

Excessive warranted emotional killing: proposing a new partial defence following an evaluation of the Coroners and Justice Act 2009 reform

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Law PhD Thesis

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August 2015

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BIRMINGHAM

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ABSTRACT

The common law partial defence of provocation for murder was abolished and replaced by a new defence, loss of control, in the Coroners and Justice Act 2009. The thesis evaluates the reform with an analytical approach by looking at its success in resolving the problems identified with the pre-2009 law, in particular the defence being used as a platform for male violence against women and victims of domestic violence and abuse struggling to rely on the defence, and, also, looking at how the key areas of the defence are dealt with and how they ought to be framed: rationale, definition of provocation, objective element and subjective element. Through evaluating the reform many aspects are found to be deficient, including the retention of the loss of self-control concept and the sexual infidelity exclusion, and a proposal is set out which seeks to address the main problems and make the defence effective. Specifically, two measures are advanced which tackle key concerns: a reliance on contextual evidence to support the defence in cases where the defendant was the victim of domestic violence and the use of presumptions against provoked killers in order to restrict the defence.

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INTRODUCTION

By the time the Law Commission was asked to report on reforming the partial defence for murder of provocation not only was the defence's ability to operate effectively in doubt but its foundations were being legitimately questioned. The Coroners and Justice Act 2009 implemented a reform of this area by abolishing the provocation defence and replacing it with the loss of control defence. There were two main reasons why reform was necessary: firstly, the defence needed to be restricted for those who killed in anger, particularly men killing their partners whilst citing reasons connected to possessiveness and jealousy as the provocative conduct, and, secondly, there was a need for the partial defence to be more open to excessive fearful killers, particularly women who killed their abusive partners. It is only possible to identify whether the Coroners and Justice Act 2009 is a success in resolving the problems with provocation if first those problems with the pre-2009 defence are fully appreciated, then it is possible to evaluate the reform and outline improvements based on this analysis. Whilst the 2009 Act improves various aspects of the defence this thesis will also detail where it does not satisfy the aims of the reform and a proposal will be suggested which would more effectively deal with these issues by introducing new measures to tackle these two forces for the reform.

The Homicide Act 1957 had previously given a legislative framework to the common law defence, albeit making changes which would prove to be significant. The provocation defence, if successful, allowed D to be liable for manslaughter instead of murder if he was provoked into losing his self-control and a reasonable man, later reformulated as the ordinary person, would have done so too. The new loss of control defence instead permits a partial defence where D's loss of self-control was brought about by a trigger, a fear of serious violence and/or a provocation-type scenario, and an ordinary person may have acted as D did. The 2009 reform makes specific changes to various elements of the defence, some of this is in line with how the defence was interpreted since the 1957 Act. However, the key points with the reform are that it allows for fear of serious violence, as well as provocation, to be a valid trigger for D losing his self-control, relying on the provocation trigger is much more difficult as it requires D to meet a warranted emotion standard, sexual infidelity must be disregarded whilst making the determination

over whether the trigger is satisfied and there is greater scope for the trial judge to rule out the defence.

At the core of the thesis is to find the partial defence's true rationale and then go about exploring the elements of the defence from this basis. A coherent approach is required in order for the defence to operate effectively but, also, to demonstrate that it still is deserving of a place in the criminal law. Put briefly, the partial defence rests on D experiencing an emotion which made him act excessively but that this stemmed from a situation where it was understandable that D got emotional and his actions were consistent with this. The thesis will look at justifications and excuses as it is possible to identify a framework to explain how provoked anger and fear of violence are appropriate emotions for the defence to rest on and how the subjective and objective elements combine to give a legitimate foundation for the partial defence.

The thesis will demonstrate that a key component of the partial defence is to appropriately label conduct as provocative; it has meaning to describe action as provocation to kill and provide a partial defence, for instance, if V leaves a relationship D should not be able to rely on this as a valid stimulus for him getting angry and killing as V's conduct is normal behaviour. The provocation defence is no longer simply about anger, fear is similarly an emotion which can cause D to act excessively but, also, somewhat understandably, therefore, a key aspect of the reform has been to set out a suitable partial defence rather than shoehorn cases into a defence which was designed for provoked anger. The thesis needs to look at why the common law defence has not been able to deal with fear of violence cases well and inspect how best to move forward with this. If the partial defence is going to centre on the two emotions, provoked anger and fear, both the subjective and objective elements must be in line with this and the thesis must explore the functions of these tests and identify how best to test if D experienced the emotion and evaluate its legitimacy. Also, how the defence operates is of importance, in terms of what evidence is required for the jury to hear the case; owing to the nature of the defence and the sorts of questions it asks the correct balance between the role of the trial judge and the jury must be struck, the defence must not become a platform of unjust victim blaming but whilst the defence looks into the

sufficiency of the emotions, values of society over what constitutes valid provocation and ordinary behaviour requires the jury to be the arbiter on such matters.

In this thesis an analytical approach will be used to examine the partial defence. Through a discussion early on of the development of the defence and a look at the various approaches to each of the key areas a broad outline of how the defence ought to be formulated will be achieved and then through the evaluation of the reform process it will be determined how best the specific provisions of the partial defence could be put in line with the broad aims of the reform and the underpinnings of the defence. This thesis, after initially looking at the development of the defence (Part I), will set out how the key areas ought to be made up (Part II) and use this discussion as a benchmark so that the reform can be evaluated (Part III) and then a more suitable defence will be proposed (Part IV).

Part I will look into how the defence developed from its origins so it is possible to appreciate and put into perspective what the problems were with the pre-2009. Chapter 1 explores the pre-1957 defence and demonstrates how the core elements and issues of the defence can be tracked throughout its history. Chapter 2 looks more specifically at how the provocation defence was interpreted after the 1957 Act and why this meant that legislative reform became necessary. Part I finds that the changes which took place with the introduction of the loss of self-control element, the reasonable man test and the 1957 Act were particularly significant as these were events which dramatically shaped the pre-2009 law and became a source of criticism.

Part II is set out into four chapters, each chapter looking at an individual issue; through the course of examining these areas a critique of the pre-2009 law is made and there are suggestions for how each individual issue, thereby the defence, ought to be reformed. Chapter 3, after looking at various approaches, identifies the true rationale of the provocation defence as being partial excuse and this is of much importance as all the subsequent findings stem from this outlook. Chapter 4 explores the sufficient evidence test, thereby examining the requirements for the defence to reach the jury and the role of the trial judge, finding that there was an insufficient filter in this process and

suggests how the correct balance is to be found between raising the bar and restricting the defence. Chapter 5 looks at how the evaluative tests ought to be formulated and how this marries up to the rationale; much of the discussion rests on how far D's own circumstances and characteristics should be ingrained into the evaluative test so the jury can contextualise events and assess if D's behaviour was ordinary in the circumstances. Chapter 6 identifies how the subjective element ought to be formulated by first setting out its function and then evaluating various subjective states, such as the loss of self-control concept, to identify which one is the most appropriate. Part II is therefore where the various possible approaches in these key areas are analysed and the judgements made in this section are the basis for the evaluation of the reform and the foundation for the proposal which is set out.

Part III inspects the Law Commission's proposal (Chapter 7), the Ministry of Justice's response to that proposal (Chapter 8) and the reform which ultimately took place in the 2009 Act (Chapter 9). The benefit of looking at these proposals in this manner is that it is possible to see how the defence developed over the course of the reform process and it helps the understanding of the purposes behind the specific provisions of the 2009 Act. An analysis of the various proposals gives an opportunity to discuss whether the 2009 Act was successful in resolving the problems with the defence, which were outlined in Part II, and then this gives a platform to put forward a proposal which is more effective, for example, in restricting the defence in provoked-anger cases and allowing victims of domestic violence and abuse to have a more fitting partial defence. Part IV, therefore, looks at how best to resolve such key issues and sets out how the provisions would work in practice (Chapter 10) before a proposal is set out which codifies all which has been supported across the thesis (Chapter 11).

Owing to the nature of the defence and the circumstances it covers this thesis will discuss many significant issues and this underlines how important the legal response to these cases is: setting the correct boundaries for a partial defence dealing with excessive killings involving anger and fear; the standards imposed and expectations placed on victims of domestic violence and abuse; the reasons used, such as a partner's sexual activity, homosexual advances or honour killings, to be the basis for being

provoked; the significance of gender bias in the legal standards, such as assessing whether D's reaction was ordinary; using the loss of self-control concept to determine if D was sufficiently emotional at the time of the killing; how those with an 'abnormal' capacity for self-control ought to be dealt with; the defence's relationship with other defences, such as diminished responsibility and self-defence, and the scope of these defences; the role of the judge and jury in making determinations on the sufficiency of emotion and behaviour. It is easy to appreciate the importance of evaluating the reform and then setting out a more preferable partial defence when considering the areas which it touches on.

PART I: THE PRE-2009 LAW

The partial defence of provocation has steadily been adapted since its origins and in Part I the history of the defence will be set out. The reform of partial defences which took place in the Coroners and Justice Act 2009 abolished provocation but there was a new defence which was put in place, loss of control, which is heavily based on provocation. Notwithstanding that the reformers sought to distance this new defence from provocation, there is no getting around the fact that loss of control adopts many of the tests and is based on similar principles to provocation. Chapter 1 will detail the provocation defence from around the seventeenth century, when it started to take shape, and Chapter 2 will explore the defence post-1957, thereby looking at the impact of the Homicide Act 1957.

CHAPTER 1

THE EARLY DEFENCE

In order to identify if the new partial defence has resolved the problems with provocation it is necessary to begin by looking at the birth of the old defence as there are important themes which will become apparent from the discussion in Part I and they carry through to the new defence. Firstly, provocation, and partial defences in general, exist because they are useful as they enable a distinction between murder and manslaughter and they are particularly necessary with the continuance of mandatory punishments for murder. Providing defences to those who intentionally kill will bring natural resistance, so partial defences must be sensitive to their function; the murder label and its mandatory punishment are there for certain intentional killings but allowance can be made for circumstances where this is not suitable.

Secondly, provocation "enjoys no canonical definition";¹ there are various ways to frame the defence and Part I exhibits that. Through the discussion of the defence it will be shown that there are three core elements: D must experience the genuine emotion (subjective element), the reason why D got emotional must satisfy the standards of the

¹ S.P. Garvey, 'Passion's Puzzle' (2005) 90 Iowa LR 1677, 1691

day (gravity test) and D must reach an expected level of behaviour (control test). The defence should constantly be under review as society's standards and expectations adapt and in order to work effectively these elements must correspond.

Thirdly, the purpose of this opening Chapter is to examine the development of the defence but by doing so it is evident that provocation has perpetual issues which cannot truly be settled; restricting the defence from dealing with certain types of cases, setting standards to reach, how to treat the impetuous people, ensuring the killing was 'hot blooded', delayed responses and where there is a range of emotions behind the killing are issues which all forms of provocation defences have to deal with suitably. The defence often requires tests which entail balance and, ultimately, the jury are left to apply the defence. Providing a consistent and clear defence has proven to be difficult and this is inevitable because of its nature. All the points raised above are themes which apply equally to provocation and the new partial defence, loss of control, so it is easy to see why this area of law remains controversial and problematic.

This Chapter will begin by detailing the early chance medley and provocation defences and show how they were heavily influenced by the definition of murder, mandatory punishments and the period in which they existed. The defence then slowly but drastically changed from being based on categories of adequate provocation to the reform which took place in the Homicide Act 1957.

Malice and Chance Medley

In the seventeenth century the provocation defence began to take a recognisable form. Parliament passed statutes and there were judicial decisions² which distinguished between murder and other forms of homicide and this distinction was based on the presence of malice aforethought:

² See J.F. Stephen, *A History Of The Criminal Law Of England* (MacMillan 1883, Volume III) 44-60.

"[H]omicide was finally divided into two main branches, namely, murder which is unlawful killing with malice aforethought, and homicide in general, which is unlawful killing without malice aforethought".³

Initially, malice included all intentional homicides whether premeditated or not.⁴ In order to restrict the use of royal pardons, which allowed killers to escape the death penalty, Parliament enacted a statute in 1390 to make murder an unpardonable felony;⁵ murder needed to be accurately defined and it was found to be a premeditated killing. The term "malice prepensed" was used in the statute and, broadly, a killing in heated blood was found to be outside this, therefore such killings remained pardonable.⁶ These developments helped to define murder and manslaughter and the distinction was made significant, in terms of murder's death penalty punishment, as a result. The *Sailsbury's Case* was the first reported manslaughter case. In that case D was unaware of a planned ambush and was deemed not to have killed with malice aforethought as he "took part suddenly" in the killing of V.⁷

With killings done in heated blood seen to be outside the scope of malice it meant that malice was equated not to intention any longer but "a notion of actual premeditation accompanied by actual ill-will"⁸ and Stephen stated that "for malice means nothing but wickedness" and that other interpretations of malice were incorrect.⁹ However, this created a problem as there were killings where mitigation was seen as unworthy but malice, under this definition, was not evident; for example, where D kills in heated blood

³ Ibid 45

R.B. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 Cal L Rev 133, 137: "The moral culpability of the defendant, therefore, provided the basis for drawing the distinction between murder and manslaughter."

⁴ J. Horder, *Provocation And Responsibility* (Oxford University Press, 1992) 6: "As it does now, this term at that time encompassed not only premeditated murder but all intentional killing, whether in cold blood or in hot blood."

⁵ Ibid 10-1

⁶ Ibid 12-3: Clergy pardons were restricted too and in 1547 the clergy could no longer pardon for murder, only manslaughter.

⁷ (1553) Plowd Comm 100

⁸ R. Singer, 'The Resurgence of Mens Rea: I – Provocation, Emotional Disturbance, and the Model Penal Code', (1986) 27 BCLR 243, 307

⁹ J.F. Stephen, *A History Of The Criminal Law Of England* 56

but it stemmed from trivial provocation. In order for these cases to remain under the scope of murder malice was implied and Horder cites Lambarde who stated that in these cases "this cannot be thought but to have bene done of a pretended purpose".¹⁰ So, even though they were hot-blood killings without premeditation they were included within murder because of implied malice¹¹ and there was a presumption of malice.¹² The distinction between murder and manslaughter was meant to represent circumstances where malice was successfully removed¹³ and chance medley was able to satisfy this.¹⁴

Stephen stated that many of the cases which fell under chance medley could come "very near to" being described as cases of provocation "and in fact must have included most of the cases of what we should describe as provocation."¹⁵ This highlights that chance medley and provocation are different defences but there is an overlap in the scenarios which they cover. Provocation can be described as being a killing in the heat of passion but it requires that this passion is brought about by adequate provocation, whereas chance medley merely is based on a sudden quarrel:

"The envisioned chance medley fact pattern starts with a verbal argument between A and B, which escalates into use of non-deadly, and then deadly force. It is critical that both parties be equally armed and able to defend themselves. The paradigm is a barroom brawl."¹⁶

¹⁰ J. Horder, *Provocation And Responsibility* 16-7

¹¹ E. Coke, *Institutes of the Laws of England* (W. Clarke & Sons, 1817) 47: "[m]urder is when a man of sound memory ... unlawfully killeth ... with malice fore-thought, either expressed by the party, or implied by law".

¹² A. Ashworth, 'The Doctrine of Provocation' (1976) 35(2) *Cambridge Law Journal* 292, 292: "Killings were presumed to proceed from malice aforethought: if there was no evidence of express malice, then the law would imply malice."

¹³ M. Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736, Volume I): "inquired, what is such a provocation, as will take off the presumption of malice in him, that kills another."

¹⁴ J. Horder, *Provocation And Responsibility* 17: If "a sudden killing took place in hot blood, in anger, then this would [have] provide[d] the factual and moral foundation for a rebuttal".

¹⁵ J.F. Stephen, *A History Of The Criminal Law Of England* 59

¹⁶ R. Singer, 'The Resurgence of Mens Rea' 250-1: "This provoked killing slowly obtained the label of 'manslaughter'."

As a provocation defence is able to cover a wide range of circumstances chance medley therefore can be seen as, although not exactly, one type of provocation.¹⁷ An important part of chance medley was the suddenness of the reaction and temporal issues are something which the provocation defence struggles to deal with as somewhat delayed reactions in responding to being provoked can be evidence that D was not genuinely provoked but killed owing to another reason or at a point when it is expected that he ought to have calmed down. It is possible that common expectations for D to lash out spontaneously after being provoked are based on the kind of situations which chance medley covers and not the wider set of circumstances and emotions which provocation covers.¹⁸ The differences between chance medley and provocation were evident in the case of *Oneby*.¹⁹ D killed V in a duel in a public house, the case became not whether the duel was contested fairly but whether there was too much delay between the argument and the killing for it to fall under provocation.²⁰

How exactly provocation developed into being the basis for manslaughter instead of chance medley is not straightforward. Coke was influential in elevating chance medley into manslaughter and it became established that it was the *sole defence* which could rebut the presumption of malice.²¹ Singer discusses the influence of the legal commentators and a few key cases in developing provocation and even though they were significant in this development they may not have reflected the law's true position at that time.²² He states that the finding that the defence was based on heat of passion instead of chance medley and then the finding that heat of passion was limited to certain narrow categories was "expanding that rationale far beyond what Coke, and presumably

¹⁷ In the terms of the *Mawgridge* case, it would be similar to '(i) angry words followed by an assault' (n32-5).

¹⁸ Delay and the emotions in provocation will be discussed in 'Chapter 6 - Subjective Element'.

¹⁹ (1727) 2 Ld Raym 1485

²⁰ J. Horder, *Provocation And Responsibility* 29: Horder has stated that chance medley is bilateral, whereas provocation is unilateral.

²¹ R. Singer, 'The Resurgence of Mens Rea' 251: "the first articulation of the rationale of manslaughter is that a killing done upon chance medley is by definition not done with malice. Coke further emphasizes that a killing done 'on a sudden' or 'by chance' is done 'without premeditation'."

Also, at 258-9: "according to Coke, manslaughter was essentially a category of offense with the single fact pattern of chance medley – a killing during a fight in which both are armed, and where there was no prior malice on either side."

²² Ibid: 'I. Manslaughter and Provocation at Common Law - The Early Centuries'

the prior common law, would have allowed."²³ It can best be seen that chance medley was too narrow and that other circumstances needed to be recognised, this is what helped to shape the sort of provocations which would be permitted. As the provocation defence became the basis for manslaughter and extended its scope it meant that instead of chance medley it was heat of passion which was the source for removing malice:²⁴ the suddenness of a fight was replaced by passions stemming from appropriate anger.²⁵

The Early Provocation Defence

In the *Mawgridge*²⁶ case Lord Holt CJ summarised four categories which would be sufficient as provocation and five categories which would not be.²⁷ In line with modern law, Holt CJ viewed malice differently and saw that a provoked killer formed malice; malice was interpreted as merely meaning an intent to kill and when D was provoked he was still adjudged as having formed such intent.²⁸ Under Holt CJ's view the defence was no longer about rebutting the presumption of implied malice²⁹ but instead about showing that the killing was not grossly excessive: even though D was wrong to kill there was some proportion between the provocation and the retaliation.³⁰ The defence was therefore viewed as a partial justification.³¹

²³ Ibid 258-9

²⁴ Ibid 259: "The heat of passion made it impossible for the defendant to consider carefully. Because consideration was essential to premeditated malice, there could be no pre-existing malice, hence no murder."

²⁵ J. Horder, *Provocation And Responsibility* 29: "It was only after the demise of chance-medley manslaughter, therefore, that mitigation for *all* hot-blooded killings came to depend on the gravity of the provocation offered, rather than on whether or not the parties involved had fought on equal terms."

²⁶ (1707) Kel 119

²⁷ The four categories of provocation and some relevant cases are discussed below.

Ibid: (i) words alone, (ii) affronting gestures, (iii) trespass to property, (iv) misconduct by a child or servant, and (v) breach of contract.

²⁸ Ibid 124-30

²⁹ (n8-14)

³⁰ *Mawgridge* 131: "this blow though not justifiable by law, but is a wrong, yet it may be manslaughter".

³¹ See (n46-9) and 'Chapter 3 - Rationale' (n46-62) for discussions of partial justifications.

(i) angry words followed by an assault

In *Watts v Brains* V made a rude gesture to D, this was adjudged to be insufficient and was described as "such a slight provocation".³² The later case of *Sherwood*³³ demonstrates that something equivalent to a "violent blow" was necessary:

"It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provocation by blows will not have this effect".³⁴

The judgment went on to state that if the blow is accompanied by words "calculated to produce a degree of exasperation" equal to a "violent blow" it is possible to find manslaughter. Therefore, there was freedom to take both the words and the conduct of the provoker into account to decide on the adequacy of the provocation. When discussing the reform of provocation in the Homicide Act 1957 the fact that words alone could not be relied upon will be a significant point as reversing this position was one of the aims of Parliament.³⁵

(ii) the sight of a friend or relative being beaten

In *Royley's Case*³⁶ the provocation was that D's son had been beaten by another. D did not see the attack and there was a long delay between being told by his son and the killing as D travelled a long distance in order to find V. D successfully claimed manslaughter. This form of provocation and the category discussed below are important as they indicate, even at this early point, that, contradictory to later statements, D himself

³² (1600) Cro Eliz 778

³³ (1844) 1 C & K 556

³⁴ Ibid 557

³⁵ 'Chapter 2 - The Post-1957 Defence' (n3-5)

³⁶ (1612) 12 Co Rep 87. This case will be referred to below, see (n93 & n120), as it is about a delayed reaction and tests the idea of heated passion and genuine emotion.

did not need to be the subject of the provocation but could take offence at conduct directed at others.³⁷

(iii) the sight of a citizen being unlawfully deprived of his liberty

In *Hopkin Huggett*³⁸ D killed V, who was pressing men into service. It was found that to rescue a person who is deprived of his liberty, even if it a stranger who is not seeking to be rescued, merited this defence "for common humanity sake".³⁹ The defence succeeded in *Tooley*, where a woman was taken into custody on illegal grounds, even though D did not know that the person which he had rescued had been arrested unlawfully, this is best, but not wholly, explained as being consistent with the justificatory nature of Holt CJ's explanation of the defence.⁴⁰

(iv) the sight of a man committing adultery with the accused's wife

In *Mawgridge*⁴¹ Lord Holt CJ stated that

"jealousy is the rage of a man, and adultery is the highest invasion of property ... If a thief comes to rob another, it is lawful to kill him. And if a man comes to rob a man's posterity and his family, yet to kill him is manslaughter. So is the law though it may seem hard, that the killing in the one case should not be as justifiable as the other."⁴²

³⁷ See (n90 & 96).

³⁸ (1666) Kel 59

³⁹ Ibid 60

⁴⁰ (1709) Holt KB 485: "If a man is oppressed by an officer of justice, under a mere pretence of an authority, that is a provocation to all the people of England."

C.f. English law, however, looks into D's motivation for justificatory defences, see *Dadson* (1850) 4 Cox CC 358, so D's action cannot be justified by accident.

⁴¹ (1707) Kel 119: "When a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter".

⁴² In the same vein, in *Maddy's Case* (1617) 1 Vent 158, 159 D killed in these circumstances, it was stated that "[it] was but manslaughter, the provocation being exceeding great".

Howe discusses this category of adequate provocation and details how the use of sexual infidelity as providing a basis for provocation was restricted, but mostly for where the husband was merely suspicious.⁴³ A condition on this category was that there had to be "ocular inspection of the act" for the provocation to be valid.⁴⁴ Howe states that an "oft-overlooked footnote" from *Mawgridge* was that the finding of the existence of this category was with "great benignity", meaning that, somewhat contrary to the above quotation from the case, this category of provocation was viewed then as being generous for husbands.⁴⁵

Holder describes Holt CJ's position in *Mawgridge* as finding "a kind of continuum or spectrum of (lack of) moral justification".⁴⁶ At one end, a killing remained as murder after finding that there was no genuine provocation (for example, self-induced provocation). Moving along, then there was trivial provocation, the retaliation grossly exceeded the affront. Then, the four categories of provocation were meant to establish that D's reaction, even though excessive, was not so far from the mean that mitigation was appropriate.⁴⁷ At the far end, Holt CJ then discusses justifiable retaliation to provocation; despite 'misconduct by a child or servant' being a category of insufficient provocation⁴⁸ the example he gives is that of the killing of a servant or child in the course of correction.⁴⁹

⁴³ A. Howe, "Red mist' homicide: sexual infidelity and the English law of murder (glossing Titus Andronicus)' (2013) 33 Legal Studies 3, 407, 418-21

R v Matthias Kelly [1848] 175 ER 342: "to take away the life of a woman, even your own wife because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder".

⁴⁴ *Pearson's Case* [1832] 2 Lewin 216. *Maddy's Case* was decided on this basis (n93).

⁴⁵ A. Howe, "Red mist' homicide" 419: "[T]he Court stated that at law 'a man is not justifiable (sic)' in killing a man he 'taketh in adultery with his wife' for this 'savours more of sudden revenge, than of self-preservation', adding however, that this law 'hath been executed with great benignity'. Even so, a doubt had been registered about a vengeful motive in such cases right from the start."

⁴⁶ J. Holder, *Provocation And Responsibility* 55

⁴⁷ At 'Chapter 3 - Rationale' (n49-52), when discussing the rationale of provocation and partial justifications, this will be explored in greater detail.

⁴⁸ (n27)

⁴⁹ *Mawgridge* 132-3

Ashworth states that the categories were based on "the unlawfulness of the deceased's conduct" as they relied on assaults and adultery.⁵⁰ Horder, on the other hand, states that the categories were concerned with honour.⁵¹ Honour was important and "[m]en of honour were expected to retaliate in the face of an affront", the greater the affront the more violent the response.⁵² Honour does not simply cover D feeling aggrieved, a part of the honour was acting out the retaliation. Horder states that the "retaliation would, as it were, 'cancel out' the affront" and "[h]e was expected to resent the affront, and to retaliate in *anger*."⁵³ By D retaliating in the 'correct' manner to an affront then it turns the violence into an act of virtue: "the passionate man is led to act virtuously rather than 'viciously'".⁵⁴ Reason drives both the anger and the response.⁵⁵ At this point, the role of reason is important to highlight as the defence drastically alters as it develops.⁵⁶

What is clear from this is the importance of an adequate affront and that this linked to standards of the day. The four categories may be viewed as arbitrary but they highlight that the defence was intended to reflect that *only* these provocations ought to be allowed; they were raised above all else and no concession was available to those who were provoked outside of them: "[A]s it is murder to kill without any provocation, so if the provocation be slight and trivial, it is all one in the law, as if there were none."⁵⁷

The necessary requirements for provocation which exist today were shaped by the seventeenth century defence;⁵⁸ the subjective element, the gravity test and the control test all existed within the early defence. The control test compares D's behaviour to an

⁵⁰ A. Ashworth, 'The Doctrine of Provocation' 294. The third category is described as being somewhat "anomalous" but still could be explained by being concerned with wrongful conduct.

⁵¹ J. Horder, *Provocation And Responsibility*, 24-5

⁵² Ibid 26-7

⁵³ Ibid 27

⁵⁴ Ibid 41

⁵⁵ Ibid 40: "with the guiding influence of reason, passions could assist men to act virtuously."

⁵⁶ At 'Chapter 6 - Subjective Element' (n29-35) reason in D's response will be discussed as it is at odds with loss of self-control element, the concept which the defence would later be build on.

⁵⁷ *Lord Morley's Case* (1666) 6 St Tr 770, 780

A. Ashworth, 'The Doctrine of Provocation' 295: "There was more than a hint that people *ought not* to yield to certain types of provocation, and that if they did the law should offer no concession to them."

⁵⁸ Referred to above (n1) and these requirements will be greatly discussed throughout Part II.

expected level of behaviour, however at this time that standard, rather than being an ordinary person, was a man of honour. As the reliance on the four categories suggests, the gravity test was a key component, however the defence only operated where D killed in heated blood, it must have been shown that there was no premeditation. Ashworth's⁵⁹ view of *Maddy's Case*⁶⁰ shows that even "where the provocation was of the highest degree" there was a need for the setting of heated blood. In that case Justice Twisden stated that the defence would have been unavailable to D if he had made a prior declaration that he intended to kill. Horder describes the provocation defence which existed at this time as being concerned with "anger as outrage":⁶¹ it was necessary for it to distinguish between provocation and killings which stemmed from outside heated blood and it required provocation which was limited to the four categories and deemed as a serious affront.

The Reasonable Man and Loss of Self-Control

The necessary requirements developed through the common law into the *reasonable man* test (containing both the gravity and control tests) and the *loss of self-control* requirement and this would help to transform the defence into being one which was more encompassing and introspective. These changes also significantly altered the rationale of the defence. An important part of Holt CJ's understanding of provocation in *Mawgridge* was that the defence mitigates as D's response, although wrong, was close to the mean; the defence from his outlook was about proportion, it was excessive to kill but not overly excessive. To fully understand this it is important to appreciate that for Holt CJ malice meant intent to kill and not premeditation combined with ill-will towards V,⁶² as had previously been relied upon⁶³ and what would later be relied upon again. According to Holt CJ, therefore, being provoked does not remove malice, the reason for mitigation was this link to proportionality.⁶⁴ When the defence then became centred on a partial excuse, with the reliance on a loss of self-control, rather than partial justification

⁵⁹ A. Ashworth, 'The Doctrine of Provocation' 294

⁶⁰ (n42)

⁶¹ J. Horder, *Provocation And Responsibility*, 42

⁶² (n28-31)

⁶³ (n8-14)

⁶⁴ The role of malice and intent becomes important again (n70-1).

the basis of the defence clearly shifted and became about human frailty to provocation instead of killing out of honour.

Horder outlines how the development of the loss of self-control requirement significantly altered the understanding of the defence from the late seventeenth century to the nineteenth century.⁶⁵ In *Walters*⁶⁶ provoked anger was described as "an ungoverned storm" and in *Oneby*⁶⁷ the defence was described in a manner that draws it close to temporary insanity:

"it must be such a passion as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office ... the Law will no longer ... lessen [the offence] from murder to manslaughter."

Horder states that the defence demanded that "reason [would] ... be incapable of exercising control over actions until the passion abates" and that this is very different from the basis of the defence in the seventeenth century as this was founded on reason and judgement determining anger and the response.⁶⁸ The case of *Fisher*,⁶⁹ where D killed a man he suspected of abusing his son, highlights how much the defence altered: D claimed that by killing V he had done what any man in England would have done, but it was argued along the lines of a loss of self-control, that he was temporarily not in control of his actions.

How the reasonable man test developed was a result of the defence being incoherent. Previously, the provocation defence was concerned with rebutting the presumption of implied malice by finding that if the provocation was a severe affront and there was

⁶⁵ J. Horder, *Provocation And Responsibility*, 'Chapter V – The Rise of Loss of Self-Control'

⁶⁶ (1688) 12 St Tr 113

⁶⁷ (1727) 2 Ld Raym 1485

R v Selten (1871) 11 Cox CC 674, 675: "throw a man's mind off its balance".

R v Kelly (1848) 2 C & K 815: "he could not resist it".

⁶⁸ (n51-56). See J. Horder, *Provocation And Responsibility*, 75

⁶⁹ (1837) 8 C & P 182. The case is further discussed (n92).

heated blood then this demonstrated no malice and the offence was manslaughter instead of murder.⁷⁰ Holt CJ's basis for provocation did not involve malice but rather showing that D killed with a degree of proportion and this was the key to mitigation.⁷¹ However, rebutting implied malice then became the centre for provocation again. Malice was again treated as requiring premeditation and ill-will towards V and not merely an intention to kill.

The defence developed into being based on D *temporarily but completely* losing his self-control and his act of retaliation being deprived of reason.⁷² The four categories remained as evidence or a presumption of the sort of thing that would produce such a loss of self-control.⁷³ It was viewed that *only* such provocation could cause a loss of self-control and a distinction could be made between those who had lost their self-control and those who killed owing to trivial provocation. Foster stated that when D killed because of a loss of self-control stemming from gross provocation it showed that the killing was down to "*human frailty*", but a killing from trivial provocation, where it was seen that no loss of self-control was possible, shows a "*heart bent upon mischief*".⁷⁴ Rebutting implied malice was the basis for the defence and the loss of self-control requirement functioned through rebutting it because of the fact that D killed whilst not being in control of his reason; this ignores the reality that D could lose his self-control owing to trivial provocation or from provocation outside the four categories. Horder states that there was a use of "fiction" to maintain the defence in this state as on this understanding any loss of self-control, no matter what it stemmed from, ought to have been able to rebut the presumption of implied malice as it would have produced the same impact on D.⁷⁵

⁷⁰ (n8-14)

⁷¹ (n28-31)

⁷² It is important to note the difference between how the loss of self-control was being defined then, D completely losing his self-control, and how it was defined more recently, the partial loss of self-control. See 'Chapter 6 - Subjective Element' (n11-6).

⁷³ J. Horder, *Provocation And Responsibility*, 89

⁷⁴ Cited at *ibid* 90

⁷⁵ *Ibid* 94

To confront this problem the defence then became focused on losses of self-control which stemmed from any form of provocation; the jury was to decide this and the reasonable man test was used.⁷⁶ Keating J's judgment in *R v Welsh* found that there is an expectation that D ought to maintain his self-control when subjected to trivial provocation, it was seen that D does not legitimately lose his self-control but "that such people give way to their passions, indulge them rather than conform their actions".⁷⁷ This is different than before as instead of being concerned with ungoverned storms of passion the basis was to do with weakness of will;⁷⁸ allowing for the fact that a loss of self-control could stem from a source other than from the categories of adequate provocation, the distinction between murder and manslaughter is then found by demanding a *reasonable* (or an *excusable*) *loss of self-control*. Under this basis of the defence D does not "follow the inclinations of a less compelling emotion",⁷⁹ D does not do the right thing as he does not restrain himself from killing his provoker:

"though the law condescends to human frailty, it will not indulge to human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions".⁸⁰

Provocation developed from providing a defence to those subjected to affronts of their honour, to those who fully lost their self-control and were no longer guided by reason and then to those who reasonably lost their self-control. This journey altered the rationale of the defence, the circumstances which the defence covered and how the

⁷⁶ A. Ashworth, 'The Doctrine of Provocation' 298: "Judges began to leave this question of degree to the jury, and it was natural that the judges should call upon that jack-of-all-trades, the concept of the reasonable man, to express the required degree of seriousness."

⁷⁷ *R v Welsh* (1869) 2 Cox CC 336

⁷⁸ J. Horder, *Provocation And Responsibility*, 98

⁷⁹ *Ibid* 98. See 'Chapter 6 - Subjective Element' (n17-26) as this fits into the explanation of loss of self-control, that D acts with desire to retaliate rather than his better judgement.

⁸⁰ *Kirkham* (1837) 8 C & P 115, 119. The judgment goes on to state that grave provocation can "stir up a man's blood [so] that he can no longer be his own master ... in a moment of overpowering passion, which prevented the exercise of reason." This is somewhat in line with the *Walters* and *Oneby* cases (n66-7). This shows that even though the defence no longer allowed for reason in the act of retaliation it was more understanding of what could cause a loss of self-control.

conduct of the provoked and provoking party were viewed. It was the role of reason which had most significantly altered; previously, reason drove the entire defence, however, the position following the implementation of the loss of self-control element was that reason could only fuel the emotion and it could not play any part in the response.

Limitations in the common law provocation defence

Before the Homicide Act 1957 was enacted a number of common law limitations were developed, this mainly involved preventing the question of provocation from being considered by the jury. An alteration on this position was intended when drafting the 1957 Act as it was perceived that the provocation defence was too narrow and "the judges rode the doctrine very hard".⁸¹ Therefore, even though the jury were given the role of arbiters of the defence through the reasonable man test the judge still held a grip on whether the defence was even permitted to be considered.⁸² As will be outlined, in the common law there were four categories which developed to limit the defence: *provocation must be done by V to D, words alone were not usually sufficient, there was no cooling-off period allowed and aspects of the reasonable man test*. It is also important to note how these categories were dealt with following the implementation of the 1957 Act, discussed in Chapter 2, as they were assimilated into the gravity and control tests.

In the first half of the twentieth century a series of judgments discussed the role of the judge and jury (the *sufficient evidence test*). *Hopper* was the most influential case on whether the defence should go to the jury and it was stated that there merely had to be

⁸¹ P. Brett, 'The Physiology of Provocation' (1970) Crim LR 634, 634-5: "provided too many instances in which the judges rode the doctrine very hard and prevented the jury from considering clear cases of killing in rage as being possible manslaughter."

M.J. Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 JCL 216, 220: "The enactment of the Homicide Act 1957 ... permitted an escape from the strait-jacket imposed by the common law's prescription of categories of conduct which could amount to provocation."

See 'Chapter 2 - The Post-1957 Defence' (n7-11)

⁸² M. Spencer, 'Provocation and the Reasonable Man', (1978) New Law Journal 615: "At common law these limitations were of primary importance, as the judge was not required to leave the question of provocation to the jury if he considered that it was not available to the accused".

"some evidence – we say no more than that".⁸³ The cases of *Clinton* (1917),⁸⁴ *Ball* and *Hall* give further insight into the sufficient evidence rule at this time. In *Ball* it was not thought that the issue would succeed if it went to the jury but it still ought to have been considered by them as there was some evidence.⁸⁵ In the same vein, in *Hall* manslaughter was substituted for murder as it was "impossible to say" what the verdict of the jury would have been.⁸⁶ The approach adopted at the beginning of the twentieth century for the sufficiency of evidence was therefore quite relaxed as the judge just had to be convinced that there was some evidence of provocation.

The issue of the "respective functions of judge and jury"⁸⁷ was discussed in *Holmes* in relation to whether the trial judge was correct in not leaving the question of provocation to the jury as he found that a confession of adultery was not sufficient as provocation. D's solicitor argued that the judge should let the jury hear the case:

"A judge should be very slow to take on himself to decide what a reasonable jury would find a reasonable man would do. The right of the accused to have his case determined by a jury should depend as little as possible on the personal views of a particular judge."⁸⁸

⁸³ [1915] 2 KB 431, 435: despite D stating that he was not angry at the time there was some evidence of provocation. Both parties were drunken soldiers and V was involved in a fight with D over a bottle of whiskey which D claimed V had stolen. Later, V refused to hand over his bayonet, he threatened D and whilst V was struggling with another D shot V.

⁸⁴ *Clinton* (1917) 12 Cr App R 215: was distinguished from *Hopper* as there was no evidence of provocation as, essentially, D's claim was that the killing was an accident: "We are not saying anything in conflict with the decision in *R v Hopper* ... This case is a different one for the reasons we have given. The defence never raised the question, but, what is more important, on the facts it cannot be said that the appellant has any grievance" (at 218). It was, therefore, implied that manslaughter could be considered even if it was not argued by the defence.

⁸⁵ *Ball* (1925) 18 Cr App R 149, 150: D's wife lied to him about where she was going. D followed her to a field where she was meeting another man, who was attempting to seduce her, and after an altercation D shot him. It was stated that "it would be ludicrous to suggest that in this country the knowledge that a man's wife has been debauched by another man is an excuse for shooting the offender."

⁸⁶ *Hall* (1930) 21 Cr App R 48, 55

Cf *Thorpe* (1925) 18 Cr App R 189: there were "words of reproach which were accompanied by pushing and jostling" (at 191), but "there was no duty on the judge to leave that defence to the jury" (at 192).

⁸⁷ *Holmes v DPP* [1946] AC 588, 596

⁸⁸ *Ibid*

However, this argument was not successful and the Privy Council's summing up of the *Holmes* decision in *Phillips* was correct, they interpreted *Holmes* as requiring the judge to make "a preliminary ruling" on the reasonable man question and if this was successful it then ought to go to the jury.⁸⁹ *Holmes* therefore took away the duty on the judge that was founded in *Hopper* to leave the issue to the jury where there was "some evidence" of provocation. As already alluded to, the reform in the 1957 Act was in response to this but the Act did influence all the limitations which existed in the common law provocation defence.

a) provocation must be done by V to D

In the *Duffy* judgment Devlin J stated that "[p]rovocation is some act, or series of acts, done by the dead man to the accused".⁹⁰ However, there were authorities which supported that the provocation did not have to be done to D (indirect provocation) and that the defence would still be available if it was someone other than V who was the provoker (misdirected retaliation).

Regan argues that there were authorities which showed that D could rely on the defence if he was indirectly provoked by an attack on a family member or, possibly, a friend.⁹¹ In the *Fisher* case⁹² there was no bar on the defence because of the fact that it was D's son who had been abused and D was merely informed about what had happened; D was therefore provoked indirectly by the wrong that was committed against his son.⁹³ Also, in *Harrington* Cockburn CJ was open for the defence to be applied in a case where D saw his daughter's husband assault his daughter.⁹⁴ Regan highlights that Cockburn

⁸⁹ *Phillips v The Queen* [1969] 2 AC 130

⁹⁰ [1949] 1 All ER 932

⁹¹ R.S. Regan, 'Indirect Provocation and Misdirected Retaliation' (1968) Crim LR 319

⁹² See (n69)

⁹³ The defence was not, however, available to D because he had not witnessed the event take place and this was a separate rule which was established in sexual infidelity cases to ensure that D killed in heated blood and not revenge. See (n44). Owing to the decision in the *Maddy's Case* the defence was not available if D had not witnessed the provocative event, in that case it was an act of adultery (n42 & 60).

C.f. In a similar case, *Royley's Case*, the defence stood even though D did not see the incident (n36).

⁹⁴ (1866) 10 Cox CC 370. The severity of the assault, however, was deemed insufficient.

CJ described this case as raising "a somewhat novel point."⁹⁵ It is possible, however, to see that two out of the four categories of adequate provocation outlined in the *Mawgridge* case by Lord Holt CJ could be described as cases of indirect provocation;⁹⁶ *the sight of a friend or relative being beaten* and *the sight of a citizen being unlawfully deprived of his liberty* are both cases where the provocation is not, in the words of Devlin J, above, "done by the dead man to the accused".

Two cases show that where retaliation was misdirected D could still successfully rely on the defence. In *Brown*⁹⁷ D killed a passer-by who he mistakenly believed to be one of the group which were provoking him and in *Gross*,⁹⁸ whilst aiming at her husband, D shot and accidentally killed another. However, in a subsequent case, *Simpson*,⁹⁹ the defence was denied as despite being provoked by his wife D killed his child. It was found that under the common law there was "no authority" to rely on to find that another could be the source of the provocation.¹⁰⁰

It is possible that the best way to reconcile *Simpson* and the *Duffy* judgment with the *Brown* and *Gross* decisions is to state that in the latter cases D killed whilst attempting to kill his provoker and in *Simpson* D was taking out his anger against another. Fontaine raised a similar point when discussing US provocation cases and found that there was a category of cases which could be labelled as "Unintentional Misdirection" and another category which could be labelled as "Knowing/Intentional Misdirection".¹⁰¹ This does raise the issue over the amount of rationality which D was expected demonstrate in these circumstances when at the same time the defence demands that he lost his self-

⁹⁵ Ibid 371

⁹⁶ (n26)

⁹⁷ (1776) 1 Leach 148

⁹⁸ (1913) 23 Cox CC 455

⁹⁹ [1914-15] All ER Rep 917

¹⁰⁰ Ibid 917 -8: "The proposition put forward by the defence is that provocation by one person, leading to the homicide of another person by the person provoked, is sufficient to reduce the crime of murder to that of manslaughter. There is no authority for that proposition."

¹⁰¹ R. G. Fontaine, 'Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification' (2009) Arizona Legal Studies, Paper 08-07, 12-3

control.¹⁰² This is evidence of the uncertain rationale which existed prior to the 1957 Act and the conflict between the established rules of the reasonableness-based objective element and the loss of self-control-based subjective element which did not work in conjunction with each other to provide a satisfactory basis for mitigation.

b) words alone were not usually sufficient

In the *Mawgridge* case Lord Holt CJ stated that words alone were not sufficient as provocation.¹⁰³ Later, however, a series of cases demonstrated that this position had altered as confessions of adultery were found to be valid provocation:

"As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter."¹⁰⁴

The case of *Jones*¹⁰⁵ fits this description: D killed V after a sudden confession of adultery and the view expressed in *Rothwell* was followed. This rule only applied to married couples though. In *Palmer*¹⁰⁶ a distinction was made between a confession of an unfaithful sexual act for a married couple and an engaged couple and in *Greening*¹⁰⁷ the rule did not include unmarried couples who lived together.

¹⁰² R.S. Regan, 'Indirect Provocation and Misdirected Retaliation' 323: "Once an accused loses his self-control it is unreal to insist that his retaliatory acts be directed only against his provoker."

¹⁰³ (n27). See *Sherwood* (n33)

¹⁰⁴ *R v Rothwell* (1871) 12 Cox Crim C 145, 147

¹⁰⁵ (1908) 72 JP 215

¹⁰⁶ [1913] 2 KB 29

¹⁰⁷ [1913] 3 KB 846

The decision, previously referred to,¹⁰⁸ in *Holmes*¹⁰⁹ is in some ways a restatement of the position taken in *Rothwell*, finding that "in no case could words alone, save in circumstances of a most extreme and exceptional character, so reduce the crime."¹¹⁰ The power left to the judge to decide in which cases words alone could be sufficient was demonstrated in *Holmes* itself where confessions of adultery were ruled out as valid provocation,¹¹¹ this is where *Holmes* can be distinguished from *Rothwell* as in that case a confession was sufficient. D's defence raised the concerns with the role of the judge on this issue:

"Nothing can justify the court in laying down a rule for all time, since what may provoke one generation may not provoke another ...

It is safer to trust to the good sense of ordinary reasonable men than to attempt to limit the operation of the principle by excluding certain matters as matters of law."¹¹²

One instructive point which was made was when Viscount Simon provided a distinction between taunts and informational words, this distinction could assist in the decision as to whether the words were of the *most extreme and exceptional character*.

"It may mean provocation by insulting or abusive language, calculated to rouse the hearer's resentment ... There is, however, a different sense which may sometimes attach to the meaning of 'mere words', for they may

¹⁰⁸ (n87-9)

¹⁰⁹ *Holmes v DPP* [1946] AC 588

¹¹⁰ Ibid 600: "When words alone are relied upon in extenuation, the duty rests on the judge to consider whether they are of this violently provocative character, and if he is satisfied that they cannot reasonably be so regarded, to direct the jury accordingly."

¹¹¹ Ibid 600: "In my view, however, a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter."

¹¹² Ibid 591-2. See (n88)

be used, not as an expression of abuse, but as a means of conveying information of a fact, or of what is alleged to be a fact."¹¹³

Therefore, abusive language or taunts may be viewed as being more likely to be provocative to D than informational words and thereby be more likely to provide sufficient evidence that D reasonably lost his self-control. This is a valuable distinction and one which will have relevance when discussing the sexual infidelity exclusion in the Coroners and Justice Act 2009 as that exclusion does not differentiate between taunts and informational communication.¹¹⁴

c) no cooling-off period allowed¹¹⁵

In *Mancini* Viscount Simon LC stated it was important "to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool"¹¹⁶ and similarly in the *Duffy* case Devlin J stated that an important element of the common law provocation defence was "whether there was what is sometimes called time for cooling".¹¹⁷ The limited role of the jury, in comparison to the judge, was highlighted in *Fisher* when it was held that "whether the blood has had time to cool or not, is a question for the court, and not for the jury".¹¹⁸

The *no cooling-off period* requirement is an objective question as Viscount Simon LC's comments in *Mancini*, above, demonstrate. It is a question about whether the reasonable man would have cooled in that time, so whether D ought to have cooled, and

¹¹³ Ibid 598-9

¹¹⁴ 'Chapter 9 - Coroners and Justice Act 2009' (n112)

¹¹⁵ Details of the subjective element are discussed in 'Chapter 2 - The Post-1957 Defence' (n22-33), including a more in depth discussion of *Duffy* and the specific requirements.

¹¹⁶ *Mancini v DPP* [1942] AC 1, 9

¹¹⁷ [1949] 1 All ER 932: "that is, for passion to cool and for reason to gain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels ... where there has been no time for reflection."

¹¹⁸ (1837) 8 C & P 182: the role for the jury was merely "to find what length of time elapsed between the provocation received and the act done."

it is not a part of the subjective question asking whether D did in fact cool.¹¹⁹ The case of *Royley* demonstrates that delay between the provocation and the killing has always been an issue.¹²⁰ The *no cooling-off period* requirement was in place to remove revenge killings from manslaughter but also highlights that even if D did, in fact, kill in heated blood there was a potential the defence would not succeed; for instance, those whose temperament meant that they remained out of control for a long period could have suffered when a comparison to a reasonable man was made.

How delay impacts on provocation cases is quite possibly the most significant aspect of the defence as it reflects the debate over gender bias and recognising emotions such as fear where it may be natural to expect a certain amount of delay. The modern approach towards the matter of delay has also been to wrap it up in the ordinary person question, as well as the factual subjective element, and through giving greater context to the killings in the objective test it is possible that greater amounts of time between the last provocative act and the killing will be afforded to D.¹²¹ Delay, therefore, is relevant to whether the jury believe that D acted with the genuine emotion (subjective test) and whether D should have responded in the manner which they did (control test). Delay also requires us to examine if the loss of self-control requirement is necessary in order for mitigation to take place.¹²² The cooling period was originally used as a limitation in order for the defence not to proceed to the jury, however it is an equally key issue in the modern defence because it relates to how we expect people to react when they are in such an emotional state.

d) the reasonable man test

Before the reasonable man test was reformed into the ordinary person test in the post-1957 defence it was comprised of a control test which contained a rule demanding a

¹¹⁹ The subjective element was still required. For example, *Hayward* (1833) 6 Car & P 157, 159: D must have killed "whilst smarting under a provocation so recent and so strong".

¹²⁰ See (n36). This case will be discussed further with regards to the modern approach to delay in 'Chapter 2 - The Post-1957 Defence' (n27).

¹²¹ It will be advanced in Part IV how this could be achieved.

¹²² These issues will be discussed extensively in 'Chapter 6 - Subjective Element' and will be the foundation for the preferred outlook of the defence outlined in Part IV.

proportionate response. In the *Duffy* judgment Devlin J stated that it was of "great importance" that the

"mode of resentment bears some proper and reasonable relationship to the sort of provocation that has been given. Fists might be answered with fists, but not with a deadly weapon".¹²³

Previously, in *Hall* "the weapon that was chosen" was viewed as a consideration,¹²⁴ but the '*mode of resentment rule*' or the '*reasonable relationship rule*' was established in *Mancini*, where D used a double-edged blade in a fist fight.¹²⁵

In *Mancini* it was stated that it was important

"to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter".¹²⁶

This limitation may be at odds with the underpinnings of the defence, given that at this point D has lost his self-control; it is difficult to understand how D can *only* be expected to strike out in an 'appropriate' manner.¹²⁷ Regan cites Baron Parke's earlier judgment in

¹²³ [1949] 1 All ER 932

¹²⁴ *Hall* 55. See (n86)

¹²⁵ *Mancini* 10: "this followed Distleman's [V's] coming at him and aiming a blow with his hand or fist. Such action by Distleman would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger"

¹²⁶ *Ibid* 9

¹²⁷ A similar point was made about the limit placed on D, in that he must kill his provoker and not another party (n102).

Thomas as reflecting the reality of the situation more accurately: the defence could be available "[i]f a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand".¹²⁸ Such a finding properly reflects that at the time D is suffering from loss of self-control and his reaction may be *even more* excessive. Also, striking out in an inappropriate manner, or a 'frenzied' attack, may be a better indicator of a loss of self-control. Nevertheless, for a short time this was an essential part of the reasonable man test and in *McCarthy* it was described as "undoubted law".¹²⁹ *McCarthy* highlights that it was not only the instrument D used but the nature of the entire violence which needed to be considered as the continuance of the beating was viewed unreasonable.¹³⁰

When the *Mancini* rule was combined with the *Holmes* judgment it meant that the judge also had to be satisfied that for the defence to go to the jury there had to be evidence as "to the degree and method and continuance of violence".¹³¹ Much like the *no cooling-off period* requirement, this placed added restrictions on how D should act when provoked if the defence was going to be available to them. Therefore, it was a substantial hurdle for the defence to go to the jury and, as will be discussed in Chapter 2, these limitations brought about the desire to reform the defence.

Another aspect of the reasonable man test is the debate over whether the jury should be able to consider any of D's peculiarities. The position before the 1957 Act was laid down in *Bedder*,¹³² the standard of self-control expected from the reasonable man should not be altered:

¹²⁸ (1833) 7 Car & P 817, 818

¹²⁹ *R v McCarthy* [1954] 2 QB 105, 109: "it is undoubted law that the violence used must have some reasonable relation to the provocation."

¹³⁰ *Ibid* 112: "If a man who is provoked retaliates with a blow from his fist on another grown man a jury may well consider, and probably would, that there was nothing excessive in the retaliation even though the blow might cause the man to fall and fracture his skull, for the provocation might well merit a blow with the fist. It would be quite another thing, however, if the person provoked not only struck the man, but continued to rain blows upon him or to beat his head on the ground".

¹³¹ *Holmes* 597

¹³² *Bedder v DPP* (1954) 38 Cr App R 133

"this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the 'reasonable' or the 'average' or the 'normal' man is invoked. If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value."¹³³

The *Bedder* decision was based on two earlier cases where such arguments put forward were rejected. In *Alexander*¹³⁴ D argued that his mental deficiency ought to be considered; it was pointed out that this was the first time that this issue had been argued but the defence was denied. In *Lesbini* Lord Reading CJ summed up the alternative view as being that "the Court ought to take into account different degrees of mental ability"¹³⁵ and then rejected this as "it would not be provocation which ought to affect the mind of a reasonable man."¹³⁶ It would be the mental deficiency, not severe provocation, which would explain the killing. This is an argument which has gone on to shape the provocation defence and its relationship with diminished responsibility.¹³⁷

In *Bedder* there was a failure to grasp that this was not an attempt to rely on a mental deficiency, so that a lower standard of self-control was to be expected from D, but a desire for the factual situation to be taken into account: the argument was not that different degrees of mental ability should be taken into account but that physical defects which are the subject of the provocation ought to be considered, such as the taunts which were in reference to D's impotence. It was seen that it would be "plainly illogical" to recognise such "unusual physical characteristic[s]" but ignore "unusually excitable or pugnacious temperament".¹³⁸

¹³³ Ibid 142

¹³⁴ (1914) 9 Cr App R 139

¹³⁵ *R v Lesbini* [1914] 3 KB 1116, 1120

¹³⁶ Ibid 1120

¹³⁷ This is one of the major themes that is explored in 'Chapter 5 - Objective Element' (n143-5).

¹³⁸ *Bedder* 141

English has stated that the earlier case of *Raney*¹³⁹ was ignored on this issue, where a man being one-legged was viewed to be a relevant consideration for the jury.¹⁴⁰ D being one-legged is clearly not a 'normal' characteristic, yet despite the position taken on such characteristics it was viewed as being relevant in assessing the provocation. The restriction in taking into account the characteristics of D was in order to keep the reasonable man test as 'objective' as possible and not allow a variable standard based on D's peculiarities, however when the jury was not allowed to consider such physical defects it meant that their judgements on the reasonableness were not able to properly reflect the actual circumstances of the incident. How far the characteristics of D are admitted into the objective test has been proven to be a challenging and inconsistent issue and much of the discussion on the post-1957 defence in Chapter 2 will be dedicated to this area.

Conclusion

The limitations discussed above helped to maintain judicial control over the defence but also enforced the concept of reasonableness; there were authorities, often conflicting, which held it was only 'reasonable' for D to kill the provoker, when the provocation is something more than words, without delay, in an appropriate manner and when it did not stem from a peculiarity in any way. Much of this, however, goes against the nature of the defence which existed since the adoption of the loss of self-control requirement. Therefore, D was in a highly emotional state but must still have acted in a reasonable or appropriate manner on these fronts for the defence to have succeeded or not respond at all to certain provocations which a normal person may have found to be highly provocative.

¹³⁹ (1944) 29 Cr App R 14, 17: "To a one-legged man like the appellant, who is dependent on his crutches, it is obvious that a blow to a crutch, whether it is a blow that knocks the crutch away or not, is something very different from mere words. It seems to us that, if the Judge had repeated that part of the appellant's evidence, it would have been very proper to do so, because a blow to a one-legged man's crutch might well be regarded by a jury as an act of provocation."

¹⁴⁰ P. English, 'What DID Section Three do to the Law of Provocation?' (1970) Crim LR 249, 253

Chapter 2 looks at the impact of the Homicide Act 1957. The defence had loss of self-control at its heart and can somewhat be seen to deal with the contradiction of demanding reasonableness and loss of self-control at the same time. The limitations which were discussed above were incorporated into the objective element, in what became the ordinary person test, allowing them to be considered or ignored by the jury depending on their significance and this was without the judge having such an influence.

