992] 1 All E.R 306 CA (118)
- R v Ahluwalia (Kiranjit) [1992] 4 All E.R. 889
- Newell (1980) 71 Cr App R
- McGregor [1962] NZLR 1069.
- R v Rossiter (Ethel Amelia) (1992) Cr. App R. 326
- Bullard v R. [1957] A.C. 635
- R v Humphreys [1995] 4 All ER 1008
- Luc Thuet Thuan [1997] AC 131
- A-G for Jersey v Holley [2005] 2 AC 580
- R v Challen (Georgina Sarah) [2019] EWCA Crim 916

Journal Articles

- Elizabeth Kenny. Battered Women Who Kill: The Fight Against Patriarchy. 13 UCL Jurisprudence Rev. 17 (2007)
- Susan Edwards Justin Devlin's Legacy: Duffy – a battered woman “caught” in time. Crim L.R. 2009, 851-869
- Amanda Clough Battered Women: Loss of Control and Lost Opportunities. 3 J. Int'l & Comp.L. 279 (2016)
- Graham Virgo. “Defining Provocation”. The Cambridge Law Journal, Vol. 58, No.1, 1999, pp 7-10
- Aileen McColgan, In Defence of Battered Women who Kill, 13 OXFORD J. LEGAL, Stud. 508 (1993).
- Rebecca Bradfield, “Women Who Kill: Lack of Intent and Diminished Responsibility as the Other ‘Defences to Spousal Homicide’” (2001) 13 Current Issues Criminal Justice 143.
- Celia Wells, ‘Domestic Violence and Self-Defence’ (1990) 140 N.L.J
- Donald Nicholson and Rohit Sanghvi. Battered Women and Provocation: The Implications of R v Ahluwalia Crim L.R. 1993, Oct, 728-738
- Alix Kirsta, Deadlier than the Male: Violence and Aggression in Women (London: HarperCollins, 1994)
- R. Emerson Dobash and Russell P. Dobash, “The Nature and Antecedents of Violent Events” (1984) 24 B.J. Crim. 269, 278-9.
- Donald Nicholson and Rohit Sanghvi. Battered Women and Provocation: The Implications of R v Ahluwalia Crim L.R. 1993, Oct, 728-738
- Aileen McColgan, In Defence of Battered Women who Kill, 13 OXFORD J. LEGAL, Stud. 508 (1993).

- Jeremy Horder. Provocation's Characteristic Difficulties: R v Humphreys [1994] 4 All E.R. 1008; Worcester College Oxford
- Susan Edwards Battered Woman. In Fear of Luc's Shadow. Denning Law Journal 12 Denning L.J.
- Alan Norrie. The Coroners and Justice Act 2009. Partial Defences to Murder (1) Loss of Control. Crim L.R. 2010, 4, 275-289
- Alan Norrie, "The Structure of Provocation" (2001) 54 C.L.P. 307.
- Helen Power. Provocation and Culture. Crim L.R. 2006, Oct 871-888.
- Amanda Clough Loss of Self-Control as a defence: the key to replacing provocation. J. Crim L. 2010, 74 (2) 118-126.
- S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74(3) Journal of Criminal Law 223.
- BJ Mitchel, 'Years of Provocation, Followed by a Loss of Control' in Lucia Zedner and Julian V Roberts (eds), Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth (Oxford University Press, 2012) 122
- Lynn Ellison Coercive and Controlling Men and the Women Who Kill Them. Wolverhampton Law Journal
- Blockley, C. (2014) 'The Coroners and Justice Act 2009: '(A)Mending' the Law on Provocation?' Plymouth Law and Criminal Justice Review, 6, pp.127-147
- Carol Whitey. Loss of Control, Loss of Opportunity? Crim L.R. 2011, 4, 263-279
- Mackay, R., and Mitchell, B., 'Loss of Control and Diminished Responsibility: Monitoring the New Partial Defences', (2011) 3 Archibold Review 5 at p.6
- Vanessa Bettinson. Aligning Partial Defences to Murder with The Offence of Coercive or Controlling Behaviour. J.Crim. L. 2019, 83 (1), 71-86
- E Stark, Coercive Control: how Men Entrap Women in Personal Life (OUP, London 2007)
- V Bettinson "Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?" (2016) 3 Crim LR 165.

Reports

- Law Commission, Partial Defences to Murder, Consultation Paper No 173 (London, The Law Commission, 2003)
- Law Commission, Partial Defences to Murder (2004), Law Com. No.290
- Law Commission Consultation Paper. A New Homicide Act for England and Wales? (2005, No. 177)
- Law Commission, Murder, Manslaughter and Infanticide (2006), Law Com. No. 304
- Ministry of Justice, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law (2008), Consultation Paper, CP No. 19/08
- Ministry of Justice, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law – Summary of Responses and Government Position, Response to Consultation CP(R) (19/08) (2009)
- Crown Prosecution Service Legal Guidance, Controlling or Coercive Behaviour in an Intimate or Family Relationship (30 June 2017) Part 7.

Books

- The Battered Woman Syndrome. 1979. Lenore E. Walker.
- J Herman, Trauma and Recovery (Basic Books, New York 1997), 34.

Newspaper Articles

- BBC News. Spotlight on Domestic Abuse Laws. 29th July 2008.
- The Independent: Trial Forced Plight of Battered Wives into The Open: Heather Mills: 30th May 1996
- The Guardian. And bad character is...? 'As 'good character' seems a factor lower in sentencing, British law is still failing women with violent partners. Cath Elliot. 10th September 2007

Legislation

- The Homicide Act 1957
- The Coroners and Justice Act 2009
- The Serious Crime Act 2015