CHAPTER 2

THE POST-1957 DEFENCE

This Chapter will explore the impact of the Homicide Act 1957; it will detail how the defence was ultimately interpreted in a manner which was consistent with the 1957 Act but by doing so was unable to bring about mitigation appropriately. Before the reform which took place in the Coroners and Justice Act 2009 the defence was left in the position where its rationale and its elements were consistent with the concept of *partial excuse* and *excusable loss of self-control*.¹ The post-1957 defence is interesting and complicated as there were many contradictory rulings and interpretations of the law. The Chapter will explore how even though the aims of the 1957 Act were limited to resolving the concerns of judicial control and the definition of provocation the impact of reform was great as it was interpreted in a manner which went beyond this owing to the vagueness of the text and the impact of hard cases.

The 1957 Act was heavily influenced by the Royal Commission on Capital Punishment and English describes how there was "no doubt" that it was the government's intention to follow their recommendations from a 1953 Report.² The following shows that there was only *two* intended consequences stemming from the 1957 Act's implementation. In a House of Commons debate the Home Secretary stated, almost verbatim to the 1953 Report,³ that "the nature as distinct from the degree of the provocation should be immaterial" and that "words alone" would be sufficient if it could be considered "grave provocation".⁴ Furthermore, the Attorney-General stated that the "whole object" of the reform "is to make clear that a jury can take into account all kinds of provocation".⁵ The 1957 Act was not intended to alter any other element of the defence, as, for example,

¹ These concepts will be discussed in detail in 'Chapter 3 - Rationale' where the foundations of the defence will be explored.

² P. English, 'What DID Section Three do to the Law of Provocation?' 250-1: from the Parliamentary debates there is "no doubt" that it was the "intention of the government that clause 3 should implement the recommendations on provocation" by the Royal Commission.

³ Report of the Royal Commission on Capital Punishment (1953) 56 [156]: "the nature (as distinct from the degree) of the provocation should be immaterial and it should be open to them to return a verdict of manslaughter."

⁴ Major Lloyd George, 15th November 1956, HofC Debate, Vol 560, 1156: the Home Secretary also stated that they were following "the recommendation of the Royal Commission" on this matter.

⁵ Reginald Manningham Buller, 15th November 1956, HofC Debate, Vol 560, 1166

the Attorney-General also stated that "[t]here is no intention at all of altering the other tests of what can amount to provocation."⁶ Therefore, the only substantive reform which was intended was that words alone could be considered as valid provocation.

The only other intended consequence of the 1957 Act was to alter the sufficient evidence test, the freedom for the jury to consider the provocation defence was appreciably increased at the cost of the judge's ability to limit the defence. English states that this was "overshadowed" by the discussion to allow 'words alone' as valid provocation.⁷ These limited intentions in the 1957 reform will be contrasted with how the law was applied and interpreted, but, also, it will be shown that these two intentions, no concern for the nature of the provocation and there being a weak sufficient evidence test, led to some of the most damning criticisms of the pre-2009 defence which will be discussed in Part II.

Consequently, the 1957 Act ensured that all the elements of the defence were jury questions and it was interpreted that if there was evidence that D lost his self-control owing to him feeling provoked the defence had to be put before the jury.⁸ Even if D did not argue that he was provoked and even if the judge did not think that the defence ought to succeed it had to be put to the jury:

⁶ Ibid

Also, see *R v Smith (Morgan)* [2001] 1 AC 146, 157: "This section plainly changed the law in two ways." Then the two matters referred to are discussed in the judgment.

⁷ P. English, 'What DID Section Three do to the Law of Provocation?' 254

Note that this point was referred to at 'Chapter 1 - The Early Defence' (n81): Brett stated that "the judges rode the doctrine very hard" and Allen stated that the 1957 Act "permitted an escape from the strait-jacket imposed by the common law ...".

⁸ *R v Doughty* (1986) 83 Cr App R 319, 326: "That matter is, in our view, imposed by Parliament upon the jury, not upon a judge, and the common sense of juries can be relied upon not to bring in perverse verdicts where the facts do not justify the conclusion."

"It does not matter from what source that evidence emerges or whether it is relied on at trial by the defendant or not. If there is such evidence, the judge must leave the issue to the jury."⁹

This approach reverted back to the stance in *Hopper*¹⁰ as the language used in *Porritt* is similar: "[t]he jury in considering the matter, if it had been left, might, and it is unnecessary to say more".¹¹

Even though provocation remained a common law defence, its role defining and interpreting the concepts involved, its provisions were outlined in section 3 of the Homicide Act 1957:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

⁹ *R v Acott* [1997] 2 Cr App R 94, 102: If there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation."

R v Porritt [1961] 1 WLR 1372, 1376: "it is incumbent upon the judge trying the case, if the evidence justifies it, to leave such issue to the jury."

R v Mann [2011] EWCA Crim 3292 [25]: in this case D did not provide evidence to support that he was provoked into losing his self-control and the Court of Appeal stated that whether he was provoked would be "a matter of speculation, and it was not for the jury to speculate."

Also, at [26]: "This merely serves to underline the importance of recognising that the need to leave provocation to the jury only arises when there is evidence of some conduct which the jury might find had provoked, i.e. caused him to lose his self-control, and in order to be able to address that question it is critical that the conduct is first identified."

¹⁰ [1915] 2 KB 431, 435: "some evidence – we say no more than that". See 'Chapter 1 - The Early Defence' (n83)

¹¹ *Porritt* 1378

This sets out three requirements: *D must be provoked, lose self-control and the reasonable man test*. It is important to note that, in line with the intentions of the drafters, the 1957 Act did not directly impact too greatly on the definition of the loss of self-control or reasonable man requirements, they were developed in the common law in response to sets of 'hard cases'. The following discussion on the post-1957 defence highlights how the vagueness of the 1957 Act gave an opportunity, which was taken, for the defence to be reformed in various ways; however, the structure and basic requirements of the defence meant that the defence was not salvageable through common law developments and ultimately statutory reform was needed for it to appropriately deal with the most problematic cases.

a) was *D* provoked?

What this element required will be explored in more depth in Part II,¹² but, put briefly, this was a subjective test over whether the event caused D to feel as if he was provoked and was a part of the sufficient evidence test. It was commonly seen that only provocation leading to anger would suffice as a valid cause and there were no restrictions on what constituted valid provocation. Following the intention of the drafters, the statute extended the span of what could provoke D from the common law by including anything done and/or said. The main change of this was from the *Holmes* judgment,¹³ in that words alone were allowed to be sufficient without the explicit demand that they be especially severe in nature. This meant that words alone could go to the jury and the jury would decide on their sufficiency in the reasonable man test.

The interpretation of the 1957 Act ensured that the source of the provocation did not have to be V: the source could be anything.¹⁴ The vagueness of the Act allowed this interpretation.¹⁵ In *Davies* it was made clear that the common law position on this issue

¹² See 'Chapter 4 - Adequate Provocation'.

¹³ *Holmes v DPP* [1946] AC 588. See 'Chapter 1 - The Early Defence' (n87-89).

¹⁴ The approach adopted in *Doughty* (1986) 83 Cr App R 319 will be further discussed in 'Chapter 4 - Adequate Provocation'.

¹⁵ R.S. Regan, 'Indirect Provocation and Misdirected Retaliation' 324: The 1957 Act "does not expressly refer to indirect provocation or misdirected retaliation but section 3 of the Act is sufficiently general to include these concepts."

was not definite but that the wording of section 3 ought to be interpreted in such a manner as to allow the source of the provocation to come from a third party:

"it seems quite clear to us that we should construe section 3 as providing a new test, and on that test that we should give the wide words of section 3 their ordinary wide meaning. Thus we come to the conclusion that whatever the position at common law, the situation since 1957 has been that acts or words otherwise to be treated as provocative for present purposes are not excluded from such consideration merely because they emanate from someone other than the victim."¹⁶

This allowed the admission of cases which often previously fell outside of the defence, as, for example, the contrast with the *Simpson* case demonstrates.¹⁷ *Pearson*¹⁸ highlights that indirect provocation was valid as D was provoked by his father's words and conduct towards himself *and* his brother, both were deemed to be valid provocation. On the issue of misdirected retaliation, under the 1957 Act D could rely on the defence not just if he accidentally killed another once provoked but if he retaliated against a third party intentionally.¹⁹ In *Porrit*, similar to the cases of *Brown* and *Gross*,²⁰ D missed and killed another when he tried to kill his provoker; D shot his step-father whilst aiming for the person his step-father was in a struggle with and it was ruled that the issue ought to have gone to the jury.

It is consistent with the loss of self-control requirement that D can be provoked by conduct carried out against another, particularly if they have a close relationship with that person, and, also, that D may make mistakes in such a state. All of this improves on the position before the Act; even though there were exceptions, it was stated that D must only be provoked by V, ignoring the possibility that he could be provoked by

¹⁶ *R v Davies* [1975] QB 691, 701

¹⁷ See 'Chapter 1 - The Early Defence' (n99-100)

¹⁸ [1992] Crim LR 193

¹⁹ *R v Twine* [1967] Crim LR 710: "Under the Act the provocation did not necessarily have to come from the victim."

²⁰ 'Chapter 1 - The Early Defence' (n97-8)

wrongs to others and in the state of a loss of self-control he could find it difficult to curb his impulse and only retaliate against a specific target.²¹ The impact of this change alone was drastic as it indicated that the defence would be more concerned with the impact of the provocation on D, losing his self-control, rather than the nature of the provocation itself.

b) loss of self-control

For the defence to have succeeded D must have felt provoked, the loss of self-control must have stemmed from the provoking events and D must have killed whilst he had lost his self-control.²²

It became clear that the defence developed into recognising that D retains a certain level of control over his actions. The early cases of *Walters* and *Oneby*²³ describe the subjective element in terms of a complete loss of self-control but by time of the Homicide Act 1957 what was required may be most accurately described as a *partial* loss of self-control; it is seen as a matter of degree and this was concluded by the Privy Council when stating that the argument that "there is no intermediate stage between icy detachment and going berserk" is "false".²⁴

A definition of the loss of self-control element was provided in the pre-1957 case of *Duffy* by Devlin J, a definition which was consistently cited post-1957 as the Act did not re-define the concept.²⁵

²¹ Such problems with the pre-1957 defence were outlined at 'Chapter 1 - The Early Defence' (n101-2)

²² Provoking event > D feels provoked > D loses self-control > D kills whilst under a loss of self-control.

Therefore, all that ought to matter is the build up to the killing. Cf. in *Clarke* [1991] Crim LR 383 it was assumed that D had lost his self-control when he strangled V but had regained it after the killing as he attempted to cover it up. It was ruled that the conduct after the strangulation ought to be considered too.

²³ See 'Chapter 1 - The Early Defence' (n66-7)

²⁴ *Phillips* [1969] 2 AC 130, 137-8 (Lord Diplock).

²⁵ [1949] 1 All ER 932

R v Smith (Morgan) [2001] 1 AC 146, 157: this statement from *Duffy* was "afterwards treated as a classic direction to the jury".

"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 mind."

As will be further discussed in Part II,²⁶ "master of his mind" continues the subjective element's reliance on metaphor to describe the necessary psychological impact of the provoking event and this does not bring about clarity or understanding.

Through this definition adding the "sudden and temporary" requirement it would seem to ensure that cases where delay between the last provocative event and the killing were no longer in the scope of the defence. It is clear, as the case of *Royley* demonstrates,²⁷ that the issue of delay has been problematic for the defence since its origins. In that case it was questioned whether D was still acting under heated blood:

"[F]or he going upon the complaint of his son, not having any malice before, and in that anger beating him, of which stroke he died, the law shall adjudge it to be upon that sudden occasion and stirring of blood, being also provoked at the sight of his son's blood, that he made that assault, and will not presume it to be upon any former malice, unless it be found. And although the distance of the place where his son complained was a mile, it is not material, being all upon one passion."

The logic of this judgment, similar to the findings in *Baillie*,²⁸ is that as long as D stays out-of-control until the time when he killed it ought to be considered a valid loss of self-

²⁶ 'Chapter 6 - Subjective Element'

²⁷ (1612) Cro Jac 296. D killed the person who had beaten his son, D had to travel a long distance in order to find V. See 'Chapter 1 - The Early Defence' (n36 & n120)

²⁸ [1995] 2 Cr App R 31

R v Mann [2011] EWCA Crim 3292 [32]: D's case was distinguished from *Baillie* as D did not kill his ex-wife with any proximity to the provoking incident and it was adjudged that D acted entirely normally before the killing, therefore his loss of self-control did not stem from him being provoked: "The facts of the present case are very different. This is not a case in which there is evidence that the appellant fell into a rage and there was an unbroken sequence of events commencing with the conduct which caused him to fall into a rage and ending with the killing."

control. In *Baillie* a drug dealer was threatening D's son, D lost his self-control, armed himself and drove to V's house. It was adjudged that D remained out-of-control all of this time. This can be directly contrasted with the case of *Ibrams*²⁹ where planning and deliberation took place over a period of days. In that case the last provocative act was on the 7th October, a plan to kill V was formulated on the 10th October and the killing took place, according to plan, on the 12th.

The decision in *Baillie*, however, came about because of a need for the partial defence to attempt to deal with killings which involved delay in another scenario, 'battered women' who kill their partners. *Duffy* changed the law, before there was no necessity to find that the loss of self-control was "sudden and temporary". The approach taken in *Ahluwalia*,³⁰ making the factor of delay merely evidential as to whether D killed whilst suffering from a loss of self-control, takes the sting out of the *Duffy* judgement:

"Time for reflection may show that after the provocative conduct made its impact on the mind of the defendant, he or she kept or regained self-control. The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self-control and therefore with the defence of provocation. In some cases, such an interval may wholly undermine the defence of provocation; that, however, depends entirely on the facts of the individual case and is not a principle of law."³¹

This helped to deal with cases which involved victims of long-term abuse who, as in *Ahluwalia* and *Thornton*,³² killed after a delay between the killing and the last provocative act. The finding in *Ahluwalia* is helpful to the success of such cases but it also reflects

Also, at [29]: "on what basis could any jury have concluded that conduct which had plainly not caused him to lose his self-control over a period of several hours, later caused him to do so?"

²⁹ (1982) 74 Cr App R 154

³⁰ *R v Ahluwalia* [1992] 4 All ER 889

³¹ *Ibid* 897–8 (Lord Taylor CJ)

³² [1992] 1 All ER 306: D went out of the room, sharpened a knife and went back to kill V.

that this is a subjective test and objective constraints, such as delay, ought not to have a bearing if there is evidence which supports D's claim that she was genuinely in this state. This finding is also supported owing to the vagueness of the 1957 Act, even though *Duffy* was the leading authority at the time the wording of the Act did not explicitly state that the killing had to be spontaneous or go into any detail in order to explain the concept.

The provocation defence remained a common law defence after the passage of the 1957 Act and given the historical background of the defence it is within its spirit that the concepts involved evolve over time to deal with the issues of the day; however, whether loss of self-control can be understood to extend to cases which involve delay is highly debateable.³³ The issue of delay will always be problematic as the greater the time lapse between the last provocative act and the killing the greater the chances that the act will be interpreted as stemming from revenge and not from the provocation. This view is even highlighted in the above passage from *Ahluwalia*, but the benefit of that decision was that there was an understanding that delay did not have to destroy a claim for provocation even if it does still make the chances for the jury believing D killed whilst under a loss of self-control less likely.

c) Would a reasonable man have done as D did?

i) mode of resentment rule

Pre-1957, in *Mancini*, there was another layer added to the reasonable man test requiring a reasonable relationship between the provocation and the violence D used. However, after the 1957 Act this requirement turned into being a factor for the jury to consider within the wider reasonable man/ordinary person test.

The Privy Council in *Phillips* made the most significant judgment on the mode of resentment test after the 1957 Act and it was not entirely consistent. It was found that *Mancini* laid down that the mode of resentment was merely a "relevant factor" and not a

³³ This is an issue that will be explored in greater depth in 'Chapter 6 - Subjective Element'

rule.³⁴ However, *Mancini* clearly stipulated that it was *mandatory*.³⁵ In *Phillips* there was a clear attempt to ensure that they did not interpret the 1957 Act beyond the intention of the drafters as it was stated that the "the only changes in the common law doctrine of provocation" from the 1957 Act were to do with the words rule and the role of the judge.³⁶ It was expressly stated that *Holmes* was the decision which the drafters sought to move away from: "[i]t was this decision [*Holmes*], not that in *Mancini* which was reversed by the English legislation of 1957."³⁷ In *Phillips* therefore there is an understanding that the 1957 Act does not touch upon the mode of resentment rule established in *Mancini* yet they still found that since the enactment its role was reduced from being a rule to a factor:

"Since the passing of the legislation it may be prudent to avoid the use of the precise words of Viscount Simon in *Mancini* ... unless they are used in a context which makes it clear to the jury that this is not a rule of law which they are bound to follow, but merely a consideration which may or may not commend itself to them."³⁸

Later, *Walker*³⁹ and *Brown*⁴⁰ followed *Phillips*. If *Phillips* had interpreted the 1957 Act in line with the intentions of the drafters then, as English states,⁴¹ the mode of resentment

³⁴ *Phillips* 137

³⁵ *Mancini v DPP* [1942] AC 1, 9: "the mode of resentment must bear a reasonable relationship to the provocation" (emphasis added). See 'Chapter 1 - The Early Defence' (n123-31)

³⁶ *Phillips* 137: reversing the *Holmes* decision to mean that the judge no longer had to make a "preliminary ruling" on the reasonable man test.

See (n2-8) for the intention of the drafters.

³⁷ *Phillips* 137

³⁸ *Ibid*

³⁹ *R v Walker* [1969] 1 WLR 311, 316: the argument that the 1957 Act removed the *Mancini* rule "may well be correct, although for the purposes of this case we do not think it is necessary to give a final decision upon it. Plainly, one vital element for the jury's consideration in all these cases is the proportion between the provocation and the retaliation".

⁴⁰ *R v Brown* [1972] 2 QB 229, 232: an issue was "whether this was a statement of legal principle or whether it was intended as a guide to one of the considerations which a jury has to take into account ... It seems to this court that this was not a statement of legal principle".

⁴¹ P. English, 'What DID Section Three do to the Law of Provocation?' 255: "The jury have been given a task that formerly could be performed by the trial judge. They and not he are to be the new arbiters of whether the requirements of the law have been satisfied. The law itself remains the same."

test would have been a mandatory test but it would have just been for the jury to decide and not the judge.⁴²

There is a great similarity between how *Mancini* and *Duffy*, above, were viewed as factors rather than rules, this exhibits that the judges were going beyond the intention of the drafters and modifying the provocation defence. The post-1957 provocation defence remained a common law defence, so they were entitled to do this, but the best justification for this, along with the expansion of the definition of 'provoked' in *Davies*, is that all these decisions were in line with an excusatory loss of self-control rationale where the previous rules, many justificatory in nature or inconsistent with the loss of self-control concept, were being removed. Despite the *Phillips* judgment going against the intentions of the drafters, and at the same time pronouncing that they were upholding them, its finding on the mode of resentment rule was therefore both in line with the rationale of the defence and more understanding of the circumstances which the defence covers.

Ashworth has stated that "any direct comparison between the retaliation and the provocation is indefensible",⁴³ this is because D cannot be expected to react to provocation in an appropriate manner whilst he has lost self-control. Demanding both at the same time is illogical, for example, in *Phillips* it is acknowledged that if there is a dangerous weapon to hand it might be expected that D, in such a state, could use it.⁴⁴ Ashworth goes on to find "that the form and style of the retaliation may provide evidence as to whether there was a sudden loss of self-control and, if so, its degree."⁴⁵ This is

⁴² In his concluding remarks (ibid 267), English states that even though he does not support the *Mancini* rule he finds that it still existed after the 1957 Act: "It might have been better if it had been abolished in 1957, but it was not. In such a situation the proper course for its opponents is to seek fresh legislation to achieve that end ... [T]he present mode of attack on the *Mancini* rule which seems to involve hope that as the years go by distance will lend enchantment to the Homicide Act 1957 so that any desired change in the law of provocation can be attributed to section 3."

⁴³ A. Ashworth, 'The Doctrine of Provocation' 292, 306

⁴⁴ *Phillips* 138: "The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly if the provocation is gross and there is a dangerous weapon to hand, with that weapon."

⁴⁵ A. Ashworth, 'The Doctrine of Provocation' 292, 306

correct, in so far as deliberation or a frenzy on the part of D could imply what actually occurred, but in making such judgements there needs to be caution, as with how delay is interpreted in the subjective element.⁴⁶ Evaluating D's behaviour became a part of what has been described as the control test and, in line with the rationale of the defence, instead of looking for a proportionate or reasonable response it was ultimately an ordinary response.

ii) the reasonable man/ordinary person and the tests of gravity and control

The following discussion is to do with the make-up of the objective test and how far the characteristics of D were allowed to be considered. The reasonable man/ordinary person test is made up of two separate but related tests, the *gravity test* and the *control test*; the gravity test asks how provocative the events would be for an ordinary person but the control test, to an extent, takes on board the *Mancini* rule and asks whether D met the expected standard of behaviour of an ordinary person. As will be illustrated in the discussion over the debate in how far D's own characteristics are considered, definitions of the reasonable man are capable of significantly altering the basis of the defence and the extent to which characteristics are considered impacts on both the gravity and control tests.

For a jury it has long been acknowledged that the objective element is more a matter of opinion and it "must be left to the collective good sense of the jury".⁴⁷ Even though since that pre-1957 statement was made more structure has been given to the reasonable man/ordinary person it is still quite a loose term which requires the jury to use their judgement and life experience: it is "more realistically as a matter of opinion".⁴⁸

Ashworth has stated (at 302-3) that "the concept of proportionality plainly remains an important element in the doctrine of provocation" and he views that the "*do as he did*" wording of the Act as a reference to proportionality, but only in so far as a consideration and not a mandatory requirement for a jury.

⁴⁶ (n31)

⁴⁷ *McCarthy* 81

⁴⁸ *Acott* 100

Even though the term 'reasonable man' was used in the common law and the statute it did not reflect the objective criteria which a loss of self-control-provocation defence ought to require because of the clash between reasonableness and losing self-control;⁴⁹ reasonableness implies that D is justified in acting in such a manner and as a provoked killing is always excessive it is not the best term.⁵⁰ It is often stated that a reasonable man would not kill in such circumstances, no matter what provoked him,⁵¹ and Lord Diplock's clarification sums up this as the standard of evaluation was reframed as the *ordinary person* rather than the reasonable man. He stated that the reasonable man is used as the "embodiment of the standard of self-control required by the criminal law",⁵² but also that

"[i]t means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today."⁵³

Lord Hobhouse has stated that the term, reasonable man, "is better avoided"⁵⁴ and Lord Nicholls saw that correct test is the 'ordinary person test'.⁵⁵

How far the characteristics of D ought to be considered by the jury when they make their assessment has caused much uncertainty and the position has altered over time. The characteristics of D may be considered in two ways and Fitzpatrick and Reed have

⁴⁹ The issue was introduced at the conclusion of the Chapter 1 when summing up the common law limitations.

⁵⁰ This point will be central in 'Chapter 3 - Rationale'.

⁵¹ For example, *R v Campbell* [1997] 1 Cr App R 199, 207 (Lord Bingham CJ): "it is not altogether easy to imagine circumstances in which a reasonable man would strike a fatal blow with the necessary mental intention, whatever the provocation".

⁵² *DPP v Camplin* [1978] AC 705, 714 (Lord Diplock)

⁵³ *Ibid* 717

⁵⁴ *R v Smith (Morgan)* [2001] 1 AC 146, 205 (Lord Hobhouse)

⁵⁵ *Attorney General for Jersey v Holley* [2005] 2 AC 580, 589 (Lord Nicholls) (PC): "The statutory reference to a 'reasonable man' in this context is, by common accord, not the best choice of words ... Rather, the phrase is intended to refer to an ordinary person, that is, a person of ordinary self-control."

The terms 'ordinary' and 'normal' will be explored in 'Chapter 5 - Objective Element'.

described them as being either '*response* characteristics' or '*control* characteristics';⁵⁶ response characteristics relate to the gravity test whereas control characteristics relate to the control test.

Gravity Test

To truly assess the gravity of the provocation the standard must share those characteristics which made the words or actions provocative to D (response characteristics). For example, if D is taunted about his impotence then no meaningful assessment can be made unless the ordinary person possesses such a characteristic, otherwise a jury would be unable to measure how a person placed in that situation would react. A ordinary person would not be impotent, so insulting remarks about this would not produce the same impact as a person who was impotent. Without reference to response characteristics much of what is commonly viewed as being provocative could not be considered as there would be no sting to the words or actions which provoked D.

In *Bedder* it was held that no characteristics of D could be considered as it would be too difficult for the jury to apply and the test would lose its strength by losing its total objectivity.⁵⁷ However, in *Camplin* the approach to response and control characteristics was altered. Lord Morris stated that it would be "unreal"⁵⁸ for *all* the relevant response characteristics of D not to be considered as there is a need to contextualise the provocation. In *Camplin* D was a fifteen year-old boy claiming that V had raped him and then V had laughed at him afterwards. Therefore, when the jury applied the gravity test they would have to take into account the rape and the subsequent laughing as these would be the factors which made the incident provocative.⁵⁹

⁵⁶ B. Fitzpatrick & A. Reed, 'Sound of Mind and Body: Psychological Characteristics and the Reasonable Man Test in Provocation', (1999) 63 JCL 365, 366

⁵⁷ See 'Chapter 1 - The Early Defence' (n132-3).

⁵⁸ *Camplin* 721 (Lord Morris): "A few examples may be given. If the accused is of particular colour or particular ethnic origin and things are said which to him are grossly insulting it would be utterly unreal if the jury had to consider whether the words would have provoked a man of different colour or ethnic origin - or to consider how such a man would have acted or reacted."

⁵⁹ With regards to the gravity test, the age of D would have no bearing on how provocative the incident was but it was relevant as a control characteristic. See (n71-2).

The next development was to produce a definition of a characteristic. In New Zealand the case of *McGregor*⁶⁰ North J gave a definition of a characteristic and the Court of Appeal in *Newell*⁶¹ cited extensively from his judgment:

"The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality."⁶²

The House of Lords in *Morhall*⁶³ disagreed with the requirement from *Newell*, for a characteristic to have *sufficient degree of permanence*: "*Newell* may have placed too exclusive an emphasis on the word 'characteristic'".⁶⁴ It was rightly stated that other factors exist "which do not strictly fall within the description 'characteristics'" and D's "history" or his general "circumstances" were cited as such examples.⁶⁵ In Lord Millett's dissenting opinion in *Smith (Morgan)* he highlighted that "history, experiences, background, features and attributes of the accused" should all be considered.⁶⁶

What is important is that the provocation is given its proper context. However, *Camplin* ought to have been interpreted in this manner anyway as it was intended that more than just characteristics should be considered:

⁶⁰ (1962) NZLR 1069

⁶¹ (1980) 71 Cr App R 331

⁶² Ibid 339. Following this reasoning in *Newell* only D's chronic alcoholism was seen as a characteristic: "The appellant's drunkenness, or lack of sobriety, his having taken an overdose of drugs and written a suicide note a few days previously, his grief at the defection of his girl friend, and so on, are none of them matters which can properly be described as characteristics. They were truly transitory in nature, in the light of the words and reasoning of North J., in *McGregor's* case." (at 340)

⁶³ [1996] AC 90

⁶⁴ Ibid 100

⁶⁵ Ibid 98

⁶⁶ *Smith (Morgan)* 210 (Lord Millett)

"in determining whether a person of reasonable self-control would lose it in the circumstances, the entire factual situation, which includes the characteristics of the accused, must be considered."⁶⁷ (emphasis added)

Camplin ought to have been interpreted as allowing everything to be considered and characteristics should have been just one aspect of this.⁶⁸

Control Test

The second aspect of the make-up of the ordinary person is how far D's power to maintain his self-control is considered in the control test (control characteristics). For example, the question in *Luc Thiet Thuan* was whether D should have been judged by his own standard, that of a person who had suffered brain damage, or by a 'normal' standard.⁶⁹ The consequences would be that D's own proclivity towards violence, stemming from his control characteristic, would be favourable to his chances as the jury would have to consider it in their assessment. It has become apparent that the answer of this question is greatly significant; whether provocation makes exception for 'abnormal' levels of self-control is at the heart of the debate.

The law's position has developed from the initial approach in *Alexander, Lesbini* and *Bedder* and the theory behind the possible approaches will be further discussed when exploring the objective element in Chapter 5.⁷⁰ In *Bedder* it was decided, as with response characteristics, that no control characteristics were to be considered. However, *Camplin* split the characteristics into these two categories, response and control characteristics; for the gravity test all the characteristics of D could be considered and for the control test the ordinary person would have 'normal' powers but the jury were able to take into account D's age and sex by attributing them to the ordinary person:

⁶⁷ *Camplin* 727 (Lord Simon)

⁶⁸ In 'Chapter 5 - Objective Element' and 'Part IV' the significance of the gravity test being able to bring this contextual evidence out will be made evident.

⁶⁹ *Luc Thiet Thuan v The Queen* [1997] AC 131 (PC)

⁷⁰ Those cases were discussed previously at 'Chapter 1 - The Early Defence' (n132-7).

"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".⁷¹

The reason for this was that age and sex were factors which were seen to be 'normal' and 'ordinary'.⁷² In *Camplin* D was a fifteen year old boy, therefore he was not only male but adolescent and this would have meant that he belonged to a set of people who would naturally be expected to be more easily provoked than any other set of people. If a jury were to apply the ordinary person standard to such facts the standard expected would be lower and the test would be easier for D to satisfy. As will be further discussed,⁷³ the reason for this approach, including age and sex, is that it is only normal and natural that a person's self-control could be altered by these factors and not only do they not go against the concept of ordinariness but through their inclusion they add greater meaning to that concept. To allow the jury to consider these factors would allow them to give a more informed answer as to whether D's response was ordinary.⁷⁴

A good example of the distinction made between response characteristics and control characteristics, owing to the necessity for a compartmentalisation to exist, is when D is taunted about being an alcoholic or addicted to drugs but was intoxicated at the time of the killing. The decision in *Morhall* was made on a similar basis as D was taunted about his glue-sniffing. Taunts of such a nature could be considered as response characteristics in the gravity question, however, D's intoxication must be ignored as a control characteristic as the ordinary standard is not to be deviated owing to the fact that

⁷¹ *Camplin* 718 (Lord Diplock)

⁷² D's solicitor's argument in *Camplin* [1978] QB 254 (CA) 261 was that "all the defects which the 'reasonable man' test is designed to exclude are abnormalities, but youth, and the immaturity which naturally accompanies youth, are not deviations from the norm; they are norms through which we must all of us have passed before attaining adulthood and maturity."

⁷³ 'Chapter 5 - Objective Element'

⁷⁴ *Smith (Morgan)* 205 (Lord Hobhouse) (dissenting): "Where relevant the age or gender of the defendant should be referred to since they are not factors which qualify the criterion of ordinariness."

D was more 'provocable' because of his intoxication.⁷⁵ The distinction allows context to be given to the events which surround the killing but it does not let standards of expected behaviour to be lowered.

However, following *Camplin*, the position on this issue altered again by allowing more control characteristics to be considered. Firstly, Lord Steyn, in his dissenting opinion in *Luc Thiet Thuan*, saw that by not allowing conditions such as D's brain damage it would lead to "crude and unfair results" through murder convictions which were "wholly inappropriate."⁷⁶ Following this, the case of *Smith (Morgan)* extended the control characteristics which could be considered. What is crucial is that the basis for this was that the *Camplin* decision was re-interpreted:

"It seems to me clear, however, that Lord Diplock was framing a suitable direction for a case like *Camplin* ... and not a one-size-fits-all direction for every case of provocation."⁷⁷

Camplin was therefore interpreted as highlighting that age and sex were control characteristics "by way of illustration rather than exclusive itemisation."⁷⁸ Through extending the control characteristics beyond age and sex in such a manner it meant that D's illness in *Smith (Morgan)*, a depressive illness which meant that he erupted into violence, could be attributed to the standard of self-control expected from the ordinary person.

Smith (Morgan) made a radical change as it would allow control characteristics which were not 'ordinary' and 'normal' to impact on the objective test and in doing so it allowed

⁷⁵ J.C. Smith, 'Case Comment' (1995) Crim LR 890, 891: "the jury must still be directed to consider the effect of the provocation on a sober person. Suppose that D, an alcoholic, is taunted by P with his addiction and instantly responds with a fatal blow. However drunk D may have been at the time, the jury must be instructed to consider the effect of the taunts on an alcoholic of D's age, sex, etc., who, at the time, is sober."

⁷⁶ *Luc Thiet Thuan* 150

⁷⁷ *Smith (Morgan)* 166 (Lord Hoffmann)

⁷⁸ M. Burton, 'Intimate Homicide And The Provocation Defence – Endangering Women? *R V. Smith*' (2001) 9 Feminist Legal Studies 247, 250

more power to be given to the jury to decide what was relevant. The jury could consider any control characteristic so long as it would be "unjust" not to consider it, with the qualification being that "characteristics such as jealousy and obsession should be ignored in relation to the objective element".⁷⁹

"So the jury may think that there was some characteristic of the accused, whether temporary or permanent, which affected the degree of control which society could reasonably have expected of him and which it would be unjust not to take into account."⁸⁰

Lord Clyde saw that, along with self-induced control characteristics, "exceptional pugnacity or excitability" also ought not to be considered.⁸¹

It was not long, however, before the law returned to the *Camplin* position on this issue. In *Smith (Morgan)* there were two dissenting opinions to this expansion of control characteristics, both finding that it would allow deviation from provocation's ordinary person:

"language which qualifies or contradicts such ordinariness must be avoided. It is the standard of ordinary not an abnormal self-control that has to be used. It is the standard which conforms to what everyone is entitled to expect of their fellow citizens in society as it is."⁸²

⁷⁹ *Smith (Morgan)* 169 (Lord Hoffmann)

⁸⁰ Ibid 173-4 (Lord Hoffmann). The freedom given to the jury was further clarified: "The jury is entitled to act upon its own opinion of whether the objective element of provocation has been satisfied and the judge is not entitled to tell them that for this purpose the law requires them to exclude from consideration any of the circumstances or characteristics of the accused." (at 166)

⁸¹ Ibid 179 (Lord Clyde): "include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced. Society should require that he exercise a reasonable control over himself, but the limits within which control is reasonably to be demanded must take account of characteristics peculiar to him which reduce the extent to which he is capable of controlling himself. Such characteristics as an exceptional pugnacity or excitability will not suffice. Such tendencies require to be controlled."

⁸² Ibid 205 (Lord Hobhouse) (dissenting)

Their argument, similar to the judgments in *Alexander* and *Lesbini*,⁸³ was that individuals would set their own standard of expected self-control: it would be D's own peculiarity and not an ordinary reaction stemming from provocation which would be the primary cause for the killing. It has been stated that in *Smith (Morgan)* the "majority is shown to have misinterpreted the most important case", *Camplin*, and "brushed aside" other important decisions such as *Morhall*.⁸⁴ In *Holley* the Privy Council decided in favour of the *Camplin* direction over *Smith (Morgan)*.⁸⁵ It must be noted that they did not find that *Smith (Morgan)* was wrong because in extending the scope of control characteristics this was incompatible with the provocation defence but that they were wrong in their interpretation of *Camplin*.⁸⁶ Lord Nicholls stated that the *Camplin* direction "was clearly intended to be a model direction, of general application in cases of provocation"⁸⁷ and it was therefore *a one-size-fits-all direction*.

Following on from *Holley*, in *Mohammed* it was stated that the proper test was based on the *Camplin* distinction: "a narrow and strict test of a man with ordinary powers of self-control rather than the wider test".⁸⁸ In that case D stabbed his daughter after seeing a man climbing out of his daughter's bedroom. The jury could consider that D was a devout Muslim, therefore the incident was severely provocative to him as sex outside

⁸³ 'Chapter 1 - The Early Defence' (n132-7)

⁸⁴ 'Case Comment: Homicide - Murder - Provocation - Characteristics of Reasonable Man', (2000) Crim LR Dec, 1004, 1005-6

⁸⁵ Note that the Privy Council overturned a House of Lords decision by a six to three majority. *Holley* was confirmed by the Court of Appeal in *R v James and Karimi* [2006] EWCA Crim 14 despite the fact that the House of Lords decision *should* have been binding. The justification for this being that the Privy Council in *Holley* was primarily made up of members of the House of Lords, even though Privy Council decisions should only be merely persuasive for English courts.

⁸⁶ That interpretation at (n77-8).

⁸⁷ *Holley* 591

The *Smith (Morgan)* is one interpretation of how the objective element can be in provocation, this will be discussed further in 'Chapter 5 - Objective Element'

K. Z. Csefalvay, 'Taunts, Chapati Pans And The Case Of The Reasonable Glue-Sniffer: An Examination Of The Normative Test In Provocation After Smith And Holley' (2006) Cambridge Student Law Review 45, 50: on this point it has been stated: "the House of Lords had overstepped the boundaries of its authority. This is because it had construed a statute so radically differently from the literal meaning that it constituted an outright departure from, and usurpation of, the intention of Parliament ... Thus the reason for the overruling is not that *Morgan Smith* was an 'inherently wrong' decision, against public policy, common-sense morality and judicial applicability, but that it was a 'procedurally wrong' decision, against Parliament's intention."

⁸⁸ [2005] EWCA Crim 1880

marriage went against his faith. However, the fact that D suffered from depression since his wife had died and had violent mood swings could not be attributed to the ordinary person. Also, in *Moses*⁸⁹ the objective standard of self-control was not lowered owing to D suffering from clinical depression or having an "an over-controlled personality". D had killed his former girlfriend after she had told him that she had had better lovers than him. D was overly sensitive about his masculinity so taunts about his sexual ability could only be relevant to the gravity test.

Conclusion

In order to identify if the problems with the provocation defence have been resolved following the Coroners and Justice Act 2009 it is necessary to understand the pre-2009 defence and how fell into such a state. Part I has detailed the history of the provocation defence and outlined the development of the concepts which will be discussed throughout. Also, how the entire nature of the defence evolved from being based on a partial justification to a partial excuse has been described. At the beginning of Part I it was stated that provocation had to be a useful defence, it had no set definition and had issues which simply could not be resolved; these factors go right to the heart of why the partial defence exists but also why it was so problematic. Provocation was constantly adapted in order to attempt to resolve the demands of the day; dealing with those with 'abnormal' levels of self-control, delayed responses and excluding or admitting certain scenarios are some of the key problems which have presented a constant challenge. Provocation, therefore, has not been a consistent defence and has often took missteps but ultimately has to be judged on its ability to provide mitigation appropriately.

Part II deals with the areas of concern: provocation's rationale, adequate provocation, the objective element (gravity and control tests) and the subjective element. The fundamental problem was that the defence ended up not really being concerned with provocation but instead with D losing his self-control owing to conduct and how the 1957 Act was interpreted imposed this outlook. The pre-2009 defence, therefore, mainly because of the impact of the 1957 Act, was left in a state where statutory intervention was necessary.

⁸⁹ [2006] EWCA Crim 1721

PART II: CRITIQUE OF PROVOCATION

Through identifying the problems with the pre-2009 defence it helps to understand the reasons for reform, how these shaped the reform and thinking about the defence and, also, it is necessary in determining whether the reform ultimately resolves these problems. The pre-2009 defence required D to be *provoked* into causing him to suffer a *loss of self-control* and the *reasonable man/ordinary person* would have shared this reaction. Each of these three elements were a source of criticism and there was a more general criticism over the uncertainty of its rationale. Therefore, the criticisms of the pre-2009 provocation defence fall under these four categories and each of these will be addressed in the following set of chapters.

The critique of provocation and the suggested approaches stem from a position which was outlined in the Introduction. The defence is concerned with how the individual responds emotionally to the situation they face, therefore an understanding of the mental processes involved and how this relates to choice is necessary. Also, the defence is grounded in expectations relating to behaviour and values to do with the severity of the provoking event; these flow from society and the terms used in the defence, such as warrant and ordinary, need to reflect this. It should, also, be the jury's role to make these evaluative judgments as they are best placed. From this perspective, in the course of Part II it is advanced that the defence should focus on the *core emotions* to best reflect the circumstances; *ordinary reactions* which stem from these core emotions; and, in assessing the severity of the provocation or threat, the comparative standard ought to only deal with what it is *acceptable* to find provocative or threatening and this is informed by liberal values, such as respecting other's freedoms and disregarding intolerance.

CHAPTER 3

RATIONALE

The Law Commission stated that the pre-2009 defence's rationale was "elusive".¹ Defences are not explicitly categorised as being justificatory or excusatory based, but for

¹ Law Commission – Partial Defences to Murder: Final Report (2004) 33 [3.21]

provocation it seems that finding an appropriate rationale is essential in order to understand and support the defence because of the nature of the circumstances which it covers and the peculiarity of it being a partial defence. If the foundations of a defence are apparent then the scope and content of the defence can be more easily be interpreted, but also it has implications for how society views D and the circumstances as it helps to reflect the judgements that ought to be made. It is submitted that the criticism over the rationale should not have been that it was "elusive" but that owing to the interpretation of the defence following the Homicide Act 1957 it meant that the defence followed a flawed approach, and most of the other criticisms of the defence flow from this.

There have been many interpretations of provocation but it is most accurately viewed as a partial excuse. It will be shown that this is the correct rationale but, also, that there are many approaches to bringing about a partial excuse for provocation; for the pre-2009 defence it was the form that the partial excuse took which was wrong. The thrust of this argument is that the defence was no longer able to provide sufficiently stringent evaluative judgements over the provocative conduct which is necessary in order for the defence to represent the views of society and provocation is very much a defence that rests on such social views. Social views shape what we find provocative according to the values we share, or at least respect, and the expectations which we place on provoked people to control themselves. Through exploring the pre-2009 defence's rationale it will help to explain why the approach adopted was flawed and this will link to the other criticisms of the defence. It is also necessary to explain how a justificatory element can be contained within a partial excuse as the form of partial excuse which is advanced requires this.

a) provocation's rationale and its necessary requirements

Justifications and excuses can be regarded as explanations for harmful conduct. Where they provide such an explanation they are seeking to extinguish any blame and punishment which would otherwise be forthcoming. Justificatory and excusatory defences function to recognise when these reasons should be valid and are exceptions

in the circumstances when harm is caused. The labels of 'justification' and 'excuse' have moral significance. Whereas excuses only focus on the agent justifications judge the value of the conduct. If conduct is justified then it is regarded as the right thing to do in the circumstances; a justified agent has undertaken conduct which society approves of, or at least tolerates, as a lesser evil is produced, so the agent's harm is the better outcome in comparison to the harm anticipated. Excuses, on the other hand, are an admission that the conduct was the wrong thing to do; it is disapproved of and not encouraged as the agent was incapable or unable to make the correct choice in the circumstances. The moral significance between the concepts is great. From a justification an agent gets a sense of vindication from showing that they were right, from an excuse the agent is able to rely on understanding and forgiveness. These labels reflect how society views the agent and the event.

The rationale of provocation is, therefore, an important issue and provocation is an important defence as it is a mechanism to avoid the mandatory life sentence for murder and it leads to the provoked defendant not being labelled as a murderer. By classifying provocation's rationale it not only helps us to decide on its scope and content but it says much about how we view such cases. Whether to characterise provocation as a justification, excuse or some sort of mixed rationale is what this Chapter will explore.

The question becomes more difficult because provocation, unlike most other defences, only provides a partial defence, this means that the agent faces blame but to a lesser degree than an unprovoked murderer. So, those explanations of the defence must account for this. Hart describes provocation as a form of *formal mitigation*,² and partial defences and mitigation share a close relationship.³ For provocation to properly fit into

² H.L.A. Hart, *Punishment and Responsibility* (Clarendon Press, 1968), 'Prolegomenon to the Principles of Punishment' 15

³ D.N. Husak, 'Partial Defences', (1998) 11 Can JL and Jurisprudence 167, 168: "Partial justifications and excuses are kinds of *mitigating circumstances*. In the broadest sense, a circumstance mitigates if it alleviates, abates or diminishes the severity of a punishment imposed by law."

Basically, a partial excuse is "if the defendant got into a bit of a state" and partial justification is if "the victim made a significant contribution by his/her own behaviour to the killing." (P. Alldridge, 'Self-Induced Provocation in the Court Of Appeal', (1991) 55 JCL 94, 94-5)

this category, to reduce the offence to voluntary manslaughter, the reason has to be sufficiently strong enough to warrant the reduction but not so strong that D deserves exoneration. The existence of partial defences and manslaughter can be put down to proportionality:⁴ D should not be blamed or punished to the extent of a murderer but it still should be substantial.⁵

Provocation is very much to do with emotion and self-control. It is a principle of the criminal law that agents must maintain their self-control and there is an acceptance "that individuals endowed with the capacity to control their behaviour are at all times expected to do so."⁶ However, at the same time it must also be acknowledged that we cannot expect too much from individuals and we "must take account of normal human failings or weaknesses".⁷ Therefore, it is proper that the defence recognises the impact of severe provocation on 'normal' human beings and this is reflected in how provocation is cited as being a general concession to human frailty.⁸

⁴ D.N. Husak, 'Partial Defences' 169: "Only a rejection of the principle of proportionality – that the severity of punishment should be proportionate to desert – would authorize the discretion to disregard a partial justification or excuse."

"In order to qualify for a partial defense, either the blame of the defendant or the wrongfulness of his act must also be less than that of the *paradigm* or *standard* offender or offense." (at 171)

J. Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] NZLR 25, 38: "The partial defences are designed to deal with a grey area of criminal culpability: cases where the choice between outright acquittal and a murder conviction is too stark."

⁵ J.H. Krause, 'Tolerating the Loss of Self-control' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 331, 332: "Although portraying provocation as an excuse does send the message that the defendant's conduct is not 'right', it nonetheless *tolerates* that conduct - by offering the defendant not only our sympathy, but also a significant reduction in punishment."

Cf. C. Lee, 'Reasonable Provocation and Self-defence: Recognizing the Distinction Between Act Reasonableness and Emotion Reasonableness' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 427, 428: "We do not want others to emulate the behaviour. We mitigate the charges only because we feel sympathy for the provoked killer."

⁶ F.McAuley, 'Anticipating the Past: the Defence of Provocation in Irish Law' (1987) 50 MLR 133, 134

⁷ Ibid 136

⁸ *R v Smith (Morgan)* [2001] 1 AC 146, 212 (Lord Millett) "The defence of provocation should be reserved for those who can and should control themselves, but who make an understandable and (partially) excusable response if sufficiently provoked."

Aside from any 'provocation' or 'provoked' requirement, there ought to be three necessary elements for all provocation defences:⁹ the provoked agent must act emotionally (subjective test), this must be brought about by severe provocation (gravity test) and the agent must meet a level of expected behaviour (control test). An anger-based defence where the agent may receive mitigation where they have lost self-control for any reason cannot be supported as citizens should demonstrate self-control at all times¹⁰ and, also, a defence where the agent kills in 'cold blood' and carries out retributive punishment cannot be supported.¹¹ In the pre-2009 provocation defence the subjective elements involved showing that D was *provoked* to lose his *self-control* and the objective element was that the provocation was enough to make a *reasonable man/ordinary person* do as he did.

By exploring justifications and excuses it will be shown that not only ought the pre-2009 defence be considered as a partial excuse but all provocation defences should be, therefore any criticism over the defence's rationale being "elusive" was incorrect.¹² Throughout Part II it will be demonstrated that the approach taken to providing a partial excuse in the pre-2009 defence was wrong and this meant that the subjective and objective elements were unable to provide mitigation appropriately.

⁹ Law Commission, 'Partial Defences to Murder: Overseas Studies' Consultation Paper No 173 (Appendices) J.Burchell, 'Appendix F - Provocation, Diminished Responsibility and the Use of Excessive Force in Self-Defence in South African Law' 188: South African's approach to provocation has been described as having "little resonance" to the traditional common law defence. South Africa treat provocation not as a defence but as a factor within the normal rules of the elements of offences, effecting capacity and intent. Since *Mokonto* (1971) 2 SA 319(A) it is considered subjective, but, despite this, a resemblance can be viewed as objective factors have some significance; evidence is inferred from expectations of ordinary behaviour ("inferences of individual subjective capacity from objective, general patterns of behaviour" (J.Burchell, 192)) and it is considered that a 'subjectivised' control test "was *always implicit*" (J.Burchell, 205)).

¹⁰ *Kirkham* (1837) 8 C & P 115, 119: "though the law condescends to human frailty, it will not indulge to human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions."

¹¹ E.O. Isedonmwun, A Requiem For Provocation [1988] 32 Journal of African Law 194, 206: "provocation provides one of those rare where self-help is allowed by the law. There is therefore observable a marked reluctance to grant the defence readily."

¹² (n1)

Cf. P. Alldridge, 'Self-Induced Provocation in the Court Of Appeal' 94: "there has never been total clarity as to why" provocation reduces murder to manslaughter. Part I does demonstrate, though, that in the course of the development of provocation the rationale was not always appreciated and it was not until post-1957 that there was more consistency in the excusatory approach.

b) justifications

When conduct is sought to be justified it is appropriate to make arguments to show that the conduct was right, good, proper and warranted in the circumstances.¹³ A judgement has to be made: on balance, the conduct was the right thing to do. The conduct remains harmful but given the correct context, all things considered, it was not wrongful. Robinson argues that the role of justifications is to remove such cases from blame and punishment as no net harm has been caused and the criminal law should not be concerned with these cases.¹⁴ However, the harm caused "remains a legally recognised harm" and this still must "be avoided wherever possible."¹⁵ It is described as a lesser evil as, overall, it brings about a better outcome.¹⁶ Therefore, the harm involved in committing some offence is outweighed through the circumstances of the justification. The actor would have to be protecting an interest which is valued highly within society.¹⁷ The overall benefit means society regards this as, at least, acceptable: "while the actor satisfies the elements of an offence, his conduct should be tolerated or even encouraged because of the benefit it brings."¹⁸ Justified conduct can be performed by anybody as it does not matter who brings the outcome about and justified conduct should not be prevented as it will stop the right outcome being produced.

¹³ However, justifications may include merely tolerable conduct (n29-30).

¹⁴ P. Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 UCLA 272: "the role of the principle of justification is to compensate for the limitations of a written code".

¹⁵ P. Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997) 95

¹⁶ G. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 769: "The modern claim is that all justificatory arguments can be reduced to a balancing of competing interests and a judgment in favor of the superior interest."

For example, the US Model Penal Code defines a lesser evil as "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."

¹⁷ P. Robinson, *Structure and Function in Criminal Law* 95: "any interest recognised by the society, whether that interest is individual, collective, institutional, tangible, or intangible."

¹⁸ *Ibid* 69

Robinson (at 71) goes on to discuss how justifications can be split up into three categories: a) "defensive force justifications", b) "public authority justifications" and c) "the general justification of lesser evils". If one were to argue that provocation is a justification then it must be founded under the third category as provocation is an aggressive act and not defensive.

i) *lesser evil*

For D's killing under provocation to be justified it needs to be shown that the act of killing produced a lesser evil. At the heart of a justificatory provocation defence would be that D is wronged by V because wrongful conduct is the only conduct which can sufficiently provoke an agent.¹⁹ It is clear that what is wrongful is based on society's views as "it is the prevailing cultural climate ... that determines what people define as offensive and how they react".²⁰ As will be further expanded in the discussion, such a theory would rely on the assumption that through V wronging D it allows the killing to become the superior interest to V's right to life as V's life becomes less valuable in the balance of interests.²¹

As discussed,²² a theory of lesser evils does not concede that an agent acted wrongly by causing an *evil*, but shows that in the circumstances the right choice was made. This balance of interests, between the harm caused and the harm avoided, is common with all justifications but this is one of three conditions within the *internal structure* of a justification: "*Triggering conditions* permit a *necessary* and *proportionate response*."²³ Firstly, a *triggering condition* would show that the circumstances are present for a justification to exist, so that, on balance, the conduct was in fact a lesser evil, meaning that "the present value of the harm avoided is greater than the present value of the harm anticipated".²⁴ Secondly, the *necessity* requirement means that the conduct must "avoid an imminent and impending danger of harm"²⁵ and this "demands that the defendant act only when and to the extent necessary to protect or further the interest at stake."²⁶ Thirdly, the *proportionality* requirement shows that there must not be an "alternative reasonable means for avoiding the threatened harm"²⁷ and this "places a maximum limit on the necessary harm that may be caused in protection or furtherance of an interest."²⁸

¹⁹ F. McAuley, *Anticipating the Past* 137

²⁰ Ibid 138. Also, Fletcher, *Rethinking Criminal Law* 243.

²¹ The balance of interests was introduced earlier (n13-8).

²² (n13-4)

²³ P. Robinson, *Structure and Function in Criminal Law* 98

²⁴ G. Fletcher, *Rethinking Criminal Law* 775

²⁵ Ibid

²⁶ P. Robinson, *Structure and Function in Criminal Law* 99

²⁷ G. Fletcher, *Rethinking Criminal Law* 775

²⁸ P. Robinson, *Structure and Function in Criminal Law* 99

The pre-2009 provocation defence did not produce a lesser evil, nor should any form of the defence. For a provoked killing to be a lesser evil it would have to be successfully argued that V's life is less worthy of protection owing to the wrongful conduct which they carried out and that D has an interest in carrying out retributive justice because of the sense of injustice they experienced. The problem for such an argument is that the wrong suffered by the agent does not outweigh his victim's right to life, therefore, this does not satisfy the first condition, that the *triggering conditions* for a lesser evil actually exist. This is implicit from the fact that the lesser offense of manslaughter has traditionally been imposed as it signifies that the killing is always excessive no matter what the provocation is; we should not recognise that hurt feelings, anger and a desire to retaliate as interests which are deserving of protection over protecting a victim's right to life.

The basis of a justified killing in self-defence allows a direct contrast with the provocation defence. Self-defence is about an agent preventing serious unjust harm from an attacker and therefore such defensive conduct has great societal value, it is about protecting the physical well-being of innocents over aggressors. Even so, self-defence is not overwhelmingly rightful conduct because of the serious harm, an intentional killing, which is caused in bringing about the most desirable outcome.²⁹ A provoked killing does not have the same power as defensive conduct in the balance, the fact that the agent is merely seeking to 'right' a wrong, and does so through the intentional killing of another, does not create a compelling argument for it to be considered a lesser evil. The interests that the agent is seeking to protect, most likely self-respect and self-worth, do not outweigh the value of a provoker's life.³⁰ A killing in provocation is an impulsive killing

²⁹ J. Dressler, 'New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' (1984) 32 UCLA LR 61, 84: "do we as a society consider the intentional taking of human life, even of an aggressor, morally good? Or do we only tolerate it as non-wrongful?"

G. Fletcher, 'The Right Deed for the Wrong Reason: A Reply to Mr. Robinson' (1975) 23 UCLA LR 293, 306: "It is harder to argue that repelling an aggressor is intrinsically good ... Self-defense appears to be better conceived as a necessary evil rather than as the bringing about of a state of affairs that is affirmatively desirable."

³⁰ J. Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) 73 JCL and Crim 421, 458: "Are we to say that immoral conduct, albeit non-life endangering, should make a person's life less deserving of society's protection? ... It runs counter to the high value we place on life, as developed in self-defense theory, wherein we only justify killing of deadly aggressors when it is necessary to do so to protect the lives of innocent persons."

where the injustice which D feels from being wronged makes him seek retribution against his tormentor. Even though in such circumstances D may feel that the only way that he can rid himself of such injustice is through retaliation it does not make his killing a necessary evil. Also, in cases of provocation the harm to D has already occurred, even though it could be argued that the harm is a continuing harm until retribution occurs. It is not necessary because we would see it as preferable that V remains alive; any form of necessity that D may feel is an impulse to commit a wrongful act, therefore not justifiable, only potentially excusable.

A provoked killing is not proportionate because of the similar reasons that we find that it is not a lesser evil: the value we place on life, even the life of a provoker, outweighs D's desires for homicidal retaliation:

"It is under this same principle that deadly force is rarely if ever permitted against a non-aggressor, suggesting that an innocent's life is a near absolute interest that can almost never be outweighed."³¹

The potential value in a provoked killing, the agent has rid society of someone who has committed wrongful conduct against another and that it allows the agent retribution, simply does not outweigh the life of a provoker.

The pre-2009 provocation did not operate with the outlook of justifying the provoked killer's actions, as was demonstrated by the fact that it was partial defence and the loss of self-control requirement, but it is important to show that the act of killing is in no way justifiable under a provocation defence in any circumstances. In *Duffy* Devlin J made it clear that the provocation defence is only concerned with the wrong D suffered in so far as it helps to explain his retaliation and it is not striving to blame the provoker:

³¹ P. Robinson, *Structure and Function in Criminal Law* 100: "such a commitment to proportionality – as in the valuation of human life over property alone, even the life of a law-breaker – is the mark of a civilised society."

"you are not concerned with blame here - the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the appellant."³²

Provocation is not a justification because, unlike self-defence, it does not seek to blame victims for their own death and Renke is correct to state that "it would not belong in our criminal law" if that were the case.³³ Nevertheless, inspecting V's conduct is a necessary part of the defence and if the rationale is not understood or appreciated then this perception can exist.

The provocation defence requires that the retaliation has a reason and this stems from the provocative conduct. It is not possible to avoid the fact that the victim's role needs to be inspected to evaluate the severity of the provocation,³⁴ but as long as it is clear that the killing was excessive and V did not deserve to be killed then the defence can exist. That is why the basis of human frailty to provocation is appealing as it appreciates the

³² [1949] 1 All ER 932

A. Howe, 'Mastering Emotions or Still Losing Control? Seeking Public Engagement with "Sexual Infidelity" Homicide' (2013) 21 Fem Leg Stud 141, 146: The author asks if the Devlin took this approach more easily because the case was that of a woman killing a man whilst the man was asleep, and he asserts that blame is often attached to women in infidelity cases: "What a far cry it is from the far more common wife-killing case where the victim is always blamed".

³³ W.N. Renke, 'Calm Like a Bomb: An Assessment of the Partial Defence of Provocation' (2009-2010) 47 Alta LR 729, 750: "If provocation were a justification, the law would, in effect, be saying that homicidal violence was right - whether the victim was an abused spouse, a person who made a homosexual advance, or someone who insulted the accused in a bar. Provocation would blame victims. If that were provocation's meaning and effect, it would not belong in our criminal law."

³⁴ C. Wells, 'Provocation: The Case for Abolition' in A. Ashworth & B. Mitchell, *Rethinking English Homicide Law* (Oxford University Press, 2000) 101: "Neither dead men nor women tell tales. Provocation invites the defamation of the dead person."

R.B. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 Cal L Rev 133, 147: "No matter which theory [justification or excuse] one uses to rationalize the provocation defense, however, the analysis still focuses on the victim's behavior."

O. Quick & C. Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45 Australian & New Zealand Journal of Criminology 337, 340: "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'".

role that the victim had to play, in terms of evaluating the gravity of the provocation, but it is focused on D's own fault for retaliating when he should not have done so. Problems also arise when it is forgotten that the defence is based on D getting provoked by something substantial and the nature and evaluation of the provocation is ignored, provocation can then be viewed as akin to diminished responsibility. Looking at the role of the victim is not ideal but it is essential for provocation as D does not get angry in isolation. There must still be strong reasons for the maintenance of the defence and this is based on proportionality which stems from the understanding of the circumstances.³⁵

There are many elements of the pre-2009 provocation defence which are not consistent with a justificatory basis. The fact that the source of the provocation did not have to stem from V is an element of the defence which highlights that it was not the wrong which D suffered that was the focus but the impact this had on D. Any argument that a provocation defence is justificatory relies on the fact that the provocation must stem from V in order to influence the balance of interests. Even before the Homicide Act 1957 the statement made in *Duffy*³⁶ by Devlin J that "[p]rovocation is some act, or series of acts, done by the dead man to the accused" has been demonstrated to be not entirely accurate.³⁷ Post-1957, in *Davies*,³⁸ it was made clear that anything could be the source of the provocation and indirect provocation³⁹ and misdirected provocation⁴⁰ are not excluded from consideration.⁴¹

The *Mancini* rule is as close as the modern defence has got to using justificatory language and this was even out of step with the defence. The *Mancini* rule, that the mode of resentment had to be proportionate to the provocation received, was also interpreted as only being "merely a consideration" since the implementation of the 1957

³⁵ This point will be advanced after showing that the rationale of the defence is partial excuse, not just that this is its basis but that it ought to be recognised because of the existence of common human frailty when provocation occurs (n93-109).

³⁶ [1949] 1 All ER 932

³⁷ 'Chapter 1 - The Early Defence' (n90-102)

³⁸ [1975] QB 691

³⁹ *Pearson* [1992] Crim LR 193

⁴⁰ *Porrit* [1961] 3 All ER 463

⁴¹ 'Chapter 2 - The Post-1957 Defence' (n18-21)

Act and was subject to much criticism for being a unrealistic expectation whilst the defence demanded that D lost his self-control.⁴² The reasonable man test was equated to the ordinary person test and this was in no way looking the raise the required level of conduct to a standard where one could forcefully argue that D was warranted in their response.⁴³ It may have been that D could have made such arguments in favour of retribution⁴⁴ but these ought not to be found in the provocation defence, as is demonstrated with the contrast with self-defence. Provocation is founded on that the killing was an over-reaction and excessive.⁴⁵ The essential elements of the defence, the subjective, gravity and control tests, have all been highlighted in how they support this conclusion.

ii) partial justification

Owing to its inability to produce a lesser evil, if provocation is based on a justificatory standing it must be shown that partial justifications can exist and, if so, they can go on to explain provocation. Conduct can be described as either being good or bad, but there are degrees to this. As alluded to,⁴⁶ a killing in self-defence may be seen as something that is merely tolerable or as having a greater net value, it is, however, justifiable even if the degree of its value can be debated. Just as one would go about to construct an argument in favour of provocation being a justification a partial justification relies on showing that V lessened the value of his life through provoking D:⁴⁷

"the defence entails a denial that the defendant's actions were entirely wrongful in the first place, in the sense that it implies that the defendant

⁴² *Phillips v The Queen* [1969] 2 AC 130, 138. See 'Chapter 2 - The Post-1957 Defence' (n34-46)

⁴³ *Attorney General for Jersey v Holley* [2005] 2 AC 580, 589 (Lord Nicholls) (PC): "the phrase is intended to refer to an ordinary person, that is, a person of ordinary self-control."

⁴⁴ For example, the discussion of the case of *Fisher* at 'Chapter 1 - The Early Defence' (n69): D claimed that by killing V he had done what any man in England would have done.

⁴⁵ (n49-52)

⁴⁶ (n29-30)

⁴⁷ A basic definition of partial justification was given at (n3): "the victim made a significant contribution by his/her own behaviour to the killing."

was partially justified in reacting as he did because of the untoward conduct of his victim."⁴⁸

There is, therefore, an acknowledgement that D's conduct is unable to become the lesser evil and there remains a degree of wrongfulness; so, a partially justified killing would be deemed to be excessive.

The argument for provocation as a partial justification is that a provoked killing is not as bad as an unprovoked killing.⁴⁹ In the discussion of the seventeenth century provocation defence it was shown that the killing was always seen to be excessive or an over-reaction, but by having adequate provocation⁵⁰ it meant that the killings were seen as closer to the mean (the proportionate response): it should be murder when there is inadequate provocation because of the "(great) extent of the departure from the mean" and it should be manslaughter where "the defendants have not in anger gone *too far* beyond the mean."⁵¹ In other words, a provoked killing should never be seen as proportionate but it should be distinguished from murder as it is *less wrong* than it otherwise would be.⁵²

Partial justifications suffer from their inability, as do justificatory theories of lesser evils, to explain the subjective limb of provocation, the loss of self-control requirement. Therefore, so that partial justification can have a role in the provocation defence, the pre-2009 defence has been interpreted as having a mixed rationale, the concepts of partial justification and partial excuse have been used to explain the elements of the

⁴⁸ F. McAuley, 'Anticipating the Past' 139

⁴⁹ M.N. Berman & I.P. Farrell, 'Provocation as Partial Justification and Partial Excuse' (2010) U of Texas Law, Public Law Research Paper No 166, 28: "Killing in response to adequate provocation is wrong—seriously wrong, and deserving of heavy punishment. But it is less wrong, all else being equal, than killing in the absence of provocation."

⁵⁰ In the form of the four categories from *Mawgridge* discussed in 'Chapter 1 - The Early Defence' (n26-31)

⁵¹ J. Horder, *Provocation And Responsibility* 54

⁵² D.N. Husak, 'Partial Defences' 185: "If a complete justification arises whenever the wrongfulness of an offense is outweighed, a partial justification arises whenever the wrongfulness of an offense is reduced, but is not outweighed altogether."

defence independently⁵³ or cooperatively.⁵⁴ Ashworth has stated that the pre-2009 defence "rests just as much on notions of justification as upon the excusing element of loss of self-control."⁵⁵ He finds that a provoked killer can be differentiated from an unprovoked killer through a partial justification as "an individual is to some extent morally justified in making a punitive return against someone who intentionally causes him serious offence".⁵⁶ The partial excuse is, though, the sole explanation of the loss of self-control requirement as it would be unnecessary under a partial justification because of its exclusive focus on the value of the conduct.⁵⁷

As has been demonstrated,⁵⁸ the concept of partial justification cannot truly explain the pre-2009 defence as it was applied in a fashion where anything could be viewed as provocative and, as McAuley states, "a plea of justification cannot succeed unless it is shown that the victim was the author of the provocation", unless the value of V's life remains unaltered in the balance of interests.⁵⁹ Through admitting cases where D is indirectly provoked or misdirects his retaliation it highlights that the focus is not on V wronging D but on the impact that feeling provoked had on D. The discussion of justifications, above,⁶⁰ can equally be applied to partial justification in how the focus of the defence is not to blame V.

It is submitted that the argument for partial justification in provocation fails in the same manner as the argument for lesser evils: provoking does not impact on the value of V's

⁵³ M.N. Berman & I.P. Farrell, 'Provocation as Partial Justification and Partial Excuse' 29: "partial excuse and partial justification each independently provide mitigation." Their argument is one that is a mixed rationale, where a partial justification and a partial excuse exist separately, in order to properly explain how adequate provocation and loss of self-control can both be a part of provocation.

⁵⁴ A. Ashworth, 'The Doctrine of Provocation' 317-8: "The law's subjective condition operates to ensure that it was not a revenge killing, but rather a sudden and uncontrolled reaction to perceived injustice. The objective condition looks to the element of partial justification and, inevitably, to the conduct of the provoking party."

⁵⁵ Ibid 307

⁵⁶ Ibid

⁵⁷ Ibid 314: Ashworth rightly finds, though, that the function of the loss of self-control requirement is to "distinguish between an uncontrolled reaction to provocation and deliberate revenge".

⁵⁸ (n32-42)

⁵⁹ F. McAuley, 'Anticipating the Past' 139

⁶⁰ (n13-21)

life.⁶¹ However, there is a more fundamental argument, which is that it does not hold that justifications work in this manner. Partial justification is an incoherent concept as justifications are all or nothing; if conduct does not reach the standard of being seen as right, all things considered, then one cannot say it was partially right. This is the approach taken by Uniacke:

"Justification can be a matter of degree: something can be arguably justified, barely justified, amply justified, etc. But conduct described in a particular way is either justified – permissible or right – or it is not. Thus a particular act ... cannot be partially justified."⁶²

The argument that partial justifications can exist, that it is wrong but less wrong, is not a justification in any way and is a misuse of the term. In the balance of lesser evils if some conduct does not tip into being classified as a justification then it is simply wrong, and, in Uniacke's terminology, it does not matter if it is *barely* wrong as it is nevertheless classified as wrongful. When conduct is classified as wrongful the agent's reasons are insufficient and the conduct, all things considered, should be condemned. The language of justification does not allow for partiality; the concept of partial justification is therefore incoherent as the agent's argument is seeking to attribute value to their conduct but, also, admits wrongfulness.

It has been demonstrated that a justification was not the basis for the pre-2009 defence, but it is also possible to go further and state that justifications cannot explain any form of provocation defence if the value of the victim's life is to be respected: the value of the act of killing cannot be enhanced through displaying that D was provoked, even if it was V who provoked him. A more convincing argument would be that where the agent has

⁶¹ See, in particular, Devlin J's judgment in *Duffy* (n32).

⁶¹ R. G. Fontaine, 'Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification' (2009) Arizona Legal Studies, Paper 08-07, 22: "Surely, many, if not most, successful heat of passion cases involve a killer whose emotional outrage, though not homicidal behavior, appears to be at least somewhat warranted. It may be that the ease with which we identify with the outrage leads us, at times, to view the reactive killing as partially justified."

⁶² S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press, 1994) 13

made such an admission, to avoid or reduce blame and punishment, they should look towards being excused as this better reflects the circumstances. The pre-2009 defence, and all forms of the provocation defence, can be explained through the rationale of partial excuse.

c) excuses

To successfully argue that provocation would only lead to a partial excuse it must be demonstrated that full excuses do not apply, but throughout the course of the argument it will become apparent why evidence of such circumstances does have *some* excusatory power.

When an excuse is sought it is admitted that there was a wrong but it is possible to provide a reason for why D should not be blamed and punished. Excuses are based on the circumstances and the actor's capacity:

"What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical or mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities. Where these capacities and opportunities are absent ... the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice.'"⁶³

In a sense, such an agent acts involuntarily and their conduct can be put down to the existence of an excusatory element: with the absence of "meaningful choice there can be no blame and ought to be no liability or punishment."⁶⁴ An excused agent commits a

⁶³ H.L.A. Hart, *Punishment and Responsibility*, 'Negligence, Mens Rea and Criminal Responsibility' 152
M. Moore, *Placing Blame: A Theory of the Criminal Law* (Clarendon Press, 1997) Chapter 13: Choice Character & Excuse 554, "One relates to the equipment of the actor: does he have sufficient choosing capacity to be responsible? The other relates to the situation in which the actor finds himself: does that situation present him with a fair chance to use his capacities for choice so as to give effect to his decision?"

⁶⁴ P. Robinson, *Structure and Function in Criminal Law* 81

wrongful act, the excuse only works to show why we should not blame the agent and does not seek to add value to the quality of the act as a justification does.⁶⁵ Excuses can, however, also be relied upon when an agent makes a mistake of fact.⁶⁶ As will be shown, provocation does not lead to an absence of capacity or opportunity, nor does it fall under a mistake of fact.⁶⁷ Provocation is not a conventional excuse and does not fall under the definition set out by Hart as it only works as a form of mitigation, the agent is still blamed and punished albeit less severely.⁶⁸

i) absence of capacity

An excuse based on the absence of capacity would show that the agent did not have the capability to make a meaningful choice, without this no blame can be attributed. For example, application of the *M'Naghten*⁶⁹ rules would show that the agent's choice is not one which blame can be associated with; the act is the sort which we can condemn but the candidate's capacity means that he is fully excused (or possibly exempt from criminal responsibility).

In provocation the agent has capacity to make the decision to do otherwise. The external conduct is perceived by D to be provocative, therefore D makes judgements of wrongdoing, and this perception creates a sense of injustice and anger.⁷⁰ Emotions in the provocation defence are not seen to incapacitate the agent.⁷¹ Moore highlights that the extent which emotions are included in a choice theory of excuse is problematic and states that there are concerns that by "recognising fears, cravings, instinctual desires,

⁶⁵ The language of justification relates to the act (n13).

⁶⁶ P. Robinson, *Structure and Function in Criminal Law* 83, "the actor should not be punished because in fact he or she has acted in a way that anyone else would have acted in the same situation. That is, the actor's mistake is reasonable; any reasonable person would have made the same mistake."

⁶⁷ Mistake of fact is often relevant but is incorporated into the test by judging the agent from the facts that they honestly believed in. For example, in the US case of *State v Yanz* 74 Conn 177, 50 A 37 (1901) D found his wife in a forest with another man and D killed the man finding this provocative, however, it was disputed over whether they were actually engaging in an affair.

⁶⁸ H.L.A. Hart acknowledges this, see (n2).

⁶⁹ (1843) 10 C&F 200, 8 ER 718: an agent may only be found insane if there is a defect of reason emanating from a disease of the mind causing an agent to be unaware of the nature and quality of his act or causing an agent not to know that his act was wrong.

⁷⁰ J. Horder, *Provocation And Responsibility* 60

⁷¹ This and emotions in provocation cases will be more fully discussed later on in 'Chapter 6 - Subjective Element'.

strong passions, or other internal states as excuses unduly reduces one's true responsibility."⁷² An emotion like anger in a normal person should not have the impact of completely overriding their choosing system and such anger may actually be seen as a guiding emotion and ought to be controlled:

"Our emotions are both products and causes of the judgements we make as we decide what to do. When we get angry, for example, our anger can itself be caused by judgement ... Such anger reflects our judgement that something immoral has just taken place. Further, such anger at unjust treatment need not make reasoned choice more difficult. It may instead make choice easier by highlighting what we otherwise might have missed."⁷³

The criminal law recognises that anger in provocation cases does not take away the agent's intent.⁷⁴ Also, provocation can help to show the desire of the agent, to strike his provoker, therefore provocation can be seen to "magnify" the intent rather than "negate" it.⁷⁵

The pre-2009 defence required a loss of self-control but still acknowledged that the agent retained a sufficient level control.⁷⁶ More accurately, it is only a partial loss of self-control that is required for provocation⁷⁷ and the agent is seen to have sufficient control

⁷² M. Moore, *Placing Blame* 556

⁷³ Ibid 559

⁷⁴ If D, for example, loses their self-control owing to inadequate provocation it will be murder and this requires intent.

As has been demonstrated though, the defence had been previously interpreted as removing intent. See 'Chapter 1 - The Early Defence' (n72-5).

⁷⁵ J. Dressler, 'Rethinking Heat of Passion' 462: "Provocation not only causes anger; it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negative intent. It magnifies it."

In South Africa, since *Mokonto* (1971) 2 SA 319(A), evidence of provocation is acknowledged to have two differing consequences: it can either remove intent, and mean D is likely to be liable for culpable homicide, or confirm it (for more on the South African law see (n9)).

⁷⁶ *Phillips* [1969] 2 AC 130, 137-8 (Lord Diplock): the argument that "there is no intermediate stage between icy detachment and going berserk" is "false". See 'Chapter 2 - The Post-1957 Defence' (n24).

⁷⁷ J. Dressler, 'Rethinking Heat of Passion' 466

over his choice.⁷⁸ Below, this partial loss of self-control concept and the relationship between emotion and D's capacity helps to establish partial excuse as the foundation for the defence.

ii) absence of opportunity

Excuses which focus on the absence of capacity involve looking at psychological matters whereas excuses which focus on the absence of fair opportunity involve looking at objective constraints.⁷⁹ There must be a factor which is substantial to excuse an agent. Using Hart's definition,⁸⁰ the circumstance must have prevented the agent from exercising his own free choice to the extent that he is free of blame ('*he could not have done otherwise*' or '*he had no real choice*'), therefore, Moore is correct to state that it must be that "[o]ur opportunities to avoid wrongful action are not *unfairly* diminished simply because they are diminished."⁸¹ Duress is a clear example of such a case, where the agent's own choice to do otherwise is being unfairly diminished through the threat of harm, the agent cannot be blamed as his ability to make "meaningful choices" are "dramatically reduced".⁸²

Provocation is to do with emotion creating the motivation for retribution.⁸³ If it was argued that the wrongful conduct was the source of an unfair opportunity to choose, equivalent to the threat in duress, then it would be necessary to see that there is some

⁷⁸ W.N. Renke, 'Calm Like a Bomb' 760. The author contrasts automatism and provocation (partial loss of self-control) to show that D does act with choice and has sufficient capacity in order to be partially blamed: "Although the influence of emotion is very strong, it cannot have made choice impossible."

In German law excessive self-defence is viewed as being a full excuse, s33 of the German Criminal Code reads: "A person who exceeds the limits of self-defence out of confusion, fear or terror shall not be held criminally liable." Pedain explains that a "a criminal conviction would be inappropriate in view of the pressure with which the agent was confronted" (see Law Commission (2003), 'The Law of Murder: Overseas Comparative Studies' Consultation Paper No 173, A. Pedain, 'Intentional Killings: The German Law' 2). However, this, obviously, does not lead to an absence of capacity akin to what has been discussed and ought to be viewed as a partial excuse as it is more like a difficulty act to a standard, see section iii).

⁷⁹ M. Moore, *Placing Blame* 561: "*fair opportunity* is not measured by his psychological difficulties, but rather by the objective facts of the matter. Objectively D₂ had a fair opportunity not to rob the bank, even if subjectively he experienced it as a hard choice."

⁸⁰ (n63)

⁸¹ M. Moore, *Placing Blame* 560

⁸² J. Dressler, 'Rethinking Heat of Passion' 461

⁸³ See (n70), where the impact of emotion is discussed.

level of compulsion to retaliate and this is not the case. In this sense, there is no *direct* link between the provocation and the retaliation, it is a process which takes place for D to feel provoked.⁸⁴ In duress the agent's choice is substantially limited by the threat. In England and Wales duress is unavailable as a defence for murder and it is probably because the agent has some choice.⁸⁵ This is an uncomfortable situation as the criminal law should not ask too much of citizens, but for murder this is being balanced with the importance with which we place on human life; as long as the agent has an opportunity, no matter how much it is reduced, he is required not to kill an innocent. It is asked of the threatened agent that he acts 'heroically' and accept the harm rather than carrying out the killing.⁸⁶ A provoked agent has the choice not to kill too, but the objective circumstances provide no reason why he lacks a fair opportunity; it is a mixture of emotional difficulty and a desire to retaliate which drives the killing.

iii) partial excuse

Provocation is a partial defence so it is not surprising that it does not fit into such definitions. When an agent is partially excused he is still to blame albeit to a lesser degree, the reason is not strong enough to exonerate but works to show why he should not face the normal level of blame and punishment.⁸⁷ This is why Hart's description of provocation as a type of *formal mitigation* works because a partial defence is essentially a matter of mitigation.⁸⁸ The reason why a partial excuse should be considered is that it makes a lesser but fairly substantial impact on choice. Unlike justifications, which have an all-or-nothing quality, there is no reason why excuses are unable to recognise

⁸⁴ (n70)

⁸⁵ A. P. Simester & G. R. Sullivan et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing, 2010) 736: "the decision to commit the crime is a product of deliberation. It is *her* choice, albeit a constrained choice."

⁸⁶ J. Dressler, 'Rethinking Heat of Passion' 463: "With duress, only Actor's choice-opportunities are reduced. As such, we demand that the unlucky Actor accept his unenviable choices, and make the morally 'right' decision, to die or turn upon the coercer. He is capable of making such a decision."

⁸⁷ Proportionality in blame and punishment of provocation cases was introduced earlier on to demonstrate the reason behind partial defences (n4).

⁸⁸ (n2-3)

degrees of blameworthiness as the ability for the actor to make a choice can be *reduced even if it is not eroded entirely*.⁸⁹

In provocation D intentionally kills another with capacity and a fair opportunity to do otherwise, yet a defence has traditionally been available. The reason behind this, for some time,⁹⁰ has been that provocation has been viewed as a concession to human frailty, a general human frailty that individuals in exceptional circumstances form strong emotions when they are wronged which impact on their ability to control themselves and the sense of injustice can motivate them to react and kill. As discussed, it is expected that citizens maintain their self-control but in such circumstances it is recognised that it is often difficult to do so and would ask a lot of the individual to curb this impulse.⁹¹ Therefore, mitigation is offered and it is the role of the objective limb to link the emotion in the circumstances of a provocation case to these standards. The objective limb is an evaluative element which must distinguish between emotions which are deserving of mitigation from emotions which are not. The elements of the defence come together to show that sufficient provocation causes a *difficulty to do otherwise*. The agent still faces blame because even though it is difficult he should have shown greater restraint: "choice is not impossible but practically very difficult."⁹²

It still needs to be explained why human frailty is recognised. The reason for a provocation defence is essentially that it allows for the acknowledgement of emotions in situations where it is known that it is difficult for a person to act with normal restraint. Human frailty means that D acted wrongly but acted like anyone else might have done:

⁸⁹ D.N. Husak, 'Partial Defences' 170: "a partial excuse reduces the blame of the agent who performs the act – but not to a degree sufficient to preclude liability altogether."

Cf. Garvey argues that partial excuses cannot exist: "... the idea of a partial incapacity is incoherent. With respect to any particular task at any particular point in time an actor either does or does not have the capacity to accomplish the task." (S.P. Garvey, 'Passion's Puzzle' (2005) 90 Iowa LR 1677, 1705)

The basis for partial excuses has and will continue to be discussed in this section. This basis does recognise that D has the capacity to do otherwise.

⁹⁰ It has been discussed, in Part I, how the defence was previously about responding with honour to affronts and how this basis changed to be human frailty.

⁹¹ (n6-8)

⁹² W.N. Renke, 'Calm Like a Bomb' 760

"the human courier is accompanied by the luggage of imperfection."⁹³ It is that D "act[ed] unreasonably when presented with a substantial provocation"⁹⁴ and this is "understandable, though still reprehensible".⁹⁵ All this means that proportionality demands that a case of provocation needs to be distinguished from murder and a partial excuse allows for this on a basis which is appropriate in relation to the circumstances. There are four important points which lead from this.

Common human frailty

Firstly, the defence is about *common* human frailty, when a defence is about *individual* weaknesses it rests on completely different foundations and that is the basis of diminished responsibility.⁹⁶ A common human frailty can only be found when the expected level of self-control is consistent with that of an ordinary person, yet there are characteristics which can be considered, such as D's age, which enhance and do not compromise the test's ability to compare D to the ordinary standard.⁹⁷ Also, the relationship between the objective and subjective elements is highlighted when discussing common human frailty, the difficulty that D faces when being provoked is not sufficient to warrant mitigation without it being a difficulty that all people may experience.

There are arguments that a subjective element alone could be the basis for provocation.⁹⁸ In that case the defence would merely be providing mitigation for anger and extreme emotions and there would be no need to judge D by the ordinary standards which society expects, in terms of controlling these passions and only responding when

⁹³ K. Bennardo, 'Of Ordinarity and Excuse: Heat-Of-Passion and the Seven Deadly Sins' (2007) 36 Cap ULR 675, 678

⁹⁴ R.G. Fontaine, 'The Wrongfulness Of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, And Heat Of Passion Homicide' (2009) 12 NCLR 1, 69, 75

⁹⁵ L.J. Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1985-1986) 33 UCLA LR 1679, 1679

⁹⁶ This is an important point and will be discussed throughout 'Chapter 5 - Objective Element'.

⁹⁷ *R v Smith (Morgan)* [2001] 1 AC 146, 205 (Lord Hobhouse): "they are not factors which qualify the criterion of ordinarity." See 'Chapter 2 - The Post-1957 Defence' (n69-89).

⁹⁸ J.K. Weber, 'Some Provoking Aspects of Voluntary Manslaughter Law', (1981) 10 Comm L World R 159, 160: "It must be remembered that we are speaking of a man who is excited out of reason, and who has perpetrated the act in an abnormal state of mind ...

All in all, though with an attitude of caution, it seems possible to conclude that heat of passion alone would be justification for reducing an offence from murder to voluntary manslaughter."

the provocation is severe. The common human frailty basis for the defence shows how important making these judgements are and the defence should not exist without them.⁹⁹

Focus on D

Secondly, whilst the act is condemned it must be acknowledged that the defence is about understanding, and maybe even showing a degree of compassion and sympathy, for the circumstances D was in. When discussing this it needs to be clear that the language establishes this and does not justify. For example, Nourse states that provocation "condemns the killings, but with sympathy for the defendant's situation"¹⁰⁰ but then goes on to state that "[it] is not simply a claim for sympathy; it is a claim of authority and a demand for our concurrence."¹⁰¹ When the role of warrant and justification is discussed in relation to the gravity test it is about ensuring that it is possible to understand why D got angry, D is saying: *'I was angry for a substantial reason. I know I was wrong but you can understand why I felt like that at the time'*. It will be advanced that warranted emotion has a role in the defence but it needs to be expressed carefully, not as, for example, to blame the victim.¹⁰²

Expected level of behaviour

Thirdly, human frailty extends only as far as provocation and does not provide a basis for revenge killings, so, for example, when retaliation is substantially delayed it is less

⁹⁹ V. Bergelson, 'Justification or Excuse? Exploring the Meaning of Provocation' (2009-2010) 42 Tex Tech LR 307, 314: "The fact that the law asks not only how badly the actor was distressed, but also why he was so badly distressed, implies that the rationale for the defense lies in the source of provocation, not merely in the resulting emotional disturbance."

T. Macklem & J. Gardner, 'Provocation and Pluralism' (2001) 64 MLR 6 815, 819: "An excuse for an angry action, *qua* angry, depends on the justification of the anger itself. Even in the realm of excuse, therefore, the analysis is moral and not merely causal, for the question of the justification of the anger (and hence the excuse of the angry action) is a moral question. Those who take the opposite view fall into the trap of confusing excuses with denials of responsibility. People who are not responsible for their actions admittedly face no justificatory questions."

¹⁰⁰ V. Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense', (1997) Yale LJ Vol 106, No 5, 1331, 1331

¹⁰¹ Ibid 1393

¹⁰² A point discussed above (n32-5).

Warranted emotion will be discussed later in this Chapter (n113-28).

certain that D acted whilst provoked.¹⁰³ Bennardo has stated, with regards to delay and temporal issues, that the defence sets "aspirational limitation[s], focusing on how humans *should* act ... rather than how humans *do* act" and this is "effectively removing entire 'passions' from protection".¹⁰⁴ The defence does set standards of behaviour that people have to meet, but these standards, rather than being "aspirational", need to be about ensuring that the killing can be somewhat understood and are therefore realistic standards of expected behaviour. Normal people are able to control themselves to an extent¹⁰⁵ and the human frailty level is the point where it becomes possible to sympathise with D for reacting.¹⁰⁶

Proportionality

Finally, understandable anger from a common human frailty may be the basis but the link between human frailty and intentionally killing another could be viewed as being unclear:

"it may be morally understandable that defendants lose their self-control; but the 'naturalness' of the relationship between this loss of self-control and the consequent deliberate infliction of harm is morally much more contentious."¹⁰⁷

By basing the defence in human frailty it requires a finding that ordinary people find the decision not to kill more difficult when substantially provoked.¹⁰⁸ The pre-2009 defence found that people can partially lose their self-control at these times and act irrationally or, as Fontaine states,¹⁰⁹ "unreasonably". It is not inaccurate to state that it is expected or understood that people can lose their temper, show less restraint or maybe lose control

¹⁰³ See quote from *R v Ahluwalia* [1992] 4 All ER 889 at 'Chapter 2 - The Post-1957 Defence' (n31).

¹⁰⁴ K. Bennardo, 'Of Ordinarity and Excuse' 682

¹⁰⁵ (n6-8)

¹⁰⁶ This is to do with the objective element, in setting the correct standard, and the subjective test, in ensuring it embraces all provocation cases where human frailty is present. These issues will be discussed in the relevant chapters of Part II.

How to construct a test for ordinary standards for self-control will be explored in 'Chapter 5 - Objective Element'.

¹⁰⁷ J. Horder, 'Autonomy, Provocation and Duress' (1992) Crim LR 706, 711

¹⁰⁸ (n89-95)

¹⁰⁹ (n94)

when they have been wronged by another and, following on from this, to provide mitigation to a substantial offence, like manslaughter, is not inappropriate as it recognises proportionality and the distinction from murder. For there to be a partial defence which rests on the basis of killing owing to anger there needs to be a strong reason and human frailty provides this and, also, limits its reach.

d) the type of partial excuse

i) three alternatives

Provocation is a partial excuse owing to its ability to produce an impact on the agent's choice, when provoked there is a difficulty in making the decision not to respond violently. However, the defence rests on more than anger and extreme emotion as its links to a common human frailty demonstrate and the basis for why D got into this state must rest on something substantial. What should give the defence standing is that in evaluating the gravity of the provocation the views of society on the seriousness of wrongs and insults are essential in making this judgement. Therefore, it is the relationship between the subjective and objective elements which provides the footing for the partial excuse.¹¹⁰

There are three formulations of a partial excuse which could be adopted which are the most compelling as they would satisfy the necessary subjective and objective requirements of a provocation defence, however each promotes a different view of the defence. The pre-2009 provocation defence followed the *excusable loss of self-control* approach, it focused on D's mental state, his loss of self-control, but still required that an ordinary person too would have been provoked. Chapter 2 outlines how the Homicide Act 1957 was interpreted removed any element of justification in the defence and how the objective criteria came through a reasonable/ordinary person test. The flaws with the excusable loss of self-control approach will be discussed throughout the remainder of Part II as it provides the foundation for critiquing of the pre-2009 defence.

¹¹⁰ The essential elements of a provocation defence will be explored in each of the remaining chapters in Part II.

The other two formulations which could be adopted for a provocation defence, *warranted loss of self-control*¹¹¹ and *warranted excuse*,¹¹² will be introduced here but will be discussed in more depth in Parts III and IV as requiring warranted emotion has been the basis for the reform of provocation and, also, it is the approach that will be advanced. These approaches require that beyond the mental state and the control test what constitutes valid provocation, in the gravity test, ought to be justifiable. These approaches differ on the subjective limb but they seek to raise the standard by demanding severe provocation, in this manner, from the perspective of society.

ii) separation of the act and the emotion

Justificatory language, with regards to provocation, has a flaw in that it naturally focuses on the conduct, showing that the killing has greater value than an ordinary killing. As has been demonstrated,¹¹³ such language should not be associated with provocation; showing that a killing was provoked adds no value to the conduct and the value of V's life is not altered by wronging D.¹¹⁴ A provoked killing *must* find its basis in a partial excuse as the agent's behaviour is neither justifiable nor fully excusable. It is possible, though, to separate the act and the emotion and to rely upon a warranted emotion standard in the gravity test whilst maintaining partial excuse as the rationale for the defence.

Nourse has outlined a theory of warranted excuse for the provocation defence. For this to work the act, which is wrongful, needs to be separated from the emotion, which is

¹¹¹ Warranted loss of self-control – this formulation requires that there is a loss of control but is more focused on the objective questions, the loss of self-control must come from a justifiable source. This seems to reflect the basis for the reform of provocation in the Coroners and Justice Act 2009 (see 'Chapter 8 - Ministry of Justice' & 'Chapter 9 - Coroners and Justice Act 2009').

¹¹² Warranted excuse – without a strong subjective element, requiring that the agent was merely provoked and that this stemmed from a justifiable source. This seems to reflect the basis for the Law Commission's proposal (see 'Chapter 7 - Law Commission') and the approach that will be advanced throughout.

¹¹³ (n29-31)

¹¹⁴ J. Dressler, Rethinking Heat of Passion 458: "Put simply, we value life too much to justify, even partially, a person's death, on the grounds of that individual's immoral conduct."

justified,¹¹⁵ for example, "my reacting angrily towards a colleague might be justified, but not my kicking him".¹¹⁶ D may have legitimate reasons to feel anger or fear but the use of violence must be labelled as excessive. If D's anger is warranted it allows acknowledgment of why D acted as he did but at the same time allows for condemnation of the killing:

"the degree to which one's emotions or feelings are justifiable have no bearing on the justifiability of the behavior which said emotions may inspire ... justifiable emotions do not (and cannot) make otherwise wrongful behaviors justifiable."¹¹⁷

Therefore, even though this brand of partial excuse uses the words 'justifiable' and/or 'warrant' it is only in reference to the emotion and does not alter how the act ought to be viewed.¹¹⁸

Neither is requiring warranted emotion another way of expressing a partial justification; it does not seek to alter the value of the conduct, nor blame V for provoking D.¹¹⁹ The purpose of using the warranted emotion in the gravity test is to raise the standard in a

¹¹⁵ V. Nourse, 'Passion's Progress' 1338: "we are evaluating the defendant's emotional claims, not his acts. In this world, it is perfectly consistent to say that the act is unjustified overall and, at the same time, that the emotion may be 'warranted'."

At 1390: it is "a theory that speaks explicitly to the reasons why defendants claim that they have killed."

Also, at 1393: "protecting emotion does not require us to protect the deed."

¹¹⁶ S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* 13

¹¹⁷ R. G. Fontaine, 'Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification' (2009) Arizona Legal Studies, Paper 08-07, 22

C.B. Hessick, 'Is an Act Reasonableness Inquiry Necessary?' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 434, 435: "By asking jurors to determine to determine whether the *intensity* of a defendant's emotion was reasonable, rather than whether the defendant's action was reasonable, we might receive more palatable juror verdicts".

¹¹⁸ V. Nourse, 'Passion's Progress' 1394: "Indeed ... we may easily say that passionate killings are not justified even if we believe that the emotions causing some killings are, in some sense, the 'right' emotion."

C. Lee, 'Reasonable Provocation and Self-defence: Recognizing the Distinction Between Act Reasonableness and Emotion Reasonableness' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 427, 427: there is "a difference between reasonable emotions (fear, anger, outrage) and reasonable action ... this does not mean that acting on that emotion by using deadly force is also reasonable."

¹¹⁹ (n32-35)

way which is consistent with the common human frailty understanding. The flaws of using the ordinary person standard, as the pre-2009 defence did, will be discussed in the following chapters, but, put briefly, the defence was not able to reflect the views of society on the seriousness of provocations. For a common human frailty to be properly recognised it requires a warranted emotion from D, it must be that the stimulus is severe in nature from the outlook of society and thereby such an emotional response could be commonly felt.

It also must be made clear that an enquiry into the severity of D's emotion is essential, a killing in revenge, for example, could not be mitigated on the basis of a warranted excuse. Human frailty does not occur if the emotion does influence D and impact on his choice: the warranted of the emotion, tested in the gravity test, must have brought about the provoked anger, tested in the subjective test. It is the subjective test where the fundamental differences between proposals for reform, which will be discussed in Parts III and IV, lie. The Coroners and Justice Act 2009 requires warranted emotions and a loss of self-control. This approach works under the framework discussed, but it is simply that the end result is a loss of self-control. The approach which will be advanced finds that a greater set of responses to warranted emotion should be permitted within the defence; killing in fear would be consistent with the basis of the defence and killing in different types of anger, for example, in outrage, could be permissible.¹²⁰

iii) framing warranted emotion

An important issue is how to frame the question in the defence. A definition of warrant which can be embraced has been provided by Baker and Zhao in their discussion of the Coroners and Justice Act 2009:

"the defendant's sense of being seriously wronged must be one that accords with contemporary society's norms and values. In other words, it must be shown that a normal person in contemporary Britain would have

¹²⁰ It will be argued that the loss of self-control requirement, even if it includes provisions for delay, limits the scope of the defence too narrowly to spontaneous reactions in anger, see 'Chapter 6 - Subjective Element'.

felt seriously wronged in the same situation. This is judged according to the normative standards of a normal person communally situated in Britain."¹²¹

Also, Yeo stated that the 2009 Act requires "an objective test based on contemporary community values and standards by which to measure the provocation".¹²² What is key is that the standard not only raises the bar but that it is representative so that it properly tracks the views of society and that it is flexible enough for change to be recognised. Furthermore, it needs to enable the jury to express the views of society but be put in the exact circumstances which D faced in order to properly assess the gravity and the nature of what occurred.¹²³ Chapter 5 will contain a more detailed explanation of the gravity test and will demonstrate that this outlook builds on the positive developments which were made to contextualise events in the pre-2009 defence but remedies the flaws of assessing the severity of the provocation by an ordinary standard.

Warranted emotion is about trying to reflect what is generally thought to be a substantial provocation and therefore finding in what circumstances it is acceptable to get angry. It is firstly an objective test but there is no reason for why it should not require D to feel that in acting out the retaliation he was correct to feel such an emotion;¹²⁴ in fact, it *should* be that the emotion is driven by D's own feelings of warrant. Therefore, it is advanced that the warranted emotion enquiry should contain an objective and a subjective element in order to ensure that D was provoked by something which was substantial in accordance with the views of society and that he understood the severity of the circumstances and this informed his decision; thereby meaning that his choice was made more difficult by something which he understood to be substantial. This would

¹²¹ D.J. Baker & L.X. Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 254, 262

¹²² S. Yeo, 'English Reform of Provocation and Diminished Responsibility: Whither Singapore?' (2010) Sing JLS 177, 183

¹²³ The gravity test will be discussed further in 'Chapter 5 - Objective Element' and this will explore how to include response characteristics and how to build on the developments made in *Camplin*.

¹²⁴ In Part III it will be discussed how the trigger in the 2009 Act does not require that D believes that he was warranted in feeling the emotion.

underline the defence's excusatory footing as by creating this link, which shows that the circumstances motivated his decision-making, the impact which the stimulus made on his choice is guaranteed. Such a requirement would also respect the relationship which the objective and subjective elements ought to share, that they feed into each other in order to provide a suitable basis for mitigation.

Much the discussion on the reform of provocation will be about how efforts have been made to create exclusions and in Part IV the use of exclusions and presumptions will be suggested. Dressler has made an important point regarding the differences in dealing with justifications and excuses in provocation. Basically, if provocation is a justification then it is proper to set categories which include or exclude certain types of provocations, however, if it is an excuse then decisions such as these need to be made in a reasonableness test:

"It is entirely appropriate for the legislature, as society's representative, to determine which classes of killing are less undesirable than the usual homicide, and to codify those judgments. If heat of passion is a justification, then it is appropriate for the legislature to adopt clear lines determining what is adequate provocation ... Under an excuse theory ... the issue is whether the actor lived up to a standard of how 'reasonable' people act. Although a legislature may properly codify an objective excusing component, it is more plausible to leave its definition (ie., what is adequate provocation) to jurors, who represent that objective standard."¹²⁵

The question is over how a defence based on a partial excuse but requiring warranted emotion should deal with categories of disagreeable cases. As will be discussed in Chapter 9, the 2009 Act, which has an objective warranted emotion standard, contains exclusions for provocations based on sexual infidelity and certain self-inducement cases. As the defence rests on this basis there is no reason why specific exclusions cannot be set out which limit the scope of the defence but only if they contradict the

¹²⁵ J. Dressler, 'Rethinking Heat of Passion' 446-7

warranted emotion standard; these exclusions must, however, be indisputable. The exclusion for self-induced provocation works because of how it is phrased,¹²⁶ it only excludes when D's "purpose" is to use the inducement as a reason to feel 'provoked'. This exclusion is incontrovertible but there are 'broader' cases of self-induced provocation which are rightly not covered by this exclusion and for those the question ought to be, and is, left to the jury.¹²⁷ The sexual infidelity exclusion,¹²⁸ on the other hand, could be disputed as much depends on the facts of the case; if D is subjected to repeated taunts on the subject then such an exclusion would be harsh and leaves the potential for deserving cases to be excluded without them being tested in the normal gravity test.

Conclusion

The provocation defence must rest on a partial excuse. Provocation does not work to justify the conduct, even partially, and it does not excuse the individual as capacity and opportunity of choice are in place. Provocation creates a difficulty in choice and links to a common human frailty in such circumstances gives the defence grounding as the defence can only be recognised when society would find that the conduct which D faced could be deemed to be provocation. The use of the warranted emotion standard, rather than the ordinary person test, is consistent with partial excuse and better reflects what ought to be required in the gravity test.¹²⁹

The aim of this Chapter was to broadly discuss the rationale of the provocation defence in order to aid the discussion in Parts III and IV, but to also pinpoint what form of partial excuse the pre-2009 defence rested upon so that the consequences of this can be appreciated in the rest of Part II. At the beginning of the Chapter it was stated that the Law Commission's criticism, that the rationale of the pre-2009 defence was "elusive", was incorrect;¹³⁰ the pre-2009 defence was based on the excusable loss of self-control

¹²⁶ 'Chapter 9 - Coroners and Justice Act 2009' (n153-65)

¹²⁷ Ibid (n160)

¹²⁸ Ibid (n112)

¹²⁹ This will be further discussed in 'Chapter 5 - Objective Element'.

¹³⁰ (n1)

rationale and the requirements of the defence were ultimately interpreted in that manner.¹³¹ The problem was that this rationale was the wrong form of partial defence for provocation to rest upon. In the rest of Part II will be shown that not all of pre-2009 defence's problems stemmed from its rationale but that this gave it the structure whereby the views of society on the seriousness of provocations could not be properly applied and that it limited the scope of the defence to killings which took place whilst D suffered a loss of self-control even though provoked reactions have the potential to be much broader.

¹³¹ See, for example, the way in which misdirected provocation (in *R v Porritt* [1961] 1 WLR 1372) and indirect provocation (in *R v Davies* [1975] QB 691) were dealt with at (n37-42).

CHAPTER 4

ADEQUATE PROVOCATION

In order to successfully rely on the pre-2009 provocation defence D had to show that he was "provoked". This could be "by things done or by things said or by both together".¹ It is therefore necessary to understand what exactly constitutes being *provoked* as the Homicide Act 1957 invalidated any other situation where a loss of self-control occurred. By properly defining and understanding the impact of the word 'provoked' it brings out a key flaw in the pre-2009 law. If D showed that he was provoked into losing his self-control, both subjective requirements, then the defence had to go to the jury and this will be referred to as the *sufficient evidence test*.² It will be advanced that the judge was not able to act effectively as a filter and the defence dealt with cases which it should not have. This ultimately led to the Law Commission's criticism that "blameless or trivial" conduct was allowed to be the basis for the defence.³

This looks into the role of the judge. It will be advanced that the judge should only permit the defence to be presented to the jury where there is evidence that the subjective element is satisfied and D faced *provocation*, rather than he merely felt provoked. One outlook, which was commonly proposed in light of the problems with the pre-2009 defence,⁴ was that the judge should be given greater powers to control the defence at the expense of the jury, however it will be argued that this goes against the main purpose of the 1957 Act and such concerns are just as valid today.⁵ The main objective elements,⁶ the gravity test and the control test, are questions which ought to be left to the jury. The role of the judge, therefore, ought to be to test if the circumstances of provocation have arisen, but it is up to the jury to evaluate D's claim.

¹ s3 Homicide Act 1957

² The sufficient evidence test was discussed at 'Chapter 1 - The Early Defence' (n83-89) and 'Chapter 2 - The Post-1957 Defence' (n7-11)

³ Law Commission (2004) Partial Defences to Murder Report No 290, 46 [3.65]. See 'Chapter 7 - Law Commission' (n2).

⁴ W. Gorman, 'Provocation: The Jealous Husband Defence' (1999) 42 Crim LQ 478, 484: a "significant threshold test should be imposed".

⁵ The aims of the 1957 Act in giving the jury greater power over the judge were outlined at 'Chapter 1 - The Early Defence' (n81) and 'Chapter 2 - The Post-1957 Defence' (n7-11).

⁶ The gravity and control tests will be explored in 'Chapter 5 - Objective Element'.

How the sufficient evidence test is defined is highly significant as it sets the scope for what sort of cases can fall into the defence and how much control a judge will have. With regards to the pre-2009 defence there are three important questions on this matter: *Could emotions other than anger provoke? Did what provoked D have to be provocative by society's standard? Is all that provokes D deserving of consideration?* By answering these questions it gives greater understanding as to why the provocation defence needed reform and what shape a reform should take.

a) could emotions other than anger provoke?

Ashworth states that the wording of the Homicide Act 1957 means that a "loss of self-control caused by fear, panic or mental instability cannot be brought within the defence of provocation"⁷ and this is because these causes fall outside what it is to be provoked.⁸ With this understanding, anger was the sole emotion which the defence was concerned. As will be discussed further,⁹ the question as to whether D felt provoked is subjective, this means that all that is being examined here is whether D can actually be provoked by an emotion other than anger, not whether it can cause a loss of self-control or whether it is of sufficient gravity.

Being provoked could conceivably be interpreted to cover a wider set of circumstances; the word 'provoked' holds connotations with something drawing out the emotion of anger but it could be interpreted as being comparable to 'causing' or 'giving rise to' if it were seen as an equivalent to 'incite' or 'evoke'. Therefore, as Gough states, 'provoked' could simply mean the giving of a "*reason*" for a response.¹⁰ If A is said to provoke B it would

⁷ A. Ashworth, 'The Doctrine of Provocation' (1976) 35(2) Cambridge Law Journal 292, 297

⁸ *Accott* [1997] 2 Cr App R 94, 102 (Lord Steyn): a "loss of self-control caused by fear, panic, sheer bad temper or circumstances ... would not be enough."

⁹ See the section entitled '*Did what provoked D have to be provocative by society's standard?*'

¹⁰ S. Gough, 'Taking the Heat out of Provocation' (1999) 19 OJLS 481, 481: "The defence has always been associated with anger, although the ordinary meaning of the word provocation is not bound to that emotion: conduct that may provoke anger can as easily provoke fear, laughter or hatred, just as it can provoke unemotional responses like thought or conversation. Provocative conduct simply gives others *reason* to respond in some way, and it is an interest in the reasons for which defendants reacted rather than their emotional state that characterizes many of the earliest provocation cases."

most commonly be thought that *A* caused *B* to be angry, but with this understanding it could just as easily mean that *A* stirred another emotion or response, such as fear, in *B*. If it were accepted that *D* could be provoked into other emotions then all that is required is that the defence embraces these other emotions. Against this, the history of the defence tells us that provocation is about anger and ordinary responses to it, it is therefore not consistent with the historical context of the defence that fear or despair are valid as being able to provoke.¹¹

Another view could be that there was a growing will to include fear as a valid emotion¹² but that the loss of self-control requirement prevented this, and this is partly what motivated the Law Commission to modify the defence.¹³ In *Smith (Morgan)* Lord Hoffmann stated that "the law now recognises that the emotions which may cause loss of self-control are not confined to anger but may include fear and despair."¹⁴ As was discussed,¹⁵ the case was controversial and it was overruled, but that did not stem from this issue. The string of cases¹⁶ which involved 'battered women' and victims of long-term abuse highlighted that the defence's focus on an anger-based version of loss of self-control led to victims who were fearful for their safety not being able to rely on the defence; these cases, such as *Ahluwalia*, demonstrate that the emotion of fear is not properly respected and when discussing the subjective element in Chapter 6 it will be highlighted that even though delay has been incorporated into the defence, in a fashion, it is essentially at odds with the concept of loss of self-control. It is therefore not certain

¹¹ For example, the four categories of provocation in the seventeenth century from *Mawgridge* (1707) Kel 119, at 'Chapter 1 - The Early Defence' (n26), were all to do with anger.

¹² L.J. Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1985-1986) 33 UCLA LR 1679, 1682: "the legal definition of heat of passion should incorporate the reactive passions of fear and terror as fully as it includes the aggressive passion of rage in order to recognize a close relationship between heat-of-passion manslaughter and imperfect self-defense."

¹³ Law Commission: Murder, Manslaughter and Infanticide (2006) No304, 81 [5.18]: "In addition, the requirement of a loss of self-control has been widely criticised as privileging men's typical reactions to provocation over women's typical reactions. Women's reactions to provocation are less likely to involve a 'loss of self-control', as such, and more likely to be comprised of a combination of anger, fear, frustration and a sense of desperation. This can make it difficult or impossible for women to satisfy the loss of self-control requirement, even where they otherwise deserve at least a partial defence."

¹⁴ *R v Smith (Morgan)*, [2001] 1 AC 146, 168

¹⁵ 'Chapter 2 - The Post-1957 Defence' (n84-7)

¹⁶ These cases, including *R v Ahluwalia* [1992] 4 All ER 889, will be discussed in the remaining chapters of Part II.

as to why fear and anger were not viewed as on par as it could be to do with fear not being seen as a valid emotion to provoke D or it could be to do with the fact that fear and the loss of self-control requirement were incompatible.¹⁷

If a strict interpretation of the Homicide Act 1957 is made then Ashworth is probably correct to state the text would support anger being the sole emotion which ought to be considered, however as provocation remained a defence which was driven through the common law encapsulating social change it must be acknowledged that attempts were made to make such advances: "Fear, too, can undermine self-control ... Legal opinion is turning to recognize this."¹⁸

b) did what provoked D have to be provocative?

As D could be provoked "by things done or by things said or by both together" the span of 'provocative' conduct was great as anything had the potential to be considered. The enquiry into whether D was provoked was interpreted as being purely subjective.¹⁹ D had to demonstrate that the external event caused a judgement of wrongdoing creating a sense of injustice which led to the emotion,²⁰ the defence was not concerned with the nature of the external event in deciding whether D felt provoked; there is no need to show that the 'provoker' acted unlawfully, intentionally provoked, that the provocation could be considered substantial or that V was the one who provoked D.²¹ However, there must have been evidence which showed that D *felt* provoked.

As was outlined in Part I, the development of this position took place over a long period of time. In the seventeenth century only four categories of provocation existed²² and the

¹⁷ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control', (2010) JCL 74.3, 223, 224: The provocation defence "prioritised anger as its clearest expression, [and] excluded anxiety, fear, panic and horror, as impassioned states somewhat outside the conventional sign/signifier of loss of self-control."

¹⁸ R. Holton & S. Shute, 'Self-Control in the Modern Provocation Defence', (2007) 27 OJLS 1, 49, 72

¹⁹ (n26-9)

²⁰ J. Horder, *Provocation And Responsibility* (Oxford University Press, 1992) 60

²¹ For example, in 'Chapter 2 - The Post-1957 Defence' (n14-21) it was discussed how misdirected retaliation and indirect provocation were allowed to be included.

²² 'Chapter 1 - The Early Defence' (n26)

language associated with the defence was that of partial justification as the focus was on near-proportionate retaliations relating to affronts of honour.²³ However, as the defence developed into requiring a loss of self-control reasonableness eventually became the test for ensuring that provocation was not trivial.²⁴ Therefore, the defence became more focused on the reasonableness of the loss of self-control and less on the nature of the provocation; this is consistent with the rationale being an excusable loss of self-control, the only objective criteria coming through the reasonable/ordinary person test.²⁵

An example which highlights the pre-2009 defence's position on merely requiring conduct that provoked D, no matter if it was severe provocation or natural and normal human behaviour on the part of the 'provoker', is the case of *Doughty*.²⁶ A fatigued father, whose baby cried persistently, lost his temper and tried to silence his baby by covering the baby's head with cushions and kneeling on them. D claimed that he lost his self-control and it was found that even conduct as natural and normal as a baby crying had to be considered as being capable of provoking D as it merely had to be shown that there was a causal link between the conduct and the loss of self-control:

"There is no doubt, and it is not in dispute, that there was here evidence upon which the appellant was – I use the word loosely 'provoked' to lose his self-control ...

[T]here was evidence which linked causally the crying of the baby with the response of the appellant. Accordingly, in our view, it seems inevitable that that being so the section is mandatory and requires the learned judge to leave the issue of the objective test to the jury."²⁷

The case of *Doughty* not only demonstrated that any conduct can be interpreted as being capable of provoking D but also that once it was shown that there was evidence

²³ 'Chapter 2 - The Post-1957 Defence' (n46-52)

²⁴ 'Chapter 1 - The Early Defence' (n76-80)

²⁵ This was introduced at 'Chapter 3 - Rationale' (n110-2).

²⁶ *R v Doughty* (1986) 83 Cr App R 319

²⁷ *Ibid* 326 (Stocker LJ)

that D lost his self-control owing to this the issue must have been left to the jury. If there was a causal link it does not matter if the judge was "strongly of the opinion that there is no basis for the defence"²⁸ or, as Russell LJ stated, it was a jury question "however tenuous [the provocation] may be."²⁹ Therefore, 'provoked' was viewed as the equivalent to 'cause'.³⁰

Some have suggested that the Homicide Act 1957 has been wrongly interpreted and the 'provoked' requirement may have been able to do more work, in terms of requiring 'provocative' conduct rather than merely conduct. Ashworth has stated that if we pay "close attention to the wording" it shows us that the loss of self-control "must have been caused (in some sense) by provocation."³¹ Macklem and Gardner have gone on to assert that "the courts have increasingly suppressed the difference" between the meanings of the words 'provoked' and 'cause'³² and that the test for the jury is similar to seventeenth century provocation defence but simply less restrictive on what passes as provocation:

"The jury still needed to ask itself, and still needs to ask itself today, much the same question that judges used to ask at common law: Were these deeds or words that caused the defendant to lose her self-control *capable of amounting to provocation*, such that she was not just caused but *provoked* to lose her self-control?"³³

There is therefore an argument to suggest that the wording of the Homicide Act 1957 required that "there must at least have been something intelligible as a provocation".³⁴ Feeling provoked, however, is subjective. The interpretation of the 1957 Act was

²⁸ A. Ashworth, *Principles of Criminal Law* (Oxford University Press, 2009) 254

²⁹ *R v Rossiter* [1994] 2 All ER 752

³⁰ This ought to have made including fear as a valid emotion in the defence easier as if anger could cause a loss of self-control then all that should have needed to be shown was that fear could also cause such a response too, see (n10).

³¹ A. Ashworth, 'The Doctrine of Provocation' 297

³² T. Macklem & J. Gardner, 'Provocation and Pluralism' (2001) 64 MLR 6 815, 818

³³ *Ibid* 819

³⁴ *Ibid* 820

consistent with the ordinary meaning of term; the test was not whether there was provocation in any objective sense but whether D felt wronged and this then went on to cause such an effect on D. The impact of this, as *Doughty* highlights, was that this provision did not provide much of a filter in the sufficient evidence test. With this disconnect, between provocation and the language used in the 1957 Act, the defence would better be described as being concerned with causes of a loss of self-control rather than provocation.

c) is all that provokes D deserving of consideration?

The discussion in Part I shows that the role of the judge was a significant issue and one which influenced the drafters of the 1957 Act.³⁵ However, if all that provokes D into losing his self-control was allowed to be considered then it raises concerns as to whether this was the correct approach; there is force in the argument that not all which is capable of provoking D deserves mitigation and, not only this, but whether all such factors deserve to be considered at all. The problem was that the defence was able to become a platform for certain cases and whether they succeeded was wholly depended on the ordinary person test; there was no point in the sufficient evidence test where the nature of what provoked D could be tested to avoid the defence reaching so far. It is important to state that in this Chapter the emphasis of the criticism is not that the judiciary lost their power to exclude cases from the jury but that the sufficient evidence test did not relate to requiring provocation and therefore was unable to act as an appropriate filter.

The solution is not simple if a strong role for the jury is going to be maintained. It is advanced that the jury ought to be the principle guardians of the objective element as the gravity and control tests are meant to represent the views of society on the issues of the severity of a provocative event and the expected level of self-control a citizen should display in the face of such provocation. In order for the defence to go to the jury it should be required that there is evidence that D experienced the emotion (the subjective element) and that this stemmed from provocation, not that D was merely provoked; the

³⁵ 'Chapter 2 - The Post-1957 Defence' (n7-11)

phrase which Macklem and Gardener use, that there must be "something intelligible as a provocation",³⁶ sums this up and shows that there ought to be an element of objectivity even at this stage. The set of cases below are some of the key problematic cases from the post-1957 defence and are examples of where what occurred may not be classified as provocation and therefore should not proceed to the jury under the approach which is advanced.

i) self-induced provocation

An area which demonstrated the problems with the pre-2009 defence was self-induced provocation. When D was provoked in such a fashion the case went to the jury in the same manner as if it were a normal case, the inducement of the provocation was merely a factor to be considered. There were conflicting judgments on this issue. In *Edwards*³⁷ D was attempting to blackmail V when V swore and attacked D with a knife inflicting several wounds. D wrestled the knife from V and stabbed him in a rage. The Privy Council stated that "a blackmailer cannot rely on the predictable results of his own blackmailing conduct" and in that case there was "[n]o authority" cited in favour of D.³⁸ However, it was stated that if V's conduct went to "extreme lengths" and this was beyond "a considerable degree of hostile reaction" in such a case then whether V's conduct could be considered as sufficient provocation would be "a question of degree to be decided by the jury".³⁹ Therefore, the principle of this decision was that self-induced provocation could only be considered if V's response to the inducement went beyond what is *reasonable*.

Following this, the case of *Johnson*⁴⁰ demonstrates that under the pre-2009 defence if D was provoked owing to provocation which was self-induced this was valid. The main concern was not on the reason behind the anger but on whether the loss of self-control

³⁶ (n34). The advances made in *Camplin*, to give context to the circumstances that D was in, would apply to this test as well as the gravity test in the main objective element (See 'Chapter 2 - The Post-1957 Defence' (n58-9).

³⁷ *Edwards v The Queen* [1973] AC 648

³⁸ *Ibid* 658

³⁹ *Ibid*

⁴⁰ [1989] 1 WLR 740 (see below for the facts of the case)

would be genuine and sufficient in such a case.⁴¹ On appeal,⁴² the literal interpretation of the Act revealed that self-induced provocation is not barred:

"we find it impossible to accept that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his self-control, should result in the issue of provocation being kept outside a jury's consideration."⁴³

The case moves away from the principle outlined in *Edwards* but this decision is consistent with the *excusable loss of self-control* rationale of the pre-2009 defence; it therefore led to the finding that the self-induced provocation cases should not be taken from the hands of the jury.⁴⁴

Johnson shows that self-induced provocation may cause a genuine loss of self-control and that the objective element can be interpreted as allowing it. *Johnson* also provides grounds for suggesting that there needs to be a stronger layer which ensures that not all causes of a loss of self-control may be considered. It may be that a case such as *Johnson* could still succeed on this basis as the facts suggest that what provoked D was somewhat removed from the inducement. In *Johnson* D made threats of violence against X. After this, D was insulted by X and as he tried to leave V poured beer over his head. V removed his own jacket and pinned D against a wall by placing his arm across D's chest or throat. X then punched his head and pulled his hair. V then smashed his glass. D fearing of being 'glassed', as he had been on a previous occasion, stabbed V.

⁴¹ P. Alldridge, 'Self-Induced Provocation in the Court Of Appeal', (1991) 55 JCL 94, 96: "the fact that it was to be expected means that the claim of the defendant to have been moved to white-hot fury by it is less credible than otherwise it would have been."

⁴² *Johnson* 742: the trial judge stated that "[i]t is rather difficult to see how a man who excites provocative conduct can in turn rely upon it as provocation in the criminal law."

⁴³ *Ibid* 744

⁴⁴ P. Alldridge, 'Self-Induced Provocation in the Court Of Appeal' 101: Alldridge explains that this was consistent with the judiciary's interpretation of the defence.

It is not satisfactory that cases of self-induced provocation were allowed to be treated in the same manner as normal provocation cases. If D *intends* to offend another in order to rely on the defence then these cases need to be excluded.⁴⁵ However, in cases such as *Johnson* a principle similar to that in *Edwards* seems appropriate, that it depends on how far the provocation is removed from the 'inducement' and that it is a matter of degree that only the jury should decide. Put simply, where D acts with this purpose in mind then this cannot be described as a case of provocation and in any reform of the defence these cases either should be viewed as outside of the sufficient evidence test, therefore outside of the definition of provocation, and/or there should be a specific exclusion dealing with intentional inducement.

ii) non-violent homosexual sexual advances

If D felt provoked owing to a sexual advance there was potential for the pre-2009 defence to have succeeded. On top of this, non-violent homosexual advances demonstrate that the defence could be used to provide mitigation for intolerance and prejudice.⁴⁶ Much of the argument on this issue relates to the ordinary person, whether the ordinary person can be attributed homophobic characteristics,⁴⁷ however the issue ought to be resolved before this point through finding that there is no provocative conduct for D to rely on.

If there are any differences between how heterosexual and homosexual advances are dealt with it highlights that the issues which surround 'adequate provocation' go beyond D being allowed to rely on trivial provocation but becomes about what values the defence stands for. Mison states that if these cases are viewed differently it "reinforces

⁴⁵ In Part III each of the chapters, which are concerned with the various efforts at reforming the defence, will be inspect this issue.

⁴⁶ R.B. Mison, 'Homophobia in Manslaughter' 158: "The homosexual-advance defense capitalizes on the social and individual responses of fear, disgust, and hatred with regard to homosexuals." A homosexual advance was the basis for the defence's argument in the pre-1957 Act case of *R v McCarthy* [1954] 2 QB 105: "While this provocation would no doubt have excused (when we say 'excused' we mean enough to reduce the killing to manslaughter) a blow, perhaps more than one" (at 109). The defence did not succeed as mode of resentment test (which had to be applied at this time) was not met as the violence used by D was viewed as excessive.

⁴⁷ This issue will be discussed in 'Chapter 5 - Objective Element'.

... that revulsion and hostility are natural reactions to homosexual behavior."⁴⁸ On this point, Justice Kirby, in the Australian case of *Green*, stated that

"[this] would sit ill with contemporary legal, educative and policing efforts designed to remove such violent responses from society, grounded as they are in irrational hatred and fear ...

The law must acknowledge extreme violence is never a reasonable response to an unwanted sexual advance, homosexual or otherwise. Community values and attitudes towards homosexuality and homosexuals have evolved to the point today that society demands it."⁴⁹

The point here is that if a non-violent heterosexual sexual advance is not viewed to be provocative then a homosexual one needs to be treated the same. For *all* non-violent sexual advances V has committed no wrong against D and *all* these circumstances should not be labelled as provocative.

Dressler makes two important points which relate to sexual advances and these help to explain how such cases could succeed. Firstly, he states that the provocation defence is predominately a male defence, therefore making non-violent homosexual advance cases more likely to receive mitigation in comparison to a heterosexual scenario.⁵⁰ By finding that the defence tends to deal with men, and their more aggressive reactions when subjected to such situations, it becomes easier to understand how the provocation defence based on such a rationale mitigates. Also, if this is understood then it may not entirely be down to treating homosexuality differently from heterosexuality but that it is a male which is subject to the advance in a case of non-violent homosexual advance; it is possible to see that gender is the real reason why

⁴⁸ R.B. Mison, 'Homophobia in Manslaughter' 136

⁴⁹ *Green v The Queen* (1997) 191 CLR 334 (Austl) 408-9 (Justice Kirby)

⁵⁰ Ibid 735: "while women are often the victims of provoked killings or the stimulus for them (e.g., a party in a sexual triangle, a 'seduced' young daughter, or a rape victim whose mistreatment stirs retaliation), men are the predominant beneficiaries of a doctrine that mitigates intentional homicides to manslaughter."

there is a difference as women are less likely to kill: "the difference may be that he is a he and she is a she."⁵¹

The second point which Dressler draws out is that a sexual advance is often combined with an assault, meaning that the basis for the mitigation could be found in the combination of these factors or by the assault alone.⁵² A case which illustrates this is *Howard*.⁵³ In that case V made homosexual advances (grasped him gently by the testicles and stated: "I want you") and D struck V on the head with a hammer, which he had a legitimate reason to have with him. V got up and advanced towards D. D, fearing another assault and shouting abuse, struck V four times over the head. Cases such as this do not involve straightforward judgements and creating hard rules for these situations would be difficult as any sexual advance may be combined with an assault which could be a legitimate basis for mitigation.⁵⁴ As with many provocation cases, but especially sexual advances owing to the nature of these circumstances, the jury have to rely on D's account of the events and if D claims that V made some effort at physical contact then the case may no longer be a non-violent homosexual advance but a violent one.

Dressler responds to Mison's criticisms of the defence by stating that these cases are simply consistent with the defence's rationale, excusable loss of self-control. However, this argument underlines that this rationale of the provocation defence is flawed.

Dressler states:

⁵¹ Ibid 754

⁵² J. Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard', (1995) 85 Journal of Criminal Law and Criminology 3, 726, 742. On discussing multiple US cases which included NHA and a fight Dressler states: "The defendants' rebuffs of the advances in these cases might have been motivated by fear or hatred of homosexuals, although such a conclusion is speculative. And, of course, the defendants may have lied about what actually occurred. But, based on the testimony presented, these were not NHA cases 'in and of themselves'. This fact is significant because mutual combat or a hard battery, even in the absence of another provocative act, traditionally justifies a heat-of-passion manslaughter instruction. Therefore, the instructions in these cases would have been proper on the basis of the fisticuffs alone."

⁵³ (1985) 7 Cr App R 130

⁵⁴ Another similar case is *Green* (n49): V, a friend & father-figure to D, invited D over for dinner and asked him to stay the night in different beds. V entered the bedroom and started touching D. D repeatedly stabbed V with nearby scissors and rammed his head against the wall. V claimed to have lost control and acted in that manner as he believed his father had abused his sisters.

"doubtless, the message that gay men deserve less respect than heterosexual men is an immoral one. But if the heat-of-passion defense is a partial excuse, not a justification, then a verdict of voluntary manslaughter sends an entirely proper message regarding the defendant's actions: the provoked homicide was entirely unjustifiable."⁵⁵

Even though Dressler is correct to state that as the defence is a partial excuse it is implicit that what D did is wrong this scenario highlights how the defence's rationale did not reflect the standards of society as it did not demand severe provocation through a strict gravity test. For the purpose of this Chapter it also demonstrates that it did not require something intelligible as provocation at all, the nature of the provocative conduct does not come into question. If what provokes D is made up of natural and blameless conduct then D should not be able to cite this as the basis for mitigation. By defining provocation in the sufficient evidence test as it is advanced it ensures that the defence would strictly deal with provocation cases and not those cases where D merely gets angry at events which take place.

iii) possessive partners

The discussion of non-violent homosexual advance cases shares similarities with concerns over cases which involve male possessiveness of their sexual partners. There were concerns that the pre-2009 defence allowed for gender bias and, owing to the defence's roots, predominately provided mitigation for male violence.⁵⁶ The roots of the defence may have been more concerned with male-on-male spontaneous violence but how the defence became available for circumstances relating to the killing of partners or ex-partners became problematic and controversial.⁵⁷ The discussion of the pre-2009

⁵⁵ J. Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men' 750

⁵⁶ L.J. Taylor, 'Provoked Reason in Men and Women' 1679: "the legal standards that define adequate provocation and passionate 'human' weaknesses reflect a male view of understandable homicidal violence. Homicide is overwhelmingly a male act."

⁵⁷ Note the Law Commission summing up this issue (n13).

Also, see the introduction in 'Chapter 10 - Contextualising and Presumptions' for more on this.

defence in Part I lays bare how the defence has always been concerned with male violence and in the remainder of Part II it will be discussed how the objective and subjective elements were designed in a way which were built on such "ingrained cultural judgment[s]", meaning that women struggled with the defence "whether as victim or offender".⁵⁸

Often the provocation for such cases relied on female partners leaving the relationship, finding new partners themselves or circumstances of sexual infidelity. Many of these cases show that normal behaviour, where often V was demonstrating her freedom, was capable of amounting to valid provocation and that jealousy and possessiveness were providing grounds for mitigation. In such cases D may feel anger and that his partner ending the relationship or committing the infidelity is the cause of this but, again, the defence should demonstrate its values by not finding that there is anything here capable of being described as being provocation.

On this issue Nourse claims that "the decision to send the case to a jury itself has legal meaning" and this is central to the criticism of the provocation defence.⁵⁹ The possibility that the defence could succeed in such cases, without provocation being present, is consistent with the defence's rationale and this is especially so when the ordinary person standard is lowered by taking into account male proclivity towards violence:

"few people would disagree that M may be excused for being disturbed by the sighting [of his partner committing a sexual act with another]. His emotions are excusable because an ordinary person, with an ordinary temper and ordinary feelings, would likely become emotionally overwrought in such circumstances. Therefore, if M kills W while he is overwrought (assuming, of course, that M did not have reasonable time to cool off), the homicide may be partially excusable."⁶⁰

⁵⁸ S. Bandalli, 'Provocation - A Cautionary Note' (1995) 22 Journal of Law and Society 398, 398

⁵⁹ V. Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense', (1997) Vol 106, No 5, 1331, 1357

⁶⁰ Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men' 748

Many would argue, and correctly, that within the defence tougher standards ought to be set: "We should, and in fact do, have more control over our passions than the defense and the prevailing scholarship assume."⁶¹ The ease at which Dressler finds that such a killing is partially excusable in the framework of an excusable loss of self-control highlights that the nature of what provoked D was not scrutinised effectively. By labelling a circumstance such as infidelity or, more alarmingly, where V leaves her partner as provocative conduct the defence does not respect V's freedom and, consequently, the scope for where violence can be used in the defence is not appropriately restricted.

There is a concern in reforming the provocation defence that if the balance between gender is addressed through extending the defence to make it easier for women then the defence will also be even easier for men to use.⁶² It is advanced that if the defence can rest on the severity of the provocation and such tests are adjusted to take into account social realities then this balance can be readdressed without this problem arising.⁶³ It would, however, require a great change for the defence not to display gender bias towards males. By the defence making allowances for male possessiveness it fuels the gender bias as the violence used becomes more understandable, but by not viewing these circumstances as provocation, which they are not, then it becomes more straightforward for the defence to uphold expectations that violence used against women in these circumstances is wholly inexcusable.

There may be potential for certain scenarios involving infidelity to progress beyond the sufficient evidence test if the defence required provocation as it would depend on the circumstances and a distinction such as that outlined by Viscount Simon in *Holmes*

How the defence allows the jury take into account gender differences in the expected levels of self-control will be discussed in 'Chapter 5 - Objective Element'.

⁶¹ S.D. Rozelle, 'Controlling Passion: Adultery And The Provocation Defense' (2005-6) 37 Rutgers LJ 197, 199
R. Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 U Tas L Rev 5, 5: "the requirements of the defence have traditionally reflected male standards of behaviour and male responses. The narrative of provocation recounts the familiar story of jealousy, betrayal and infidelity - the story of the jealous husband."

⁶² L.J. Taylor, 'Provoked Reason in Men and Women' 1721: "Those who advocate change in the substantive law must safeguard against endangering women by more readily excusing their male killers."

⁶³ This is central to the proposal in Part IV.

could be adopted, a distinction between taunts and informational words.⁶⁴ In discussing the Coroners and Justice Act 2009 Norrie finds a similar distinction as he states that it would be difficult to exclude all cases which are based on sexual infidelity from the defence as some cases could involve "one partner habitually taunt[ing]... another with the example of their infidelity, either by itself, or as part of a range of taunts."⁶⁵ Simply because this issue just happens to be sexual infidelity it does not mean that it must be barred from the defence. Again, as with self-induced provocation and sexual advances, this highlights that creating strict rules may be difficult as there will be hard cases which are on the boundaries if exclusions, for example, were adopted.

Conclusion

With the defence being allowed to be a platform for such cases it highlights that there ought to be greater limits on what can satisfy the sufficient evidence test, this requirement should not be entirely subjective. Instead of asking whether D was provoked, as the pre-2009 defence did, the defence ought to require that the event, which is the basis for the claim, can be described as provocation; this would remove the scenarios where the provoking event can be adjudged to regard natural, normal and blameless conduct.

Once the rationale is appreciated then reforming the sufficient evidence test is the next step in resolving the issues with the defence; it is about ensuring that the partial defence deals with cases which ought to be within its ambit and restricting those outside the definition of provocation. It should ultimately be down to the jury to determine if D the provocation was sufficient (gravity test) and if D lived up to the expected level of behaviour of an ordinary person (control test). The role of the judge in the sufficient evidence test, therefore, ought to be to test if the circumstances of provocation have arisen, but it is up to the jury to evaluate D's claim.

⁶⁴ 'Chapter 1 - The Early Defence' (n113)

⁶⁵ A. Norrie, 'The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control', (2010) 4 Crim LR 275, 288-9: "should it be the case that one somehow excludes the one taunt and admits the others? In such cases, it is surely the campaign of taunting that is significant and not the substance of individual taunts."

CHAPTER 5

OBJECTIVE ELEMENT

This Chapter will look at the evaluative standards which the jury had to apply following the sufficient evidence test being satisfied. Through the objective element in the pre-2009 defence the jury were required to evaluate the severity of what provoked D in the *gravity test* and to examine D's behaviour in the *control test*. Despite the 1957 Act referring to the reasonable person both of these tests were ultimately interpreted as setting the standard of comparison as the *ordinary person*.¹ The rationale of the defence has been described as being *excusable loss of self-control*,² meaning that the evaluative element of the defence was entirely relying on this ordinary person standard. It has already been advanced that the rationale of the defence ought to be *warranted emotion*³ and this Chapter will detail how that test could be formulated.

Deciding what the objective standard ought to be was evidently, from Part I, not straightforward. Defining the objective standard in different ways, as has been done in *Bedder*, *Camplin* and *Smith (Morgan)*, is capable of significantly altering the types of cases which the defence admits. Each interpretation had at its core the aim of producing a platform for providing mitigation based on human frailty and can be supported with legitimate reasons. It will be argued that the *Camplin* distinction between the gravity of the provocation and the powers of self-control ought to be maintained.⁴ However, the gravity test ought to focus on warranted emotion rather than a comparison to ordinariness, but the control test ought to judge D by an ordinary standard.⁵ In support of this, the gravity and control tests and the scope to which D's characteristics involved in those tests will be discussed. Also, through this discussion it will become clear why the objective standard for self-control in a provocation defence ought to have such links with ordinariness as there is a need to justify this approach against claims that the defence

¹ 'Chapter 2 - The Post-1957 Defence' (n71)

² 'Chapter 3 - Rationale' (n110-2)

³ *Ibid* (n113-31)

⁴ *DPP v Camplin* [1978] AC 705, 717-8 (Lord Diplock). See the contrast in what was allowed to be considered in the tests at 'Chapter 2 - The Post-1957 Defence' (n67-71).

⁵ This would set an expected level of behaviour which is obtainable and consistent with common human frailty, discussed at 'Chapter 3 - Rationale' (n93-109).

ought to be a partial denial of responsibility, akin to diminished responsibility, rather than a partial denial of wrongdoing.⁶

a) the standard of self-control and ordinariness

The case to rely on an objective standard to evaluate D's claim to the provocation defence has been made out in the Chapter 3:⁷ the objective element is a way to test "adequacy of the compulsion".⁸ Neither the objective element nor the subjective element alone can provide a basis for mitigation, only through both working together can it be shown that there was difficulty for D not to react and the provocation was adequate so that it is understandable that D reacted. It is how to define both of these elements which is the issue. Ultimately, following *Camplin*,⁹ the objective element of the pre-2009 defence required that D's response was that of an ordinary person. Why the required level of self-control is measured by ordinariness and then how to define ordinariness needs elaboration.

The objective standard could be judged as an "ideal" to "aspire" towards.¹⁰ Requiring a reasonable man standard, as the 1957 Act text did, would seem to go along with this view, but this is inconsistent with the idea of a common human frailty as reasonableness

⁶ B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers: in defence of Morgan Smith' (2008) 124 LQR 675, 691: "those who support the ... more objective approach ought to be able to justify the claim that, notwithstanding the characteristic differences between us, there is a minimum level of self-regulation which everyone (including the defendant and whatever his individual characteristics) should exercise in the circumstances."

⁷ See, in particular, 'Chapter 3 - Rationale' (n96-9)

⁸ P. Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997) 89. Also, (at 90) "It simply is not the case that we intuitively excuse every person who can show pressure or temptation or disadvantage in resisting the same. Our blaming and excusing judgements are more complex. We want to know: how strong was the pressure or temptation? How difficult was it for the actor to resist? Inevitably, we try and put ourselves in the actor's situation and imagine whether we would have been able to resist the violation in similar circumstances."

W. Gorman, 'Provocation: The Jealous Husband Defence' (1999) 42 Crim LQ 478, 480: "We have a societal right to demand certain minimum standards of conduct. The objective element of provocation should be its cornerstone."

⁹ 'Chapter 2 - The Post-1957 Defence' (n71)

¹⁰ R.B. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 Cal L Rev 133, 147

suggests that D acted correctly in the circumstances.¹¹ The excessive nature of the act coupled with the human frailty basis means that the defence deals with human action which is wrong but an allowance is made as "the defendant is, unfortunately, just like other ordinary human beings."¹² The defence should rest on the concept of the ordinary person; this standard would take into account that an ordinary person can lose his self-control and act in a way which is incorrect but owing to the circumstances and the knowledge of how normal people may react it is somewhat understandable.¹³ the ordinariness of human weakness is taken into account.¹⁴

It needs to be appreciated that the ordinary person is not intended to reflect a real person but an average reaction of a person within the community. The pre-2009 defence often got bogged down in trying to define the reasonable man and discussing what this fictional person would have done.¹⁵ In the Australian case of *Moffa v The Queen* Justice Murphy stated that

"The objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is ... It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing

¹¹ After exploring justifications it has been expressed that a provoked killing can never be justified and any rationale of the defence must be based on the understanding that the act was wholly wrong. See 'Chapter 3 - Rationale' (n29-30 & n61).

J.K. Weber, 'Some Provoking Aspects of Voluntary Manslaughter Law', (1981) 10 Comm L World R 159, 162: For instance, Weber states that provocation should not be concerned with the reasonable man as it "implies society's approval of the course of conduct".

¹² J. Dressler, When 'Heterosexual' Men Kill 'Homosexual' Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard, (1995) 85 Journal of Criminal Law and Criminology 3, 726, 753

¹³ S.P. Garvey, *Passion's Puzzle* (2005) 90 Iowa LR 1677, 1731: "the reasonable loss of self-control requirement cannot mean what it says. Instead, a provoked actor's loss of self-control can be described as 'reasonable' only in the limited sense that losing self-control is an all-too-ordinary human failing."

¹⁴ The common human weakness basis for the defence was explored in 'Chapter 3 - Rationale' (n93-109).

¹⁵ P. Brett, 'The Physiology of Provocation' (1970) Crim LR 634, 367: "the reasonable man ... is a figment of the imagination" and "[p]lainly we cannot sensibly talk of the ordinary man in any meaningful way."

A. Samuels, 'Excusable Loss of Self-Control in Homicide' (1971) 34 MLR 163, 167: "There is no readily identifiable concept of the reasonable, average, ordinary or normal man, he is unreal because he is an amalgam of real people, but unlike any real person for that very reason."

emotional flashpoint, loss of self-control and capacity to kill under particular circumstances."¹⁶

Even though these are issues which need to be discussed, as control characteristics,¹⁷ too much emphasis was placed on defining this character and not enough on discussing the standard which the defence imposed. For instance, Ashworth states that the test "is to ascertain whether the accused showed a reasonable amount of self-restraint" but that "the words 'reasonable' and 'man' have unfortunately diverted attention from this fundamental requirement."¹⁸

From this it is possible to recognize that there is a range of conduct which an ordinary person could be expected to undertake and an appropriate point on that range must be selected.¹⁹ The provocation defence should only require the *minimum* from a provoked agent.²⁰ Colvin described provocation as "the clearest example of an objective test being geared to a minimal standard of ordinary behaviour."²¹ The defence deals with people who have been provoked and as a result people who are acting in a highly emotional way, by requiring a minimal ordinary standard it is a reflection that human frailty is the

¹⁶ (1977) 138 CLR 610, 626

¹⁷ See section 'c) control test & control characteristics'.

¹⁸ A. Ashworth, 'The Doctrine of Provocation' (1976) 35(2) Cambridge Law Journal 292, 299: "The word 'reasonable' indicates quantity in the phrase 'reasonable self-control', whereas in combination with the word 'man' it begs questions about the age, sex, marital status, race, colour, religion and other personal characteristics of a hypothetical individual."

R v Morhall [1996] AC 90, 97-98 (Lord Goff): "The function of the test is only to introduce as a matter of policy, a standard of self-control which has to be complied with if provocation is to be established in law."

G. Orchard, 'Provocation - Recharacterisation of 'Characteristics' (1996) 7 Canterbury LR 202, 209: "The objective test is not concerned with how or why an actual person might behave. Rather the purpose of the test is to impose a standard, and to deny the defence when, in the view of the jury, the provocation was not calculated to so stir the accused's emotions that a level of self-control which is 'ordinary', or normal, might be overcome."

¹⁹ E. Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 Monash ULR 197, 200: "The idea of 'ordinariness' sets limits to the range but does not itself provide a single point of comparison for the conduct of an accused. If an objective test is to be used, a point within the range must be selected as the standard against which the accused is measured."

²⁰ T. Macklem & J. Gardner, 'Provocation and Pluralism' (2001) 64 MLR 815, 824: "It is true that reasonable people vary somewhat in their reactions. But for the purposes of the provocation defence we are presumably interested only in the lowest possible level of self-control that any reasonable person would have."

Stingel (1990) 171 CLR 312 (Australia), 329: "The lowest level of self-control which falls within those limits or that range is required of all members of the community."

²¹ E. Colvin, 'Ordinary and Reasonable People' 209

basis for the defence. Such a standard sets a realistic expectation and one which if D fails to meet it would then be correct to find that he should have shown greater restraint.

It must be determined what the minimum level of self-control for an ordinary person is when they are exposed to severe provocation and it has been questioned if this is possible:

"In theory, the concept may seem attractive, but acquiring a proper understanding of its true meaning may be more difficult than has generally been assumed."²²

A standard definition of 'ordinary' would mean it could be equated to mean commonplace, average, not outstanding nor exceptional, being expected, uniform and normal. Two points need to be noted which will support why and how this standard is applicable when one kills another. Firstly, ordinariness takes into account human frailty, meaning that the defence deals with exceptional moments and it is within the range of human behaviour, at the lowest end, that a person may strike out. Secondly, the gravity and control tests take this on board and help to make this determination. What is seen as ordinary depends upon the gravity of the circumstances; a violent killing is not an ordinary occurrence but given context it is possible to understand what led to this event. This all feeds into the control test and this functions to determine if D's response was ordinary; by taking the normal into consideration, with this appreciation of human weakness, it ultimately becomes possible to find that D's conduct reached the minimum expected level.²³

Yeo has stated that the objective element "functions to restrict the scope of provocation rather than to reflect the rationales underlying the defence."²⁴ However, this is not the

²² B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers' 693

²³ The gravity and control tests are to be discussed separately and have been distinguished throughout, and this has been stressed because of the different purposes of each test, but they have this relationship.

²⁴ S. Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 Sydney LR 3, 4

case with the understanding which has been discussed: the gravity test, with the warranted standard, and the control test, with the ordinary standard, upholds the underlying rationale of a *common* human frailty to *severe provocation*.

b) gravity test & response characteristics

In the pre-2009 defence the gravity of the provocation was ultimately measured against the ordinary person standard. To do this the jury had to consider the "entire factual situation"²⁵ and this included D's characteristics, circumstances, history and the like. For example, in *Morhall*²⁶ D was taunted about his addiction to glue sniffing and therefore this was a part of his background which had to be considered. This was a move away from the strictly objective test previously laid down in *Bedder*, where the reasonable man was not bestowed with D's characteristic of impotence.²⁷ When these characteristics²⁸ are applied they can be described as *response characteristics*,²⁹ in that they only apply to the gravity question (how provocative), and can be distinguished from *control characteristics*, which have the ability to alter the ordinary person's expected level of self-control (how provokable).³⁰

A critique of the gravity test can come in two parts. Firstly, in the need to contextualise the provoking incident the distinction between response characteristics and control characteristics can become harder to maintain. Secondly,³¹ links to the ordinary person in the gravity test do not bring about results which are attractive and this also concerns the application of *undesirable* characteristics, such as racist views, to the objective standard. The separation of provocativeness and provocability is necessary as the ordinary person test should be exclusively for the objective standard of self-control in the control test and the gravity test should require warranted emotion.

²⁵ Camplin 727. See 'Chapter 2 - The Post-1957 Defence' (n67).

²⁶ *R v Morhall* [1996] AC 90

²⁷ *Bedder v DPP* (1954) 38 Cr App R 133. See 'Chapter 1 - The Early Defence' (n132-3).

²⁸ The term 'characteristic' will be used but will include these other factors.

²⁹ B. Fitzpatrick & A. Reed, 'Sound of Mind and Body: Psychological Characteristics and the Reasonable Man Test in Provocation', (1999) 63 JCL 365, 366

³⁰ The extent that these characteristics should apply is debateable. See J.C. Smith, 'Case Comment' on *Morhall*: "It is suggested that increased provocativeness is relevant, increased provocability is not."

³¹ See 'Chapter 3 - Rationale' (n115-20).

i) distinguishing response characteristics from control characteristics

The position of the pre-2009 provocation defence was that as long as the characteristic was relevant it ought to be considered as it helps the jury to assess the true gravity of what occurred. It has already been discussed how *Camplin* extended the scope of the response characteristics which could be considered as it would be "utterly unreal" not to contextualise the meaning of the provocation.³² The example stated in *Camplin*, that "[d]irty nigger" ... is obviously more insulting when said by a white man to a coloured man",³³ highlights that the surrounding circumstances may give the conduct greater sting.

What is important is that the response characteristic is actually relevant to the incident which took place, it may seem to add weight to the gravity but be unconnected to the emotion behind the killing. *Newell*³⁴ is a good example of this as D was a chronic alcoholic whose girlfriend had recently left him. He was drinking with V and V criticised his ex-girlfriend, suggesting that D ought to go to bed with her. D struck V on the head repeatedly and killed him.³⁵ It was made clear, from the exchanges which took place between the parties, that the reason why D was angered was to do with V's comments about his ex-girlfriend:

"Why don't you forget that fucking bitch; she's no fucking good for you. Why don't you come to bed with me," his exact words. I hit him with the ash tray on the table. I have just explained why, because of what he said; it was the effect on me; I was so angry my only thought was to hit him. My reaction was instantaneous. It was what he said about Amalia which caused my reaction."³⁶

³² *Camplin* 721 (Lord Morris). See 'Chapter 2 - The Post-1957 Defence' (n58).

³³ *Ibid* 726

³⁴ *R v Newell* (1980) 71 Cr App R 331

³⁵ The *Newell* judgment, however, can be criticised for its narrow definition of a characteristic, see 'Chapter 2 - The Post-1957 Defence' (n60-6).

³⁶ *Newell* 333

Newell highlights the need for the characteristic to be relevant and therefore "some direct connection" must exist between the characteristic and the reason for the anger to rule out superfluous factors which had no impact on D;³⁷ the sexual advance and D's alcoholism which were present in the case "had nothing at all to do with the words by which it is said that he was provoked."³⁸

The requirement for relevance and a distinction between response and control characteristics is even more apparent when the characteristic in question is a mental one or when it is related to cumulative provocation. In *Humphreys*³⁹ D was in an abusive relationship. D cut her wrists in front of V and he responded by taunting her, stating that she had not made a very good job of it. D was emotionally immature for her age, explosive and attention-seeking. The difficulty is to determine which response characteristics, if any, are relevant to the gravity test and to ensure that they are only considered in this side of the objective element. It was decided that the jury could consider the abnormal immaturity and attention seeking by wrist slashing. However, it is difficult to see how this is consistent with the approach on response characteristics as Horder is correct in stating that "the provocation given by the deceased directly related only to one of these characteristics, namely the attention-seeking."⁴⁰ The attention-seeking characteristic adds weight to the gravity as D's conduct, cutting her wrists, was related to that characteristic and the taunt was therefore connected. In this case if a jury were to apply abnormal immaturity to the objective element they could only do it with regards to the powers of self-control as it has no relevance to the gravity question. Therefore, when dealing with response characteristics it has to be ensured that the jury understands the extent to which they can include them in their judgement of how provocative the incident was.

³⁷ Ibid 339

³⁸ Ibid 340

³⁹ (1995) 145 NLJ 1032

⁴⁰ J. Horder, 'Provocation's "reasonable man" reassessed' (1996) 112 LQR 35, 37-8

In a wider point about the gravity test *Humphreys* also shows how an innocuous act can be considered provocative given the proper context; D was subjected to violence and being raped over a period of time, this meant that when V undressed it was provocative to her because of the context of their violent history: she knew what this signified.

In *Dryden*⁴¹ D had shot and killed a planning officer on the day of demolition of his bungalow. There was evidence which suggested D was eccentric, had obsessive personality traits, had a depressive illness and suffered from paranoid thinking. The trial judge did not allow any of these mental characteristics to be considered and the *Camplin* direction and her judgment, according to Lord Taylor CJ, were "almost verbatim".⁴²

The Court of Appeal, however, found that these mental peculiarities ought to be considered. From the judgment, like in *Humphreys*, it is not clear as to whether they were found to be relevant and were then limited to be considered only in the gravity test:

"this was a characteristic - the obsessiveness on the part of the appellant and his eccentric character - which ought to have been left to the jury for their consideration. We consider that they were features of his character or personality which fell into the category of mental characteristics and which ought to have been specifically left to the jury."⁴³

The 'provocation', or, more accurately, the cause of the loss of self-control, was not directed at these mental characteristics but that was not what the law required; what was required was that they were relevant: would the characteristic make the incident sufficiently grave if it was shared by the ordinary person? As D was obsessed with his

⁴¹ [1995] 4 All ER 987: The planning officer and the police had informed D that they were going to attempt to gain access to the property. D went inside and when he returned he had taken his jacket off, put on a holster and was armed with a revolver.

⁴² Ibid 996: "Now, a reasonable man, members of the jury, is a person having the powers of control to be expected of an ordinary person of the sex and age of the defendant ... [A] reasonable man is not exceptionally excitable or exceptionally eccentric or, indeed, eccentric at all, or obsessed, but is possessed of such powers of self-control as everyone is entitled to expect of his fellow citizens, to expect that they will exercise in society as it is today."

⁴³ Ibid 998

land, and evidence in the case backs up the severity of this obsession, such a characteristic helps us to understand why the incident was so provocative to D. The trial judge's description of the ordinary person and the similar one given in *Camplin* only refers to his powers of self-control, no restriction is placed on what may be considered in the gravity test. Therefore, if the mental characteristics included in *Dryden* only apply to the gravity test this is a correct finding, however the distinction needs to be made clearer. D's obsession over his land is the equivalent to the attention-seeking in *Humphreys*, however, like in that case, with regards to the abnormal immaturity, it would be incorrect to consider the other characteristic, eccentricity, in the gravity test.

What is important, therefore, is that these mental characteristics are being considered for the correct reason, not altering the standard of self-control but giving the jury the opportunity to give proper weight and background to applicable factors in the gravity test. In *Smith (Morgan)* it was stated that the ambiguity which a case like *Dryden*, and other cases which involve mental characteristics, demonstrated shows that this distinction is not clear and a jury may find it difficult to understand:

"the jury should have been directed to have regard to these characteristics only in so far as they might have affected the gravity of the provocation and not in so far as they may have affected the accused's power of self-control. No doubt this omission was for the very good reason that, on the facts of both cases, no jury would have understood what such a distinction meant."⁴⁴

It is likely that this distinction is the most difficult in the cases of prolonged abuse and cumulative provocation where D's power of self-control is acknowledged to be lowered owing to this but the abuse and the history of violence is also the reason why the provocation is grave. For example, where D suffers from battered women's syndrome the circumstances which contribute to the existence of that condition have the potential to make the incident both more provocative and to make D more provokable. If the

⁴⁴ *Smith (Morgan)* 170. The cases referred to are *Dryden and Ahluwalia* [1992] 4 All ER 889.

ordinary person's powers of self-control are constant⁴⁵ then only consideration of the abuse in the gravity test could have been relevant. It must be acknowledged that there are cases where sufferers of abuse kill because of their illness⁴⁶ and cases where they kill because of the gravity of the situation.

As will be advanced in Part IV, the gravity test needs to be constructed in a manner where context for provoking events is ensured; this will allow the distinction between response and control characteristics to be respected and guarantee that mitigation is being provided only where the provocation is severe and not where D was more prone to act violently. A key case in this area was *Ahluwalia*⁴⁷ where D suffered from domestic abuse for ten years. V threatened D and later that night, while her husband was sleeping, D fetched petrol and poured it over the bed and set it alight. What is clear is that if the gravity test is applied properly and the context of persistent violence and the threat of future violence is taken into account then such cases could pass the objective element. Like in *Humphreys*,⁴⁸ thought must be given to the fact that "past abuse influenced their perception of future danger".⁴⁹ In the New Zealand case of *Oakes* this was given consideration and the reasoning, to an extent, will form the basis for the suggested reform advanced in Part IV:

"provocation may be in the form of threatening words or actions, and the heightened awareness of or sensitivity to threats or threatening behaviour

⁴⁵ The potential of dealing with such cases within the diminished responsibility will be discussed when discussing control characteristics, this would allow lower levels of self-control to have relevance in that defence instead.

⁴⁶ B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers' 679: "we would argue that the battered spouse, who, in an outwardly calm manner, gets a knife from the kitchen drawer and then fatally stabs her sleeping partner, should be treated with some leniency by the law to the extent that she is no longer able to exercise her capacity to think, reason and judge normally."

⁴⁷ [1992] 4 All ER 889: the violence included physical violence, food deprivation and marital rape. D had failed in attempts to leave her husband. On the night of the killing V had threatened to hit her with an iron and told her if she did not provide him with money he would beat her the next day.

⁴⁸ (n39-40). V undressing had significance to D as it related to past abuse and signified future abuse.

⁴⁹ L.J. Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1985-1986) 33 UCLA LR 1679, 1716

that is a feature of the syndrome may be a relevant characteristic in the light of which the accused's response is to be judged."⁵⁰

It is possible with this outlook to distinguish the factual situation from the issue of control characteristics and to ignore any mental abnormality caused by the abuse. Ultimately, if the provocation was not sufficient and/or if D killed because of her abnormality where an ordinary person would not have done so then this falls outside the scope of the provocation defence. If a proper context is given, allowing for the relevant factors which can contribute to the building of a full picture of D's circumstances, it may be viewed that the victims of abuse have acted like an ordinary person in those circumstances: "they may not be exceptional women; they may be ordinary women pushed to extremes."⁵¹

ii) the ordinary person to the warranted person

The gravity test, to an extent, can be praised for how it has developed into being inclusive and giving greater context to the provocative conduct but, on the other hand, this approach can be criticised for not setting the required standard for mitigation at an acceptable level. The gravity test must be sensitive enough to not set the standard too high, thereby removing sets of cases which may develop to be 'hard cases' from its scope, but, at the same time, ensure that the defence is consistent with the values of the culture and society which shapes it. It must be noted that it has been stated that "provocation's instability ... is built into the defence's very structure" owing to the fact that it must adapt with society's values,⁵² as culture moves on how severely provocative an incident is will alter. Therefore, the gravity test needs to be flexible enough to cope with these demands but the bar needs to be raised to a sufficient level.

A discussion of the gravity test leads back to the problems discussed in Chapter 4, that 'provocation' which was trivial or not deserving of recognition was allowed to proceed to the jury and be the basis for a defence, meaning these cases were consequently tested

⁵⁰ [1995] 2 NZLR 673, 676

⁵¹ L.J. Taylor, 'Provoked Reason in Men and Women' 1697

⁵² H. Power, 'Provocation and culture' (2006) Crim LR 871, 876: "Culture is not static, monolithic and uncontested and the law's attempts to accommodate it as a source of excuse for crime fail to satisfy for any length of time."

in the ordinary person test. At the heart of this is the need to be ensure that the defence does not give "legitimacy to superficial explanations of violence".⁵³ If the standard is maintained at the level of *ordinariness* this means sometimes there will be circumstances which are not entirely acceptable for the defence to allow as people get angry when they ought not to, but these surely must be viewed as sufficient in the pre-2009 defence as *ordinariness* includes a degree of fallibility and shortcomings. Infidelity is the classic example as it is uncomfortable to see a defence provide mitigation for that scenario but if in the defence the adequacy of the provocation is assessed by the standard of *ordinariness* it is hard to argue against its applicability and arguments against this ignore that this standard must include human weakness. Dressler, for example, refers to "an ordinary person, with an ordinary temper and ordinary feelings" finding a killing stemming from infidelity being sufficiently severe.⁵⁴

In Chapter 3 the rationale of the defence was described as being an *excusable* loss of self-control,⁵⁵ meaning that the gravity test used *ordinariness* as the standard of comparison instead of warrant; such a standard embraces human weakness rather than upholding the values of society. Such a gravity test simply cannot be an adequate test for severe provocation.⁵⁶

If the standard is to be raised to that of warrant, as outlined in Chapter 3,⁵⁷ then an interesting set of cases to inspect are those where the provocation is made more severe because D's response characteristics are his intolerant views. It was debateable if the ordinary standard incorporated such undesirable response characteristics:

⁵³ C. Wells, 'Provocation: The Case for Abolition' in A. Ashworth & B. Mitchell, *Rethinking English Homicide Law* (Oxford University Press, 2000) 86

⁵⁴ J. Dressler, When 'Heterosexual' Men Kill 'Homosexual' Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard, (1995) 85 *Journal of Criminal Law and Criminology* 3, 726, 748

⁵⁵ 'Chapter 3 - Rationale' (n110-2)

⁵⁶ A similar argument was made in Chapter 4 when Dressler supported that the pre-2009 defence ought to allow for mitigation in the circumstances of a homosexual advance, see 'Chapter 4 - Adequate Provocation' (n55).

⁵⁷ 'Chapter 3 - Rationale' (n113-31)

"the provocation defence is bound to encourage and exaggerate a view of human behaviour which is sexist, homophobic, and racist."⁵⁸

The gravity test sought to find how provocative something was and in doing that it allowed everything which may be considered that was relevant to be taken into account in order to give context.⁵⁹ If D holds intolerant views towards a certain group then this had to be considered, and Horder has stated that this approach seemingly "dictate[s] that the jury should suspend commitments to fundamental liberal values".⁶⁰ The standard can be distorted if, for example, the jury is asked to consider whether the ordinary racist would be provoked by the event.

Dressler, on the other hand, has argued that the ordinary standard does not really allow for mitigation in these circumstances. He states that if society is made up of people who are homophobic it does not necessarily mean that the ordinary standard is compromised by such prejudice and intolerance:

"the Ordinary Man may not possess 'idiosyncratic moral values' that manifest the actor's moral depravity and which render the person abnormally likely to take affront and lose self-control. This means that ... the Ordinary Man is not racist, anti-Semitic, or prejudiced against any class of persons. Thus, too, the Ordinary Man is not homophobic."⁶¹

The question becomes whether the ordinary person standard rejects the attribution of these undesirable characteristics because the standard undeniably requires tolerance. As with self-control and how provokable we are,⁶² the ordinary standard requires minimum expectations with regards to what provokes us. Ordinarity must take on

⁵⁸ C. Wells, 'Provocation: The Case for Abolition' 85

⁵⁹ (n32)

⁶⁰ J. Horder, *Provocation And Responsibility* (Oxford University Press, 1992) 143

⁶¹ J. Dressler, When 'Heterosexual' Men Kill 'Homosexual' Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard, (1995) 85 *Journal of Criminal Law and Criminology* 3, 726, 757

⁶² (n7-24)

board human weakness and this may include things which we should really not get provoked by as it is shaped by human experience and not an ideal. The pre-2009 law may have been wrong to find that everything must be considered by the jury in the gravity test but this was consistent with the more inward rationale of the defence. This became a fundamental problem as it was increasingly more interested in what people found provocative rather than upholding a standard and rejecting instances where people should not have lost their self-control.⁶³

As is outlined in Part IV, a warranted emotion standard could be constructed which allows for the contextualisation of the surrounding events but rejects the consideration of instances which are inconsistent with society's values. If the gravity test instead relies on warranted emotion it allows a straightforward question to be asked: *was it right for D to get angry or fearful in the circumstances?* This, as has already been discussed Chapter 3, is consistent with the demands of mitigation in the provocation defence. It provides an evaluative element which ensures that the reason behind the killing deserves such understanding and the use of a justification in this manner still insists that the act of killing is to be condemned.

c) control test & control characteristics

The control test evaluates the conduct of D by comparing his behaviour to a standard and that standard ought to be that of the ordinary person. With the understanding which was given to the defence in Chapter 3⁶⁴ there is the acknowledgement that D's conduct was excessive but mitigation is given because ordinary people can react in such manner when they are provoked; the control test has to account for this. Control characteristics are factors which help to describe D's own power of self-control but depending on which theory is followed on this matter the extent over how far these characteristics can be taken into account by the jury and attributed to the objective standard differs. This

⁶³ In 'Chapter 4 - Adequate Provocation' the central theme was the difference between the words 'provoked' and 'provocation', this is the key indicator of this inward move.

⁶⁴ 'Chapter 3 - Rationale' (n93-109)

section will explore the extent to which such characteristics should be able to alter the standard.

Control characteristics have the ability to alter the question being asked to the jury. For example, in *Camplin*⁶⁵ D was a fifteen-year-old boy. In a case like this the issue is whether a jury should judge D by the standards of self-control of a boy of fifteen years of age or an adult, who through maturity has greater self-control. Another example, as was given in Chapter 2,⁶⁶ is that of *Luc Thiet Thuan*. In that case evidence suggested that D suffered from brain damage and was prone to respond to minor provocation by losing his self-control and acting explosively. If control characteristics were considered to a greater extent then the consequences of D's brain damage could potentially distort the ordinary person standard in the control test.

It has already been discussed how the ordinary person test can be applied.⁶⁷ The jury ought to be concerned with the minimum expected standards of behaviour which an ordinary person could demonstrate in the circumstances. It must be remembered that the ordinary person is not an ideal, it takes into account normal human frailty to provocation, and it is a standard and not meant to reflect an actual person. For example, in *Camplin* the jury were seeking to establish if a normal fifteen-year-old boy would have acted in a similar manner, not D himself; this allows for a comparison and not a re-hash of the subjective element.

There are three theories which set out the approaches to the objective standard of self-control.⁶⁸ Chapter 2 outlined that the approach in *Camplin* was ultimately followed,⁶⁹ that 'normal' control characteristics of D, such as age and sex, could be attributed to the ordinary person. As Mitchell, Mackay and Brookbanks⁷⁰ have stated, this approach,

⁶⁵ See 'Chapter 2 - The Post-1957 Defence' (n58-9).

⁶⁶ [1997] AC 131 (PC). See 'Chapter 2 - The Post-1957 Defence' (n76).

⁶⁷ (n7-24)

⁶⁸ These theories are outlined in J. Horder, 'Between Provocation and Diminished Responsibility' (1999) 10 KCLJ 143

⁶⁹ 'Chapter 2 - The Post-1957 Defence' (n71)

⁷⁰ (n6)

which demands D reaches this level of behaviour, needs to be justified. Through the discussion of these theories the greater merits of the *Camplin* approach will be shown. Each theory is a legitimate approach but if 'abnormal' control characteristics are considered then the defence moves further away from the common human frailty basis.

i) strong excuse theory

The strong excuse theory demands that the expected level of self-control does not fluctuate at all,⁷¹ everyone is judged by the standards of the ordinary person without taking into account any of D's control characteristics.⁷² This was the approach taken in *Bedder*.⁷³ *Bedder* was incorrect on the issue of response characteristics,⁷⁴ but the basis of the decision on control characteristics upheld previous findings which were consistent with a focus on demanding severe provocation.⁷⁵

"[T]he *Bedder* rule was itself designed to uphold the classical principle that provocation must be serious ... The flaw in the rule was the assumption that it was necessary to exclude evidence of personal characteristics in order to guarantee this result, when a rule excluding evidence of temperament would have sufficed."⁷⁶

The main thrust of the objection to the attribution of characteristics to the objective standard was that the whole purpose of the test was to make the comparison to a standard which showed that D's lack of restraint was not an individual difficulty but a

⁷¹ J. Horder, 'Between Provocation and Diminished Responsibility' 144: "defendants should be judged by an ordinary standard of conduct, whatever their individual capacity to reach that standard."

⁷² Ibid: "no individual characteristics affecting someone's levels of self-control can be taken into account"

⁷³ In Part I *Bedder* was discussed in detail at 'Chapter 1 - The Early Defence' (n132-40).

⁷⁴ *Bedder* also required that no response characteristics could be considered but this theory and the other two, below, are consistent with *Camplin* on that matter. Each of the three theories would permit contextual factors to be considered in the gravity test.

⁷⁵ The previous case law is further discussed at (n83-6).

⁷⁶ F.McAuley, 'Anticipating the Past: the Defence of Provocation in Irish Law' (1987) 50 MLR 133, 152

frailty which is commonly possessed.⁷⁷ Through creating a distinction between response and control characteristics and by appreciating that the gravity and control tests are linked but separate tests it is possible to contextualise the provocation but, at the same time, maintain an ordinary standard of behaviour.

The reasons which support the ordinary person standard are twofold and both reasons can be contrasted to the outlook of the weak excuse theory, which is discussed later. Firstly, it is alleged that by holding all to the same standard it brings about equality in the assessment of D's reaction and such control characteristics would move the objective element away from common reactions to provocation to individual ones.⁷⁸ Secondly, the defence of diminished responsibility ought to, and was designed to, be present for those who are unable to reach this standard, therefore there should be no pressure on the provocation defence to deal with such control characteristics.

In the Canadian case of *Hill* the reasons which supported the ordinary person were set out:

"The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard."⁷⁹

⁷⁷ *Bedder* 142 (Lord Simonds LC): "But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct ... If the reasonable man is then deprived in whole or in part of his reason ... the test ceases to have any value."

Note that this is in line with the rationale of a general concession to a common human frailty.

⁷⁸ *Ibid* 145: "principles of justice and equality demand that we are all to be held to the same standards of conduct those that would be maintained by the ordinary adult."

⁷⁹ *Hill* (1986) 27 DLR (4th) 187, 210-211: "It is evident that any deviation from this objective standard against which an accused's level of self-control is measured necessarily introduces an element of inequality in the way in which

Judging all by the same standard, thereby producing a formal equality for D,⁸⁰ is important for the provocation defence owing to the nature of the circumstances it covers, these are killings stemming from extreme emotions where the killing is not justified but condemned; D is seeking to be partially excused as he was provoked, the severity of the provocation and the natural impact which this would have on a person are the reasons why mitigation is offered.⁸¹

Determining how far D's control characteristics ought to be considered is the equivalent to determining whether we offer mitigation because we are concerned with D responding to provocation like we would expect the ordinary person to or whether we offer mitigation because, taking into account his frailties, we understand that he personally would struggle to maintain his self-control even though the provocation would not produce such a reaction from an ordinary person. The former relying on the basis that we should hold all to account at the same level and the latter on that D should only be responsible for what he could actually be expected to do. Provocation having its place as a defence based on a partial denial of wrongdoing rather than responsibility, like diminished responsibility, relies on this standard being met. Failing to reach this standard shows that the killing stemmed from D's own failings and any move from this standard radically alters the defence which was outlined in Chapter 3. Allen is correct to state that "the whole *raison d'être* for the defence is undermined" if the ordinary person standard is not followed.⁸²

The second point which supports that provocation ought to rely on the ordinary person standard is that diminished responsibility exists to deal with those who are unable to meet such standards owing to abnormal control characteristics. Such agents should be

the actions of different persons are evaluated and must therefore be avoided if the underlying principle that all persons are equally responsible for their actions is to be maintained."

This is in reference to a moderate excuse theory, discussed below, but the principles of equality and justice support both theories.

⁸⁰ Arguments against this, that it perpetuates inequality, will be discussed below.

⁸¹ A general or a normal human frailty to provocation was discussed at 'Chapter 3 - Rationale' (n93-109).

⁸² M.J. Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' 240

catered for in the capacity defence if these characteristics are sufficient. In the early twentieth century two cases, *Alexander*⁸³ and *Lesbini*,⁸⁴ held the position that D's mental abnormalities were not consistent with the defence.⁸⁵ It would not be in line with the ordinary person to attribute such characteristics but also the provocation would not be severe enough, as has been discussed above, it would be the abnormality which was the real reason behind the killing.⁸⁶

"if the provocation was objectively slight, this suggests that the substantial cause of the loss of control was not the provocation but rather some weakness (or wickedness) in the accused's character, and the case, then becomes one of murder or mental abnormality – not provocation."⁸⁷

Diminished responsibility, on the other hand, is designed to deal with such abnormalities as it partially excuses because D is unable to reach a certain level of behaviour. Substantial impairment⁸⁸ of powers of self-control are dealt with in this defence and at the time of drafting it was intended that this would be the route for such cases:

"It has to be borne in mind in considering the law of provocation that a person with a disability of such a nature and degree as to make him acutely sensitive might be able to show that the provocation upon him had, because of his sensitivity, led to him having at the particular moment a disability amounting to a serious abnormality of mind. I simply draw attention to the fact that that type of situation might come within clause 2."⁸⁹

⁸³ (1914) 9 Cr App R 139

⁸⁴ [1914] 3 KB 1116

⁸⁵ These cases were discussed at 'Chapter 1 - The Early Defence' (n134-7).

⁸⁶ *Lesbini* 1120: "it would not be provocation which ought to affect the mind of a reasonable man"

⁸⁷ A. Ashworth, 'The Doctrine of Provocation' 308

⁸⁸ s2 Homicide Act 1957: Where a person kills or is party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

⁸⁹ Attorney-General - HC Deb 1956-57, vol 561, col 505

In *Smith (Morgan)*, where the majority went against this approach in order to follow a more inclusive or 'subjectivised' approach,⁹⁰ the dissenting judgments were adamant that the standard of self-control ought to be the ordinary person and this distinction between provocation and diminished responsibility was based on these standards being met.⁹¹

The arguments against such an approach will be brought out when discussing the other two theories, below, but mainly the *weak excuse theory* as it offers a direct contrast in approach to the strong excuse theory. The *moderate excuse theory* can be viewed as a more advanced form of this theory and most of what has been discussed here can equally be applied to that theory as they both rest upon a similar understanding and outlook of the defence.

ii) moderate excuse theory

The moderate excuse theory does not allow the attribution of any control characteristics which would compromise the ordinariness of the ordinary person.⁹² This was a similar approach to that taken in *Camplin* where it was viewed that age and sex were such

'Case Comment: Homicide - Murder - Provocation - Characteristics of Reasonable Man', (2000) Crim LR Dec, 1004, 1007: "In section 2, the Act deals with the person suffering from an abnormality of mind, in section 3 with the reasonable person."

⁹⁰ 'Chapter 2 - The Post-1957 Defence' (n77-81)

⁹¹ *Smith (Morgan)* 212 (Lord Millett) (dissenting): "persons who cannot help what they do are intended to be catered for by the defence of diminished responsibility. The defence of provocation should be reserved for those who can and should control themselves, but who make an understandable and (partially) excusable response if sufficiently provoked."

"The potential availability of this defence in these cases underlines the importance of not viewing the defence of provocation in isolation from the defence of diminished responsibility. These two defences must be read together to obtain an overall, balanced view of the law in this field." (*Attorney General for Jersey v Holley* [2005] 2 AC 580, 594) One reading of this is that provocation deals with the normal characteristics and diminished responsibility deals with the abnormal characteristics. That would also be consistent with the supporting of the *Camplin* approach.

⁹² J. Horder, 'Between Provocation and Diminished Responsibility' 145: "defendants should be judged by an ordinary standard of conduct, unless their capacity to reach the standard is inhibited by a natural and normal factor, such as age."

characteristics.⁹³ In that case the objective standard was altered and the adequacy of the provocation was judged by the effect it would have on a fifteen-year-old boy rather than an adult. In contrast, in a case like *Luc Thiet Thuan*, D's brain damage would not succeed as it is not an ordinary factor and it would allow for a fluctuating standard of self-control in the test.⁹⁴ The moderate theory seeks to built on the strong theory by only including limited variables.⁹⁵ For example, the quotation from the Canadian case of *Hill*,⁹⁶ which discusses the need for objectivity to bring about equality, was in reference to a moderate excuse theory where age was being employed as a control characteristic.

The approach taken in *Camplin* was strongly influenced by Ashworth; he stated that "provocation is for those who are in a broad sense mentally normal"⁹⁷ and that "individual peculiarities" should only be relevant in the gravity test and not the control test.⁹⁸ Therefore, by following this approach it is possible to draw a clear distinction between response and control characteristics. This was forcefully advanced by the judgments which favoured this approach as the dissent in *Smith (Morgan)* by Lord Millett⁹⁹ and Lord Hobhouse demonstrates:

"Where relevant the age or gender of the defendant should be referred to since they are not factors which qualify the criterion of ordinariness. But language which qualifies or contradicts such ordinariness must be avoided."¹⁰⁰

⁹³ *Camplin* 718 (Lord Diplock): "a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused".

⁹⁴ J. Horder, 'Between Provocation and Diminished Responsibility' 145: "broadly speaking ... mental infirmities or abnormalities are characteristics which must be ignored when considering what standard of self-control D could reasonably be expected to meet, in the face of the provocation in issue."

⁹⁵ S. Christie, 'Provocation-Pushing the Reasonable Man Too Far?' (2000) 64 JCL 409, 415: "insists that certain standards of self-control are met, with very limited concessions to universal characteristics which affect ability to achieve such a standard. Any extension to this test subjectivises the concept of the reasonable man too much."

⁹⁶ (n79)

⁹⁷ A. Ashworth, 'The Doctrine of Provocation' 292, 312

⁹⁸ Ibid 300

⁹⁹ (n91)

¹⁰⁰ *Smith (Morgan)* 205 (Lord Hobhouse): "It is the standard of ordinary not an abnormal self-control that has to be used. It is the standard which conforms to what everyone is entitled to expect of their fellow citizens in society as it is."

The control characteristics which are able to be considered by the jury are not therefore peculiarities or abnormalities but can be described as 'normal', 'natural' and 'universal' factors which influence the levels of self-control which a person possesses. It will be argued, however, that age and sex ought to only have a limited role and their inclusion should be narrowly defined in order to maintain a stringent objective standard which only deviates because of one factor: natural immaturity; both of these control characteristics have a role to play in setting an appropriate level of self-control for young people.

Age

In *Camplin* age was described as "a universal quality not a personal idiosyncrasy".¹⁰¹ The Court of Appeal found that young people "are given special privileges by the law" and it would be contradictory if the provocation defence "should be construed as putting youth at a special disadvantage."¹⁰² In the House of Lords it was stated that "to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity".¹⁰³ The former being a policy issue and the latter ensuring that the reasons why this is done is to do with it being consistent with the defence's rationale. It is clear that it would be inappropriate to define youth as an abnormality¹⁰⁴ in comparison, for example, to an adult who lacks normal levels of maturity for a person of his age. The real characteristic which is being considered through age is the expected *maturity* of someone who is D's age and this was explained in the Court of Appeal:

¹⁰¹ *Camplin* 724 (Lord Simon)

¹⁰² *Camplin* (CofA) 262 (Bridge LJ)

An example of treating young people differently comes from the case of *Gillick* [1986] AC 112. In *Gillick* it was decided the age for effective consent is determined by the "child's maturity and understanding and the nature of the consent required."

¹⁰³ *Camplin* 717 (Lord Diplock)

¹⁰⁴ J. Horder, 'Between Provocation and Diminished Responsibility' 145: "youth - with all its occasional unpredictability - is no mental abnormality"

"youth, and the immaturity which naturally accompanies youth, are not deviations from the norm; they are norms through which we must all of us have passed before attaining adulthood and maturity."¹⁰⁵

To consider maturity rather than age would undermine the objective approach taken in *Camplin* and would allow personal peculiarities regarding under-developed maturity to alter the expected standard of self-control.¹⁰⁶ On this point, the Law Commission confirms that it "would be complicated and would go a significant way to undermining the objective test".¹⁰⁷ Age has been described as "a rough and ready way of marking maturity"¹⁰⁸ and this supports its inclusion as a control characteristic under this approach as for an ordinary person a level of maturity ought correspond to their age.¹⁰⁹ Therefore, age is both consistent with the rationale of human frailty and does not compromise the ordinary person standard.

If special consideration is being given to maturity through age then there is a point at which there is no longer a need to give it such consideration. When a person reaches a certain age then they are expected to behave in a manner which is befitting of an adult and ought to exhibit such restraint. At this point it is not appropriate for the objective standard to make such allowances. In *Al*¹¹⁰ D was aged twenty but it was found that the expected level of self-control of a person aged twenty was the same as any adult male.¹¹¹ At 18 a person is expected to behave like an adult and the reason why maturity

¹⁰⁵ *Camplin* (CofA) 261 (Bridge LJ)

¹⁰⁶ *Camplin* 724 (Lord Simon): "If youth is to be considered (and, presumably, advanced years too), what about immaturity in a person of full years or premature senility? These would seem to fall on the other, on the *Bedder*, side of the line [and be viewed as a 'personal idiosyncrasy']."

¹⁰⁷ Law Commission: Partial Defence to Murder – Final Report (2004) 60 [3.130]

¹⁰⁸ A. Norrie, 'The Coroners and Justice Act 2009 - Partial Defences to Murder (1) Loss of control, (2010) 4 Crim LR 275, 281

¹⁰⁹ T. Macklem & J. Gardner, 'Provocation and Pluralism' 836: "Notice that the answer is not a function of the self-control that he actually has, nor of the self-control that people of his age generally have, but rather of the self-control that he and they ought to have if they are to be fit to call themselves proper, self-respecting teenagers."

¹¹⁰ [1989] Crim LR 736

¹¹¹ *Ibid.* "It is in our judgment inconceivable that the jury would have found any difference in answering that question by considering a reasonable man of 20 or a reasonable man of any other age."

A benefit of this approach is that it makes the objective element more straightforward by not including erroneous factors: "There may well be occasions when a direction to the jury about considering an ordinary person of the sex

is considered, a *greater* human frailty, is not present. In the next section it will be argued that consideration of sex does have a role when taking into account maturity through age.

Sex

In *Camplin*, alongside age, sex was considered as a control characteristic which could be considered by the jury to vary the ordinary person standard. Therefore, in that case the ordinary person was attributed with the age, and accompanying maturity, of a fifteen-year-old and being *male*. In the judgment not a lot was said to justify sex's inclusion as a control characteristic but reference was made to "the 'reasonable woman' as a standard" and its equivalency to age as a factor which was normal and natural:

"It could be said that the law, in distinguishing from personal idiosyncrasy something universal like age, was doing no more than it had already done in distinguishing implicitly something universal like sex."¹¹²

Sex does fit the criteria of being a normal characteristic, however whether it does impact on levels of self-control and, even if it does, if it ought to be considered are issues which suggest its inclusion is not clear cut. Authorities have suggested that its inclusion could go against a key principle of the moderate control theory: equality. The Law Commission have stated that "the criminal law should be gender neutral unless it is absolutely necessary to depart from that principle"¹¹³ and the Western Australian Law Commission have stated that "recognising 'these differences would breach the principle of equality before the law'."¹¹⁴

and age of the accused ... will be totally unnecessary and as likely as not distract them from the other matters which they have to consider and which are of importance."

¹¹² *Camplin* 724 (Lord Simon)

¹¹³ Law Commission: Partial Defence to Murder – Final Report (2004) 49 [3.78]

¹¹⁴ Law Reform Commission of Western Australia – Review of the Law of Homicide: Final Report, (2007) No 97, Chapter 4, 207

Sex's inclusion makes it more difficult for women to succeed in meeting the objective standard of self-control as it is commonly held that women do not lose their self-control as easily as men. The provocation defence favours male violence¹¹⁵ and with this being considered it can only add to concerns over gender bias as it acknowledges that there are differences which need to be taken into account by a jury.¹¹⁶ The difficulties in considering sex as a control characteristic mean that it ought not to be normally taken into account. The objective standard has at its core the principle of equality and assessing all D's by a fairly inflexible standard. If sex is included then the two halves of the population have a different standard and there seems no necessity, as the Law Commission see fit to demand, for differences based on sex to be considered.

Also, there is the view that sex does not impact on provocability but provocativeness, in that sex helps to shape the factual situation in terms of, for example, the strength of the parties and their ability to defend themselves:¹¹⁷

"Whilst men and women may evaluate the gravity of particular provocations in different ways, it seems unlikely that their powers of self-control when responding to these provocations are different."¹¹⁸

In *Ahluwalia*, discussed above,¹¹⁹ it is difficult to appreciate the relevance of considering that D was a woman when determining the expected level of self-control. If we would not expect a man to maintain his self-control in a scenario it simply cannot be found that the

¹¹⁵ For example, the quote from Dressler used previously at 'Chapter 4 - Adequate Provocation' (n50): "men are the predominant beneficiaries of a doctrine that mitigates intentional homicides to manslaughter."

A. Howe, 'Mastering Emotions or Still Losing Control? Seeking Public Engagement with "Sexual Infidelity" Homicide' (2013) 21 Fem Leg Stud 141, 148: "it can only serve to reinforce the notion, clearly illustrated in hundreds of years of case law, that men have less self-control than women in the face of 'infidelity'."

¹¹⁶ S. Yeo, 'Ethnicity and the Objective Test in Provocation' (1987-88) 16 Melbourne University Law Review 67, 72: Yeo has asserted that "it is difficult to appreciate why this characteristic should be relevant at all" and as women would be "unfairly disadvantaged" it should not be considered.

¹¹⁷ L.J. Taylor, 'Provoked Reason in Men and Women' 1701: "a woman's reasonable response to physical violence is likely to be different from a man's because of her size, strength, and socialization."

¹¹⁸ J. Horder, 'Provocation's 'Reasonable Man' Reassessed', 39: "There is, then, clearly life left in the debate over the applicability of the 'Camplin distinction'."

¹¹⁹ (n47)

defence imposes a conviction for murder instead of manslaughter on a woman simply because of her sex. To contrast, with regards to the gravity test, sex can help to contextualise what occurred as it is a factor which may add to the vulnerability of a person's position. If considerations are made about a woman's expected level of self-control then it can only prejudice women and there does not seem to be any reason to depart from the objective standard that all should be judged equally.

There should, however, be a limited role for sex when taking into account maturity. The defence gives special consideration to maturity through age. In the process of gaining maturity there are differences based on sex in how boys and girls go through puberty. Girls reach a state of maturity more quickly, therefore when taking into account age consideration should be given to the lower expected level of self-control of boys. In *Camplin* the standard was that of a fifteen-year-old boy, this ought to be considered the most provokable group which can fall within the ordinary standard. This limited level of flexibility over teenagers, particularly male teenagers, would make the control test more realistic by accommodating uncontroversial views which exist over maturity.

Culture and ethnicity

A control characteristic which was not incorporated into the objective standard was culture and ethnicity.¹²⁰ It would be wrong to describe culture as a personal peculiarity as it is an ordinary factor in shaping a person's ability for self-control. Yeo states that to describe culture as akin to being "unusually excitable or pugnacious" goes "well beyond what was contemplated in cases such as *Lesbini*."¹²¹ He goes on to state that ruling out abnormal control characteristics has been to do with "mental deficiencies of individuals and not whole communities."¹²² Nevertheless, it is clear that this factor is not as apparent or as straightforward as age. Immigration means that different groups are a part of the same society and this means that questions such as the one Brown asked become

¹²⁰ In Australia the case of *Masciantonio* (1995) 183 CLR 58 found that ethnicity and cultural background could potentially be included as control characteristics.

¹²¹ S. Yeo, 'Ethnicity And The Objective Test In Provocation' 73

¹²² *Ibid*

important: "should the test of a 'reasonable Englishman' give way in such cases to that of the 'reasonable Jamaican' and the 'reasonable Italian' who is living in England'?"¹²³

If a group did have a different temperament to the minimum expected by society then to hold them to a higher standard than they can fairly be expected to meet may create a problematic situation, and possibly the equivalent situation to holding a teenager to account at the same level as adult.¹²⁴ However, finding that culture is an applicable control characteristic creates two issues which mean it is unsuitable under a moderate excuse theory. Firstly, similarly to including sex, it is a sensitive matter and to recognise differing levels of self-control may be incorrect: "any assertion that one cultural group has a different capacity for self-control than another is mere speculation and potentially offensive."¹²⁵ Secondly, culture is difficult to define accurately,¹²⁶ so it would compromise the objective standard and move away from the formal equality which is the basis of this approach. Christie asserts that whilst "they are not peculiar to the individual" they are not "universal", meaning that they are factors which are "relatively indeterminate and therefore unsuitable for inclusion".¹²⁷

It is possible to hold certain groups to a lower expected level of self-control than the majority. During the 1950s in the Northern Territory, Australia Kriewaldt J consistently found that Aboriginal groups should not be judged by the Anglo-Saxon standards.¹²⁸ For

¹²³ B. Brown, 'The "Ordinary Man" In Provocation: Anglo-Saxon Attitudes And "Unreasonable Non-Englishmen"' (1963) 13 International and Comparative Law Quarterly 203, 225

¹²⁴ S. Yeo, 'Ethnicity and the Objective Test in Provocation' 72: "A migrant to England or Australia would, in most cases, have already been deeply conditioned by the customs and traditions of his native land. These customs and traditions would have moulded his emotions and personality to such a degree that altering them in any significant manner would be extremely difficult."

¹²⁵ Law Reform Commission of Western Australia – Review of the Law of Homicide: Final Report, (2007) No 97, Chapter 4, 207

¹²⁶ R. Cotterrell, 'Law in Culture' (2004) 17 Ratio Juris 1, 8: "What are the conditions for, and limitations on, the invocation of 'culture'? What defines the specificity of any particular culture and what should determine when 'cultural' considerations should apply or not apply? The difficulty is ultimately that of the vagueness of the concept of culture."

¹²⁷ S. Christie, 'Provocation-Pushing the Reasonable Man Too Far?' 415

¹²⁸ H. Douglas, 'Assimilation And Authenticity: The 'Ordinary Aboriginal Person' and the Provocation Defence' (2006) 27 Adelaide LR 199, 207

example, in *Muddarubba*¹²⁹ the standard for D was that of a member of the Pitjintjara tribe. Douglas explains that this separate standard was with the aim of assisting assimilation between Aboriginal groups and the wider population:

"The judge accepted that one role of the law was to assist Aboriginal people to learn civilised ways of behaving so that they would gradually become 'useful' members of society."¹³⁰

These views were expressed in the 1950s and the language seems to be based on stereotypes. If this sort of approach was being justified today, for it to have legitimacy, it would need to focus on real, scientifically proven differences between cultures. Despite the argument in favour of assisting assimilation Douglas goes on to state that instead this approach encourages and highlights differences.¹³¹ In order to fall under the definition of an 'ordinary Aboriginal person', and therefore the lower standard, D must have demonstrated that the culture of the majority had not impacted on him and that he is authentically Aboriginal by relying on stereotypes of that culture: the case can become a test of D's authenticity.

The grounding for the moderate excuse theory is in providing formal equality, holding everyone to the same standard but making allowances which are consistent with ordinariness. It has been discussed how culture is not a peculiarity but nor is it a factor which would not compromise the ordinary objective standard as it is not universal; it is therefore difficult to place. There may be sympathy for recent immigrants being judged by a higher standard when they have been brought up in a different culture.¹³² It is possible to view that in this scenario there is room within the concept of human frailty to

¹²⁹ [1951-1976] NTJ 317

¹³⁰ H. Douglas, 'Assimilation And Authenticity' 201-2: "Kriewaldt J assumed that Aboriginal Defendants, in their current state of assimilation and civilisation, were more likely than others to retaliate with violence and that they might be slower to 'cool down'".

¹³¹ Ibid 207: "it often becomes caught up in attempts to essentialise culture, by relying on cultural stereotypes. The concept of Aboriginal authenticity is related to the idea of being uncivilised or unassimilated."

¹³² S. Yeo, 'Ethnicity And The Objective Test In Provocation' 79: "the recent adult immigrant has not been given the same opportunity of exposure ... [T]he principle of equality demands that the law should take this factor into consideration."

consider culture and ethnicity. The difference with this and differences based on maturity is that ordinariness is advanced through these considerations, by including culture and ethnicity it creates uncertainty and it is a factor which, unlike immaturity, is not applicable to all. It would be a move away from formal equality.¹³³ Therefore, in much the same way as a general control characteristic for sex would be, the purpose of making an allowance for culture is not strong enough to outweigh the considerations against as it would lead to a highly contestable ordinary standard which could be seen to be offensive.

iii) weak excuse theory

The weak excuse theory is a standard which incorporates D's abnormalities, therefore D would still have to reach a standard but it would not be an ordinary one;¹³⁴ it would be a standard of self-control which D could be fairly expected to reach and this is the force behind the theory, that the strong and moderate theories demand a level that some people simply cannot meet, or would find it very difficult to do so, and this is too harsh, especially given the seriousness of offence and punishment which is involved.¹³⁵ Lord Steyn stated that expecting ordinary standards from all created "crude and unfair results".¹³⁶ In *Smith (Morgan)* it was stated that, put simply, "[t]he purpose of the objective element in provocation is to mark the distinction between (partially) excusable and inexcusable loss of self-control."¹³⁷ A weak excuse theory finds that a partially excusable loss of self-control can stem from when D is provoked but kills when an ordinary person would not, this is because the reason can be attributed to his abnormality.

It is important to note that not all abnormalities or peculiarities are considered under the weak theory. In Chapter 2 it was discussed how only characteristics which were viewed as *just* could alter the objective standard in order to reject factors which are wholly

¹³³ Equality will be further discussed, below, in the section relating to the weak excuse theory.

¹³⁴ J. Horder, 'Between Provocation and Diminished Responsibility' 145: "defendants should be judged by the standard of what could be reasonably be expected of the individual in question."

¹³⁵ Ibid 158: "the theory that judges a defendant in the light of the standards he could, as an individual, be expected to reach, however inadequate they may be."

¹³⁶ *Luc Thiet Thuan* 150 (Lord Steyn)

¹³⁷ *Smith (Morgan)* 169 (Lord Hoffmann)

inconsistent with the defence,¹³⁸ for example, self-induced control characteristics and "exceptional pugnacity or excitability".¹³⁹ The thrust of this approach is that D is not responsible for these abnormalities¹⁴⁰ and he should not be excluded from the defence if D met 'his' objective standard:

"some persons may be incapable of attaining a common standard or may face such severe difficulties in attaining it that, even if it is conceivably within their reach, it would be unjust to blame them for having failed to grasp it ...

[Therefore,] it is necessary to construct personalised standards under which comparisons are made with other people who have the relevant handicap".¹⁴¹

Samuels stated, before *Smith (Morgan)*, that the test ought to incorporate everything that we know about D in order to set an expected level of self-control which "that man" could conform to.¹⁴²

A critique of the weak excuse theory comes from looking at the role of standards and equality in the defence and, also, inspecting provocation's relationship with diminished responsibility. Viewing the objective element in this manner, replacing the concession to human frailty from a general to an individual one, means that the footing of the defence

¹³⁸ B. Fitzpatrick & A. Reed, 'Sound of Mind and Body' 368: "How does one go about rationalising a list of control characteristics? What is it that makes battered wife syndrome, obsessive traits and attention-seeking behaviour akin to age and sex? ... It is something to do with the inherent 'reasonableness' of exhibiting these characteristics (which may be akin to the unavoidable reasonableness of being of a particular age and sex)?"

¹³⁹ 'Chapter 2 - The Post-1957 Defence' (n79-81)

¹⁴⁰ B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers' 51: "If age (and perhaps sex) can justify different levels of self-control the same should be true of other characteristics which, through no fault of the individual, affect the ability to regulate his or her response when provoked."

¹⁴¹ E. Colvin, 'Ordinary and Reasonable People' 202. Also, at 227: "Allowance should be made for relevant cognitive or volitional handicaps for which an accused cannot be held responsible. Justice demands this flexibility." And, at 205: "justice demands that objective tests be sufficiently flexible to accommodate handicaps for which an accused cannot be held responsible."

¹⁴² A. Samuels, 'Excusable Loss of Self-Control in Homicide' 168-9: "What the jury should be required to do is to fix upon the proper norm of behaviour to be expected from that man in that situation and then to judge whether or not he acted in conformity with it."

changes. It brings provocation closer to diminished responsibility¹⁴³ in the way which D no longer has to reach the ordinary standard and trivial provocation can be the basis for the defence; taking into account peculiarities only helps to secure mitigation for those who kill when restraint or reason is lacking. Throughout, it has been stressed that mitigation requires understanding in light of the general human frailty and, in doing so, D's reasons and level of behaviour need to meet society's standard. To highlight the differences, it has been stated that provocation tells an "*everyman's* story" and in contrast diminished responsibility tells "a very *personal* story",¹⁴⁴ and, as Da Souza states, it is the difference between creating a vacuum and striking a chord with society.¹⁴⁵

If D's abnormality is so severe that it is necessary for it to be considered then it is up to the capacity defence to admit the abnormality. Macklem and Gardner's discussion of battered women's syndrome highlights this, a provocation defence based on the weak excuse theory is essentially diminished responsibility and by following this theory we lose the merits of the provocation defence and distort what has actually occurred, that D has killed owing to his abnormality not because he faced adequate provocation:

"[By abandoning] standards altogether ... there is no question of *judging* the reactions of battered women, of seeing whether they are up to scratch, of assessing them as reasonable ... This is, of course, quite literally to diminish their responsibility by abandoning any claim that they are people who can be judged by standards, in this case by standards of self-control.

This makes the whole exercise of accommodation self-defeating, however,

¹⁴³ B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers' 703: "provocation ought properly to be recognised as a plea of partial responsibility and as such operates in a manner broadly similar to diminished responsibility."

¹⁴⁴ S.P. Garvey, *Passion's Puzzle* (2005) 90 Iowa LR 1677, 1740

C. De Souza, 'Diminished Responsibility: A Less Vindictive Excuse Than Provocation' (2005) 17 SAclJ 793, 793: "Within the sphere of diminished responsibility, law and psychiatry work together by matching wrongful acts with the actor's appropriate level of culpability." However, in provocation it "focuses on an objective enquiry into the reason why the killer lost self-control."

¹⁴⁵ C. De Souza, 'Diminished Responsibility' 817: "This creates a vacuum between society and the defendant who argues diminished responsibility – the reasonable man is not present to 'strike a chord' with the defendant, and this detachment generates less societal-vindication."

since the whole point of pleading provocation rather than diminished responsibility is to garner the respect and self-respect that flows from being judged by the proper standards."¹⁴⁶

The weak excuse theory strives to remove the formal equality which is imposed under a strong or moderate excuse theory and replace it with substantive equality, where individuals differences are taken into account in objective standards. For some, formal equality is argued to be "illusory" and may serve "to perpetuate inequality":¹⁴⁷ "because it ignores differences in capacities to meet the standard, [it] generates substantive inequalities".¹⁴⁸

Provocation is a peculiar defence in that it regulates such behaviour by comparing D's act with how a person would act whilst at the same time also condemning the act. Mitigation is available only because of the understanding that an ordinary person may over-react and kill when subjected to severe provocation, this common human frailty is outside of the scope of murder. It is only by making such a comparison with the act of an ordinary person in the control test that the defence has any standing. With diminished responsibility in place there is no reason to follow a weak excuse theory and thereby lose the reasoning of the provocation defence. It is better to maintain a distinction between provocation and diminished responsibility and respect the purpose and qualities of each defence; it is only if they are understood correctly that they can then operate appropriately and cohesively.

The idea of merging provocation and abnormal control characteristics together would be problematic. As provocation demands severe provocation, as outlined in the discussion on the gravity test above,¹⁴⁹ including such control characteristics would be inappropriate

¹⁴⁶ T. Macklem & J. Gardner, 'Provocation and Pluralism' 827

C. Morgan, 'Loss of Self-control: Back to the Good Old Days' (2013) 77 JCL 119, 130: "the underlying rationale for both defences is entirely different."

¹⁴⁷ D.A. Donovan & S.M. Wildman, 'Is The Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation' (1981) 14 Loy LALR 435, 465

¹⁴⁸ E. Colvin, 'Ordinary and Reasonable People' 225-6

¹⁴⁹ A weak excuse theory would be inconsistent with basing the anger or fear on a justification as has been outlined.

when D is claiming that they faced severe provocation. In the Australian case of *Green* the unsuitability of a weak excuse theory was stated:

"[This would allow] jury verdicts and outcomes which would seriously offend the community's sense of justice by apparently indulging, or condoning, unrestrained 'human ferocity'. It would sanction excessive conduct which allowed head-strong, violent people to take the law into their own hands in a way which no civilized society could permit."¹⁵⁰

It has been stated that the weak excuse theory stems from "a judicial concern for greater fairness"¹⁵¹ and that "cognitive—and not just emotional—dysfunction has considerable moral relevance".¹⁵² If a proper distinction is made between provocation and diminished responsibility then it is possible for diminished responsibility to deal with cases of cognitive dysfunction and for the basis of provocation not to be destroyed. De Souza supports the finding that there is a link between the provocation and society through the objective test, by meeting the required standards it "cultivates more empathy for the offender".¹⁵³ Formal equality is necessary for provocation but it is with the understanding that diminished responsibility is present to handle these cases which are outside its scope.

In the US case of *Maher* it was stated that by taking into account the higher provocability of a person "a bad man might acquire a claim to mitigation which would not be available to better men."¹⁵⁴ The point of the distinction between the two partial defences is not to state that those who cannot reach the standard are *bad men* who deserve no sympathy, it is that a different set of rules needs to be applied to their cases. There is no point in applying normal criteria to those who struggle to reach it, but for those who can then by reaching this standard it means that they killed owing to human frailty: "For the

¹⁵⁰ (1997) 148 ALR 659 (Kirby J)

¹⁵¹ M.J. Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' 239

¹⁵² R.G. Fontaine, 'The Wrongfulness Of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, And Heat Of Passion Homicide' (2009) 12 NCLR 1, 69, 71

¹⁵³ C. De Souza, 'Diminished Responsibility' 816

¹⁵⁴ *Maher v People* (1863) 10 Mich 212, 221

excusatory logic of the provocation defence is not the logic of lowering standards but the logic of upholding them."¹⁵⁵

Conclusion

This Chapter demonstrates that the objective element can be split into two tests and that certain characteristics or circumstances can be applied to each: the gravity test is concerned with relevant response characteristics and the control test is concerned with ordinary control characteristics. The gravity test and its links to ordinariness help to explain the problems with the pre-2009 defence, in that it is actually necessary to ask if the emotion was warranted unless there are cases in which requiring ordinary anger is simply not a strong enough test to ensure mitigation should take place. The control test, however, needs this link to ordinary standards of behaviour as the test cannot ask too much of agents and it should also not take into account any of D's abnormalities or peculiarities as the defence is not seeking to mitigate based on D's level of responsibility but on their level of wrongdoing.

A moderate theory was the correct approach for the pre-2009 defence to take as it only allows normal control characteristics to alter the standard. Normal immaturity is the only control characteristic in which a clear case can be made through including age up to the point of adulthood and when this is considered differences based on sex in teenagers could be taken into account. Therefore, a narrower role for control characteristics in the control test compared to the pre-2009 defence, originally in *Camplin* and then eventually after *Holley*, would be more appropriate.

In Chapter 3 the rationale of warranted emotion was introduced and this would allow for the gravity test to enforce a warranted standard but for the control test still to be based on ordinariness.¹⁵⁶ This solution ensures that the correct framework can exist in the objective element but greater detail still needs to be given to the gravity test so that it can operate appropriately and uphold society's standards on what valid provocation ought to be.¹⁵⁷

¹⁵⁵ T. Macklem & J. Gardner, 'Provocation and Pluralism' 830

¹⁵⁶ 'Chapter 3 - Rationale' (n113-31)

¹⁵⁷ This will be discussed in Part IV.

CHAPTER 6

SUBJECTIVE ELEMENT

The final area of critique for the pre-2009 provocation defence regards the subjective element. It has previously been demonstrated, in the preceding chapters of Part II, that the rationale, the sufficient evidence test and the objective element required reform in order to bring about a better functioning partial defence. Along with the gravity and control tests which form the objective element, the subjective enquiry is one of the three necessary requirements;¹ D must experience an emotion which stems from being provoked, a reaction which is commonly described as the formation of '*heated blood*'.²

The pre-2009 defence asked whether D had *lost his self-control*. There was an understanding that D's loss of self-control was merely partial,³ it was not irresistible and D was not compelled to kill. This description of the concept fits into the rationale of partial excuse and form of partial excuse which the pre-2009 defence adopted, excusable loss of self-control.⁴ Provocation is a partial excuse because its impact on choice brings about a difficulty for D to have done otherwise. The loss of self-control concept is an apparent form of this difficulty, by D demonstrating that the impact of the provocation was that he was no longer in control of his actions it is an obvious signifier that D's reaction stemmed from the provocation and not, for example, a part of a plan to kill V.

The pre-2009 defence dealt with the subjective element in two areas. Firstly, one of the key criticisms was that the judge's sufficient evidence test was entirely subjective, meaning that anything which provoked D and caused a loss of self-control could

¹ 'Chapter 3 - Rationale' (n9)

² All these three elements are required in order for mitigation to be appropriate and fulfil the human frailty understanding which the defence rests on, see 'Chapter 3 - Rationale' (n93-109).

³ *Phillips* [1969] 2 AC 130. See 'Chapter 2 - The Post-1957 Defence' (n24).

⁴ 'Chapter 3 - Rationale' (n110-2). It was stated that there were three possible versions of the partial excuse which contained all the necessary elements, the others being warranted emotion/excuse and warranted loss of self-control.

proceed to the jury.⁵ Secondly, the task for the jury was to then determine if D had, in fact, lost his self-control at the time of the killing.

This Chapter will explore whether the loss of self-control requirement was able to function in a correct fashion. It is not necessary that loss of self-control is a part of the defence, it is just required that there is some form of subjective test which reflects the difference between when D is wronged and then kills because he was provoked and when D is wronged, reflects on this, and then decides to engage in a reprisal. The line between the two concepts, provocation and revenge, can be thin⁶ and is summed up in commonly used terms 'heated blood' and 'cold blood'. In psychology the terms *instrumental violence* and *reactive violence* attempt to represent this distinction⁷ and this is basically the foundation of the seventeenth defence where implied malice was removed by the finding that the killing was not based on a long standing ill-will towards the victim.⁸ In concurrence with the Law Commission, which saw loss of self-control as "a valiant but flawed attempt to encapsulate" the distinction between provocation and revenge,⁹ in this Chapter it will be advanced that that the loss of self-control element, which only took hold in the provocation defence in the eighteenth and nineteenth centuries,¹⁰ was not able to make this distinction and a much simpler subjective test ought to be used. There are three inter-related lines of criticism for the use and retention of loss of self-control.

⁵ See, in particular, 'Chapter 4 - Adequate Provocation' (n26-9). It was advanced that there ought to be an objective component to this test, rather than a purely subjective test it ought to be asked if there was anything which could be described as provocation instead of asking whether D felt as if he was provoked.

⁶ R. Holton & S. Shute, 'Self-Control in the Modern Provocation Defence', (2007) 27 OJLS 1, 49, 63: "It is often said that loss of self-control is inconsistent with motives of revenge or punishment. We suspect, however, that a desire for revenge or punishment is present in almost every case in which self-control is lost as a result of provocation."

⁷ R.G. Fontaine, *The Wrongfulness Of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, And Heat Of Passion Homicide* (2009) 12 New Criminal Law Review 1, 69, 79: "Whereas instrumental (or proactive or predatory) violence is typically premeditated, goal-driven, and committed in cold blood, reactive (or hostile or affective) violence is characterized as hot-blooded, emotional, and enacted in retaliation to social stimuli that are perceived to be provocative and wrongful."

⁸ 'Chapter 1 - The Early Defence' (n2-14)

⁹ Law Commission (2004) *Partial Defences to Murder Report No 290*, 36 [3.30]: "a judicially invented concept, lacking sharpness or a clear foundation in psychology".

¹⁰ J. Horder, *Provocation And Responsibility* (Oxford University Press, 1992) 2: "Most commentators thus make this conception of anger [loss of self-control] their theoretical lynchpin. That is a mistake." It is only a fairly modern term used to mitigate killings and Chapter 1 shows that provocation did not initially rest on such a basis.

a) loss of self-control is imprecise

A criticism of loss of self-control was that it was not precise enough. In an effort to describe it there was a need to resort to metaphor and this obviously did not bring about clarity, in terms of the psychological processes and effects which needed to take place.¹¹ It would be expected that such a requirement, being a specific type of reaction, would have rested on a proper understanding rather vague terms. The judgment in the case of *Duffy*¹² is the most significant example of this:

"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 mind."¹³ (emphasis added)

The loss of self-control element developed from being something close to temporary insanity into being described as a *partial* loss of self-control;¹⁴ this ensures that D can be considered an agent and does not fall outside criminal responsibility. In his judgment in *Duffy* Devlin J also went on to discuss that this would rule out revenge from the defence as it removes opportunity for time for reflection,¹⁵ and this highlights the underlying function of the subjective element.¹⁶ Therefore, the subjective element's function is merely to demonstrate where the provocation has taken effect on the agent.

¹¹ G. Orchard has stated that "positive descriptions of what is required always employ highly metaphorical language" ('Provocation – Recharacterisation of 'Characteristics' (1996) 6 Canterbury LR 202, 202) and J. Horder has stated that "it might be thought to be more metaphorically than psychologically descriptive" ('Reshaping the Subjective Element in the Provocation Defence' (2005) OJLS 25 (1) 123, 126).

¹² [1949] 1 All ER 932

¹³ Ibid 933

¹⁴ 'Chapter 1 - The Early Defence' (n65-9)

¹⁵ [1949] 1 All ER 932: "whether there was what is sometimes called time for cooling, that is, for passion to cool and for reason to gain dominion over the mind. That is why most acts of provocation are cases of sudden quarrels ... where there has been no time for reflection."

¹⁶ A. Ashworth, 'The Doctrine of Provocation' (1976) 35(2) Cambridge Law Journal 292, 314: "the subjective condition operates to distinguish between an uncontrolled reaction to provocation and deliberate revenge."

The following section attempts to define and describe the concept as far as it is possible to do so and after that another concept, emotional disturbance, will be discussed, as this has been adopted as the subjective element in some jurisdictions.

i) loss of self-control

There have been attempts to show that the subjective element can be defined and understood in more detail.¹⁷ However, in order to maintain the concept's relationship with the emotion of anger the loss of self-control in provocation had to take the form of D losing his temper. In *Cocker*¹⁸ D's wife was dying of a terminal illness and she constantly asked him to end her life. When D killed he had lost his self-restraint but not his temper. Loss of self-control is best understood, as Horder states, "by its nature" as "a sudden and immediate reaction" to provocation.¹⁹ Loss of self-control has been kept in a simplified state to mean that 'D's mind went blank' or 'many blows without thought'.²⁰ There must be greater meaning in the subjective element if such errors are to be avoided, especially as this removes many defendants from the ambit of the defence who do not react to provocation in this manner.²¹

Holton and Shute's explanation of the subjective element explains how provocation impacts on choice and how desires for retaliation take hold of D:

"It does not require that the agent 'goes berserk', loses control of her body, or fails to know what she is doing. The agent will still be an agent when

¹⁷ Part I demonstrated that such understanding has not taken hold in the defence, though.

¹⁸ [1989] Crim LR 740

¹⁹ J. Horder, *Provocation And Responsibility* 68

²⁰ B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers: in defence of Morgan Smith' (2008) 124 LQR 675, 677-8: "The tendency is to think of the loss of self-control in rather crude, graphic terms where the defendant's actions visibly reflect a lack of control - blows are rained down one after another on the victim ... Some defendants in provocation cases say that at the critical moment they were not thinking, their mind 'went blank', or they were not thinking clearly."

S. Gough, 'Taking the Heat out of Provocation' (1999) 19 OJLS 481, 486: "provocation has more in common with automatism than with excessive defence, and is naturally intolerant of conduct that lacks an appropriately reflexive character."

²¹ Agents that do not kill spontaneously and those whose killing indicate that there was a certain amount of reason in the method. These types of killings, sometimes in fear, will be discussed throughout.

self-control is lost, and her acts will still be intentional, driven by a desire for revenge, or whatever. What is lost when one loses self-control is control over which mental elements drive one's actions".²²

D remains an agent as his loss of self-control can be described as partial; what D really does lose control over is the ability to follow his considered judgements of what would be the best thing to do in the situation. Maintaining self-control is a faculty that relies on D doing "what they judge [is] best in the face of strong inclinations to the contrary"²³ and therefore following such "considered judgments in the face of changing desires."²⁴ When control is 'lost' D finds it difficult to restrain himself from following his desires. In this moment of extreme emotion D acts upon his desire to retaliate, to strike out against his perceived wrongdoer: "What they would lose is the ability to control those inclinations: to bring their actions into line with what they judged best."²⁵ The power of this emotion is to "undermine" self-control to the point that D follows these desires over his judgements.²⁶

Looking at self-control from this perspective it is possible to see that there is a process which occurs. Once D has judged that they have been wronged and is angry then it is possible to see how he could lose his self-control:²⁷ it is the overpowering desire to retaliate which ensures that D finds it difficult to do anything other than act upon this desire. This way of looking at the subjective element supports the rationale of the defence which has already been discussed, that the decision not to kill is not impossible

²² R. Holton & S. Shute, 'Self-Control in the Modern Provocation Defence' 51-2

²³ Ibid 55. This was a point that was initially made at 'Chapter 1 - The Early Defence' (n79), when citing J. Horder (*Provocation And Responsibility*, 98): D does not "follow the inclinations of a less compelling emotion".

²⁴ Ibid 57

²⁵ Ibid 57

²⁶ Ibid 57-8: the anger is able to weaken "the very thing that is supposed to control it".

Also, (at 58) "it is only in cases in which this undermining has occurred that we can properly speak of an agent losing her self-control as a result of the provocation."

²⁷ W.N. Renke, 'Calm Like a Bomb: An Assessment of the Partial Defence of Provocation' (2009-2010) 47 Alta LR 729, 755: "provocation does not occur until the accused reacts emotionally to the external act. The external act must be embraced within the subjective for it to function as provocation." Also, "[p]rovocation is the result of the accused's interpretation and reaction to the events, and the victim controls neither process."

J. Horder, *Provocation And Responsibility* 61: "Anger is properly seen as compromised of sensation, desire and reason in the sense of moral judgement."

but made more difficult because of the provocation and this is a normal process when D is faced with such provocation.²⁸

Horder, similarly, stated that there is a judgement of wrongdoing which is followed by a desire for retaliation, this desire then takes hold of D in the form of a loss of self-control where D is not able to judge what would be an appropriate response.²⁹ An implication of this is that if D's initial judgement of wrongdoing is incorrect then his response will be, there will be no opportunity to check the impulse.³⁰ Once the judgement of wrongdoing is made there is no room for reason, this then means that "everyone is rendered akratic by the experience of anger",³¹ meaning that all act against their better judgement. This constricts the defence to a certain type of impulsive killing where there is no room for rational thought about what is done. So, the early case law on the loss of self-control concept, where phrases such as "an ungoverned storm" and "deprives him of his reasoning faculties" were used,³² seem to be correct: the impact on D is total, but D can still be considered an agent as only his desires have taken over.³³ Therefore, a key element of this loss of self-control-based defence was that we are in fact able to blame D for the judgement of wrongdoing and the following desire for retaliation.³⁴ It is possible to evaluate the reasons for why D lost his self-control and this is how the subjective and the objective tests are able to work together:³⁵ the subjective test explains why it was difficult for D not to kill and the objective test evaluates the reason for why D got into that state.

²⁸ (n1-4)

²⁹ J. Horder, *Provocation And Responsibility* 108

³⁰ Ibid: "This desire will impel them".

³¹ Ibid. Also, at 81: "The *akrates*' anger 'boils up straight away' on being informed, by reason or imagination, of an insult" and "the law holds generally to be true what Aristotle thought true only of the quick-tempered who lack self-control."

³² See 'Chapter 1 - The Early Defence' (n65-9) and (n22), above.

³³ The use of the term 'partial loss of self-control' would only be correct if it acknowledges that once D is in that state he cannot be expected to have any control over his actions, it is partial because it is his own desire for retaliation which is the cause of the state.

³⁴ J. Horder, *Provocation And Responsibility* 108: "The failure to make a correct judgement of wrongdoing must clearly be the failure".

³⁵ S. Gough, 'Taking the Heat out of Provocation' 489: "Anger may modify a defendant's view of the reasons for mounting a violent attack but ... people also *become* angry for reasons, and reasons that are as subject to evaluation as reasons for action."

ii) emotional disturbance

Another significant attempt to explain the subjective element is to do away with the loss of self-control requirement and focus on an emotional disturbance instead. Emotional disturbance would have closer links to diminished responsibility than provocation and Mitchell, Mackay and Brookbanks have expressed their desire for the two defences to be merged into a plea based on this concept.³⁶ An emotional disturbance is based on the idea that thinking has been disturbed or distorted, there is a "disturbance of reasoning".³⁷ To contrast, loss of self-control is about desire: desire overtakes rational thought and self-control is undermined.

An emotional disturbance has been described as "diminished rationality" and must be committed with an "extreme emotional dysfunction":

"The emotion that the killer experiences while committing the homicide has to be substantial enough that it prevents rational thought and reasoned behavior. In other words, the actor's rationality is diminished as a direct result of his emotional dysfunction."³⁸

If emotional disturbance replaced loss of self-control in a traditional provocation defence then it could have certain advantages as it would be natural for it not to have as strict temporal strains and a reliance on an 'explosive' act from D. An emotional disturbance could show how abuse over a long period of time can alter D's ability to control themselves through a valid 'dysfunction'; it would lend itself to the idea of battered women's syndrome and similar conditions which result from domestic abuse. Therefore,

³⁶ B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers' 703: "If the emotional disturbance has so inhibited D's capacity for rational thought and judgment, his claim to reduce liability is based on his reduced responsibility for action. In our view it is vital again to emphasise that provocation ought properly to be recognised as a plea of partial responsibility and as such operates in a manner broadly similar to diminished responsibility."

³⁷ Ibid 680

³⁸ R.G. Fontaine, 'The Wrongfulness Of Wrongly Interpreting Wrongfulness' 75-6: "The emotion is necessarily dysfunctional because it so significantly impairs the actor's rationality that he becomes able to wrongfully kill, and indeed wrongfully kills, another human being."

if emotional disturbance was adopted it would draw in diminished responsibility cases as it would not seek to base mitigation on ordinary responses to being provoked.³⁹

If emotional disturbance was adopted it would not be correct to find that this defence required provocation at all. An emotional disturbance would remove rationality not just from the decision to retaliate but from the decision to get angry too, therefore no true evaluation of the decision to kill is possible and the objective test would become insignificant:

"The disturbance undermining self-control may be mental as well as emotional, and the emotional or mental disturbance need not arise from provoking conduct at all."⁴⁰

Emotional disturbance is interpreted as turning the situation of provocation into a denial of responsibility by treating a killer who is not capable of making correct judgements of wrongdoing the same as those who are. The focus of this type of defence is entirely different from the one which has been discussed so far; an emotional disturbance could be independent and not need a stimulus: all that matters is that the emotional disturbance was extreme. Emotional disturbance would turn the defence from being based on an understandable reaction, a reaction which was in the range of normal human emotion given the severity of the provocation, to one in which D must act in a

³⁹ Law Commission (2004) *Partial Defences to Murder* Report No 290, Appendix F: 'The Model Penal Code's Provocation Proposal and its Reception in the State Legislatures and Courts of the United States of America, with Comments Relating to the Partial Defenses of Diminished Responsibility and Imperfect Self Defense' 271 [9]: the US Model Penal Code relies on an extreme emotional or mental distress (EMED) and when it was adopted it shared the aim of the Homicide Act 1957, in that its impact was intended "to enlarge the freedom of the jury and to confine the role of the courts."

⁴⁰ M.N. Berman & I.P. Farrell, 'Provocation as Partial Justification and Partial Excuse' (2010) U of Texas Law, Public Law Research Paper No 166, 11-12

C.B. Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100 *Journal of Criminal Law and Criminology* 33, 56: "the victim-as-provocateur does not need to have played a catalytic role. Indeed, no triggering event is required."

Law Commission (2004) *Partial Defences to Murder* Report No 290, Appendix F 271 [3]: "there are no limitations on when a jury is permitted to return a manslaughter verdict that derive from how the defendant came to be disturbed ... Thus the traditional limitations as to what acts could constitute adequate provocation ... are gone."

way which is unbalanced and, consequently, is set apart from others.⁴¹ For example, as emotional disturbance is labelled as a "dysfunction"⁴² it means that the reaction cannot be considered ordinary. With regards to this argument, loss of self-control, by showing how desire can take over from better judgement to not kill the 'provoker', is a better reflection of what occurs.

There are important points which can be taken from looking at the subjective element in this manner. It is clear that loss of self-control has not been properly defined in the pre-2009 law but it is possible to give it greater understanding. The loss of self-control element demands a lack of rationality and a certain type of reactive killing, thereby removing many cases from the ambit of the defence. Loss of self-control is different from emotional disturbance as it requires proper evaluation for the reasons for why D got angry and subsequently got into the emotional state. Also, this emotional state, which stems from a mental process relating to being provoked, is a common human frailty, not an individual peculiarity, and should be treated as such. Loss of self-control fits into the framework of a provocation defence as it relates to reactions when wronged but still the defence should not rest upon such a concept because it is neither necessary nor able to respond to all the circumstances which need to be covered.

b) loss of self-control is inessential

By requiring D to lose his self-control it means that only a certain type of killing will suffice, a killing which is reactive and D is not able in any way to consider his actions. This section will discuss whether a loss of self-control adds weight to a claim that D deserves mitigation. It will be argued that even though a subjective element is required to show that the killing was not done in revenge a killing stemming from a loss of self-control does not have any special significance beyond this.

⁴¹ This draws similar criticisms as allowing abnormal control characteristics in the control test, see 'Chapter 5 - Objective Element' (Da Souza was cited at (n146): it is the difference between creating a vacuum and striking a chord with society).

⁴² (n37-8)

There are arguments which support that loss of self-control has value, that this sort of anger is more deserving of mitigation and by establishing this condition it is not merely proof that the killing was, firstly, provoked and, secondly, not based on other factors, such as revenge or greed:

"there might be thought to be little excusatory weight to a claim that one was moved intentionally to kill another by a punitive retaliatory urge, even if it was provoked, were it not for the fact that it is claimed that the provocation in question led to an un-looked for loss of control of that urge, making the defendant's reaction almost (albeit, obviously, not truly) 'instinctive' or only quasi-voluntary."⁴³

A loss of self-control became the only type of reaction which the law could accommodate as its presence was seen to signify the human frailty to provocation. Obviously, the question then becomes whether other reactions or situations are capable of fulfilling the rationale.⁴⁴ However, it is also significant to consider whether the defence ought to rely on D losing his self-control or whether a more straightforward subjective element is what should be required. The cases, in particular, regarding 'battered women' and victims of abuse, demonstrate that an agent who has lost her self-control is not more deserving of mitigation but, also, the cases which involve male violence should not be viewed more sympathetically because of its presence.

In *Holley*⁴⁵ D struck his girlfriend with an axe seven or eight times after she had told him that she had just had sex with another man. It is clear from the facts that D had lost his self-control. However, beyond showing that he genuinely was provoked the loss of self-control element does not support any reason for mitigation; if D had struck V once in anger, and not exhibited a loss of self-control, then the case for mitigation would be equal. The existence of multiple blows makes his story more easily believable as it is

⁴³ J. Horder, 'Reshaping the Subjective Element' 126

⁴⁴ Discussed in the next section: 'c) *loss of self-control is inadequate*'

⁴⁵ *Attorney General for Jersey v Holley* [2005] 2 AC 580 (PC)

often only from the outward expression of anger that it is possible to assess D's state of mind. Such a reaction conforms to the most common understanding of the pre-2009 defence, that 'D's mind went blank' and he struck out with 'many blows without thought'.⁴⁶ It has been stressed that if mitigation is to track common human frailty and understandable reactions to provocation it must focus on the reason behind the killing; the reason remains the same if D struck the victim once or eight times. Loss of self-control might be the clearest example of a provoked killing but it does not mean that it adds value to the claim for mitigation, it can only be the equivalent to showing that D acted in provoked anger.

Loss of self-control is not necessary in order to provide mitigation but inhibits the defence from properly dealing with anything other than uncontrolled anger. Cases which involve domestic abuse are examples which show that a loss of self-control is not required for mitigation to be warranted. If the severity of the abuse is properly made out, as has been described when discussing context in the gravity test,⁴⁷ then there are strong merits for the provocation defence to deal with such cases so long as a provoked emotion can be established.⁴⁸ However, if loss of self-control is relied upon the defence is not only about the genuine existence of provoked anger but also a spontaneous, reactive killing; in this case context will be less important in showing a loss of self-control took place as how D carried out the killing will be the primary indicator.

In *Ahluwalia*⁴⁹ D suffered from domestic abuse for ten years and there was a threat of future violence. The strength of the provocation in this case was great, however there were difficulties with the subjective element as there was a delay between the last provocative act and the killing. The loss of self-control element was altered making the factor of delay merely evidential.⁵⁰ Even though this is helpful to a claim of provocation in

⁴⁶ (n20)

⁴⁷ 'Chapter 5 - Objective Element' (n47-51)

⁴⁸ In order for the provoked emotion to be established it will mean that context should be an important consideration for the jury in the subjective element too, see Part IV.

⁴⁹ [1992] 4 All ER 889. The facts are outlined at 'Chapter 5 - Objective Element' (n47)

⁵⁰ 'Chapter 2 - The Post-1957 Defence' (n30-32)

some cases⁵¹ it does not sit easily with the standard interpretation of loss of self-control and the judgment itself shows the difficulty of drawing conclusions on this matter from the facts of the case as delay may be interpreted both ways.⁵²

Ahluwalia allows one to question whether it matters if D had lost her self-control or not. It is clear that D killed owing to the reasons of anger and fear and this stemmed from the victim's conduct which can legitimately be described as provocative and threatening. The killing was carried out emotionally but it was not a clear example of D losing her self-control and then remaining out-of-control.⁵³ There was an undeniable element of rationality, as there are in many similar cases,⁵⁴ as D kills when V is in a weak position; deciding to kill when D is asleep, for example, is at odds to how the loss of self-control element was described above. Overall, it is difficult to argue that D lost her self-control, but, also, that the killing was anything other than an excessive killing in anger and/or fear. If D had lost her self-control she would have satisfied the subjective element of the pre-2009 defence but it would not have altered the merits behind the reason for her mitigation.

The early provocation defence⁵⁵ relied on showing that malice did not exist, in other words showing that D did not plan or set-out to kill his provoker; this is the actual function of the subjective test, however the loss of self-control requirement has blurred this. What matters is to show that D killed because of the existence of provocation and in that moment he found it difficult to resist the impulse. What we know about provocation, from the understanding that has been provided, above, is that the common process that a person goes through is anger leading to a desire to retaliate leading to a person being able to control this instinct. However, normal people may fail at this last hurdle and respond in a manner which is wrongful but somewhat understandable because of what

⁵¹ R. Holton & S. Shute, 'Self-Control in the Modern Provocation Defence' 64: "It is perfectly possible to smoulder for a long time before finally losing control."

⁵² *Ahluwalia* 897–8 (Lord Taylor CJ). See quote at 'Chapter 2 - The Post-1957 Defence' (n31).

⁵³ For example, *Royley* (1612) Cro Jac 296 and *Baillie* [1995] 2 Cr App R 31.

⁵⁴ For example, in *Thornton* [1992] 1 All ER 306 D went out of the room, sharpened a knife and went back in and killed V.

⁵⁵ As was described at 'Chapter 1 - The Early Defence' (n2-14).

we know about the circumstances. To deny the defence to a person because he has not lost his self-control is not consistent with this because we are not concerned with this; it is the genuineness of the emotion and lack of revenge which signifies that D was provoked, there is no reason to rely on a certain type of anger.

c) loss of self-control is inadequate

Loss of self-control should not be a necessary condition of a provocation defence. The defence most comfortably deals with male violence⁵⁶ and it has been difficult for it to progress beyond this with the subjective test resting on spontaneous and reactive anger. There is a need to find a defence for cases which involve anger where D does not respond like this and where D kills in circumstances similar to excessive self-defence, involving fear of violence.⁵⁷ It is natural, with provocation's rationale and there being no other similar partial defence available, to incorporate these cases within provocation as they have their basis in being excessive killings but D reaches a certain standard where they can be distinguished from a murderer.

i) fear

Loss of self-control was developed for cases of reactive anger and it not really applicable to other emotions in a manner which respects their qualities:

"much of the criticism of the former law on provocation was concerned that this behaviourally specific outward expression of loss of self-control which prioritised anger as its clearest expression, excluded anxiety, fear, panic and horror, as impassioned states somewhat outside the conventional sign/signifier of loss of self-control."⁵⁸

⁵⁶ See the four categories of *Mawgridge* (1707) Kel 119 at 'Chapter 1 - The Early Defence' (n26).

⁵⁷ K. Fitz-Gibbon, 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) 40 *Journal of Law and Society* 2, 280, 291: the author states that there is a "gap" between provocation and self-defence, an act which is calm but not justifiable is not covered under any defence.

In Part III the relationship between the two emotions will be inspected.

⁵⁸ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control', (2010) *JCL* 74.3, 223, 224

The key point about the relationship between loss of self-control and the emotion of fear is that fear does not seem to be an emotion where a loss of self-control is necessary for it to be genuine. Also, by the pre-2009 defence requiring a loss of self-control it meant that cases involving fear, if they were going to have any chance of succeeding, had to be framed in a manner which went against the natural expectations for how somebody would respond to a threat, often a defensive and somewhat reasoned response. By doing this it compromised the strong position for providing mitigation in such cases. Therefore, cases which involved fear struggled to fulfil the subjective requirement and this did not even represent the true circumstances or the reason why mitigation ought to occur.

Just like killing in anger, killing in fear can be dragged in two directions; either justificatory reasons are looked for or there is a focus on D's inability to act to normal standards. For situations where the killing is deemed excessive there is no reason why the law cannot take into account both views by making provocation available to those who kill emotionally with a valid reason and making diminished responsibility available to those who suffer from mental illness.⁵⁹ For some, battered women syndrome can be used as "a medicalized specialist term"⁶⁰ and the law can then treat some "battered women as 'psychologically impaired' victims",⁶¹ but this does not apply to all. Decisions to kill through fear, whilst allowing for the possibility of an overlap with anger, are often

Also, at 228: "Instead of an eruptive moment, as is anger, fear is an enduring underlying state ... Fear, therefore does not sit comfortably with loss of self-control as an eruptive moment."

R. Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 U Tas L Rev 5, 23: "The loss of self-control still must manifest in an explosive loss of self-control culminating in the fatal act. At the time of the killing, the brooding emotion must erupt (like a volcano) ... As such 'since the battered woman's final action is often devoid of frenzy and passion, women fail to meet the standard required of the reactive response'."

⁵⁹ 'Chapter 5 - Objective Element' (n46)

⁶⁰ C. Wells, 'Provocation: The Case for Abolition' 94

⁶¹ C. Cookson, 'Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense In Vermont' (2009-10) 34 Vt LR 415, 418

seen to be a rational decision, though.⁶² There may be a rationality which surrounds the killing by a victim of abuse and there is a definite relationship with self-defence in this regard, this being why such cases are often described as excessive self-defence. A provocation defence which does not require a loss of self-control could satisfy the demand for mitigation in these cases by being a step down from the full defence.⁶³

However, some have pressed for these killings to be viewed as justificatory; there is therefore a need to show that the killing was not excessive. Botterell discusses jurisdictions which have viewed wives killing their husbands owing to fear of future violence as justificatory and he states that this sends a "very different message" as sometimes abused women will be "entitled to act."⁶⁴ Similarly to the discussion about appreciating contextual evidence,⁶⁵ this view relies on showing that "a reasonable assessment" was made, but, also, that the response was neither an "overreaction" nor "excessive".⁶⁶ In order to do this then the reality of the woman's position needs to be brought out within this test, otherwise women will continue struggle in these objective assessments:

"the law continues to treat women homicide defendants, as if they were indeed men in respect of size, strength, ability to box, spar, and land a punch. So when women defend themselves against male violence with an instrument as they are inclined to do ... and as a result kill, their 'mode of resentment' is treated for all legal purposes as 'excessive'".⁶⁷

⁶² Ibid 427: "Attempting to convey reasonableness through pathology ignores the possibility that any rational woman in the same circumstance might take the same drastic measures upon weighing her options to escape alive."

⁶³ This will be discussed further below at (n81-4).

⁶⁴ A. Botterell, 'A Primer on the Distinction between Justification and Excuse' (2009) 4(1) *Philosophy Compass* 172, 177

⁶⁵ 'Chapter 5 - Objective Element' (n47-51)

⁶⁶ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' 233

⁶⁷ S. Edwards, 'Abolishing Provocation and Reframing Self Defence - The Law Commission's Options for Reform' (2004) *Crim LR* 181, 189-90

The discussion in Chapter 3 displays the high standards which are set in order for the intentional killing of another to be justifiable.⁶⁸ There is no reason why self-defence should not be open to abused parties if they have justifiably killed, however, in cases such as *Ahluwalia* and *Thornton* it is difficult to view the killings as anything but excessive, even though their circumstances evoke sympathy the acts of killing lack necessity. The partial defence therefore remains necessary because there are cases where the killing ought to be mitigated even if the act does not fall into the scope of a justification.

The rational, but wrong, decision to kill an abuser is based on the circumstances which the abused party faced and there are many factors which allow sympathy for the killer: there may be little opportunity to escape; D may feel compulsion to act owing to the possibility of future abuse; D may have experienced the abuse for a long time and her knowledge of this means that she feels as if this pattern of violence will not end; D knows that she is physically weaker and if she is going to strike she needs to put herself at an advantage by using a weapon or striking when V cannot defend himself. Such decisions often require delay to take place between the last provocative event and the killing and this implies deliberation and demonstrates that the killing did not take place whilst D had lost her self-control. However, if the agent deliberated it does not mean that the agent was not genuinely fearful.⁶⁹

"alternative options are recognized but are seen as unrealistic ... Thus, killing the abuser can be a rational response to the victim's predicament ...

In cases in which they acted for reasons of self-preservation with a genuine belief in the necessity of the action, mitigation may be thought to be deserved even if the perception of the danger or of the options for escaping it was wrong."⁷⁰

⁶⁸ 'Chapter 3 - Rationale' (n29-31)

⁶⁹ A. Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' (2010) 74 JCL 118, 119: in cases of fear "a person might appear to be acting rationally".

⁷⁰ E. Colvin, 'Abusive Relationships and Violent Responses: The Reorientation of Self-Defense in Australia' (2009-10) 42 Tex Tech LR 339, 340-1

The above section supports that if D does kill her abuser without losing her self-control there remains a strong argument for a partial defence to be available if the emotion is present and if the objective component of the defence is satisfied. Part IV will address how contextual evidence could be tailored to support both the subjective and objective elements in support of a claim.

ii) anger

There are also different types of anger and Horder is able to draw the distinction between *anger as loss of self-control* and *anger as outrage*.⁷¹ Therefore, a loss of self-control requirement should mean that the defence is only responding to this type of anger, however, it ought to be required to do much more work and is not able to respond to circumstances which may deserve recognition.⁷² Anger as outrage differs as when D is outraged he makes a judgement that he has been wronged, as in anger as loss of self-control, but then he responds with what is an emotional response but what he *believes* to be appropriate, not a response that is out-of-control.⁷³ Therefore, outrage is like loss of self-control as there is a "desire for retaliatory suffering" but with outrage the response is "largely determined by reason".⁷⁴

Reason is the key to understanding this type of anger and genuine demonstrations of it rely on D maintaining the ability to judge what he is doing; it is still an excessive and emotional response but it is a different expression of anger. This is not to say that anger as loss of self-control does not exist and should not be mitigated, it means that there are

⁷¹ J. Horder, *Provocation and Responsibility* 68: he finds that action stemming from anger as loss of self-control "has a distinctive spontaneity and immediacy that outraged action may not."

⁷² C. Morgan, 'Loss of Self-control: Back to the Good Old Days' (2013) 77 JCL 119, 121: "there is no decisive evidence that a loss of self-control actually occurs when humans kill as a result of provocation, which weakens the theory's accuracy."

⁷³ J. Horder, *Provocation and Responsibility* 68: "outrage may be the product of simply reflecting on some event or events now judged to involve grave wrongdoing (working oneself up into a 'lather'), rather than being, like loss of self-control, the product of some immediately preceding provocative stimulus."

⁷⁴ Ibid 60

different types of anger and they need to be respected in the defence: provocation ought to apply "whatever the form that anger takes."⁷⁵

For the modern provocation defence anger as outrage is alien but if the focus of the defence is to change to demanding 'good' reason for why D got angry with a softer subjective test then how to deal with outrage needs to be explained as these type of cases could easily be understood to be revenge.⁷⁶ The following example will be used to illustrate that a simple approach regarding 'provoked anger' can distinguish where the defence should operate. All that matters in the subjective element is that D had a genuine and highly emotional response to being wronged.

D is a father who saw his child being abused by V and D legitimately used non-lethal force against V to stop the attack. Moments later D strikes V once in anger and V is killed. D had not lost his self-control but struck in anger because he desired retaliation as V had committed a gross wrong against his child.

This is an excessive killing, like all killings in the provocation defence,⁷⁷ and this is even so when instead of losing his self-control D was guided by reason and judgement. D felt a desire to strike V and it is possible to sympathise with this as it may be viewed as an understandable reaction to such circumstances, however, the rationale is only fulfilled if the provocation made the decision not to retaliate more difficult. What is clear is that this is not a case of revenge, yet D did not lose his self-control. This approach, of only relying the existence of the guiding emotion, has the advantage of not misrepresenting scenarios to fit the concept of loss of self-control.⁷⁸

⁷⁵ Ibid 67

⁷⁶ S. Gough, 'Taking the Heat out of Provocation' 488: "The more reasons in favour of the defendant's retaliation, the less emotional disturbance he need invoke to explain his decision to act."

⁷⁷ (n68)

⁷⁸ This has long been a problem for the defence as was referenced when discussing the case of *Fisher* (1837) 8 C & P 182, see 'Chapter 1 - The Early Defence' (n69): D stated that he was justified in what he did because of the wrong he had suffered but had to claim that he lost his self-control.

This would allow for a broader defence which covers a lot more which is deserving of mitigation on the basis which has been discussed throughout Part II. Even though this approach can itself be criticised for being imprecise, like loss of self-control was above, it is a concept that is closer to what is trying to be achieved. From the beginning, it has been stressed that the subjective element's function is to provide the distinction between when D acts owing to provocation and when he acts owing to revenge. This approach simply enquires into what motivated D to kill, and this is something which the loss of self-control requirement only blurs by masking the question behind one type of anger which is merely the most obvious signifier of whether D killed because of the provocation or not. Horder has stated that to find that loss of self-control is the only form of acceptable anger and to view outraged killers as the equivalent to revenged or cold blooded killers relies on a "poor grasp of the doctrine's history".⁷⁹ Part I helps to demonstrate this point,⁸⁰ by showing how the defence has not had a consistent definition, and this Chapter has outlined how loss of self-control unnecessarily constricts the defence and makes arguments in favour of a different approach. The best approach in enquiring as to whether D acted because he was provoked or threatened would be to simply require the corresponding emotion: provoked anger or genuine fear.

iii) self-defence

Another issue which supports the point that loss of self-control is inadequate stems from its impact on the relationship between the full defence of self-defence and the partial defence of provocation. The Law Commission considered there to be a significant problem when running a loss of self-control provocation defence alongside self-defence.⁸¹ Self-defence is a full defence and involves fear of violence, so they clearly

⁷⁹ J. Horder, *Provocation and Responsibility* 70

⁸⁰ See (n10).

⁸¹ Law Commission (2004) Partial Defences to Murder Report No 290, 51-2 [3.88-90]

R v Van Dongen [2005] [2005] EWCA Crim 1728 [4]: "Whether or not to rely on a defence of provocation is a dilemma which often faces those representing defendants in murder trials whose main defence is self-defence or lack of intent. A defence of provocation may be intrinsically inconsistent with, or may otherwise weaken, other defences. But it is well established that the judge should direct the jury to consider a defence of provocation, even if it is not the defendant's overt case, if there is some evidence from whatever source from which the jury could find that there was provoking conduct which resulted in the defendant losing his self-control".

have a relationship if provocation is to be expanded to include such cases.⁸² An argument for loss of self-control will imply a lack of reasonableness in the agent's actions, which is understandable given the previous discussion of loss of self-control and the irrationality which it demands from D. Given this, it would mean that self-defence is unavailable, but if an agent argues self-defence and fails without arguing provocation he risks being liable for murder. Also, by arguing that he acted reasonably in self-defence an agent would undermine that he lost his self-control as it would be inconsistent.⁸³

Being asked to make this sort of choice is not necessarily illustrative of the events but more an attempt to bring about the best outcome for D;⁸⁴ it involves this misrepresentation of what has occurred in order to fit into the loss of self-control requirement if D chooses that manslaughter is his best option. By the defence acknowledging that anger can cause a rational but emotional response or an irrational response it could allow a more sound approach to the question of whether D killed because of the provocation and allow for a relationship between provocation and self-defence. It would be preferable if D could argue self-defence and if that fails then he could go on to argue provocation, so he could have the option of falling back on a partial defence if his full defence fails.

iv) delay

The subjective element in any form has problems with delay; if the last provocative act and the killing are not relatively close to each other then it is less believable that D responded because he was provoked than if the killing had followed on from the provocative incident. The pre-2009 defence dealt with delay by finding that D can often stay out of control for a long time⁸⁵ or that D can simmer and then lose self-control at a

⁸² It was previously discussed that there is a desire to put victims of abuse within the provocation defence rather than it resting on the basis of diminished responsibility (n59-68).

⁸³ Law Commission (2004) Partial Defences to Murder Report No 290, 51 [3.89]: the Law Commission cited the case of *Osborn*, where D had to make this decision.

⁸⁴ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' 229: "It must also be understood that expressions of anger and fear are linguistic devices, and represent attempts by the defendant to negotiate the legal outcome, rather than a true reflection of an underlying inner state."

⁸⁵ *Baillie* [1995] 2 Cr App R 31. See 'Chapter 2 - The Post-1957 Defence' (n28).

later point,⁸⁶ and this is possibly because the last provocative act was not particularly severe.⁸⁷ These solutions offered a way of maintaining the loss of self-control element, as is explicitly required in the Homicide Act 1957, but stretch the meaning of the concept in light of the explanation of it, above. The loss of self-control is really about spontaneous, reflex responses to a provoking stimulus and delay brings with it time for reason to enter in D's decision-making.

If in the above example the father instead of killing his child's abuser near to the time of the incident kills him at a later point this presents even greater problems for a provocation defence which is not based on loss of self-control. Advancing that the defence ought to rest merely on requiring provoked anger means that the subjective element would be quite broad, but it is intended to be. In contrast, however, to the loss of self-control element, a potential problem could be that it may be difficult to prove; if D kills when he has lost his self-control he can often point to some evidence that there was a point where he had actually lost control. For provoked anger it may have taken the form of a loss of self-control but if it did not then it may become difficult to prove; the subjective test becomes whether the jury believes in D's account rather than it being an act of revenge. This still does not mean a loss of self-control requirement is preferable, it is still better to rely on the existence of the core emotion for the reasons previously discussed but it simply may be difficult to prove where there is delay.

In cases which involve an abused party and the emotion of fear the circumstances around the killing will support that D acted because of a genuine fear of violence,⁸⁸ but for anger as outrage this would understandably be difficult to establish. There is a need for the defence to include more than uncontrolled anger but there needs to be caution as it must not mean that revenge is mitigated. Advancing such a subjective element means that the objective element becomes more central to the enquiry but such a subjective

⁸⁶ S.Bandalli, 'Provocation - A Cautionary Note' (1995) 22 Journal of Law and Society 398, 398: In *Ahluwalia* it was "conceded that provocation was not negated as a matter of law simply by delay, a concession to slow-burn anger."

⁸⁷ Then cumulative provocation is required to show that the objective test is satisfied.

⁸⁸ (n69-70)

element is more focused on and consistent with its purpose: to allow the distinction between a provoked killing and a vengeful killing to be exposed. Establishing that there were strong reasons to get angry by requiring warranted anger is only half of the defence and it still must be shown that the subjective element is satisfied in order for the defence to fulfil its rationale of a common human frailty.

Conclusion

The Law Reform Commission of Victoria have stated that the loss of self-control concept fails to "provide a sufficient reason, moral or legal" to distinguish between provocation and murder and this Chapter supports this finding.⁸⁹ It has been demonstrated that it is difficult to give meaning to the concept and the pre-2009 case law failed to give a satisfactory definition which meant that it was viewed as a metaphorical term. It was also established that the concept was neither necessary for mitigation to be worthy nor able to function as a satisfactory subjective element.

The issue of delay and finding a balance for such cases seems to be one which is insolvable; the longer it takes for D to respond the less likely it seems that D reacted because of the emotion and the more likely it was a deliberate and vengeful response. The best which can be achieved is having a subjective element which is open to delayed killings. The loss of self-control concept should have meant that delayed killings were outside the defence and it was only because the concept was stretched for convenience that it operated in such a fashion.

Beyond critiquing the loss of self-control concept this Chapter has also advanced that the subjective element ought to rest on merely finding that the core emotion was present: provoked anger or a genuine fear. The benefits of having a defence which is more receptive to what actually occurred and is able to have a relationship with self-defence in cases of fear means that the defence could respond to victims of abuse who kill more effectively. Loss of self-control functions to mitigate one type of angry killing where the partial defence should be equipped to do more.

⁸⁹ Law Reform Commission of Victoria, *Homicide* Report No 40 (1991) [156]

PART III: REFORM OF PROVOCATION

Part III explores the how the provocation defence was reformed at the beginning of the twenty-first century by examining Parliamentary debates, the Law Commission's reports, the government's response to those reports and the reform which ultimately took place in the Coroners and Justice Act 2009. Various proposals will be inspected and reference will be made to the issues brought up in Parts I and II in order to see how those matters were dealt with. The following discussion helps to give insight to the reform which ultimately took place, whether certain aspects of the various proposals were adopted or not the responses to them give an understanding to the general intentions behind the reform and into the individual provisions.

CHAPTER 7

LAW COMMISSION

In Part II the Law Commission's reports were used to support the findings that were made. To summarise, the Law Commission found that the defence contained a gender bias, it dealt with men who killed in anger but it struggled with women who killed in fear.¹ Also, it was reported that the defence was being used in circumstances which relied on conduct by V which was "blameless or trivial".² The Law Commission sought to clarify the ordinary person test after a period of uncertainty over the extent to which D's control characteristics may be considered and ultimately supported the *Camplin* distinction which follows a similar approach to the moderate excuse theory.³ The loss of self-control requirement was vehemently criticised in the reports and it was viewed as not representing the true function of the subjective element, that it did not distinguish between emotional and vengeful killings.⁴

This Chapter will deal with the Law Commission's proposal for reforming the provocation defence. The Law Commission were first asked to report on just reforming partial

¹ 'Chapter 4 - Adequate Provocation' (n13)

² Law Commission (2004) Partial Defences to Murder Report No 290, 46 [3.65]

³ 'Chapter 5 - Objective Element' (n4)

⁴ 'Chapter 6: Subjective Element' (n6-10)

defences⁵ and subsequently were asked to report on the entire structure of homicide law.⁶ The proposal⁷ to reform provocation was to create three limbs and one of these would need to be satisfied; the limbs were "gross provocation", "fear of serious violence" and "a combination" of the former limbs. For the "gross provocation" limb D must have "a justifiable sense of being seriously wronged". D, also, had to satisfy an ordinary person test.

Two exclusions were included which meant that the defence could not be used where D purposely relied on self-induced provocation and where D had a "considered desire for revenge". The proposal outlines that there is no requirement for the judge to leave the defence to the jury "unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply." The proposal does not require a loss of self-control, in its place the limbs require the core emotion, a feeling of being seriously wrong and/or fear, and, also, there is the revenge exclusion. The proposal's rationale rests on warranted excuse,⁸ the killing is viewed as wrong and excessive but the emotion which was behind the killing must be warranted. The Law Commission refer to Nourse's view,⁹ which is addressed in Chapter 3,¹⁰ and the limbs reflect this: "It is the justification of the sense of outrage which provides a partial excuse for their responsive conduct."¹¹

In the 2004 Report the Law Commission did not recommend any change to diminished responsibility from the Homicide Act 1957.¹² However, in the 2006 Report¹³ it was suggested that the defence ought to be "modernised, so that it is both clearer and better

⁵ Law Commission (2004) *Partial Defences to Murder* Report No 290

⁶ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304

⁷ Law Commission (2004) *Partial Defences to Murder* Report No 290, 70-1 [3.168]

The proposal is contained in Appendix A.

⁸ This was discussed in 'Chapter 3 - Rationale' (n111-31)

⁹ Nourse is discussed at Law Commission (2004) *Partial Defences to Murder* Report No 290, 42-44 [3.52-9] and the Law Commission express its view at 45-6 [3.60-4]

¹⁰ 'Chapter 3 - Rationale' (n115)

¹¹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 44 [3.59]

Also, at 46 [3.68]: "the defendant had legitimate ground to feel strongly aggrieved at the conduct of the person at whom his/her response was aimed, to the extent that it would be harsh to regard their moral culpability for reacting as they did in the same way as if it had been an unprovoked killing."

¹² Ibid 105 [5.86]: "There appears to be no great dissatisfaction with the operation of the defence".

¹³ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 102-3 [5.112]

able to accommodate developments in expert diagnostic practice".¹⁴ The proposal involved looking at D's capacity "to understand the nature" of his conduct, "to form a rational judgment" or "to exercise self-control". These three abilities must be "substantially impaired by an abnormality of mental functioning", this must arise from a "recognised medical condition", "developmental immaturity in a defendant under the age of eighteen" or a "combination of both". These factors must provide "an explanation" for D's part in the killing. This proposal would go on to form the basis for the Ministry of Justice's proposal and, ultimately, the reform contained in the 2009 Act.¹⁵ As will be discussed further, the outlook of the two proposals supports the view that the partial defences ought to be designed to deal with entirely different types of circumstances.¹⁶ The main focus of this Chapter is to explore the Law Commission's proposal as it sought to put the provocation defence on a new path.

The Call for Reform

There have been various calls for reform, both before and after the Homicide Act 1957, and the key reasons for this have been outlined in the Part II.¹⁷ Key cases discussed previously have shown that there were fairly recent attempts to reform the defence at common law, the decisions of *Smith (Morgan)*¹⁸ and *Ahluwalia*¹⁹ were attempting to enlarge the scope of the defence to deal with gender bias and 'battered women'.²⁰

A suggested reform was put forward in 1879. The Criminal Code Bill Commission published the English Draft Code of 1879 and a provocation defence was outlined:

¹⁴ Ibid 101 [5.107]

¹⁵ 'Chapter 8 - Ministry of Justice' (n8) and 'Chapter 9 - Coroners and Justice Act 2009' (n6-9).

¹⁶ (n42-50)

¹⁷ The focus of the individual chapters of Part II will be referred to in order to evaluate the various reform proposals discussed in Part III.

¹⁸ [2001] 1 AC 146. See 'Chapter 2 - The Post-1957 Defence' (n76-81).

¹⁹ [1992] 4 All ER 889. See 'Chapter 2 - The Post-1957 Defence' (n30-3).

²⁰ It has been stated, in the introduction to 'Chapter 2 - The Post-1957 Defence', that the common law could not have suitably reformed the defence because of the structure which the 1957 Act imposed: the defence "was not salvageable through common law developments".

"s176 - 'Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden and before there has been time for his passion to cool.'"²¹

Both the objective and subjective elements are stated plainly. Provocation is defined and the use of the word 'insult' helps to limit the span of the defence to what would commonly be interpreted as instances of provocation. It contains a reference to the ordinary person and the expected standard of self-control is determined by this. The subjective element relies on suddenness and heat of passion, without a loss of self-control requirement; 'sudden' is a term better avoided and heat of passion is a mere metaphor. For this to be workable definitions of 'wrongful act', 'insult', 'ordinary person' and 'passion to cool', would be required.²² The positives are that it sets a bar for provocation, it has a standard of comparison that is sought after in modern reform and it has a realistic subjective element which reflects the circumstances of provocation. Many of the problems with the common law defence would have been remedied if a proposal such as this was enacted instead of the 1957 Act, however, much depends on the definitions which would be given to the terms referred to above. This proposal has been highlighted because it demonstrates that even in the nineteenth century there were calls to move away from some of the aspects of the traditional common law defence and there were various ways in which provocation can be defined.

Part I discussed the problems which existed with the common law and the aims behind the reform which took place in the 1957 Act. Mainly this involved removing common law restrictions and handing greater powers to the jury at the expense of the judge. However, problems with the 1957 Act were apparent and have been outlined in Part II; the rationale, the definition of 'provoked' and the objective and subjective elements were

²¹ Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) Cmnd 2345

²² In Canada 'wrongful act or insult' has been defined in *R v Taylor* [1947] SCR 462, 475: "an act, or the action, of attacking or assailing; an open or sudden attack or assault without formal preparations; injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity."

areas where the defence required clarity or improvement. Since the 1957 Act calls for reform of provocation have been made with the issues of gender bias, sexual jealousy, battered women and violence against women in mind. In 1994 a House of Lords debate took place where Harry Cohen stated that "[t]he injustice that I seek to remove is the blatantly sexist application of the law in homicide cases and the availability of the plea of provocation".²³ Making the defence more difficult for men to use and easier for women is a point which has been discussed.²⁴

The Law Commission Proposal

The Law Commission's review was initially limited to just partial defences;²⁵ therefore, specific routes to avoid murder and the mandatory life sentence had to be laid out in the form of partial defences and they could not rely on sentencing reform, for example, the possibility of avoiding the life sentence if there were extenuating circumstances. In 2006 the Law Commission would be given greater scope to suggest proposals to alter the entire structure of homicide law. The proposal for reform of the provocation defence remained the same.²⁶ Both reports will be used below to explain the proposal.

In the 2004 Report the Law Commission were also "asked to have particular regard" for "domestic violence".²⁷ The Commission recommended "reform rather than abolition"²⁸ and desired for provocation to be designed in a way to include fear of future violence. It found that the defence should be "recast" to include scenarios "which involve excessive use of force in self-defence" and because of this there would be no necessity to

²³ Harry Cohen, May 17, 1994, HL Deb, col 688

Ibid 688-90: "It has been obvious for years that the law operates two different systems when deciding what is provocation for men and what is provocation for women ...

It is obvious that, unless Parliament protects these women by amending the provocation law, the judiciary will continue to hand out uneven and unequal justice. I stress that the Bill is not a licence for women to commit murder."

²⁴ 'Chapter 4 - Adequate Provocation' (n13)

²⁵ Law Commission (2004) *Partial Defences to Murder* Report No 290, 1 [1.2]

²⁶ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 76 [5.1]: however, its effect, because D forms the necessary intention for murder, would not be to reduce the offence to manslaughter but to second degree murder.

²⁷ Law Commission (2004) *Partial Defences to Murder* Report No 290, 1 [1.1]

²⁸ Ibid 3 [1.8]

recommend a new defence of excessive self-defence.²⁹ The reasons they gave for provocation dealing with these cases were that they believed deserving cases fell outside self-defence and by providing a partial defence "nothing is lost but much gained".³⁰ This was the Law Commission's view despite finding that self-defence was already "generous"³¹ in allowing the objective questions to be asked from D's perspective.³² Also, the proposal did not include loss of self-control as the subjective element, therefore provocation would be available to a calm, fearful D. The reasoning for reforming the partial defence in this manner will be important in highlighting the flaws with the 2009 Act in Chapter 9. Before discussing the specific provisions of the proposal there are important broader points which come from the reports.

Patchwork reform

Firstly, the Law Commission were well aware that the 2004 proposal would be limited in its effectiveness by the constraints placed on them, in particular the maintenance of the mandatory life sentence would create pressures on the partial defences just like they faced before. Judge and jury may seek to avoid injustice through their interpretation of the law and possibly distort the terms. The partial defences were described as a "patchwork" and "a product of piecemeal development and reforms, rather than systematic thought".³³ The Law Commission also found that their proposals, without a broader reform to the law of homicide, "would not be satisfactory in the long term and

²⁹ Ibid 6 [1.15]

³⁰ Ibid 80 [4.27]

³¹ Ibid 75 [4.12]

Palmer [1971] AC 814 (PC), 832: "it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken."

³² *Williams (Gladstone)* [1987] 3 All ER 411 and *Owino* (1996) 2 Cr App Rep 128 both demonstrate that the facts are judged as D honestly believed them to be and the jury assess reasonableness based on this.

³³ Law Commission (2004) *Partial Defences to Murder* Report No 290, 33 [3.19]

German homicide law, however, shows that problems can still exist where the law is structured. Murder is narrowly defined, requiring a qualifying condition, and there is a mandatory life sentence for such cases. A 'battered woman' could fall under murder if her killing is viewed as being "devious", one of the conditions, e.g. kills whilst V was asleep. Pedain explains that in rare cases judges have got around this by stating that they are "constitutionally authorized" to impose a lesser sentence if it would otherwise be disproportionate (see Law Commission (2003), 'The Law of Murder: Overseas Comparative Studies' Consultation Paper No 173, A. Pedain, 'Intentional Killings: The German Law' 5 (available at http://lawcommission.justice.gov.uk/docs/Murder_comparative_studies.pdf)).

would leave the law still subject to the same pressures".³⁴ A counterpoint to this is the view, which was expressed by the Ministry of Justice,³⁵ was that a provocation defence should be able to stand on its own merits. Despite there being some truth in this, provocation ought to have a well-functioning relationship with both self-defence and diminished responsibility; self-defence is for justifiable killings in fear, diminished responsibility is for 'abnormal' actors and provocation is for excessive emotional killings. It is submitted that provocation can only work effectively if it is limited in its scope and the other defences can deal with the cases which come under their ambit.

Abolishment and sentencing

Secondly, as provocation was been debated in Parliament it become apparent that the case for abolishing the mandatory life sentence has gained much support:

"Abolishing the mandatory life sentence would give judges the ability to take all the circumstances of each case into account and to graduate their sentences accordingly, passing determinate sentences where appropriate and reserving life sentences for the most heinous cases."³⁶

On one level the necessity for partial defences would no longer exist if such a measure was taken,³⁷ however, there is still the argument for correct labelling and maintaining structure in the homicide law.³⁸ If the mandatory life sentence was removed and the

³⁴ Law Commission (2004) *Partial Defences to Murder* Report No 290, 33 [3.19]

³⁵ 'Chapter 8 - Ministry of Justice' (n9)

The Ministry of Justice's proposal and the 2009 Act only dealt with the partial defences and did not alter the wider structure of homicide law as the Law Commission's 2006 Report suggested.

³⁶ Lord Dholakia, March 1, 1997, HL Deb, col 1698

³⁷ Lord Thomas of Gresford, March 1, 1997, HL Deb, col 1717: "Diminished responsibility and provocation would not be necessary as partial defences if we did not have the mandatory sentence distorting the criminal law of murder." For example, since 1994, when a new Criminal Code was adopted, France no longer has a provocation defence; neither *meurtre* nor its aggravated form have a mandatory sentence but instead have maximum sentences, 30 years and life, respectively (see Law Commission, Law Commission (2003), 'The Law of Murder: Overseas Comparative Studies' Consultation Paper No 173, J.R. Spencer, 'Intentional Killings in French Law').

³⁸ The Minister of State, Home Office (Baroness Scotland of Asthal), March 1, 1997, HL Deb, col 1722: "I am glad that there has been no suggestion in this debate to abolish entirely those partial defences, because it is recognised that they provide us with an important way in which to differentiate levels of culpability."

issue of provocation was left to sentencing then the problems discussed in Part II may still exist but they would be much more hidden.³⁹ By containing these issues within a defence "there is no discretion as to whether the issue will be considered as a mitigating factor" and "the shape of the defence is fixed".⁴⁰ Therefore, by having a defence set out it is clear what is acceptable for mitigation to take place and enables such cases to be dealt with in a fairly consistent manner. Tomlie goes on to state that sentencing is less likely to be scrutinised and the process is not as open to review.⁴¹

Diminished responsibility

Finally, the Law Commission were clear that the defences of provocation and diminished responsibility are "essentially different"⁴² and they "rest on entirely different moral bases".⁴³ This supports the theme which was discussed in Chapter 5,⁴⁴ that provocation is about judging D's reaction by the common standards of society whereas diminished responsibility is about testing whether D's incapability to reach that standard is sufficient. In response to Mackay and Mitchell's⁴⁵ suggestion to merge the partial defences of provocation and diminished responsibility the Law Commission stated that there was "very little support" for it.⁴⁶ An important point behind Mackay and Mitchell's view is that provocation "sends out the wrong message ... as it is likely to focus attention on the behaviour of the victim."⁴⁷ As has been discussed,⁴⁸ this may be inescapable for a provocation defence as the conduct of the party who committed the wrong is going to be

³⁹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 39 [3.42]: "the problems about what should or should not be regarded as provocation would not disappear by abolishing the defence of provocation, but would be faced at a separate stage of the proceedings."

⁴⁰ J. Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] NZLR 25, 35

⁴¹ Ibid 36: "If injustices occur - like those that have historically taken place in relation to battered defendants or battered victims - it is difficult to know what is taking place and what might be done."

⁴² Law Commission (2004) *Partial Defences to Murder* Report No 290, 45 [3.63]

Also, at 70 [3.166]: "A merger of the two defences would not be compatible with our present thinking about the way in which the defence of provocation should be reshaped, and we do not recommend it."

⁴³ Ibid 108 [5.99]

⁴⁴ 'Chapter 5: Objective Element' (n143-55)

⁴⁵ This basis for the defence was introduced at 'Chapter 6: Subjective Element' (n36-7).

⁴⁶ Law Commission (2004) *Partial Defences to Murder* Report No 290, 107 [5.98]

⁴⁷ R.D. Mackay & B.J. Mitchell, 'But is this provocation? Some thoughts on the Law Commission's report on partial defences to murder' (2005) Crim LR 44, 55

⁴⁸ 'Chapter 3: Rationale' (n32-5)

reviewed. However, with the proposal resting on the rationale of warranted excuse it will limit the scope of the defence and it will not apply like before, where V's conduct could be "blameless or trivial".⁴⁹ The provision which increases the judge's role in filtering cases will also prevent the defence from dealing these types of cases.⁵⁰

The rest of this Chapter will go through the Law Commission's proposal and define the terms used and explain the provisions in reference to the previous chapters. Firstly, all of the three limbs in section 1 will be discussed. After, the revenge exclusion, the self-induced provocation exclusion and the role of the judge and jury will be explored. Even though the Law Commission's proposal should be viewed in a favourable manner, as what it attempted to achieve was broadly correct, there are many issues where there is a lack of clarity.

s1) (a) Gross Provocation

Anything has the potential to amount to being provocation, the phrase "words or conduct or a combination" means that any situation is capable of providing a foundation for the defence. This is the correct approach as much of the criticism of the defence before 1957 was to do with exclusions of this sort, for example how in *Holmes* words alone could only be considered in exceptional circumstances.⁵¹ There is no reason why words of a provocative nature, such as repeated taunts or racist abuse, for example, should not be viewed as being equivalent to an assault.

i) subjective element

Requiring D to have a 'sense of being seriously wronged' is a subjective test. Therefore, the subjective element, rather than being heat of passion or loss of self-control, is the existence of the core emotion. For D to feel wronged means that he is either angry or outraged at what has occurred and therefore has the potential to include a greater set of circumstances than a loss of self-control requirement.⁵² The difference between

⁴⁹ (n2)

⁵⁰ This provision will be discussed below, at (n132-45), but it will not be supported.

⁵¹ *Holmes v DPP* [1946] AC 588. See 'Chapter 1 - The Early Defence' (n109-114).

⁵² At 'Chapter 6: Subjective Element' (n71-80) the different types of provoked anger are discussed.

'wronged' and 'seriously wronged' is unclear but it can be inferred that it would take something severe. This would help to avoid cases such as *Doughty*,⁵³ where a baby crying was the source. In that case there was no feeling of D being wronged in any way or that D was actually subjected to provocation, it was merely how the pre-2009 defence was interpreted in that 'provoked' was viewed as the equivalent to 'cause'.⁵⁴ By stipulating "gross provocation" and defining the limb in this way it helps to ensure that the limb only deals with cases which can truly be described as *provoked anger*.

ii) gravity test

The Law Commission also state that the jury must find it to be "gross provocation" through the objective element, which relies on the term 'justifiable': "we do not intend the test to be purely subjective".⁵⁵ Below, it will be discussed how the lack of further explanation of the 'justifiable' term means that the nature of the limb is not wholly clear from the text.

The developments in the pre-2009 defence from *Camplin* have been built on in this proposal. With regards to response characteristics, the Law Commission made an effort over the concerns with considering racist, sexist and homophobic characteristics by requiring that the objective standard is to have 'ordinary tolerance'. If the "provocation demonstrated an outlook (e.g. religious or racial bigotry) offensive to the standards of a civilised society" then it should not be considered by the jury.⁵⁶ The inclusion of "ordinary tolerance" shows that the Law Commission understood a problem with the ordinary standard, that it allows prejudices to be relied on.⁵⁷ The proposal refers to 'circumstances' rather than 'characteristics', this is preferable as it gives greater scope to

⁵³ *R v Doughty* (1986) 83 Cr App R 319. See 'Chapter 4: Adequate Provocation' (n26-30).

⁵⁴ 'Chapter 4: Adequate Provocation' (n31-4)

⁵⁵ Law Commission (2004) *Partial Defences to Murder* Report No 290, 46-7 [3,69-3.70]: [T]he jury must of course consider the situation in which the defendant found him or herself and take into account all the characteristics of the defendant which they consider to be relevant. Taking into account the circumstances and characteristics of the defendant does not mean that if the defendant considered it to be gross provocation, the jury must therefore accept that it was gross provocation."

⁵⁶ *Ibid* 47 [3.70]

⁵⁷ Ordinarity, by definition, would include prejudices which society hold. See 'Chapter 5: Objective Element' (n57-63).

contextualise the events leading up to the killing, but the term 'characteristic' was previously given such meaning in the common law anyway.⁵⁸

iii) control test

The ordinary person test follows a similar approach to the moderate excuse theory by only referring to normal and ordinary control characteristics as the ordinary person must have an "ordinary temperament" and "self-restraint".⁵⁹ Further explanation is given in s2 of the proposal and the Report clearly states that the *Camplin* and minority position in *Smith (Morgan)* is being taken.⁶⁰ Whilst age remains sex is removed from consideration in this test. Sex was applied incorrectly in the pre-2009 defence and is commonly viewed as controversial, nevertheless, as Chapter 5 demonstrates,⁶¹ there may be a place for it in a broader discussion about maturity.

The language used in the proposal does not state their view of the moderate excuse theory as plainly as it could have been done.⁶² It has even been questioned if a moderate excuse theory has been followed at all and authors have suggested that this was done unintentionally.⁶³ On this reading of the provision, it is found that where the circumstance is not *only* relevant as a control characteristic it can be considered in the control test. For example, if the provision was applied to the *Morhall* case, where D was a glue sniffer and was taunted about his habit, his drug addiction could be considered as a control characteristic.⁶⁴ D's drug addiction is not *only* relevant to his general capacity for self-control as it is also relevant as a response characteristic in the gravity test, meaning in these scenarios where a characteristic is potentially applicable in both tests it may be

⁵⁸ 'Chapter 2 - The Post-1957 Defence' (n63-8)

⁵⁹ The moderate excuse theory was described at 'Chapter 5: Objective Element' (n92-6).

⁶⁰ Law Commission (2004) *Partial Defences to Murder* Report No 290, 55 [3.110]

⁶¹ 'Chapter 5: Objective Element' (n112-9)

⁶² s2: "the court should take into account the defendant's age and all the circumstances of the defendant other than matters whose only relevance to the defendant's conduct is that they bear simply on his or her general capacity for self-control."

⁶³ C.M.V. Clarkson, H.M. Keating, S.R. Cunningham, *Criminal Law: Text and Materials* (7th ed, Sweet & Maxwell, 2010) 686: "it would seem that this provision has (perhaps unintentionally) opened the door to a wide variety of characteristics being taken into account ... [T]here is no reason why the defendant's impotence, pregnancy, physical disability, sensitivity or even mental disability cannot be taken into account" in certain cases.

⁶⁴ [1996] AC 90. See 'Chapter 2 - The Post-1957 Defence' (n75).

considered as a control characteristic too. From the wording a control characteristic is only unavailable to consider if its "only relevance" is as a control characteristic. Even though the wording could be interpreted in such a manner it is clear that this was not the intention of the Law Commission and given this it seems surprising that the 2009 Act adopts similar language in their equivalent provision.⁶⁵ The Report makes it very clear the *Camplin* distinction is being followed⁶⁶ and to underline this s1 of the proposal refers to a person of "ordinary temperament, i.e. ordinary tolerance and self-restraint". It may have been better to state straightforwardly that 'D's age is the *only* factor which can be considered with regards to the general capacity for self-control.'

iv) critique

There are two main points about this limb of the Law Commission's proposal. Firstly, there is not a subjective element akin to loss of self-control. Instead the proposal seeks to define what it is to be provoked, sets a higher standard, and then the defence merely requires the core emotion. The gross provocation limb therefore includes serious cases of anger and outrage, this means that the proposal caters for a greater set of provocation cases as it is not restricted to spontaneous and out-of-control reactions.⁶⁷ Also, it restricts those cases which were admitted into the pre-2009 defence as the provision does not allow for 'cause' to be seen as the equivalent of 'provoked';⁶⁸ it means D must feel wronged by an identifiable source which is adjudged to be of a provocative nature. All this means that the limb is tailored to archetypal provocation cases.

Secondly, the Law Commission, as they acknowledge,⁶⁹ placed a greater emphasis on the objective questions owing to its abandonment of loss of self-control. Considering that the importance of the term 'justifiable' in the proposal the Law Commission can be criticised for not elaborating on its meaning in their reports. It was merely stated that the

⁶⁵ s54(3) Coroners and Justice Act 2009

⁶⁶ (n60)

⁶⁷ See the discussion of the loss of self-control concept at 'Chapter 6: Subjective Element' (n17-35).

⁶⁸ (n53-4)

⁶⁹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 56 [3.115]: "Moreover our proposals involve abandoning the loss of self-control test, which has proved very unsatisfactory, and this makes the need for an objective test still greater."

limb has "two aspects":⁷⁰ the subjective element is that the 'provocation' must caused D to have a "sense of being seriously wronged" and the objective element is that it was "justifiable", a determination which requires D's response characteristics to be considered.⁷¹ There was no definition provided, meaning that the impact of the term is not as clear as could have been as without further explanation it is more difficult to appreciate how far they were intending to narrow the scope of the defence. This is especially so given that the term has not been associated with the defence in this manner before and greater clarification by such an authority could have aided its application.

In Part II it was stated that the *Camplin* approach, combined with a provision to exclude undesirable characteristics, ought to be applied to a warranted standard for the jury to apply.⁷² Therefore, the Law Commission's proposals are, on the whole, in line with what has been advanced. The one point at which it differs is that in Chapter 3 it was stated that D himself ought to believe that his sense of being provoked was warranted too;⁷³ this ensures that D's emotion is driven by the provocation which he appreciated to be substantial and through this the defence is on a more satisfying platform as the warrant informs both the objective (for the jury) and the subjective (for D) elements.

s1) (b) Fear of Serious Violence

The provocation defence had become under increasing pressure to deal with cases which fell outside self-defence and did not involve diminished responsibility.⁷⁴ Rather than create a separate partial defence of excessive self-defence the Law Commission sought to combine provocation and fear as the emotions can be seen to be somewhat similar⁷⁵ and in both D "acknowledges" that their conduct was "unlawful" but they stem from "from an external source",⁷⁶ a provoker or someone who threatens. The Law

⁷⁰ Law Commission (2004) *Partial Defences to Murder* Report No 290, 46 [3.68]

⁷¹ Ibid 47 [3.70]. See (n55-8).

⁷² 'Chapter 5: Objective Element' (n156)

⁷³ 'Chapter 3: Rationale' (n124)

⁷⁴ (n29-35)

⁷⁵ Law Commission (2004) *Partial Defences to Murder* Report No 290, 52 [3.97]

⁷⁶ Ibid [3.95]

Commission felt they were able to do this as their proposal did not include a requirement for D to lose his self-control.⁷⁷

i) subjective element

The Law Commission referred to Lord Hoffmann in *Smith (Morgan)* and how he stated that provocation may include cases of fear.⁷⁸ However, this proposal is evidently a very different defence from the one which Lord Hoffmann was referring to as is shown when comparing the structure and rationale.⁷⁹ The subjective test in this proposal is, quite simply, that D feared serious violence. Chapter 6 discussed how losing self-control was at odds with the emotion of fear, it is possible that D can genuinely fear, and act upon it, whilst being in control and acting somewhat rationally: "D should not be prejudiced because he or she over-reacted in fear or panic, instead of overreacting because of an angry loss of self-control."⁸⁰ Such an agent's actions, under the influence of this emotion, in those circumstances, may understandably consist of an excessive response which differs from an anger-based response.

The Law Commission envisioned two types of cases arising under this limb. Firstly, situations where the killing was excessive as D used too much force. An example given was a householder killing an intruder where it was not necessary to do so but D over-reacted.⁸¹ Secondly, where the killing was "insufficiently imminent" to a threat of violence, the best example being the case of a 'battered woman';⁸² for instance, in the case of a victim of abuse who kills V when he is sleeping there is sympathy with her situation and murder "would be overly harsh".⁸³ Therefore, this shows that the Law Commission

⁷⁷ (n80)

⁷⁸ Law Commission (2004) *Partial Defences to Murder* Report No 290, 52 [3.90]. See *R v Smith (Morgan)*, [2001] 1 AC 146, 168 and 'Chapter 4: Adequate Provocation' (n14).

⁷⁹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 51 [3.85]: "the proposed partial defence would go beyond the traditional limits of provocation."

⁸⁰ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 89 [5.54]

⁸¹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 77 [4.17]: "... where the force used is unlawful, because it is excessive, even though the circumstances are such that some use of force would have been lawful in self-defence."

⁸² Ibid: "where the threat of attack was insufficiently imminent to attract any possible defence of self-defence."

⁸³ Ibid [3.92]

intended a true relationship between their proposal and self-defence, where the full defence was not available as one of the elements was not present the partial defence could ensure that D did not fall under the scope of murder.

As with the provocation limb, it is not altogether clear what the difference is between violence and *serious* violence. The Law Commission stated that it included "sexual as well as other physical violence" and the seriousness would depend upon the "context of the relationship between the defendant and the victim".⁸⁴ D's past experiences will shape her future expectations harm. A problem with this requirement is that there may be borderline cases and D may fear a certain amount of future violence but is excluded from the partial defence owing to its insufficiency. Also, another consideration is that this term, 'serious', was introduced to the gross provocation limb to raise the bar on what could be admitted into the defence. It is not apparent that the same problems exist with regards to the fear limb. This is partly because of what will be discussed when examining the 'combination' limb, that killing excessively in fear ought to be viewed as being on a greater standing than killing excessively in anger.⁸⁵ Ultimately, this means that the rules do not have to be so strict in comparison with the first limb and this, in part, may explain the extra layer of requiring a 'justifiable' serious wrong in the 'provocation' limb as if D felt fear of serious violence this emotion could be construed as being warranted already.

ii) control test

For all the limbs of the proposal the same control test applies as sections 1 and 2 refer to a person of "ordinary temperament". How appropriate it is for same the control test being used to deal with both cases of provocation and fear is questionable. It has been stated that 'tolerance and self-restraint' fit the enquiry into whether mitigation it was suitable for a killing in anger but the "terms do not fit neatly ... with excessive force in self-defence to a fear of serious violence."⁸⁶

⁸⁴ Ibid 53-4 [3.102]

⁸⁵ (n106-7)

⁸⁶ C.M.V. Clarkson, H.M. Keating, S.R. Cunningham, *Criminal Law: Text and Materials* 686-7

The Law Commission supported the fact that a fearful D must still show a similar level of restraint as an ordinary person: "Ordinarily it would not be even partially excusable for a person in fear, but not in imminent danger, to take the law into his or her own hands."⁸⁷ This explanation by the Law Commission, even though this passage later refers to "criminal gangs",⁸⁸ seems at odds with extending the defence to include victims of abuse and 'battered woman' scenarios; the sorts of cases which the Law Commission imagined would fall into the fear limb include killings where the threat was "insufficiently imminent".⁸⁹ Therefore, there is a lack of clarity with regards to this limb in how far it is intended to reach; whether the limb would deal with 'battered women' who kill with delay or not is unclear as the control test may bar reactions which are not responding to imminent threats as they could be viewed as being outside the scope of an ordinary reaction. Designing a limb to deal with excessive killings in fear would be a pointless exercise if the problem cases are outside the ambit of the defence as the tests imposed have not been adapted to specifically deal with the emotion of fear.

*iii) contextual evidence*⁹⁰

Unlike the provocation limb, the fear limb is entirely subjective, this means that there is no reference to judging the severity of the threat by objective standards. Therefore, the consequence of these two limbs operating in differing manners means that there is no specific gravity test for the fear limb akin to provocation. The issue is that sections 1 (the final paragraph) and 2, which deal with how to apply the objective standard, are equally applicable to the fear limb and both of these sections refer to "the circumstances of the defendant", meaning response characteristics and contextual evidence. The question becomes how should this phrase be interpreted. Above,⁹¹ reference was made to how the Law Commission rightly supported that contextual evidence could be used to support D's fear of serious violence in the subjective element. Also, as Chapter 5 discussed,⁹² by allowing contextual evidence it gives the jury the opportunity to show more

⁸⁷ Law Commission (2004) *Partial Defences to Murder* No 290, 56 [3.112]

⁸⁸ Ibid

⁸⁹ See (n82-3).

⁹⁰ Part IV will deal with how contextual evidence could be used more appropriately.

⁹¹ (n84)

⁹² 'Chapter 5: Objective Element' (n48-51)

understanding to the emotion which D experienced. In terms of any objective enquiry, the only way contextual evidence may therefore be applicable to the fear limb is in giving greater understanding to the jury in their assessment of the control test, it in no way has any significance in assessing the gravity of the threat.

iv) critique

This proposal, owing to the removal of loss of self-control from the subjective element, allows this defence to have a relationship with self-defence: this proposal would be a natural step-down.⁹³ It would be very difficult for D to simultaneously argue that he acted proportionality and that he lost his self-control.⁹⁴ The way which the proposal would function is as ideal as these cases could possibly be dealt with:

"Under our proposal, the jury would first consider whether D acted in lawful self-defence. If the jury is satisfied that the killing was unlawful, they would then consider whether D was entitled to a partial defence of provocation under either limb."⁹⁵

It is important to note that despite self-defence being considered generous, in allowing the defence to be judged from D's perspective, the partial defence was still proposed because of the desire to provide mitigation for excessive responses.⁹⁶ A downside to this approach, removing the 'all or nothing' consequence, is that a risk emerges that juries will see this defence as a "compromise" and they could "return a manslaughter verdict, whereas presently they would acquit on grounds of self-defence".⁹⁷ It is submitted, however, that the benefits of the fear limb outweigh this drawback; the utility of a defence

⁹³ Law Commission (2004) *Partial Defences to Murder* Report No 290, 80 [4.28-9]

N. Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77(5) JCL 433, 436: "A commendable outcome of the Law Commission's recommendations was that, in the absence of the loss of control requirement, the partial defence could be cogently aligned with the law on self-defence".

⁹⁴ 'Chapter 6: Subjective Element' (n81-4)

⁹⁵ Law Commission (2004) *Partial Defences to Murder* Report No 290, 52 [3.90]: "We believe that this represents a coherent and just approach. D would not be in the dilemma identified".

⁹⁶ (n29-32 & n76)

⁹⁷ Law Commission (2004) *Partial Defences to Murder* Report No 290, 79 [4.24]

which operates in the middle-ground could be valuable for cases which do involve excessive killings and such cases will finally have a tailored partial defence.

There are forceful arguments which exist which seek to brand many of the 'battered woman' cases as justifiable if objective questions are allowed to be refocused to recognise that women act differently to men and that from their perspective the act of killing is necessary to avoid future violence.⁹⁸ Self-defence rules could be tweaked to make the defence more receptive to these types of cases; there are ways of re-defining self-defence as, for example, in Australia the Victoria Law Commission's proposals described the required threat, attempting to include 'battered women' within self-defence, as needing to be "not immediate, but ... inevitable."⁹⁹ On this issue, however, concerns have been expressed about considering these cases as self-defence rather than being considered as excessive killings and a matter for partial defence,¹⁰⁰ this is from a standpoint where immediacy is a necessary requirement for it to be a justification.¹⁰¹

Despite there being issues with regards to how the provision was drafted the Law Commission were correct to recognise that people could kill in fear without losing self-control and without responding to an immediate and necessary threat and still deserve some form of defence in the face of being labelled as a murderer.

s1) (c) A combination and s4)

i) anger and fear

A great concern with the proposal is that there is not enough detail in how the combination limb, which deals with both emotions, would operate.¹⁰² There seems to be an essential difference between the two limbs and the reasons why mitigation ought to be available; killing in anger is an aggressive act whereas killing in fear is a defensive act. One of the points, therefore, that the Law Commission had to respond to was why

⁹⁸ 'Chapter 6: Subjective Element' (n64-68)

⁹⁹ Victoria Law Reform Commission (2004) *Defences To Homicide: Final Report*, 80 [3.60]

¹⁰⁰ 'Chapter 6: Subjective Element' (n68)

¹⁰¹ 'Chapter 3: Rationale' (n22-8)

¹⁰² *Ibid* 54-5 [3.104-8]

anger and fear were joined in one defence in their proposal rather than each having its own partial defence. The three arguments which were used were that the situations and emotions are in fact similar,¹⁰³ there was a wish to keep the defence "as broad and simple as possible"¹⁰⁴ and "from a moral viewpoint, there is a common element namely a response to unjust conduct".¹⁰⁵

The rationale for a fear-based limb ought to be construed as being far more compelling than provocation's as it could act as a step-down from the justificatory defence, the partial defence could cover those cases which did not quite fit into the full defence. In Chapter 3 the rationale of self-defence was discussed in order to contrast it with provocation,¹⁰⁶ to highlight how far provocation is from resting on a justificatory basis. Even so, there still must be a reason to offer a partial defence, a reason why we show compassion to somebody who killed excessively out of fear. The two emotions do find a common ground in human frailty, extreme emotions and highly charged situations where an excessive reaction, given the gravity of the stimulus, can be distinguished. This is consistent with the Law Commission stating that the fear limb is not meant to be excessive self-defence as D makes no claim that their conduct was in any way proportionate to the threat.¹⁰⁷ Through experiencing the emotion and with the application of the control test it is possible to link D's behaviour to common standards in a similar manner to the provocation defence.

On one hand, there needs to be a purpose to put them together in a single defence and, on the other, it must be possible to separate them because of the different standings of the two emotions. A benefit to the proposal is that the operative emotion can be identified from its separate limb. Anger and fear have been labelled separately, therefore the

¹⁰³ Ibid 53 [3.99]

Law Commission (2005) *A New Homicide Act for England and Wales?* Consultation Paper No 177, 175 [6.139]: "there seems to us to be no reason to distinguish sharply between the excusatory element in limb (a) (gross provocation) and the excusatory element in limb (b) (a fear of serious violence). Anger and fear are often mixed in people's responses. In some cases, it may be almost impossible to say whether the defendant's reaction was in essence predominantly fearful or predominantly angry. A jury should not have to distinguish between the two for the purposes of reducing first degree murder to a lesser offence."

¹⁰⁴ Law Commission (2004) *Partial Defences to Murder* Report No 290, 53 [3.100]

¹⁰⁵ Ibid [3.101]

¹⁰⁶ 'Chapter 3: Rationale' (n29-30)

¹⁰⁷ (n76)

reasons why mitigation is offered is clear and there will be an ability to punish D proportionately as killing out of fear deserves less punishment. There should be therefore quite clear gradations of blame and punishment within the defence when the individual limbs are relied upon.

Combining the two emotions, however, may wrongly put these emotions on par with each other but it may also allow the lines between defensive and aggressive action to be blurred within the combination limb. 'Battered women', for example, may kill justifiably in self-defence. But they may also kill excessively because they have found the abuse they have suffered to be provocative or because they fear future violence from their abuser despite at the time facing no threat (or they may kill owing to a mental abnormality in diminished responsibility). Not all 'battered women' cases will be dealt with through arguing that D acted in a defensive manner.¹⁰⁸ Therefore, combining the emotions in one defence has value owing to the complexities of the key scenario, the 'battered woman' case, which the Law Commission were attempting to deal with. However, how the two emotions relate to each other in the case of the combination will mean the jury is being asked to consider mitigation for defensive and aggressive reasons together. The anger limb, especially, could undermine the fear limb.

ii) critique

The Law Commission at no point identifies how the combination limb ought to operate. The best understanding is that both the provocation and the fear limbs must be satisfied in full; this interpretation is that the combination does not mean that D can be insufficiently angry and fearful but combine them together to make a successful limb; if D shows she killed because of gross provocation and fear then it will make her argument, in the control test, that an ordinary person might have killed too and, also, that she did not kill in revenge more forceful. The rationale for the combination limb is therefore that if D is able to demonstrate that he experienced both of these emotions at the time then he will be more likely succeed with a combination limb but the two emotions, even though similar, have the potential to work against each other.

¹⁰⁸ J. Tolmie, 'Is the Partial Defence an Endangered Defence?' 42: she could argue that she was "responding to an emotional rather than a physical abuse at the time she killed him."

Section 4 of the proposal adds an interesting contribution to the discussion on the relationship between anger and fear. It states that D shall not be viewed to have killed in revenge if she killed out of fear but was angry at the same time. The Law Commission state that a jury should be able to spot a D "who was not truly killing out of fear for their future safety (or that of the children) but for other reasons."¹⁰⁹ The purpose of this section means that the presence of anger or outrage will not damage the subjective element of the fear limb. It will also help to isolate fear from anger in standalone fear cases, if D's anger does not satisfy the provocation limb then the fear limb, in theory, should not be disturbed. By allowing the fear limb to be isolated from the anger limb in such a way only exemplifies how the combination limb does not sit right. It creates another balancing act for the jury: the decision to ignore the anger, which could possibly be construed as revenge, or to find that even though D was fearful she acted in revenge would become a difficult task for a jury. It highlights the differences between the two emotions and acknowledges that they can work against each other, proof that D was angry at the time might make arguments in favour of the fear limb less creditable: if there are two different reasons behind the killing then it may undermine D's argument. The benefit of the combination limb is that it could strengthen D's claim that they acted like an ordinary person but by putting the two emotions in the same limb it forces the jury to consider contrasting reasons behind the killing.

s3) (b) Considered desire for revenge

i) removal of loss of self-control

The Law Commission's proposal does not rely on a subjective element such as loss of self-control, instead it merely requires the core emotion of anger and/or fear. The loss of self-control concept was described as being "unnecessary and undesirable".¹¹⁰ It has been stated that the key function of a subjective element is to ensure that D was acting

¹⁰⁹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 63 [3.137]

¹¹⁰ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 80 [5.17]: "For 250 years or more, the law took the uncomplicated view that the defence of provocation could be pleaded whenever D was provoked into a towering rage or temper and killed before the rage or temper subsided. In the 19th century, this subjective requirement was turned into a requirement that D 'lost self-control' at the time of the killing. Judges have since struggled to interpret and apply this notion as a description of the necessary state of mind."

emotionally, "on impulse or in fear or both",¹¹¹ and not owing to revenge.¹¹² The provocation defence has never been designed in a way to include revenge killings, mitigation is available because D is shown to have got carried away in the moment and because of the strength of the emotion and its link to common standards the killing can be distinguished from murder. The Law Commission stated that their preference was to express the subjective element "negatively, avoiding reliance on a positive requirement of loss of self-control" and all that matters is that the emotion is genuine and not "engineered".¹¹³

The Law Commission's reports plainly criticise the loss of self-control element.¹¹⁴ Loss of self-control has been ill-defined, distorted and its necessity can be called into question. If its function is to distinguish between 'hot blooded' provoked killers and 'cold blooded' vengeful killers then it failed. The Law Commission reported of "undesirable side effects",¹¹⁵ that the concept had been stretched in order to do justice by allowing a certain amount of delay for 'battered women' and therefore was unable to exclude cases such as *Baillie*.¹¹⁶ There are those cases which involve outrage rather than a loss of self-control, they involve extremely provocative scenarios but were outside of the pre-2009 defence. Also,¹¹⁷ if fear is included as a valid emotion then loss of self-control simply should not be required as it would exclude those scenarios where D kills excessively and acts rationally under the influence of fear or despair. Strong links with self-defence would be lost too.¹¹⁸

Section 3)(b) expressly rules out where D acts with a 'considered desire for revenge'. The Law Commission stated that "[t]here may be borderline cases on the facts" but "a jury would be able to recognise and apply" the provision.¹¹⁹ The advantage of this over requiring a loss of self-control is evident: the underlying emotions are more successfully

¹¹¹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 62 [3.135]

¹¹² 'Chapter 6: Subjective Element' (n6-10)

¹¹³ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 81 [5.20]

¹¹⁴ See, in particular, 'Chapter 6: Subjective Element' (n9).

¹¹⁵ Law Commission (2004) *Partial Defences to Murder* Report No 290, 63 [3.136]

¹¹⁶ [1995] 2 Cr App R 31. See 'Chapter 2 - The Post-1957 Defence' (n28).

¹¹⁷ (n80)

¹¹⁸ (n93-101)

¹¹⁹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 62 [3.135]

brought out in the tailored limbs, there is no need to rely on a concept which does not function effectively and the scope for undeserving cases is limited with specific provisions, such as s3(b), which restrict the defence from unmeritorious cases.

ii) critique

A few points can be raised from this terminology though. The difference between a *considered* desire for revenge and a desire for revenge is not straightforward, for example, Card has stated that "one cannot desire something without giving the matter some consideration".¹²⁰ As has been discussed,¹²¹ this is only true in part; in the process of becoming provoked the desire for retaliation only comes after a judgement of wrongdoing has been made. Even though 'consideration' is required before all desires can exist the provision actually states that considered desires are excluded, not judgements over whether D has being wronged. The consideration which is referred to therefore is to do with how to carry out the killing; a vengeful killing is a calculated decision where the emotional impulsiveness is removed. The provision does therefore make it implicit that a certain amount of revenge can exist but it must not cross over the threshold as to be considered, a plan could not take form in D's mind of how to proceed in carrying out the feeling of revenge but a feeling of resentment could exist.¹²² This is most likely what is at the core of section 4 of the proposal too, that D's anger does not necessarily invalidate D's fear of serious violence.¹²³

As with any defence which enquires into emotional killings the issue of delay would remain a major concern. It is interesting to consider how differently these cases would be treated given that a loss of self-control is not required. The greater the delay without overt signs to demonstrate that the killing was not done in 'cold blood' would make it difficult for juries. These are the borderline cases and where there is some evidence of preparatory actions, no matter how slight, the subjective element may prove to be a difficult obstacle. The 'considered desire for revenge' exclusion would put the proposal

¹²⁰ R. Card, *Criminal Law* (20th ed, Oxford University Press, 2012) 259-60

¹²¹ 'Chapter 3: Rationale' (n70)

¹²² 'Chapter 6: Subjective Element' (n6): R. Holton & S. Shute suspect that revenge is present in most provocation cases.

¹²³ (n109)

closer to the true rationale of this type of defence but as a substantive rule, when there are so many factors which could be relevant, it could be difficult for a jury to apply.¹²⁴

s3) (b) Self-induced Provocation

The Law Commission included another exclusion, that self-induced provocation cannot be relied upon by D in certain scenarios. Under the pre-2009 defence, in *Johnson*,¹²⁵ self-induced provocation was seen to be consistent with the defence's rationale, all that was required was that D needed to feel provoked into losing his self-control and this then needed to be inspected through the ordinary person test: the nature of the provocation did not matter. The main question was whether a loss of self-control could be genuine in such a case.¹²⁶

The Law Commission reported that self-induced provocation could either be defined narrowly or broadly but decided they should only exclude the narrow circumstances.¹²⁷ The excluded narrow definition is a situation where D purposely uses the 'provocation' scenario as a guise. The broader definition, on the other hand, could include all situations where D puts himself into a position where he is likely to be provoked; so, for example, D going to a place where he knows it is likely that his presence will cause an affront to another is not explicitly excluded under this proposal. These cases would need to fulfil the standard elements of the defence.¹²⁸

The wording of the provision would indeed limit the exclusion to a narrow set of circumstances. It is interesting that the phrase "the purpose" is included in the text,¹²⁹ this means that D must intend that his conduct is to have the effect of wronging another and this will induce that person into acting violently in response. D may therefore only use the defence if it is not planned. For example, in *Edwards* D planned to blackmail V,¹³⁰ his

¹²⁴ See 'Chapter 6: Subjective Element' (n88) for further discussion of this point.

¹²⁵ [1989] 1 WLR 740

¹²⁶ See 'Chapter 4: Adequate Provocation' (n37-45) for the discussion of self-induced provocation.

¹²⁷ Law Commission (2004) *Partial Defences to Murder* Report No 290, 63 [3.139]

¹²⁸ Ibid 64 [3.140]: "it would be for the jury to take a common-sense view whether the defendant's conduct met the requirements of the objective test."

¹²⁹ "the provocation was incited by the defendant for the purpose of providing an excuse to use violence"

¹³⁰ [1973] AC 648: D was attempting to blackmail V. V then swore and attacked D with a knife inflicting several wounds. This provoked D into killing V as D wrestled the knife from V and stabbed him in a blind rage.

purpose was not to use this in order to anger V and then kill him, arguing that he was provoked. This exclusion, with merit, is very narrow but the jury could still hear cases which commonly would be defined as self-induced.

The actual rule set out in *Edwards* is preferable to later developments (*Johnson*) and the *Edwards* provision, D can only rely on self-induced provocation if V's conduct went beyond reasonable expectations, ought to apply to the 'broad' category of self-induced provocations.¹³¹ The Law Commission's proposal does not explicitly deal with the broader circumstances, instead of advocating an approach such as the one in *Edwards* it merely instructs that those cases should be dealt with within the normal rules.

s6) Role of the judge and jury

The aim of the Homicide Act 1957 was to give greater power to the jury because the common law had developed in a way which meant judicial control was great and it contained many exclusions which were not necessary.¹³² This goes very much the other way. The fact that such a provision is required in the proposal is significant as the Law Commission have made the decision that certain cases should never reach the jury: "[t]o leave such a case to the jury would imply that a properly directed jury could reasonably conclude" that the defence could succeed.¹³³ In a later report it was stated that the judge's role involves "filtering out purely speculative and wholly unmeritorious claims."¹³⁴

The Law Commission set out a number of cases which it did not want to succeed under its proposal. They cited the Australian case of *Stingel*¹³⁵ where a jealous D killed his ex-girlfriend. Other cases were highlighted: "Examples of other cases which under our approach ought not to be left to the jury are *Baillie*, *Doughty* and *Dryden*."¹³⁶ Therefore, apart from sexual jealousy and possessiveness, the intention of the Law Commission was to also exclude cases which involved a great time of delay and possibly motives of

¹³¹ [1973] AC 648. See 'Chapter 4: Adequate Provocation' (n39 & n45).

¹³² 'Chapter 1 - The Early Defence' (n81-2)

¹³³ Law Commission (2004) *Partial Defences to Murder* Report No 290, 65 [3.145]

¹³⁴ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 80 [5.16]

¹³⁵ (1990) 171 CLR 312: D was stalking his ex-girlfriend and saw her having sex with V in a car. V swore at D and D went to get a butcher's knife from his car and killed V.

¹³⁶ Law Commission (2004) *Partial Defences to Murder* Report No 290, 66 [3.148]

revenge (*Baillie*),¹³⁷ cases where the provocation stems from a normal and natural source (*Doughty*)¹³⁸ and cases involving D relying on mental abnormalities (*Dryden*).¹³⁹

Part I discussed many cases which explored how much evidence was actually required for the case to go to the jury.¹⁴⁰ For example, in *Hopper* it was stated that "some evidence"¹⁴¹ was required and following *Holmes* "a preliminary ruling" by the judge on all the elements of the defence was required.¹⁴² Following the 1957 Act all cases of loss of self-control which stemmed from D feeling provoked had to go to the jury.¹⁴³ Presumably, the provision in the proposal requires a similar approach to the much criticised case of *Holmes*, a judge must inspect all of the elements of the defence and be satisfied before the case may proceed. On one hand, an argument has been made that undeserving cases should not be heard at all by a jury as this has significance,¹⁴⁴ and on the other, it gives greater powers to the judge at the jury's expense and this is not desirable. The greater worry, rather than a jury hearing an undeserving case, is that such cases will actually succeed or that the judge will mistakenly rule out a case with merit. Ideally, the provisions of the proposal ought to be sufficient to stand alone. It is understandable that the Law Commission, following how the 1957 Act was applied, would be hesitant to follow the *Hopper* approach, but as the proposal both rests on a more stringent warranted excuse rationale and gives a definition of provocation handing over such power to the judge at the expense of the jury is unnecessary for this defence.¹⁴⁵

Conclusion

The Law Commission can be praised for many of the aspects of the proposal: appreciating the rationale of the defence and moving towards the warranted excuse form

¹³⁷ (n116)

¹³⁸ (n53)

¹³⁹ [1995] 4 All ER 987. See 'Chapter 5: Objective Element' (n41-3).

¹⁴⁰ 'Chapter 1 - The Early Defence' (n83-9) & 'Chapter 2: Adequate Provocation' (n7-11).

¹⁴¹ [1915] 2 KB 431, 435

¹⁴² *Phillips v The Queen* [1969] 2 AC 130

¹⁴³ *R v Acott* [1997] 2 Cr App R 94, 102: "If there is such evidence, the judge must leave the issue to the jury."

¹⁴⁴ V. Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) Yale LJ, Vol 106, No 5, 1331, 1357: "the decision to send the case to a jury itself has legal meaning".

¹⁴⁵ In 'Chapter 4: Adequate Provocation' it was advanced that the sufficient evidence test ought require evidence that the emotion existed and that there was something which fulfils the definition of 'provocation'. Also, the preference for only the jury to decide on the warrant of the emotion and control test was discussed.

of partial excuse; for removing the loss of self-control requirement and instead placing the focus on the core emotions and lack of revenge; modifying provocation's gravity and control tests by removing many of the criticisms of the pre-2009 law, and not just restating the *Camplin* direction but enhancing it.

Despite the fact that this proposal would have improved the provocation defence there are problems with it. The key issue is how to properly deal with the emotions of fear and anger in one defence and, particularly, in a 'combination' limb. The provocation limb contains a gravity test based on the justifiability of the anger, but there is no corresponding gravity test within the fear limb; this means that the jury never assess the severity of the threat as it is an entirely subjective matter and it means that there is not really room to consider contextual evidence to support an objective assessment of the circumstances. Also, for each limb an identical control test is stipulated and the factors which deal with self-control and restraint are more suited to provocation. The reasons to have anger and fear in a single defence were strongly made and rest on the overlapping nature of the situations they cover, however, having a limb which includes aggressive and defensive reactions could cause problems. Therefore, how the combination limb operates is not entirely clear, in terms of how the limbs work in conjunction.

How the Ministry of Justice proposal and the ultimate reform which took place in 2009 Act dealt with these issues, plus those raised concerning self-inducement and sufficient evidence, will help to establish whether the problems identified with the pre-2009 defence have been resolved. The Law Commission laid down a path to be followed and all that was required was for certain aspects of their proposal to be enhanced as the main elements of this proposal both built on positive aspects of the pre-2009 defence and attempted to resolve the problems which were identified with that defence. One key area, which must be highlighted, which would help to make improvements on this proposal would be if more clarity could be given to the terms used, for instance, 'justifiable' in the 'provocation' limb, in order to more fully appreciate the scope of the provisions and enable them to be applied in the manner in which they were intended.

CHAPTER 8

MINISTRY OF JUSTICE

The Ministry of Justice produced two important reports in response to the Law Commission's proposal for reform. One sets out their position but also highlights responses from academics and interested groups.¹ The other explains the basis for their proposal for reform.² To summarise, the Ministry stated that they agreed with much of the Law Commission's findings but "propose a slightly different approach in respect of the detail".³ As will be demonstrated, this does not reflect the significance of the differences between the two proposals, they are fundamentally different. This Chapter will deal with the reasons why there are differences with the Law Commission's proposal and Chapter 9 will look at the provisions in more detail.

The Ministry of Justice proposal⁴ is to abolish provocation and to establish "two new partial defences" which can be "run either separately or in parallel".⁵ The qualifying triggers are "based on the limbs of the Law Commission's proposal", fear and/or anger:⁶ "fear of serious violence", something said and/or done which amounts to "circumstances of an extremely grave character"⁷ and "caused D to have a justifiable sense of being seriously wronged" or a "combination of the matters". The most significant aspect is that a loss of self-control would be required. It requires D, stemming from a qualifying trigger, to have lost his self-control and fulfilment of an ordinary person test. There are three exclusions or limitations contained within the proposal: the conduct cannot be "predominantly attributable" to a criminal offence, "an act of sexual infidelity is not, of itself, an exceptional happening" and D cannot incite the wrong in the 'provocation' trigger.

¹ Ministry of Justice (2009) *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law: Summary of Responses and Government Position* CP(R) 19/08

² Ministry of Justice (2008) *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* Consultation Paper CP19/08

³ *ibid* 10 [25]

⁴ *ibid* 'Annex A - Provocation: draft clauses' 33-4

The proposal is contained in Appendix B.

⁵ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 9 [24]

⁶ *Ibid*

⁷ The term 'circumstances of an extremely grave character' replaced 'exceptional happening' in the 2009 Report (n35).

A proposal was also set out for changes to diminished responsibility.⁸ D must suffer from a "relevant mental impairment", this means "an abnormality of mental functioning" which "arises from a recognised medical condition"; this must impair D's ability "to understand the nature" of his conduct, "to form a rational judgment" and/or "to exercise self-control". This impairment must cause or be "a significant contributory factor in causing" the conduct. The ultimate reform of diminished responsibility in s52 of the 2009 Act is very similar, merely removing the term "relevant mental impairment".

The Ministry of Justice's proposal is much narrower in scope than the Law Commission's final proposal as it only deals with the partial defences. The Ministry of Justice found that it does not necessarily matter if the rest of homicide law is reformed, the proposals for provocation reform "should be able to stand on their own".⁹ Later in the Chapter it will be stated that it may have been political concerns which led to this reform rather than a wider alteration to the structure of homicide.¹⁰ It has been discussed that the same pressures as before, restricting the defence for male violence and attempts to accommodate women, would simply be put on any reform if a wider reform of homicide did not take place.¹¹ In particular, the success of other defences will have an impact on how provocation operates as there are important relationships with diminished responsibility and self-defence which have been stressed; if each defence was reformed with this in mind, self-defence being for justifiable killings in fear, diminished responsibility for 'abnormal' actors and provocation for excessive emotional killings, then this outlook could lead to a set of defences which are designed to function within their specific areas and without the gaps and flaws which made the pre-2009 law in such need of reform. In a sense it is correct that a provocation defence "should be able to stand on" its own merit, but this expectation can only be in place if the defence is limited to provocation-style anger and fear cases and is not required to be stretched out of

⁸ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide*, 'Annex B - Diminished responsibility: draft clauses' 35

⁹ Ministry of Justice (2009) Summary of Responses and Government Position [21]

¹⁰ (n82-8)

¹¹ 'Chapter 7 - Law Commission' (n33-5)

necessity for hard cases. This is why throughout, when discussing certain aspects of the defence, provocation's relationship with other defences must be referenced.

s5) Fear of serious violence

The reports highlight some important points on the fear limb. Firstly, the Ministry did not believe that there was "much of a loophole in practice"¹² and this is what the research conducted by the Law Commission suggested.¹³ In a study, which was a part of the Law Commission's 2004 Report, it found that women in the sample tended to run self-defence and provocation together more often than men.¹⁴ Also, in the sample, where a female killed her partner this was the case too.¹⁵ In another study none of the women who killed men were convicted of murder and in nearly all of these cases there was a sexual relationship.¹⁶ However, the Ministry did wish to include fear of serious violence as a limb so that such cases, when they do arise, are not "shoehorned into a partial defence which is aimed at killings triggered by anger".¹⁷

Secondly, in the response to the Ministry of Justice's proposal it was felt that "the boundary between serious and non-serious violence" and also the necessary degree of "imminence" needed greater clarity.¹⁸ The Ministry did agree with the terms used by the Law Commission but acknowledged that there could "be cases on the borderline", it was viewed that it would not be "desirable to be more specific in the statute" in order to allow for flexibility and this, in part, was because context is often required to assess the seriousness of the circumstances.¹⁹ In Chapter 7²⁰ it was stated that the fear limb does

¹² Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 10 [26]

¹³ These studies were contained in Appendix A and D of the 2004 Report, cited below.

¹⁴ Law Commission (2004) *Partial Defences to Murder* Report No 290, Appendix D: 'Partial Defences and Defendants Convicted of Murder' 223: the gender differences are "highly significant."

¹⁵ Ibid 224: "Self-defence and, in particular self-defence run alongside provocation, was run by significantly more female than male defendants."

¹⁶ Law Commission (2004) *Partial Defences to Murder* Report No 290, Appendix A: R.D. Mackay, 'The Provocation Plea in Operation – An Empirical Study' 123 [25]: "Of the 11 female defendants only one killed another female. She in turn was the only female convicted of murder. The remaining 10 all killed men, of whom 9 were in a sexual relationship with the victim. Nine were convicted of manslaughter and one was found unfit to plead."

¹⁷ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 10 [27]

¹⁸ Ministry of Justice (2009) Summary of Responses and Government Position [23]

¹⁹ Ibid [28]

not have to be so stringent on rules such as this in comparison to the 'provocation limb' because killing in fear has a stronger grounding to provide mitigation but this is not wholly reflected in the proposals for reform and it could be down to an unwillingness to create a partial defence with a wider scope.²¹ Requiring a fear of serious violence does raise concerns of a possible gap where victims of abuse who killed may not fall under a defence, this is where they did not kill stemming from an abnormality within the definition of diminished responsibility and where the violence they feared was not serious;²² this is significant as this scenario is similar to the paradigm 'battered woman' case, of a person who has experienced abuse which may have impacted on her ability for self-control and of a person who kills in response to a threat which appears slight.

Thirdly, in agreement with the Law Commission,²³ the Ministry found that fear of serious violence does include sexual violence,²⁴ thereby allowing for the scope of the defence to include cases such as fear of rape. An important limit to this trigger is that D's fear of serious violence must stem from V. This provision was used in the 2009 Act and will be discussed in more detail in the Chapter 9,²⁵ but it does mean that the defence cannot be relied upon if D, who has lost her self-control, does not kill the person who threatened her or another. This, as was also an issue when rules were placed on conduct in the pre-2009 defence,²⁶ requires D curb her reaction whilst she is in a state where she has lost her self-control.

Finally, in response to Ministry of Justice's proposal it was viewed that the exclusion clause for 'self-induced provocation' needs to be extended to inciting fear of violence,²⁷

²⁰ 'Chapter 7 - Law Commission' (n106-7)

²¹ (n82-8)

²² Ministry of Justice (2009) Summary of Responses and Government Position [83]: "would be some cases which would fall between the new fear of serious violence and words and conduct partial defence(s) and the diminished responsibility partial defence."

²³ 'Chapter 7 - Law Commission' (n84)

²⁴ Ministry of Justice (2009) Summary of Responses and Government Position [27]

²⁵ 'Chapter 9 - Coroners and Justice Act 2009' (n46)

²⁶ 'Chapter 1 - The Early Defence' (n102 & n127)

²⁷ Ministry of Justice (2009) Summary of Responses and Government Position [68]: "should be extended to the fear of serious violence limb of the defence, in order to ensure criminal gangs may not benefit from the defence if they have incited the violence in order to provide an excuse for killing."

such an exclusion ought to cover only those cases in the narrow category of inducement where the inducement is a part D's purpose or plan to rely on a defence.²⁸

Overall, the fear limb itself has not been developed beyond what the Law Commission proposed in any significant way, except that V must be the person who created the fear. The term 'serious violence' has not been given any greater clarity and the jury are to play a significant role in a case-by-case basis in interpreting its sufficiency. The inclusion of the loss of self-control element will be discussed in depth below but it is striking how it seems that the Ministry of Justice has stepped around the concerns of the Law Commission and linked fear to this concept. The Law Commission only proposed the reform in such a manner because it had removed the loss of self-control requirement.²⁹ In reference to women who "deserve at least a partial defence", the Law Commission stated that "[w]omen's reactions to provocation are less likely to involve a 'loss of self-control'" and this can "make it difficult or impossible for women to satisfy the loss of self-control requirement".³⁰ If loss of self-control was to be maintained, at best, it should only have applied to the 'provocation limb' and a separate fear-based defence would have needed to have been proposed. By requiring this sort of reaction it makes this a very different type of trigger and will significantly restrict the limb from dealing with the most problematic cases.

s6) 'Provocation'

The Ministry of Justice believed the pre-2009 law was "too generous" for those who were arguing that they were provoked.³¹ In response to the proposals, the 'justifiable sense of being seriously wronged' provision was seen by some as being too broad³² and, also, as

²⁸ A distinction between the narrow and broad categories of inducement was discussed previously at 'Chapter 7 - Law Commission' (n127).

²⁹ 'Chapter 7 - Law Commission' (n77-80)

³⁰ Law Commission: Murder, Manslaughter and Infanticide (2006) No304, 81 [5.18]

Full quote at 'Chapter 4 - Adequate Provocation' (n13).

³¹ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 10 [20]

Also, at 12 [34]: "want to provide a partial defence which has a much more limited application than the current partial defence of provocation."

³² Ministry of Justice (2009) Summary of Responses and Government Position [43]: "A few respondents commented on the phrase 'seriously wronged' and thought this might allow in too many circumstances."

being inappropriate.³³ However, neither criticism really holds; to raise the bar on the required standard is a more favourable approach compared to positively laying down categories of valid provocation as it allows a standard which must be reached based on the circumstances and the justifiable element refers the emotion and not the act of killing, which is excessive. It is possible that greater guidelines could be given for what they believe ought to be considered to be justifiable, such judgements are made elsewhere through excluding self-induced provocation and sexual infidelity so there is no reason to suggest this would be inappropriate on their part. Any suggestion that the term 'justifiable' should be removed from the proposal was viewed as wrong as it "would lower the threshold unacceptably"³⁴ and this is in keeping with the intentions of the reformers throughout the process and the underlying rationale.

Another layer of evaluation was added to the 'provocation' trigger. Initially, the Ministry of Justice decided to use of the term 'exceptional happening' for this added layer, but instead the preferred term, 'circumstances of an extremely grave character', was adopted as it was better equipped to acknowledge cumulative provocation and abuse.³⁵ This would imply that a jury would be required to apply an even greater objective standard and that the 'justifiable sense of being seriously wronged' provision is inadequate by itself.³⁶ It was desired that the defence would only be available "in a very narrow set of circumstances".³⁷

In evaluating the success of these provisions much will depend on how these terms are defined but the reports do not give much explanation; it is unclear how the two elements of the trigger should operate together, how they differ and by adding 'circumstances of an extremely grave character' what sort of scenarios this would avoid. Providing a distinction between murder and manslaughter, the ultimate purpose of the partial defences, may

³³ *ibid* [44]: "Some respondents also thought that the term should not include 'justifiably', as this suggested the killing was justified."

³⁴ *ibid* [45]

³⁵ *ibid* [38-40]

³⁶ This term will be explored in further detail when discussing the 2009 Act, see, in particular, 'Chapter 9 - Coroners and Justice Act 2009' (n65-9).

³⁷ Ministry of Justice (2009) Summary of Responses and Government Position [40]

well have been achieved with the 'justifiable sense of being seriously wronged' provision alone.

s9)(a) Sexual infidelity

The government wanted it made "clear – on the face of the statute – that sexual infidelity should not provide an excuse for killing".³⁸

"We want to make it absolutely clear that sexual infidelity on the part of the victim can never justify reducing a murder charge to manslaughter."³⁹

Exclusions, in general, ought to be adopted cautiously; Part I highlighted that many of the problems which arose in the defence stemmed from having hard rules on issues which were debateable and there was a general move, through introducing the reasonable man test, in the defence to examine each case on its individual merits, hence, it has been suggested that exclusions should only be adopted where it is indisputable that an exclusion ought to apply.⁴⁰ It only takes one example of a particularly severe case of taunting over sexual infidelity where an exclusion would become undesirable. Introducing guidelines and creating presumptions for the sort of circumstances which should not be considered may be a better approach.⁴¹

A valid point which arose in the responses to the Ministry of Justice's proposal was if this exclusion is included then "there ought also to be an exclusion for honour killings."⁴² Pre-2009 honour killings were capable of being taken into account in the ordinary person test

³⁸ Ministry of Justice (2009) Summary of Responses and Government Position [54]

³⁹ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 11 [32]: "This should be the case even if sexual infidelity is present in combination with a range of other trivial and commonplace factors." This is an important point as the reference to other factors will prove to be significant in how the 2009 Act has been interpreted, see 'Chapter 9 - Coroners and Justice Act 2009' (n107).

⁴⁰ 'Chapter 3 - Rationale' (n126-8)

⁴¹ See Part IV.

⁴² Ministry of Justice (2009) Summary of Responses and Government Position [53]

Honour killings will be discussed in greater detail at 'Chapter 9 - Coroners and Justice Act 2009' (n79 & n118-121).

even though they are based on views which are strongly offensive in modern society.⁴³ Honour killings, where D usually kills a member of their family as V is seen to have injured their reputation within their community,⁴⁴ provide a much stronger reason to set out an exclusion than sexual infidelity. However, the Ministry of Justice stated that even though the "Government fully agrees" with the statement that honour killings should be excluded they saw that it would be excluded within the normal elements of the defence.⁴⁵ This explanation both makes the sexual infidelity exclusion seem unnecessary and fails to answer the initial point over why honour killings are being treated differently as with the same logic sexual infidelity cases should be excluded within the normal elements of the defence without the need for a specific exclusion.

It could be the Ministry simply did not want the defence to maintain the image of the previous defence, used in defence of violence against women, and calls by the Liberal Democrats "accused the government of exaggerating the current use of sexual jealousy as a defence".⁴⁶ The Law Commission conducted two studies as a part of its reports. In one study from a sample of 71 defendants it was found that "only four cases ... of a male killing a female clearly resulted in a successful plea of provocation".⁴⁷ It was also found that in the sample "of the 16 female victims, 11 resulted in murder convictions" and all of 11 involved male defendants.⁴⁸ Therefore, in this study provocation defences were successful for men killing women about as often as the overall sample.⁴⁹ However, in another study there was a considerable difference between males and females, specifically on the issue of sexual infidelity: "13% (19/146) of male defendants as compared to 3.8% (3/79) of female defendants" killed "in response to infidelity on the part

⁴³ See *Mohammed* [2005] EWCA Crim 1880 at 'Chapter 2 - The Post-1957 Defence' (n88).

⁴⁴ This newspaper article gives insight into the circumstances, the reasons behind honour killings and how they are perceived in the UK: 'Death before dishonour', The Observer, 21 November 2004 (accessed on 03/06/13: <http://www.guardian.co.uk/world/2004/nov/21/gender.features?INTCMP=SRCH>)

⁴⁵ Ministry of Justice (2009) Summary of Responses and Government Position [56]

⁴⁶ D. Pallister and R. Stevenson, 'Plans to reform murder laws unveiled', The Guardian 29 July 2008 (accessed on 03/06/13: <http://www.guardian.co.uk/politics/2008/jul/29/justice.ukcrime>)

⁴⁷ Law Commission (2004) *Partial Defences to Murder* Report No 290, Appendix A: R.D. Mackay, 'The Provocation Plea in Operation – An Empirical Study' 121 [23]

⁴⁸ Ibid: "These eleven murders were perpetrated by 10 single male defendants and in ... [one case] two male co-defendants and one female co-defendant."

⁴⁹ Ibid 118 [19]: the overall success for provocation in the sample being 33.8%

of the victim."⁵⁰ Also, in this type of scenario, where the female V was "unfaithful", "provocation was run or put to the jury in 68.4% (13/19) of cases".⁵¹ On the whole, the results followed the stereotypical view of the defence: when a man killed a woman infidelity was commonly, whether successfully or not, claimed to be a cause.

A point which was made in the responses was that "as a matter of principle, the defence should succeed if the other tests in the defence were met".⁵² As has been discussed, it is not that exclusions ought not to exist, it is that they should only be applicable if the scenario should indisputably be removed from the scope of the defence, and this is not the case. The exclusion also has the potential to "exclude a woman who killed after years of abuse, in response to a final act of sexual infidelity."⁵³ This is an interesting point and it highlights that narrowing the defence for men can also impact on the availability of the defence for women, just as expanding the defence for women can expand it for men too as, for example, the fear limb could lead to gang-related scenarios falling into the defence. The actual term 'sexual infidelity' needs to be defined and how the term is to be applied will be discussed at length in Chapter 9.⁵⁴

s1)(a) Loss of self-control

The most important part of the Ministry's report was to do with its views on the subjective element. The Ministry went against the Law Commission's proposals and wished to retain the loss of self-control requirement: "we believe that the danger of opening this up to cold-blooded killing is too great".⁵⁵ It was stated that there was a concern that the defence would be "used inappropriately":⁵⁶

⁵⁰ Law Commission (2004) *Partial Defences to Murder* Report No 290, Appendix D: 'Partial Defences and Defendants Convicted of Murder' 229

⁵¹ Ibid

⁵² Ministry of Justice (2009) Summary of Responses and Government Position [48]

⁵³ Ibid [49]

⁵⁴ 'Chapter 9 - Coroners and Justice Act 2009' (n107-52).

⁵⁵ Ministry of Justice (2009) Summary of Responses and Government Position [62]

R.D. Mackay & B.J. Mitchell, 'But is this provocation? Some thoughts on the Law Commission's report on partial defences to murder' (2005) Crim LR 44, 47-8: the Law Commission's proposal "strongly implies an element of revenge".

⁵⁶ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 12 [36]

[T]here is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence."

There was a specific provision, s3(b), contained within the Law Commission's proposal which excluded killings in revenge, the Ministry were therefore concerned with more than just revenge killings. Whilst the Law Commission wished to include emotional killings the Ministry requires irrational reactions and obviously this will draw the proposal into the criticisms of the pre-2009 defence. The Ministry stated that if D's reaction was not irrational in this manner there would be "insufficient grounds" to provide mitigation.⁵⁷ Despite the Ministry's proposal being similar to the Law Commission's in many respects the retention of the loss of self-control requirement changes the entire basis of the defence.

In order to remove some of the problems which have been identified with the loss of self-control concept it was proposed that it should be altered to exclude any 'suddenness' requirement.⁵⁸ Loss of self-control remains undefined and how the suddenness removal could impact on it is unclear.⁵⁹ The two cases which this provision may assist are victims of abuse who kill with delay,⁶⁰ even though not all of those who the Law Commission

⁵⁷ Ministry of Justice (2009) Summary of Responses and Government Position [65]

⁵⁸ Ibid [66]: "we acknowledge the concerns that 'suddenness' could be read back into the law and therefore have decided to put the matter beyond doubt on the face of the statute."

⁵⁹ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 13 [37]: "This would allow for situations where the defendant's reaction has been delayed or builds gradually. We think this strikes the right balance between addressing the problems identified with the current law whilst not creating new ones."

⁶⁰ Ministry of Justice (2009) Summary of Responses and Government Position [66]: "We also do not believe that it will be a bar to the partial defence applying in deserving cases of long-term abuse."

described as deserving cases would fall into this type of reaction,⁶¹ and cases such as *Baillie* where D stays out-of-control for a long time.⁶²

The Ministry were aware that many viewed it as being inconsistent, that "some academics and legal practitioners believed that the retention of the loss of self-control did not fit well with the intention for the partial defence".⁶³ Many genuine cases of fear and outrage would have no place within the defence. Edwards stated that "[t]here remain problems with what behavioural response the courts will embrace as constituting a loss of self-control",⁶⁴ implying that the same problems which existed with the pre-2009 could be transferred to the new defence. However, as has been stated the Ministry clearly had a different vision of the defence. The views of academics were not universally supportive of the Law Commission's proposal to remove the loss of self-control requirement. Mackay and Mitchell stated that there was a "failure to deal with the fundamental issue of how emotions affect human behaviour".⁶⁵ They went on to state that the Law Commission's proposal "makes no reference to D's mental state at the time of the killing" and that it seems that "D does not have to be emotionally disturbed" to fall within its scope.⁶⁶ The Law Commission attempted to reform the defence by making the subjective element about the core emotion and less about irrational and *disturbed* responses. It is clear that the inclusion of the fear limb drove this type of proposal, putting the two emotions together but at the same time making the provocation limb tougher through the objective elements of the defence.

There are other issues which surround the concept's retention. The Ministry stated that a "loss of self control does not act as a bar to a full defence of self defence",⁶⁷ the full defence would still be available as it gives a "considerable degree of latitude" by taking

⁶¹ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 89 [5.54]: "D should not be prejudiced because he or she over-reacted in fear or panic, instead of overreacting because of an angry loss of self-control." See 'Chapter 7 - Law Commission' (n80).

⁶² [1995] 2 Cr App R 31. See 'Chapter 2 - The Post-1957 Defence' (n28).

⁶³ Ministry of Justice (2009) Summary of Responses and Government Position [60]

⁶⁴ S. Edwards, 'Justice Devlin's legacy: Duffy - a battered woman "caught" in time' (2009) 12 Crim LR 851, 869

⁶⁵ R.D. Mackay & B.J. Mitchell, 'But is this provocation?' 44

⁶⁶ *Ibid* 46

⁶⁷ Ministry of Justice (2009) Summary of Responses and Government Position [63]

into account the circumstances from D's viewpoint.⁶⁸ Even so, D must still argue that they acted in a reasonable manner in the circumstances; on one hand, arguing that he was out-of-control and, on the other, that he acted with necessity and reasonably will be difficult. The links with self-defence which the Law Commission envisioned would be lost and it is worth noting that the Law Commission saw its removal as necessary despite recognising that self-defence operated in a quite lenient fashion too.⁶⁹

The final issue is that there has never been a suitable definition of loss of self-control provided in case law. As will be outlined in Chapter 9, there will not be too much difference between this form of loss of self-control and the one which existed in the pre-2009 defence; the removal of suddenness will not have too much impact because of how the concept was interpreted since *Ahluwalia*.⁷⁰ Following this, not much difference ought to be expected between this proposal and the pre-2009 defence and problems will still exist for those victims of abuse who do not lose their self-control. Many of the advantages of adding the fear trigger will be removed with the concept's retention.

Other issues

Judge and jury

The responses to the proposal showed that there were concerns raised by some over the proposed role of the judge, that it ought to be the jury and not the judge to make decisions on the viability of the defence.⁷¹ Even though it is oddly not within the draft proposal,⁷² the 2008 Report states that the Ministry agrees with the Law Commission in that the defence should only be left to the jury if "a reasonable jury, properly directed, could conclude that it might apply."⁷³ The Ministry stated that there was not a problem on this issue as the provision would only apply "where the evidence of the defence is very

⁶⁸ Ibid [64]

⁶⁹ 'Chapter 7 - Law Commission' (n31 & n96)

⁷⁰ [1992] 4 All ER 889. See 'Chapter 2 - The Post-1957 Defence' (n30-3).

⁷¹ Ministry of Justice (2009) Summary of Responses and Government Position [79]: "judges would be able to withdraw a defence based on loss of self control in circumstances where the decision should be left to the jury."

⁷² Ministry of Justice (2008) *Murder, Manslaughter and Infanticide*, 'Annex A - Provocation: draft clauses' 33-4

⁷³ Ibid 13 [40]

poor."⁷⁴ These two statements do not correspond as a 'reasonable jury' standard would be much higher than excluding where the evidence is "very poor".

The Ministry made reference to the *Holmes* decision,⁷⁵ where it was decided that the judge must make a preliminary ruling over all the elements of the defence before provocation could go to the jury, but it did not allude to the fact that the main purpose of the Homicide Act 1957 was to remove this rule and give the jury greater power.⁷⁶ Clough has stated that "[i]t seems as though the government have taken a step back ... by reverting the law back to its original state before it was altered by the 1957 Act."⁷⁷

Ordinary person test

The Ministry included "age and sex" as control characteristics,⁷⁸ it was stated that they "agree" with the Law Commission on this point even though the Law Commission had not provided that sex could be a control characteristic.⁷⁹ If women and men are viewed to respond differently according to stereotypical views on levels of self-control then one of the key criticisms of the pre-2009 defence will remain as it would put women D's at a disadvantage. Also, it inhibits the defence from operating on a gender neutral basis.⁸⁰ It has been advanced that the self-control test should not make reference to gender differences beyond the impact of maturity on teenagers, but instead for the social reality of a woman's position to be taken into consideration fully and this is particularly relevant for the fear trigger.⁸¹

⁷⁴ Ministry of Justice (2009) Summary of Responses and Government Position [80]

⁷⁵ Ibid

⁷⁶ 'Chapter 2 - The Post-1957 Defence' (n2-9)

⁷⁷ A. Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' (2010) 74 JCL 118, 120
Also, Clough has asked: "will this lead to opening the floodgates for appeals on misdirection?"

⁷⁸ Ministry of Justice (2008) *Murder, Manslaughter and Infanticide* 13 [39]

⁷⁹ 'Chapter 7 - Law Commission' (n59-61)

⁸⁰ Law Commission: Partial Defence to Murder – Final Report (2004) 49 [3.78]. See 'Chapter 5: Objective Element' (n113-4).

⁸¹ 'Chapter 5: Objective Element' (n47-51)

Political considerations

It is undoubtedly true that political considerations have influenced the reform of homicide law. An interesting article cites the reaction of some newspapers to the Law Commission's proposal to restructure homicide law, the article begins by stating: "Today's horror headlines in the tabloid papers will explain why it has taken 50 years to review the law on murder".⁸² Removing the loss of self-control requirement and broadening the scope for those who do not quite fall into self-defence⁸³ would have been a difficult thing to do. Articles such as 'Go soft on killer women, courts told'⁸⁴ and 'Killers could get away with murder'⁸⁵ underline the political difficulty to embrace the reforms which the Law Commission proposed.

It is not just the removal of the mandatory life sentence for murder which would be difficult, expanding partial defences would mean that laws would be enacted which dealt with people who formed an intention to kill not falling under the scope of murder. It was stated towards the beginning of the process to reform homicide law that "for politicians, tampering with the legislation has always been a hot potato."⁸⁶ A later article cited Judge John Samuels as "[h]e feared that politicians had held back from" reforming homicide law in the way which the Law Commission proposed "because they were looking over their shoulders at public concerns."⁸⁷ It was expressed that the way which the Ministry of

⁸² 'Three tiers for reform', The Guardian 21 December 2005 (accessed on 03/06/13: <http://www.guardian.co.uk/uk/2005/dec/21/ukcrime.prisonsandprobation?INTCMP=SRCH>)

⁸³ Those cases "where a defendant has killed while basically in full possession of his or her senses", see (n56).

⁸⁴ Daily Mail 30 November 2006 (accessed on 03/06/13: <http://www.dailymail.co.uk/news/article-419559/Go-soft-killer-women-courts-told.html#ixzz2VFtkK3bn>)

⁸⁵ Daily Mail 20 December 2005 (accessed on 03/06/13: <http://www.dailymail.co.uk/news/article-372168/Killers-away-murder.html#ixzz2VFtt9QNN>)

⁸⁶ J. Silverman, 'Messy' murder law a hot potato', BBC 24 May 2005 (accessed on 03/06/13: <http://news.bbc.co.uk/1/hi/uk/4576169.stm>)

K. Fitz-Gibbon, 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) 40 Journal of Law and Society 2, 304: "Overwhelmingly, the respondents attributed the government's unwillingness to implement the reforms proposed by the Law Commission to its desire to impose a package of reforms that would garner public support and further promote a 'tough on crime' political image."

⁸⁷ P. Wintour, 'Battered women: Change in murder law seeks to aid victims of domestic abuse', The Guardian 28 July 2008 (accessed on 03/06/13: <http://www.guardian.co.uk/uk/2008/jul/28/ukcrime.law?INTCMP=SRCH>)

K. Fitz-Gibbon, 'Replacing Provocation in England and Wales' 304: "respondents across all samples interviewed believed that the government's primary motivation to appease public concerns had prevented the implementation of legally favoured reforms to the law of homicide in England and Wales."

Justice had presented the reform, for just the partial defences, was pragmatic; there was "[n]o grand shake-up" or "radical restructuring" but instead it was "taking the murder reforms step by complex step" as reformers would get "more support for these measures" if murder law and punishment were left untouched.⁸⁸

Conclusion

The Ministry of Justice reports give an insight into how the government wished to reform the defence. They sought to build upon some of the Law Commission's recommendations but altered it enough so that their proposal was quite detached. The changes to the subjective element, the 'provocation' limb and the introduction of the sexual infidelity exclusion mean that the 2009 Act stands apart from the Law Commission's proposal. The identity of that proposal was to focus on the reason why D killed and move away from the pre-2009 defence's reliance on irrational and spontaneous reactions. The 2009 Act and its terminology is explored in the following chapter.

The inspection of these reports enables a contrast to be drawn between the basis of the Law Commission's proposal and the reform which ultimately took place. Both outlooks acknowledged the same problems but sought to deal with them differently. It is, though, doubtful if the Ministry's proposal will be as effective for victims of abuse who kill in fear, but both proposals seek to tighten up the 'provocation' trigger for men in particular. The lack of justification for the two most significant changes from the Law Commission's proposal, the re-emergence of the loss of self-control requirement and the sexual infidelity proposal, is surprising and of importance; these two issues will not only be key in shaping the success of the reform but also its perception.

⁸⁸ D. Shaw, 'Tidying up the murder law "mess"', BBC 29 July 2008 (accessed on 03/06/13: <http://news.bbc.co.uk/1/hi/uk/7530186.stm>)

CHAPTER 9

CORONERS AND JUSTICE ACT 2009

The Coroners and Justice Act 2009 followed the Ministry of Justice proposal and revived the requirement that D must suffer a loss of self-control; therefore, the underlying rationale can be described as 'warranted loss of self-control' rather than 'warranted excuse'.¹ The Ministry of Justice proposal and the ultimate reform in the 2009 Act are very similar, so this Chapter and Chapter 8 help to give an overall outlook of the new defence. The previous Chapter was more focused on the reasoning behind the proposal and why the government had not decided to enact the Law Commission's proposal. This chapter will deal with the terminology used in the Act and evaluate the Act with reference to previous chapters. How the Act responds to the issues previously raised will help to determine whether it will be effective in resolving the problems identified with the pre-2009 defence.

Under section 56 of the Act 2009 the common law partial defence of provocation was abolished and under sections 54 and 55 a new defence, named 'loss of control', was established.² D is liable for manslaughter rather than murder if he kills whilst he lost his self-control, this state must be caused by a "qualifying trigger" and D must also fulfil an ordinary person test. It is stated that "it does not matter whether or not the loss of control was sudden". There are three qualifying triggers: D fears serious violence, conduct and/or words "constituted circumstances of an extremely grave character" and "caused D to have a justifiable sense of being seriously wronged" or "a combination of the matters". There are three exclusions: D cannot have killed whilst he had a "considered desire for revenge", for any trigger to be satisfied the killing must not have been for the "purpose of providing an excuse to use violence" and "sexual infidelity is to be disregarded". For the defence to go to the jury there must be "sufficient evidence", this is only when the trial judge decides that "a jury, properly directed, could reasonably conclude that the defence might apply."

¹ 'Chapter 3 - Rationale' (n111-2)

² The provisions are contained in Appendix C.

*Clinton*³ was the first major case to deal with interpreting the new defence and will be discussed throughout. The cases which deal with the new defence are highly significant as there are many problems with the 2009 Act which stem from imprecise drafting and they indicate how the provisions will be interpreted. The *Clinton* judgment contained the cases of *Clinton*, *Parker* and *Evans*. In *Clinton* D killed his partner and the main source of provocation for D seemed to be that V taunted him about her sexual partners, therefore, this was significant as it tested the sexual infidelity exclusion. In *Parker* D killed V after she expressed that she wished to end their relationship, this case is also related to the limits of the sexual infidelity exclusion but its main significance was to do with the role of the judge. In *Evans* D stabbed V after an argument, this case raises issues relating to loss of self-control requirement and the revenge exclusion.

Many issues to do with the 2009 Act were also raised in the case of *Dawes*.⁴ The *Dawes* judgment contained the cases of *Dawes*, *Hatter* and *Bowyer*. In *Dawes* D claimed to be trying to remove V from his property and was fearful, the case brings up the issue of the relationship between fear and loss of self-control and also the incitement provision. In *Hatter* D killed V after he found out that she had been seeing another person. In *Bowyer* D had planned a burglary of V's home and killed V when he returned, he claimed he killed in fear and in anger over comments V made about a woman known by both parties. The role of the judge in removing the defence, in *Hatter*, and how the judge summed up the defence to the jury, in *Bowyer*, were the subject of the appeals. The cases referred to from *Clinton* and *Dawes* will be used in order to aid the discussion of the provisions.

Section 52 of the 2009 Act also provides for a new diminished responsibility defence which is heavily based on the Law Commission's proposal in the 2006 Report⁵ and the Ministry of Justice's proposal.⁶ The 2009 Act aims to provide "a modernised definition" of the defence so that expert evidence can be relied upon more satisfactorily.⁷ D must suffer from "an abnormality of mental functioning" which "arose from a recognised

³ *R v Clinton* [2012] 3 WLR 515

⁴ *R v Dawes* [2013] EWCA Crim 322

⁵ 'Chapter 7 - Law Commission' (n12-6)

⁶ 'Chapter 8 - Ministry of Justice' (n8)

⁷ Explanatory notes of the Coroners and Justice Act 2009 [327]

medical condition" and this must provide "an explanation" for D's part in the killing. The medical condition must have "substantially impaired D's ability" to "understand the nature" of his conduct, "to form a rational judgment" and/or "to exercise self-control". The explanatory notes suggest that the 2009 Act ought to be seen as preferable to the pre-2009 defence as that defence did not specify how a person's mental responsibility needed to be substantially impaired.⁸ Diminished responsibility will be discussed further, below,⁹ because of how it relates to the loss of control defence.

Warnings

It was envisioned that the new defence meant a fresh start and the old common law defence was no longer authoritative.¹⁰ The thrust of the reform was to make the defence more difficult to satisfy for those who killed in anger by "raising the bar", so that the defence would only be available in "exceptional circumstances", and, also, there was a desire to create a specific route for those who killed excessively owing to fear.¹¹ There was an aim to ensure the distinction between the new defence and diminished responsibility remained, the defence is about D meeting a standard of behaviour which is linked to common and ordinary experience.¹² It was to clarify the move away from *Smith (Morgan)* and cases like *Doughty*: "We are trying to put the bar higher and not to bring it down."¹³ There are, however, a set of warnings for the success of the reform.

a) diminished responsibility

The relationship which loss of control has with diminished responsibility is going to impact on the overall success of the partial defences in providing a step-down from murder to manslaughter. The new diminished responsibility defence restricts the impact of D's abnormality to certain scenarios; one of the three ways in which the abnormality may impact on D is on his ability "to exercise self-control", this therefore lays down a

⁸ Ibid [329]

⁹ (n15-21)

¹⁰ *Clinton* 518: "It therefore needs to be emphasised at the outset that the new statutory defence is self-contained. Its common law heritage is irrelevant. The full ambit of the defence is encompassed within these statutory provisions. Unfortunately there are aspects of the legislation which, to put it with appropriate deference, are likely to produce surprising results."

¹¹ Maria Eagle, February 3, 2009, HofC Committee, 1st Sitting, col 8

¹² This approach is summed up when discussing the applicability of control characteristics (n90).

¹³ Maria Eagle, February 3, 2009, HofC Committee, 1st Sitting, col 9

logical pathway for a D who does not have a 'normal' ability to control himself. *Smith (Morgan)* attempted to pull these cases into the pre-2009 provocation defence.¹⁴ If D kills owing to a mental abnormality, post-2009, it is to be dealt with in the diminished responsibility defence and this helps to settle one of the most controversial issues in recent times.

The 2009 Act made diminished responsibility a tougher defence to satisfy. As stated above, the defence can only be used in scenarios which relate to three types of abnormalities¹⁵ but also for it to be fulfilled there must now be a "recognised medical condition". With the tightening up of both the partial defences it may create pressure on them, there may be hard cases where D does not kill in line with ordinary standards but has a condition which is not recognised in diminished responsibility.¹⁶ In the House of Commons Committee David Howarth, citing "those with learning disabilities", stated that he was "worried" by this potential problem.¹⁷ If there is a gap between these two defences it will create pressures similar to those which existed before, these pressures were behind Lord's Steyn's dissenting judgment in *Luc Thiet Thuan*¹⁸ and *Smith (Morgan)*.¹⁹

Card states that depressive illnesses would come under a recognised medical condition and these could be argued by men who kill their partners or ex-partners.²⁰ Consequently, this could potentially mean that with the sexual infidelity exclusion such cases would merely fall under diminished responsibility instead. In the post-1957 case

¹⁴ *R v Smith (Morgan)* [2001] 1 AC 146. See 'Chapter 2 - The Post-1957 Defence' (n77-81).

¹⁵ R. Card, *Criminal Law* (20th ed, Oxford University Press, 2012) 252: "limits the aspects of D's mental functioning which must be affected".

¹⁶ 'Chapter 8 - Ministry of Justice' (n22): this problem was identified in the Ministry of Justice Report, the most significant example being if D does not have a fear of *serious* violence but does not suffer from an abnormality that is recognised within diminished responsibility.

¹⁷ David Howarth, February 3, 2009, HofC Committee, 1st Sitting, col 8-9: "By making that defence more precise, and with reference to recognised medical conditions, there is a danger of people who perhaps come under the category of those with learning disabilities who might not be said to have a recognised medical condition, being caught by the law of murder rather than manslaughter."

¹⁸ *Luc Thiet Thuan v The Queen* [1997] AC 131 (PC): it was viewed that by not allowing conditions such as D's brain damage it would lead to "crude and unfair results" through murder convictions which were "wholly inappropriate." See 'Chapter 2 - The Post-1957 Defence' (n76).

¹⁹ R. Card, *Criminal Law* 249: Card has stated that by tightening-up diminished responsibility it reduces its "utility".

²⁰ *Ibid* 251

Vinagre D killed his wife and argued that he suffered from 'Othello syndrome', described as a "morbid jealousy for which there was no cause".²¹ Lawton LJ criticised the scope of this defence where jealous husbands killed their wives: he stated that before diminished responsibility was introduced a partial defence was only available for where there were "good reasons", through provocation, but "wives should be protected by the law", in cases such as this, where "the reasons are flimsy".²² This is the dilemma in this area of law, if provocation-type defences are restricted in scope then it leaves a vast area for diminished responsibility to deal with and this could bring undesirable cases within the ambit of that defence.²³ It is advanced that this, though, is the correct approach: diminished responsibility is not about assessing the reason behind D's action, it is about testing whether the impairment is substantial.

b) moving forward

A second concern which surrounds the reform is that it is difficult to draft a provocation-type defence without encountering the same problems which have been identified with the previous defences. This was introduced in Part I, where the history of the provocation defence was discussed; restricting the defence from dealing with certain types of cases, setting standards to reach, how to treat impetuous people and ensuring that D was emotional owing to the provocation are issues which all provocation defences have to deal with and it is obviously a difficult task to suitably deal with all these matters. For example, when Nourse was discussing provocation reform she stated that "there is no reason to believe that they will not simply transfer these conflicts into new and less controversial guises".²⁴ This was in reference to abolishing the partial defence and dealing with the matter in sentencing, but it remains a valid point for all routes of reform.²⁵

²¹ *R v Vinagre* [1979] 69 Cr App R 104, 105

²² *Ibid*

²³ For example, when the sexual infidelity exclusion applies D's best option may be to claim diminished responsibility, see (n149-51).

²⁴ V. Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense' (1997) Yale LJ, Vol 106, No 5, 1331, 1403

²⁵ When the Homicide Act 1957 was introduced many of the problematic issues were no longer dealt with as exclusions but hard rules instead were put into the reasonable man test as considerations, see the conclusion of 'Chapter 1 - The Early Defence'.

The subjective element is an area where revenge, delay and levels of rationality will always be controversial. It is difficult to envisage that these reforms will settle these issues. It is, though, more likely that the objective element could be reformed in a way to resolve many of the matters which have plagued it, if it is set out in a way where only the most severe provocations are allowed to succeed and proper context is given. There will always be cases which will test the boundaries of the concepts used but a defence which is more focused on the objective factors involved in a provocation case has the potential to be a more grounded and consistent defence.

c) title and wording

A final concern comes from the actual title of the defence and the wording which was used in the provisions. Even though naming the new defence 'loss of control' will not directly impact on its success it seems to go against the core aims of the reform process.²⁶ On one hand, it makes perfect sense to name the defence 'loss of control', a trigger must cause a loss of self-control so each incident will require this to take place. It allows a clean break with the common law and it removes the same sense that blame is being placed on V as it is implicit when using the word 'provocation' that another has put D into that state.²⁷ On the other hand, it seems to go against the purpose of the reform, the aims of the defence were to raise the bar on what could succeed and to outline a specific route for cases of fear. The title of the defence may only be symbolic but a focus on the triggers would have been in line with these aims;²⁸ to name it after the subjective element makes the defence sound as if it is going down a more introspective route when it is not.

²⁶ Peter Lodder, February 5, 2009, HofC Committee, 4th Sitting, col 111: "I appreciate that this is an attempt to break away from the law as it has been ... We wonder a little whether 'loss of control' conveys the right message ... In our view 'loss of control' does not convey the same standing or high threshold as 'gross provocation' would."

²⁷ Ministry of Justice (2009) *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law: Summary of Responses and Government Position* CP(R) 19/08: The word 'provocation' carries "negative connotations".

²⁸ For example, 'warranted emotion' does focus on the reasons behind the killing whilst the wrongfulness of the act is implicit.

More importantly, the wording of the clauses and the lack of precision means that the legislation may not have the impact which was intended and when these terms are defined by the courts they could easily be given similar definitions as before. This links to a previous point, the same problems could easily return. Leigh has stated that the 2009 Act does not "represent a high water mark of legislative coherence"²⁹ and that in comparison to the pre-2009 defence the reform is "an even worse set of statutory provisions."³⁰ Even though the reform is drafted poorly and its provisions are not thoroughly explained it is, on the whole, likely to be an improvement on the pre-2009 defence because it is tailored to deal with the problematic cases. As will be outlined, the triggers, the exclusions and the loss of self-control element are not meticulously explained and as was shown in Chapters 7 and 8 the Law Commission and Ministry of Justice reports failed to be specific enough on some of the core provisions of their proposals which were the basis for the 2009 Act. For example, one of the main tasks for the Court of Appeal in *Clinton* was how to deal with the 'sexual infidelity' exclusion, this was not a straightforward task.³¹ In that case and in *Dawes* definitions and explanations had to be given for sections 54 and 55 owing to lack of clarity.

As Chapter 5 demonstrated,³² Norrie was correct to state that the 2009 Act "may cover much of the old ground", in that the Law Commission's proposal has much in common with it, "but there is a significant difference of approach and emphasis".³³ In *Clinton* it was stated that the Law Commission's proposal for reform does not impact on how the 2009 Act ought to be interpreted:

"[T]he legislation does not sufficiently follow the recommendations of the Law Commission to enable us to discern any close link between the views and recommendations of the Law Commission and the legislation as enacted."³⁴

²⁹ L.H. Leigh, 'Loss of control: the significance of sexual infidelity and other matters' (2012) 2 Arc Rev 4, 4

³⁰ Ibid

³¹ A good example of this is cited below (n126).

³² 'Chapter 8 - Ministry of Justice' (n3)

³³ A. Norrie, 'The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control', (2010) 4 Crim LR 275, 275

³⁴ *Clinton* 518

Therefore, even though some of the language is the same and the 2009 Act is built on the framework of the Law Commission's proposals the 2009 Act must be viewed independently. According to *Clinton*, the 2009 Act therefore needs to be interpreted independently from the Law Commission's reports and the pre-2009 defence.³⁵

The 2009 Act

Section 56(1) states that "[t]he common law defence of provocation is abolished and [is] replaced by sections 54 and 55." The discussion of the elements of the 2009 Act will be split into the following five sections: triggers, ordinary person test, exclusions, subjective element and the sufficient evidence test.

a) triggers

s55(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.

For this trigger the explanatory notes of the Act state that this is a subjective test as it requires "a genuine fear of serious violence" and it does not matter "whether or not the fear was in fact reasonable."³⁶ In *Dawes* it was stated that "[t]he presence, or otherwise, of a qualifying trigger is not defined or decided by the defendant",³⁷ however, this seems to be an incorrect interpretation of the law as the fear of violence trigger is shaped by D's experience.³⁸ The notes also explain that the fear has to be specific; the fear could be over "a child or [an]other relative", however, "it could not be a fear that the victim would in the future use serious violence against people generally."³⁹ D must fear *serious* violence, as with the Law Commission and the Ministry of Justice reports this remains undefined⁴⁰ but as the test is subjective it will be up to the jury to decide whether they believe that D deemed that the threat was to carry out such a substantial harm. D's

³⁵ (n10): "[T]he new statutory defence is self-contained. Its common law heritage is irrelevant."

³⁶ Explanatory notes of the Coroners and Justice Act 2009 [345]

³⁷ *Dawes* [61]

³⁸ T. Storey, 'Loss of Control: the Qualifying Triggers, Self-induced Loss of Control and 'Cumulative Impact' (2013) 77 JCL 3, 189, 192: "the issue is whether the accused feared violence which he personally regarded as 'serious'."

³⁹ Explanatory notes of the Coroners and Justice Act 2009 [345]

⁴⁰ 'Chapter 8 - Ministry of Justice' (n18-22)

previous experiences of violence and the history of V's behaviour ought add weight to D's belief that the threat was of this nature.⁴¹

Withey states "it is unlikely that the fear of violence has to emanate from an immediate threat",⁴² if it did then many victims of abuse would struggle to fall into the scope of defence and it would restrict the impact of the trigger.⁴³ The Law Commission reports demonstrated that the issue of immediacy was not clear as there were contradictory statements made, it stated that a killing would not "[o]rdinarily" be partially excusable without "imminent danger" but an example which they gave for the type of case which the fear limb would cover is that of a killing which is "insufficiently imminent" to a threat of violence.⁴⁴ As the trigger is framed as a subjective test it is most likely the case that the further detached a killing is from the threat the less likely that the fear will be viewed as genuine. Once again, if the jury is provided with the context of previous events this may assist them in believing, from D's perspective, that a real threat existed.⁴⁵ From this it is clear that the scope of the trigger is difficult to appreciate and much depends on how the defence will ultimately be applied.

The provision requires that the person who causes the threat must be the person who gets killed. This is an odd requirement as when D loses his self-control mistakes over identity can be made and it may be expecting a lot of him in those circumstances to make such a rational decision.⁴⁶ Also, in the 'provocation' trigger it is not required that the serious wrong came from V, with this in mind to restrict the fear trigger in this way does not seem consistent. The reach of this trigger could go as far as a "householder killing an intruder, or the policeman shooting dead an unarmed suspect",⁴⁷ but D must

⁴¹ The use of such evidence will be discussed in Part IV and the Law Commission supported the use of contextual evidence for this purpose, see 'Chapter 7 - Law Commission' (n84).

⁴² C. Withey, 'Loss of control, loss of opportunity?' (2011) 4 Crim LR 263, 270

⁴³ It is evident that this is the reason why 'battered women' struggle to fulfil the conditions of self-defence when similar rules are required to be fulfilled, see 'Chapter 6: Subjective Element' (n64-70).

⁴⁴ 'Chapter 7 - Law Commission' (n82 & n87-9)

⁴⁵ The case of *Humphreys* (1995) 145 NLJ 1032 is an example of where past events shaped D's future expectations of violence against her, see 'Chapter 5 - Objective Element' (n39-40 & n48).

⁴⁶ See 'Chapter 1 - The Early Defence' (n102 & n127).

⁴⁷ A. Norrie, 'The Coroners and Justice Act 2009' 285

lose his self-control and this would be a substantial impediment for those types of cases.⁴⁸

The intention of the 2009 Act was to create a specific route for those who kill excessively in fear, this limb was "intended to apply in a more tailored" way.⁴⁹ In Chapter 4 it was discussed whether the pre-2009 defence could have been interpreted to include the emotion of fear,⁵⁰ it would depend on the definition of 'provoked' but the main obstacle was fear's incompatibility with the loss of self-control element. The inclusion of the fear trigger ought to be an improvement but with the retention of the loss of self-control requirement it is questionable whether these cases can be sufficiently dealt with under the new defence. Witney has stated that the trigger "is likely to fail"⁵¹ some of those who the Law Commission sought to be beneficiaries of the reform.⁵² The 2009 Act will restrict this trigger to dealing with irrational decisions made in fear where D does not really consider her response, many genuine cases of fear where the reaction is excessive exist outside of this type of response.⁵³

s55(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.

The 'provocation' trigger does not require that V must be the one who 'provokes' D. Also, the stimulus could take the form of a single incident or a series of events;⁵⁴ this means

⁴⁸ Self-defence has been reformed in the Crime and Courts Act 2013. Section 43(2) states that "[i]n a householder case" the defence will only be denied if D's response was "grossly disproportionate" rather the usual requirement, from s76(6) Criminal Justice and Immigration Act 2008, that it was "disproportionate".

⁴⁹ Lord Bach, October 26, 2009, HofL Report, 2nd Sitting, col 1041: "It achieves this by focusing on what the defendant feared in the future, rather than being based on what occurred in the past."

⁵⁰ 'Chapter 4 - Adequate Provocation' (n7-18)

⁵¹ C. Witney, 'Loss of control, loss of opportunity?' 271

⁵² Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 89 [5.54]: "D should not be prejudiced because he or she over-reacted in fear or panic, instead of overreacting because of an angry loss of self-control." See 'Chapter 7 - Law Commission' (n80).

⁵³ This was the main point in 'Chapter 6: Subjective Element' and will also be further discussed when looking at the subjective element.

⁵⁴ Dawes [54]: "Given the changed description of this defence, perhaps 'cumulative impact' is the better phrase"

that anything can be the trigger. However, for the trigger to be valid it must fulfil two further conditions: firstly, that it "(a) constituted circumstances of an extremely grave character" and, secondly, that it "(b) caused D to have a justifiable sense of being seriously wronged."⁵⁵ This test replicates the Ministry of Justice's final proposal, but the latter element was originally taken from the Law Commission's proposal.

Instead of using the word 'provoked' the provision, in a sense, is an attempt to define what it means to be provoked and set a higher standard for evaluation. There has been an early indicator that this outlook will be successful. In *Zebedee*⁵⁶ D killed V, his elderly father, after V had soiled himself, D had cleaned him, and then V soiled himself again soon afterwards. The defence was denied. Storey points out that this case is very similar to *Doughty*,⁵⁷ that being a case which highlighted that D could rely on normal or natural behaviour in the pre-2009 defence. With the terminology used in the trigger both the required standard is raised and it rules out cases such as this where the conduct cannot be described as 'provocation'.

A reason for avoiding the word 'provocation', though, is that it implies that V is at fault or played a part in his own death.⁵⁸ This is a concern which has been discussed throughout, that the defence must attempt to relate to provoking conduct without placing blame on V, most likely the source of the conduct. However, by trying to sever this tie it may undermine the reason for the existence of the defence. In the House of Commons Committee it was stated that

⁵⁵ Explanatory notes of the Coroners and Justice Act 2009 [347]: "The effect is to substantially narrow the potential availability of a partial defence".

Dawes [60]: "normal irritation, and even serious anger do not often cross the threshold into loss of control."

⁵⁶ [2012] EWCA Crim 1428

⁵⁷ T. Storey, 'Raising the Bar: Loss of Control and the Qualifying Triggers' (2013) 77 JCL 17, 19. See 'Chapter 4 - Adequate Provocation' (n26-30) for a discussion on *Doughty* (1986) 83 Cr App R 319.

⁵⁸ A. Samuels, 'The Coroners and Justice Act 2009': "abolition of the word 'provocation' might be seen as diverting attention from the conduct and responsibility of the victim for the death." Issue also raised at (n27)

"If one ... forgets about who did that justifiable wrong, the provocation has been turned into the kind of defence in which being angry with the world is an excuse to kill someone. I cannot see, morally, how that is the case."⁵⁹

Evaluating the basis of D's emotions with more vigour through a warranted emotion rationale could help to create the correct balance as the victim's role will only be brought out in such a manner if a jury could state that D's emotion was warranted. With this in place and a stricter rule on what can go to the jury the provocation defence would sit on a firmer basis and would not operate in many of the more controversial areas. On the point which Howarth made, it is unlikely that the defence as outlined in the 2009 Act could be interpreted in such a manner owing to the intentions of the reform and the language used in the provision. Also, the phrase used by Samuels,⁶⁰ "diverting attention" from V, is probably the best choice of words, it is trying to focus on the emotion and D without setting out to blame V.

With regards to the terminology used in the trigger, in *Clinton* it was stated that "[t]here is no point in pretending that the practical application of this provision will not create considerable difficulties."⁶¹ It is the case that precise definitions were not given for the justifiable emotion terms. In Part II Baker and Zhao's definition of warranted emotion was set out:⁶² the wrong "must be one that accords with contemporary society's norms and values."⁶³ However the justifiable emotion terms are actually interpreted, below, it is important to state that for the test to have any meaning and utility it must both raise the bar and demand that such judgements should only be made after allowing for proper context to be given to all the relevant surrounding events. The role of the jury is to apply

⁵⁹ David Howarth, March 3, 2009, HofC Committee, 11th Sitting, col 423

⁶⁰ (n58)

⁶¹ *Clinton* 521

⁶² D.J. Baker & L.X. Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 254, 262. See 'Chapter 3 - Rationale' (n121).

⁶³ S. Yeo, 'English Reform of Provocation and Diminished Responsibility: Whither Singapore?' (2010) Sing JLS 177, 183: Yeo stated that it was "an objective test based on contemporary community values and standards by which to measure the provocation".

the values of society to D's situation and this is the purpose of going down the route of requiring warranted emotion.

It has been argued previously that D ought to feel that their emotion was justifiable too,⁶⁴ this ensures that the killing was down to the strength of the emotion and D felt this at the time. Even if the 2009 Act rests on a loss of self-control this still ought to be a requirement as then it could be stated that D's own feeling of justifiable emotion caused such an impulse which led to D acting out-of-control. If it was not necessary for D to feel a justifiable emotion at the time then the defence could be relied upon when D did not have a belief that he was acting with a such a strong sense of injustice; D may have been wronged but not have appreciated the severity of the circumstances and a jury may find them to be more provocative than he did. Therefore, it ought to be necessary that both the jury and D believe that the emotion was warranted.

From the reform process which has been outlined in Part III and wording of the 2009 Act it is not clear how the trigger was intended to be interpreted.⁶⁵ The 2009 Act states that the 'provocation' must have "(a) constituted circumstances of an extremely grave character" and that it "(b) caused D to have a justifiable sense of being seriously wronged." The explanatory notes state that "[w]hether a defendant's sense of being seriously wronged is justifiable will be an objective question for a jury to determine"⁶⁶ and this is the view which was expressed in the House of Commons: "It would be subjective if it said, 'He has a sense of being seriously wronged.' The word 'justifiable' makes the test objective."⁶⁷ Therefore, the 'justifiable' element of this limb is an objective test but D must experience 'a sense of being seriously wronged'. For the other element, Withey has stated that "[t]he Act is silent on whether 'extremely grave character' is a subjective or objective test" and she "submitted that it is most likely to be an objective test."⁶⁸ This was

⁶⁴ 'Chapter 3 - Rationale' (n124)

⁶⁵ In R. Card, *Criminal Law* 263 & C.M.V. Clarkson, H.M. Keating, S.R. Cunningham, *Criminal Law: Text and Materials* (7th ed, Sweet & Maxwell, 2010) 677 it has been stated that the wording and explanation of the trigger is unclear on how it is to be applied.

⁶⁶ Explanatory notes of the Coroners and Justice Act 2009 [346]

⁶⁷ Maria Eagle, March 3, 2009, HofC Committee, 11th Sitting, col 439

⁶⁸ C. Withey, 'Loss of Control' (2010) 174 JPN 197

indeed how it was interpreted in *Clinton*: "all the requirements of section 55(4)(a) and (b), require objective evaluation."⁶⁹

This interpretation of the trigger raises three important points concerning D's characteristics, the ordinary person test and D's emotion. A simpler and more effective test will be advanced whilst discussing the problems with the trigger.⁷⁰

i) response characteristics

The relevance of D's response characteristics is not clear, so it is not certain if both, one or none of the two elements of the trigger require context to be given to the surrounding circumstances and, if so, the extent of this. The ordinary person test, discussed below, sets out how far these factors need to be applied by the jury, in accordance to the *Camplin* judgment, however, with the lack of direction given to the two terms of the trigger it is uncertain just how far the jury are free to express their own opinion or if they must put themselves entirely in D's position.⁷¹ Without the context being appreciated the task of comparing D to any standard would be meaningless; the trigger, surprisingly, given the debate over the extent of response characteristics makes no allowance for what is relevant for a jury to consider.⁷²

ii) the ordinary person test & the gravity test

By including the trigger it seems to make a gravity test in the ordinary person test redundant. If the jury find that the emotion was warranted there seems to be no reason to ask the jury whether an ordinary person would find the provocation severe, therefore the gravity of the provocation is established in the trigger. It is possible that the discussion on the sexual infidelity exclusion, below, gives light to the function of this test.⁷³ Sections (1)(c) and (3) refer to "the circumstances of D" and *Clinton* firmly establishes that this is

⁶⁹ *Clinton* 521

⁷⁰ What will be discussed is consistent with what was introduced in Part II.

⁷¹ C. Withey, 'Loss of Control' (2010) 174 JPN 197: "this begs the question whether this is a 'purely' objective test, or whether the defendant is judged against a reasonable person sharing the characteristics of the defendant which affected his or her assessment of the things said or done."

⁷² It is implicit that warrant would not allow the intolerant views of D to be relied on.

⁷³ (n126-52). This interpretation may also limit the consideration of sexual infidelity following the *Clinton* judgment.

in order to merely give *context* to the control test;⁷⁴ in order to ask if D behaved like an ordinary person it is necessary to properly consider the circumstances which they were in. It is important to note that the function of the ordinary person test is no longer to evaluate the severity of the provocation as was the case in the pre-2009 defence: the justifiable standard for the gravity test now comes from the trigger whilst the ordinary standard is only to do with control test. Despite this the ordinary person test is far more detailed in how response characteristics ought to be interpreted and applied.⁷⁵

iii) D's emotion

A third point is that it is never asked if D felt justified in feeling the emotion, this "is irrelevant as far as the new defence is concerned."⁷⁶ Both of the elements of the trigger are jury questions evaluating D's anger rather than looking into the strength of his feelings towards the incident; D is required to feel seriously wronged and lose his self-control owing to the circumstances of the trigger but this does not necessarily mean that he lost his self-control as he believed he was warranted in feeling angry. The structure of the trigger can be called into question owing to this as having two objective limbs in the provocation trigger seems excessive. The Law Commission only relied on the 'justifiable sense' limb and it is unclear, other than to raise the bar further, what the function of requiring the 'extremely grave character' limb on top of this is.⁷⁷ A preferable test would be to have both subjective and objective limbs within the triggers: to ask the jury 'if they believe D felt his emotion was warranted' and if they believe 'a normal person would find that the emotion was warranted'.

Even though the 2009 Act is on the correct track in how it deals with the 'provocation' trigger not enough has been done to outline the nature of the two tests, and there have

⁷⁴ (n130-3)

⁷⁵ (n86-9)

⁷⁶ D.J. Baker & L.X. Zhao, 'Contributory qualifying and non-qualifying triggers in the loss of control defence' 262 See (n64).

⁷⁷ 'Chapter 8 - Ministry of Justice' (n35-7)

Explanatory notes of the Coroners and Justice Act 2009 [347]: "Subsection (4) therefore sets a very high threshold ... The effect is to substantially narrow the potential availability of a partial defence".

been no improvements in terms of clarity from the Law Commission proposals.⁷⁸ The lack of clarity within the Act on such an important point sets the new defence off on the wrong footing. When the role of the judge is discussed this area of the defence will be important, when the terms are ill-defined in this manner their greater power will become more difficult to manage.

The most coherent interpretation of the trigger would be that "(b) caused D to have a justifiable sense of being seriously wronged" will be viewed as an objective test which includes the response characteristics and circumstances of D. The other limb, "(a) constituted circumstances of an extremely grave character", is probably best interpreted as an objective test without consideration of D's circumstances in the same way; the jury will be given free reign as to whether the provocation was severe enough. The two elements ought to lead to the same answers being reached but there could be some circumstances where without consideration of D's personal feelings the jury could conclude that the defence should not apply. In the case of honour killings D kills to "uphold the honour of the family",⁷⁹ it is possible that through '(b)' a jury could find that D had warranted anger but through '(a)' they would find these killings unacceptable by the standards of society; a jury would not be forced to consider the religious or social pressures which D may have faced. It is submitted, however, that if '(b)' was to be interpreted correctly it would be sufficient by itself to rule out such cases, the provision is not asking if D felt a warranted emotion but asking the jury to evaluate the emotion taking into account society's values and a honour killing would not be in line with such values.

s55(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).

Within Law Commission's and the Ministry of Justice's reports there was no explanation for how the combination trigger would operate and the 2009 Act gives no indication either. Quick and Wells have stated that this trigger is "interesting" as it would serve little

⁷⁸ C. Withey, 'Loss of control, loss of opportunity?' 274: "The problem is in the statutory wording, and the failure to stipulate the exact nature of the 'justifiably wronged' and 'extreme graveness' tests."

⁷⁹ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 82 [5.25]

purpose if it did not cover cases which were "not sufficient on their own to qualify as triggers under subsections 3 or 4."⁸⁰ However, as has been indicated, the best understanding of the trigger is that both the 'provocation' and the fear triggers must be satisfied in full and the purpose of the combination trigger is merely to be helpful when both of the emotions are the basis of a defence;⁸¹ evidence regarding both the emotions could work to support the ordinary person test and the loss of self-control requirement.

The combination trigger would work slightly differently to the Law Commission's proposal, this is because the 2009 Act is centred around the loss of self-control provision. The Law Commission proposal was all about the sufficiency of the core emotion and there was no link in the subjective elements as the two limbs were separate in this regard. For the 2009 Act the combination limb would therefore also support D's efforts to fulfil the subjective element as it implies that the two emotions can work cooperatively to support the finding that D lost his self-control.

On the understanding above, the combination trigger could only be relied upon in one scenario: when both the triggers are fulfilled. For example, Card states that combination trigger could be used "where D kills V who is threatening to stab D's daughter unless the daughter lets V have sex with her",⁸² here both the 'provocation' and fear triggers would be fulfilled and a combination trigger could be construed to be the preferable option in comparison to relying on one of the triggers in order to give greater force to the subjective element and the ordinary person test. Such as in the case of the 'battered woman' it must be shown that D has been seriously wronged by the provocative events which have gone on before, fulfilling the two warranted emotion limbs, and that she was fearful of serious violence in the future.⁸³

⁸⁰ O. Quick & C. Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45 *Australian & New Zealand Journal of Criminology* 337, 344

⁸¹ 'Chapter 7 - Law Commission' (n102-9)

⁸² R. Card, *Criminal Law* 264

⁸³ Dawes [56]: "In most cases the qualifying trigger based on a fear of violence will almost inevitably to include consideration of things said and done, in short, a combination of the features identified in s55(3) and (4)."

For the combination limb to work a loss of self-control must be able to be caused by anger and fear cooperatively. A problem is that where these two emotions overlap the finding of anger could undermine D's argument that she killed in fear.⁸⁴ The reason why D killed could become muddled and where this is the case it may, in turn, damage her argument. A single narrative for D's defence will always be preferable and as the fear trigger must already have been satisfied for the combination trigger to come into play there will be little advantage to be gained by requiring the jury to consider the presence of D's anger towards V. It is submitted that even though there will be cases where there is an overlap between the two emotions there should not be a combination trigger, instead D should have to rely on the argument that she was fearful or provoked but the jury should be instructed that any anger towards V does not harm her defence if she was genuinely fearful.⁸⁵

b) ordinary person test

s54(1)(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.

s54(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.

i) contextual evidence

The function of the gravity test, assessing the severity of the provocation, is now carried out in the trigger.⁸⁶ The ordinary person test's sole work is evaluate D's behaviour through the control test. However, in the 2009 Act it still refers to "the circumstances of D", meaning that the test is still looking to contextualise D's behaviour by taking into account all the relevant factors. The pre-2009 law had already shown preference for the

⁸⁴ See 'Chapter 7 - Law Commission' (n102-9).

⁸⁵ In the Law Commission's proposal s4 stated that D shall not be viewed to have killed in revenge if she killed out of fear but was angry at the same time. See *ibid* (n109).

⁸⁶ (n73-5). This is only in the 'provocation' trigger as the fear trigger has no gravity test.

Part IV will discuss in detail how the defence should deal with contextual evidence in a way which corresponds to the emotion in the trigger and how this can be achieved in a consistent manner.

term 'circumstances' over 'characteristics'.⁸⁷ Using 'circumstances' means that there is a greater scope for what can be attributed to the standard and ensures the emphasis of the defence is on ordinary behaviour.⁸⁸

The template for this clearly comes from the pre-2009 defence as response characteristics did not cause the complications which control characteristics did and the only issue was to do with undesirable characteristics which D may have and which the jury, therefore, needed to attribute to the ordinary person.⁸⁹ The 2009 Act addresses this issue by requiring "a normal degree of tolerance", meaning that circumstances which are outside of this need to be ignored by a jury; it is probable that racist, homophobic and sexist views would fall under this category but it is also possible that it could be used against honour killings, D's views may need to be ignored as they show a lack of tolerance to V's lifestyle and decisions.

ii) control test

The ordinary person standard ensures that D is judged by the normal standards expected in society. The approach in the 2009 Act pretty much follows on from the Law Commission's proposal and uses an approach similar to the moderate excuse theory by only allowing the 'normal' characteristics of D, such as age, to alter the expected standard of behaviour in the control test.⁹⁰ The ordinary person test in the 2009 Act is very similar to the one which was developed in the pre-2009 defence and that was obviously designed to deal with provocation cases. Traditionally, women's responses

⁸⁷ 'Chapter 2 - The Post-1957 Defence' (n63-8)

⁸⁸ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control', (2010) JCL 74.3, 223, 239: "such an approach transfers the focus away from her psychology onto his violence."

A. Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' 124: "it is a move away from making such women seem as though they have a mental illness. 'Circumstances' suggests being able to consider prior abuse as an external element rather than having to try and deem it as a characteristic by internalising it as some kind of syndrome or character flaw."

⁸⁹ 'Chapter 5 - Objective Element' (n57-63)

⁹⁰ Explanatory notes of the Coroners and Justice Act 2009 [338]: "a defendant's history of abuse at the hands of the victim could be taken into account in deciding whether an ordinary person might have acted as the defendant did, whereas the defendant's generally short temper could not."

have struggled to satisfy evaluative tests on behaviour.⁹¹ As the fear trigger is entirely subjective the ordinary person test becomes highly significant as it is the only objective component which D must satisfy. Therefore, it is suggested that when dealing with the fear trigger a tailored ordinary person test would improve the defence; one which instead of referring to restraint and self-control is more to do with how people react to threats.⁹²

The test has been slightly altered from the pre-2009 defence as it asks if an ordinary person "might have reacted in the same or in a similar way to D." Asking whether the ordinary person 'might' have done so rather than 'would' he "do as he did" means that the test is more in line with the loss of self-control rationale.⁹³ It would be difficult for a jury to give a conclusive answer whether a person who has lost their self-control would have acted in a certain manner, it makes more sense to ask whether it is within the range of responses.⁹⁴

As was outlined when discussing the Law Commission's proposal, the wording of the provision is not satisfactory and this was not resolved in the reform process.⁹⁵ Section 54(3) has the potential to include much more, in terms of control characteristics, than was presumably intended. One reading of it is that where the circumstance is not *only* relevant as a control characteristic it can be considered in the control test, meaning that if it is also relevant as a response characteristic then it can be considered to reduce the expected level of self-control, such as the impact of intoxication on D when he has been taunted on being an alcoholic.⁹⁶

⁹¹ 'Chapter 6: Subjective Element' (n64-70)

⁹² See 'Chapter 11 - Proposal' for the proposal which is advanced.

⁹³ A. Clough, 'The Judge's Role Where Provocation Is Evident but Not Discussed' (2011) 75 JCL 350, 354: "This appears to be a much looser term than that used in s. 3 of the Homicide Act 1957, and this 'might/would' distinction is hopefully a step in the right direction when it comes to assessing the actions of a person, once self-control has been lost."

⁹⁴ The range of conduct that could be expected from D is discussed at 'Chapter 5: Objective Element': 'a) *the standard of self-control and ordinariness*'. However, if D has lost his self-control then even this range would be difficult to appreciate.

⁹⁵ 'Chapter 7 - Law Commission' (n62-6)

⁹⁶ D. Ormerod has also stated that the language used allows for another relevance, mistake of fact, at *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, 2011) 526: "also [if it] had some other relevance - e.g. that it caused a relevant mistake".

This issue has already been raised in *Asmelash*⁹⁷ where the judge directed the jury to apply the ordinary person standard but stated that this would be "unaffected by alcohol".⁹⁸ The D's representation made reference to the wording of s54(3)⁹⁹ and the prosecution even acknowledged it by contesting that D's drunkenness was only relevant to his self-control,¹⁰⁰ thereby not falling into the contested "only relevance" language. The Court of Appeal stated that if it had been Parliament's intention to allow intoxication to be considered then "it would have been spelled out in unequivocal language."¹⁰¹ Apart from the actual text used nothing supports this deviation from the moderate excuse theory as it would be absurd if D could alter the expected self-control through a factor such as intoxication if it was relevant in some other way in his case. As has been stated,¹⁰² it would have been preferable if the text simply read 'D's age is the *only* factor which can be considered with regards to the general capacity for self-control.'

This interpretation ensures that the *Camplin* approach is followed and only normal factors can be considered in the control test. Age is included as a signifier of maturity but sex is also included, this goes against the Law Commission's proposal.¹⁰³ Nothing was stated to justify sex's inclusion and if applied improperly then it could create gender differences within the new defence by expecting women to show greater restraint than men.¹⁰⁴ Yeo has stated that the reformers have "condone[d]" gender differences on the issue of self-control and he supports "a single standard of tolerance and self-restraint for

⁹⁷ [2013] EWCA Crim 157

⁹⁸ R v Asmelash [2013] EWCA Crim 157 [15]

⁹⁹ Ibid [18]

¹⁰⁰ Ibid [19]: "the only relevance of the drunkenness was that it affected the appellant's self-restraint ... Such drunkenness was an irrelevant consideration. It may have had some relevance to his general capacity for tolerance or self-restraint: but no more."

¹⁰¹ Ibid [24]

Also, at [25]: "It does not mean that the defendant who has been drinking is deprived of any possible loss of control defence: it simply means, as the judge explained, that the loss of control defence must be approached without reference to the defendant's voluntary intoxication."

¹⁰² 'Chapter 7 - Law Commission' (n62-6). Note that gender is also included in the 2009 Act but this is not supported, below.

¹⁰³ 'Chapter 7 - Law Commission' (n59-61)

¹⁰⁴ A. Norrie, 'The Coroners and Justice Act 2009' 281: "it is unclear what role 'sex' should play in the new law ... Presumably the idea is that sex also generally affects capacity for self-control, but exactly how is left unstated."

both sexes."¹⁰⁵ As has been discussed,¹⁰⁶ the control test ought to be maintained in a manner which is pretty inflexible and by doing so it would judge all by the same standards of expected behaviour. Adult men and women should not face different tests and the only flexibility which is justifiable is in setting a lower standard for teenagers who have not yet reached maturity. Gender may be a relevant as a contextual factor, but this is to do with the situations which women find themselves in and not because it is expected that they may react differently from men.

c) exclusions

s55(6)(c): In determining whether a loss of self-control had a qualifying trigger the fact that a thing done or said constituted sexual infidelity is to be disregarded.

i) the merit and scope of the exclusion

It is important to note that the sexual infidelity exclusion only refers to the trigger and if there are multiple provocations D can fulfil the trigger by relying on another source.¹⁰⁷ An interesting example is given in the explanatory notes, it refers to "a person [who] discovers their partner sexually abusing their young child".¹⁰⁸ In this scenario D cannot rely on the sexual infidelity by their partner as a trigger but they could argue that the abuse they witnessed against their child was a trigger.

The existence of the exclusion does not deny that sexual infidelity is a provocative scenario. In the House of Commons Anne Main stated that when there is a "sexual bond" then there is "a greater closeness and involvement" and infidelity results in a "betrayal" which "is so much greater and the anger may be so much more".¹⁰⁹ The government

¹⁰⁵ S. Yeo, 'English Reform of Provocation and Diminished Responsibility: Whither Singapore?' (2010) Sing JLS 177, 183

¹⁰⁶ Alongside the warranted emotion standard for the gravity test, this is the main argument in 'Chapter 5: Objective Element'.

¹⁰⁷ Explanatory notes of the Coroners and Justice Act 2009 [349]: "the thing done or said can still potentially amount to a qualifying trigger if (ignoring the sexual infidelity) it amounts nonetheless to circumstances of an extremely grave character causing the defendant to have a justifiable sense of being seriously wronged."

¹⁰⁸ Ibid

¹⁰⁹ Anne Main, November 9, 2009, HofC, col 82

position accepts that this is the case but it simply does not want these types of cases to be the basis for mitigation:

"We are not trying to legislate away people's natural and normal upset, concern and anger about those circumstances, but we do not accept that that itself ought to lead to reducing a murder finding."¹¹⁰

It has been stated that it is perfectly acceptable to have an exclusion in a warranted excuse provocation defence but only where the presence of the exclusion can be viewed as indisputable.¹¹¹ However, there may be circumstances of an extreme nature, involving insults and taunting, where a denial of a partial defence would be unsuitable.¹¹²

In *Dawes* it was stated that "the events surrounding the circumstances in the breakdown of a relationship will often but not always" be excluded under the provision.¹¹³ However, as will be shown, this interpretation seems to ignore the wording of the 2009 Act and demonstrates that there may be attempts to re-define the ordinary meanings of the terms used; this exclusion is about sexual infidelity and not about the breakdown of a relationship. A point which was made in a House of Commons debate was that this exclusion is not in line with the Law Commission's proposal,¹¹⁴ the Law Commission were concerned with "male possessiveness and jealousy" and that these factors "should not, of themselves, constitute good cause."¹¹⁵ An alternative provision was debated in the House of Lords:

Lord Thomas of Gresford, July 7, 2009, HofL Committee, 5th Sitting, col 589: "I fail to see why a loss of self-control caused by a deep breach of trust and unfaithfulness should be any less a reason for reducing murder to manslaughter than any other form of provocation that may be advanced. It is fundamental."

¹¹⁰ Maria Eagle, March 3, 2009, HofC Committee, 11th Sitting, col 440

A. Norrie, 'The Coroners and Justice Act 2009' 288: "The Government does not want to say conduct was 'rightful but wrongful' in such cases; rather that it was doubly wrongful, in both taking offence initially and killing."

¹¹¹ 'Chapter 3 - Rationale' (n126-8)

¹¹² J. Horder, Memorandum to Public Bill Committee (2009): "One of the difficulties about being 'absolutist' in this area is that one prevents the jury hearing rare meritorious cases."

¹¹³ *Dawes* [65]

¹¹⁴ Mr. Hogg, November 9, 2009, HofC, col 92

¹¹⁵ The Law Commission wished to use power of the judge and the standard elements of the defence to exclude such scenarios, see 'Chapter 7 - Law Commission' (n135-9).

"(c) where D acted principally out of a desire to punish V for any act, whether by V or by any other person, which D perceived at the time to amount to sexual infidelity, or where D acted principally out of sexual jealousy or envy, the circumstances shall not constitute 'circumstances of an extremely grave character' for the purposes of subsection (4)(a)."¹¹⁶

The provision therefore views a "desire to punish" and where D "acted principally out of sexual jealousy or envy" as outside the scope for mitigation. On one hand, this gets to the core of what is attempted to be achieved by including such a provision at all, but, on the other, it could create another layer of problems and complicate the defence further.¹¹⁷ The debate does highlight that the term 'sexual infidelity' may not be a precise term and could conceivably cover circumstances where the defence ought to run; therefore, through such a finding its existence is controversial and could cause some who are worthy of mitigation to fall under murder.

A specific exclusion for sexual infidelity shows up that another form of provocation case, honour killing, does not have an exclusion.¹¹⁸ "[W]e are making explicit certain types of situation where the defence will not be available."¹¹⁹ This means that an honour killing could provide the basis for a trigger if the conditions are met. It has been stated that the difference between the two scenarios is merely that it is more difficult to define a honour killing, so an exclusion would be unworkable: "It is much easier to define sexual

¹¹⁶ Lord Thomas of Gresford, November 11, 2009, HofL, col 836

Also, see J. Horder, Memorandum to Public Bill Committee (2009): "If this clause is to remain, it might be worth considering re-wording to say that in so far as D was motivated by sexual jealousy or envy, these motivations are to be disregarded."

¹¹⁷ Lord Bach, November 11, 2009, HofL, col 845: "Having a list of motives risks creating loopholes where killers can argue that their motive was something else not on the list; for example: fury, shock, embarrassment or betrayal."

¹¹⁸ David Howarth, March 3, 2009, HofC Committee, 11th Sitting, col 426: "why [has] one particular form of provocation or loss of control had been picked out, when there are other forms that one might equally insert in the primary legislation to state that they should not form the base of a defence."

R. Card, *Criminal Law* 264: "Why should this one situation be singled out for express exclusion?"

¹¹⁹ Maria Eagle, March 3, 2009, HofC Committee, 11th Sitting, col 431

infidelity, say, than honour killings. Honour killing is not easy to define."¹²⁰ The Law Commission did, however, set out a pretty clear description of what it believed a honour killing was: D seeks "to make an example" out of V because V has "defied tradition, custom or parental wishes in her choice of boyfriend, spouse or life-style."¹²¹ Providing a clear definition for the sexual infidelity exclusion may be difficult, though; in many ways the term is too broad but it may also not include the controversial cases where the reform ought to have been focused. A case which was discussed was *Stingel*,¹²² this was an Australian case which the Law Commission highlighted as being the sort of scenario which needed to be excluded from the defence. If plain language is used then this case does not involve sexual infidelity as there is no existing relationship between the parties.¹²³

Nourse has asked that "[i]f intimate homicide frequently involves separated couples why does our canonical legal image still revolve around sexual infidelity?".¹²⁴ The exclusion of sexual infidelity does not include the key set of cases which required the attention of the drafters. Much of Nourse's discussion on the provocation defence rested on cases of departure, a woman attempting to leave a relationship and being killed. In *Clinton* a

¹²⁰ Ibid 442: We do not believe that the phrase 'violation of a code of honour' is sufficiently precise. We think that the current wording deals with the point, and we all agree that we do not want to allow honour killings to sneak into the partial defence."

¹²¹ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 82 [5.25]

¹²² (1990) 171 CLR 312: D was stalking his ex-girlfriend and saw her having sex with V in a car. V swore at D and D went to get a butcher's knife from his car and killed V. See 'Chapter 7 - Law Commission' (n135).

¹²³ See (n126-52) for a more detailed definition of 'sexual infidelity'.

R. Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 U Tas L Rev 5, 30-1: "the relationship is over and the 'intimate relationship' only exists in the male offender's mind ... How does the concept of unfaithfulness have any relevance in the context of a relationship that is over?"

H. Edwards & J. Robson, 'Caging the Green-Eyed Monster - Restrictions on the Use of Sexual Infidelity as a Defence to Murder' (2012) 21 Nottingham LJ 143, 145: "Is it correct that the obsessive stalker who murders their quarry will have a defence when the faithful spouse will not?"

¹²⁴ V. Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense', (1997) Yale LJ, Vol 106, No 5, 1331, 1345

Also, at 1359: "But what if the parties are legally divorced'? Separated by force of law? What if the defendant finds the rival in the arms of his ex-wife, ex-lover, or ex-girlfriend? A jilted lover snaps when he sees his former girlfriend 'dancing' with another man? A battered woman is thwarted by physical violence when she tries to leave for another? Seen through the lens of infidelity, these cases may seem only minor extensions of our canonical image of a crime of passion. Seen through the lens of departure, however, these cases challenge us to ask whether it is possible to be unfaithful to a relationship if one party believes that there is no relationship at all."

decision on the *Parker* case, where V was killed after previously stating she wanted to end the relationship, was given and the defence was left to the jury. *Parker* highlights the limits of the exclusion; it will not prevent the defence from being used when a partner attempts to leave a relationship, it is limited to infidelity. *Clinton* refers to an example similar to *Stingel* and it finds that this scenario "could not sensibly be called 'infidelity'" and would not be excluded.¹²⁵ Sexual infidelity is the term used in the exclusion but it is possessiveness and jealousy which are at the core of the problem. The exclusion may be too broad, it is not indisputable that all the cases which fall under the exclusion ought to be excluded, and it may be too narrow, infidelity may not deal with the key scenario of where V is trying to leave or already has left a relationship.

ii) the Clinton judgment and contextual evidence

In *Clinton* it was stated that objective evaluation is "hugely complicated by the prohibitions in section 55(6)",¹²⁶ meaning that the added layer of exclusions made the task of interpreting the defence more difficult. In *Clinton* a key consideration was how to deal with the sexual infidelity exclusion and the solution proved to be somewhat controversial even though the approach which was outlined in the Parliamentary debates was followed.

The first task in *Clinton* on this issue was to attempt to define the term 'sexual infidelity':

"To begin with, there is no definition of 'sexual infidelity'. Who and what is embraced in this concept? ... Is the provision directly concerned with sexual infidelity, or with envy and jealousy and possessiveness, the sort of obsession that leads to violence against the victim on the basis expressed in the sadly familiar language, 'if I cannot have him/her, then no one else will/can'? The notion of infidelity appears to involve a relationship between

¹²⁵ *Clinton* 523

¹²⁶ *Ibid* 521

the two people to which one party may be unfaithful. Is a one-night-stand sufficient for this purpose?"¹²⁷

In a House of Lords Committee Lord Thomas stated that "[i]nfidelity has a very wide range."¹²⁸ He discussed how it could be interpreted to vary from a "casual affair, where there is a feeling of disappointment" to a "lengthy marriage, where there has been concealment". The key point is that he found that infidelity involves a "breach of the trust" between the two parties.

The exclusion refers to *sexual* infidelity, so this breach can only be excluded if it is of a sexual nature. Card has stated that sexual infidelity seems to refer "to a lack of faithfulness" and the parties must "already [be] in a 'sexual relationship'"; Card finds that this "must mean more than a one-night stand or casual relationship."¹²⁹ The term is probably wider than Card's interpretation as it is really down to the expectations of the parties involved, for example, there would be expectations of fidelity between a couple who are engaged to marry but do not believe in sex before marriage. Therefore, sexual infidelity must refer to a sexual act involving a person who is in a relationship where there are expectations of faithfulness so that the sexual act could be considered to be a breach of trust. The term is clearly inadequate.

In *Clinton* the impact of the exclusion on the defence was then set out: the sexual infidelity exclusion is only relevant to the trigger.¹³⁰ The exclusion includes acts of sexual

¹²⁷ Ibid 522: "Is sexual infidelity to be construed narrowly so as to refer only to conduct which is related directly and exclusively to sexual activity? Only the words and acts constituting sexual activity are to be disregarded: on one construction, therefore, the effects are not. What acts relating to infidelity, but distinguishable from it on the basis that they are not 'sexual', may be taken into account?"

¹²⁸ Lord Thomas of Gresford, July 7, 2009, HofL Committee, 5th Sitting, col 589

¹²⁹ R. Card, *Criminal Law* 263

¹³⁰ *Clinton* 523: "the statutory provision is unequivocal: loss of control triggered by sexual infidelity cannot, on its own, qualify as a trigger for the purposes of the second component of this defence. This is the clear effect of the legislation."

Ibid 521: "On the face of the statutory language, however grave the betrayal, however humiliating, indeed however provocative in the ordinary sense of the word it may be, sexual infidelity is to be disregarded as a qualifying trigger."

infidelity but also words which relate to it.¹³¹ With the exclusion's reach limited to the trigger this means that sexual infidelity may be considered in the ordinary person test as context:¹³²

"The exclusion in section 55(6)(c) is limited to the assessment of the qualifying trigger ... [S]ection 54(3) expressly provides that reference to the defendant's circumstances extends to 'all' of the circumstances except those bearing on his general capacity for tolerance and self-restraint. When the [ordinary person test] ... is examined it emerges that, notwithstanding section 55(6)(c), account may, and in an appropriate case, should be taken of sexual infidelity."¹³³

The judgment acknowledges that this is not satisfactory but that it is effect of the legislation: "there will be occasions when the jury would be both disregarding and considering the same evidence. That is, to put it neutrally, counter intuitive."¹³⁴ The judgment goes further in stating that to "compartmentalise" sexual infidelity by asking the jury to exclude it and then consider it "is unrealistic and carries with it the potential for injustice".¹³⁵ However, it is made clear that sexual infidelity may be considered in the ordinary person test as *context* when it is "integral" and "essential".¹³⁶

The language of the 2009 Act is consistent with the findings in *Clinton* but also in the Parliamentary debates it was made clear, after concerns were raised relating to the consequences of the exclusion, that this is how the exclusion was intended to operate.¹³⁷ Concerns were raised that the exclusion would mean that proper context

¹³¹ Ibid 523: "In our judgment things 'said' includes admissions of sexual infidelity (even if untrue) as well as reports (by others) of sexual infidelity."

¹³² See (n73-5 & n86-9) for the discussion of how contextual evidence is to be used in this test.

¹³³ *Clinton* 526

¹³⁴ Ibid 526

¹³⁵ Ibid 528

¹³⁶ Ibid

¹³⁷ L.H. Leigh, 'Loss of control' 5: "the Court charted a path already indicated in the Parliamentary debates."

could not be given for other sorts of provocations.¹³⁸ In supporting the government's position, Claire Ward stated that "[i]f other factors come into play, the court will of course have an opportunity to consider them", the purpose of the exclusion was to remove the situation where the defence can be raised "exclusively on the ground[s] of sexual infidelity."¹³⁹ Following Wards' comment an important exchange took place:

"Claire Ward: ... If something else is relied on as the qualifying trigger, any sexual infidelity that forms part of the background can be considered but it cannot be the trigger. That is essentially what the legislation seeks to do - to stop the act of sexual infidelity being the trigger ...

Mr. Grieve: ... There is a clear contradiction between the wording of subsection (6)(c) and her intention. That is why I urge her to be so cautious about the clause, which I think has been very poorly thought through."¹⁴⁰

Any criticism over how the *Clinton* judgment interpreted the law on this issue is misdirected, this was simply the approach which was set out in the debates and the ordinary meaning of the legislation. For example, Baker and Zhao have stated that the judgment "overlooked the fundamental policy issues that led Parliament to enact a narrower defence of loss of control."¹⁴¹ Also, they have stated that it "undercuts Parliament's aim" and "[i]t is clear that Parliament did not intend sexual infidelity to be used in this way."¹⁴² It is more accurate to state that the drafters focused on the wrong area, sexual infidelity, and once they did this they only intended to remove this scenario in a smaller manner than many would have desired.

¹³⁸ David Howarth, March 3, 2009, HofC Committee, 11th Sitting, col 426: "It might mean that where the context for some other form of provocation needed to be explained, it might become impossible to explain that to the court."

¹³⁹ Claire Ward, November 9, 2009, HofC, col 79

¹⁴⁰ Claire Ward & Mr Grieve, November 9, 2009, HofC, col 94-5

¹⁴¹ D.J. Baker & L.X. Zhao, 'Contributory qualifying and non-qualifying triggers in the loss of control defence' 255

¹⁴² Ibid 270-1

Also, at 273: "The decision seems to ignore that a core aim of reforming the law in this area was to give women greater protection."

Wake has stated that "the prohibition will rarely be invoked since it is unlikely that sexual infidelity will be raised in isolation from other factors."¹⁴³ This statement is mistaken as the exclusion *should* impact on the trigger each time sexual infidelity arises, but its use as contextual evidence later, in the ordinary person test, will mean it continues to be a factor. However, *Clinton* itself only has to be observed to discover how multiple sources of provocation can be relied upon and its application in this case caused inconsistencies. In *Clinton*, according to D, V had taunted him about sexual partners (she had intercourse with five men) and him wanting to commit suicide (she stated that he had "not the balls to commit suicide"). She had also said that she did not want her children anymore. The trial judge found that the defence of loss of control was not available because of the sexual infidelity exclusion, the provoking factors outside of sexual infidelity were not sufficient to satisfy the trigger. In line with s54(6) the defence did not go to the jury as the trial judge found that a jury properly directed could not reasonably conclude that the defence might apply.

The Court of Appeal, however, ordered a retrial as they found that the defence should have been left to the jury:

"we have concluded that she misdirected herself about the possible relevance of the wife's infidelity. We have reflected whether the totality of the matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to the wife's sexual infidelity, and examined as a cohesive whole, were of sufficient weight to leave to the jury. In our judgment they were."¹⁴⁴

The Court of Appeal's judgment can be interpreted in two ways; firstly, the qualifying trigger was satisfied by the taunts about suicide and the references to the children and the sexual infidelity was merely context in the ordinary person test or, secondly, that sexual infidelity was considered as context in order to satisfy the qualifying trigger. It is

¹⁴³ N. Wake, 'Loss of control beyond sexual infidelity' (2012) 76 JCL 193, 197

¹⁴⁴ *Clinton* 536

submitted that it must be the latter. The Court of Appeal did not state that they re-interpreted the strength of the other issues and deemed them to have satisfied the trigger but that they had differed in their decision because of the sexual infidelity being used as context for these factors, meaning that the exclusion was not properly applied. This is supported by the following statement which the Court of Appeal made:

"On the basis that the remarks made by the wife had to be disregarded, her conclusion that the defence should be withdrawn from the jury was unassailable."¹⁴⁵

The Court of Appeal therefore agreed that when disregarding sexual infidelity the other factors were not sufficient to satisfy the defence; this shows that the trigger could not have been satisfied without reference to sexual infidelity and the only difference which can explain this divergence is that sexual infidelity was relied upon in the trigger. The Court of Appeal therefore did not properly apply the exclusion. Consequently, Baker and Zhao have stated that "[t]he sexual infidelity was the dominant contributory trigger"¹⁴⁶ and Slater has stated that it "means sexual infidelity can be the *principal* reason for the presence of a qualifying trigger despite s55(6)(c)."¹⁴⁷

From the Court of Appeal's own interpretation of the exclusion, the trigger needs to be satisfied before the ordinary person test and sexual infidelity as context comes into play. The role of the judge is to consider all the elements of the defence and then only allow the jury to consider it if he is satisfied that a "properly directed" jury might apply the defence. The judge must apply s54(1) to the facts of the case and, in order, determine if there is evidence that D lost his self-control, if this could be deemed to be caused by a valid qualifying trigger and if the ordinary person test could be satisfied. The qualifying trigger requires an examination of the sexual infidelity exclusion and this process should

¹⁴⁵ *Clinton* 536

¹⁴⁶ D.J. Baker & L.X. Zhao, 'Contributory qualifying and non-qualifying triggers in the loss of control defence' 265

¹⁴⁷ J. Slater, 'Sexual Infidelity and Loss Of Self-Control: Context or Camouflage?' (2012) 24 Denning Law Journal 153, 160: "A closer examination of the outcome of *Clinton* and the implications of the contextual approach reveal that it enables sexual infidelity to act as the main and indeed predominant qualifying trigger despite s55(6)(c)."

stop if the judge needs sexual infidelity to be considered in order to satisfy the trigger. This is what the trial judge did but the Court of Appeal relied on this excluded factor.

The Court of Appeal were wrong but it can be questioned whether the trial judge was wrong too. The trial judge was correct to ignore the sexual infidelity but where D gives two such reasons to satisfy the trigger, about suicide and the children, a jury should be given the opportunity to hear the defence. It is quite likely that a jury would find that the trigger is not satisfied and would not have to consider the other elements of the defence. If this is the case it cannot be said that the defence would then become a platform for cases of sexual infidelity as the jury would not be able to consider that issue unless the trigger is first established.¹⁴⁸

iii) diminished responsibility

Clinton makes an important point and in some ways gives a warning to how sexual infidelity could be dealt with in the future:

"If the defendant is suffering from a recognised medical condition, for example, serious and chronic depression, the discovery that a partner has been sexually unfaithful may, and often will be said to, impair the defendant's ability to form a rational judgment and exercise self control. This situation is not all that uncommon ... Sexual infidelity may therefore require consideration when the jury is examining the diminished responsibility defence even when it has been excluded from consideration as a qualifying trigger for the purposes of the loss of control defence."¹⁴⁹

The prediction in *Clinton* is that as sexual infidelity cannot be the sole basis for the loss of control defence such cases will move to be dealt with under diminished responsibility. The intentions of the reformers were to limit the reach of the defence for men when they

¹⁴⁸ This point on the role of the judge will be explored further when the sufficient evidence test is discussed at (n224).

¹⁴⁹ *Clinton* 526-7

claimed to be solely provoked by sexual infidelity. In a fashion, this is achieved as sexual infidelity cannot be relied upon as a trigger, but there is likely to be a move to include these cases in diminished responsibility as was suggested in *Clinton*. Card¹⁵⁰ has stated that depressive illnesses would come under a recognised medical condition within the definition of diminished responsibility.¹⁵¹ It stands to reason that if D is excluded from loss of control he will run diminished responsibility to avoid a conviction for murder and this will mean that these scenarios will rely on medical evidence of depression rather than comparing D to a standard of behaviour in order to receive mitigation.

A class of cases certainly exist which ought to be restricted for being a basis for mitigation. Other proposals which were considered have their merits in that they aim to deal with the core issues.¹⁵² Ultimately, the intentions of the drafters must be questioned on this issue. The term is flawed; it does not cover a killing outside of a relationship where there can be no 'infidelity', meaning that many cases of possessiveness and jealousy will be outside this. Also, it was their intention that sexual infidelity will play a significant part in the new defence. There is a potential that the main provoking feature of the case will be sexual infidelity and this is even where the law is correctly applied, unlike *Clinton*. If D is able to satisfy the trigger with another reason, or a combination of many other reasons, then sexual infidelity may be the primary force in satisfying the ordinary person test and the subjective test. The reason why the compartmentalisation of sexual infidelity occurs in the 2009 Act is so that an overall view of the circumstances may be presented and not to allow D to rely on sexual infidelity in the trigger. The most effective way of limiting the impact of sexual infidelity is to ensure that the factor which established the trigger is the central force behind the satisfaction of all the evaluative elements of the defence.

¹⁵⁰ R. Card, *Criminal Law* 251

¹⁵¹ (n14-23)

¹⁵² (n116)

s55(6)(a) & (b): 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;

These two provisions ensure that D cannot incite the circumstances which the trigger rests on for the purpose of relying on the defence. The Law Commission's equivalent provision referred to an exclusion based on the incitement of "provocation",¹⁵³ but the 2009 Act specifically refers to both triggers as was suggested in the Ministry of Justice Report.¹⁵⁴ As has previously been discussed,¹⁵⁵ "purpose of providing an excuse" ought to be viewed narrowly and be seen as the equivalent of forming a plan. It is indisputable that if D planned to incite the trigger that the defence ought not to apply, therefore this is an exclusion which can be fully supported.

Both the Law Commission and the 2009 Act, though, failed to deal with the broader circumstances of incitement and did not put a mechanism in place for such cases.¹⁵⁶ In the pre-2009 defence *Johnson* found that there was no difference between standard provocation and self-induced provocation, each needed to be dealt with in the subjective and objective tests.¹⁵⁷ A preferable method of settling these cases was established before, in *Edwards* it was found that self-induced provocation could only be relied upon if V's conduct went beyond reasonable expectations;¹⁵⁸ this is for when D did not plan on inciting V but ultimately did and then relies on the trigger which occurred.

¹⁵³ 'Chapter 7 - Law Commission' (n125-31)

¹⁵⁴ 'Chapter 8 - Ministry of Justice' (n27)

¹⁵⁵ 'Chapter 4: Adequate Provocation' (n37-45)

¹⁵⁶ The distinction between the 'narrow' and 'broad' circumstances of self-induced provocation was discussed at *ibid.*

¹⁵⁷ [1989] 1 WLR 740

¹⁵⁸ [1973] AC 648

In *Dawes*¹⁵⁹ this issue was raised as D did not plan to kill V, he was trying to get V out of his flat, but his conduct had made the situation escalate; D had an altercation with V before fetching a knife and stabbing him. The Court of Appeal had to decide on the scope of the exclusion and how these broader cases of incitement need to be dealt with. Firstly, they found that "inciting, or encouraging or manufacturing a situation for this purpose" is covered under the exclusion but "behaving badly and looking for and provoking trouble" is not.¹⁶⁰ This supports the distinction between the narrow and broad circumstances of incitement but the interpretation seems to go slightly beyond the wording of the Act; 'inciting' and 'manufacturing' are covered under the exclusion but 'encouraging' ought not to be, if D 'encourages' V but V's reaction is so far out of proportion then the *Edwards* rule should apply instead of the exclusion.

Secondly, the Court of Appeal seemed uncertain in how to deal with the broader category of incitement and how far *Johnson* was relevant to the matter as there were a series of contradictory statements. In *Dawes* D fell outside the exclusion and into this grey area because he neither planned the attack nor was his conduct agreeable. Initially, it was stated that "the impact of *Johnson* is now diminished, but not wholly extinguished by the new statutory provisions."¹⁶¹ Following this, it was stated that "[a]s *Johnson* no longer fully reflects the appropriate principle, further reference to it is inappropriate."¹⁶² However, later it was found, when applying the law to the case, that "*Johnson* should not have been treated as overruled".¹⁶³

How this issue was dealt with in *Dawes* highlights both a weakness in the 2009 Act and uncertainty in how to apply the provisions, an issue which the former may have caused. The exclusion only deals with a narrow set of circumstances, where D plans to incite, but there was no provision set out in the 2009 Act for how to deal with cases which involved incitement without such a plan. Rather than the Court of Appeal referring to *Johnson*, a

¹⁵⁹ *R v Dawes* [2013] EWCA Crim 322. The facts of the case will be more fully discussed below (n196).

¹⁶⁰ *Ibid* [57-8]

At [63], it was decided that "[t]here was no sufficient evidence that this was the defendant's purpose."

¹⁶¹ *Ibid* [58]

¹⁶² *Ibid*

¹⁶³ *Ibid* [63]

case which is, to an extent, symbolic of the problems with the pre-2009 defence, it ought to have established a more suitable way for dealing with these cases.¹⁶⁴ The inconsistent way in which this issue was approached in the judgment indicates that the judiciary were uncertain over the significance of pre-2009 law as the 2009 Act did not specifically deal with the issue at hand. The 2009 Act is meant to be a new beginning,¹⁶⁵ but this does raise the issue of whether previous law ought to be referenced at all, especially when some of the provisions were directly influenced by the pre-2009 defence.

d) subjective element

s54(4): Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.

The "considered desire for revenge" provision was supported when discussing the Law Commission's proposal, the exclusion goes to the core of the subjective element. The subjective element is essentially there to distinguish between cases of what are commonly referred to as 'hot blooded' and 'cold blooded' killings.¹⁶⁶ Removing 'cold blooded' killings expressly makes sense as all the cases which it covers ought to be outside the defence, however, the correct balance needs to be found in order to ensure those who kill with the emotion which relates to human frailty with delay are not excluded.

The term 'considered' requires some understanding but it would seem to be the opposite of an impulsive and emotional killing. The two points of view about attaching the term to the provision were set out in the Parliamentary debates:

¹⁶⁴ See 'Chapter 4: Adequate Provocation' (n37-9) for the discussion of *Edwards*.

¹⁶⁵ (n10): in *Clinton* it was stated that the "common law heritage is irrelevant".

¹⁶⁶ 'Chapter 6: Subjective Element' (n6-10)

"I do not want a prolonged and footling discussion about revenge being considered or unconsidered. If somebody does something from a sense of revenge, it does not matter how considered it was."¹⁶⁷

"By referring to a 'considered' desire for revenge, we are trying to strike the right balance—barring thought-out revenge killings, without automatically excluding cases in which some thought of revenge may have passed through the mind of the abused partner in an abusive relationship, when a complex range of emotions is in play."¹⁶⁸

A considered desire for revenge is to do with how the killing is carried out and not D taking time to become emotional,¹⁶⁹ it is about ensuring that the response is not a calculated decision as it is necessary that the emotion stemming from the stimulus overrides D's ability to restrain himself.¹⁷⁰ Expressing the exclusion in such a manner leaves an implication that there can be cases of *unconsidered* revenge in the defence. The best interpretation of this is that it does not mean that if D has a feeling of resentment towards V then this is necessarily the same as revenge, such desires are not an indication that D has made an entirely rational and 'cold' decision to kill.

Withey has stated that "[t]here is no explanation of what 'considered' means, but it clearly refers to planned attacks and grudge killings."¹⁷¹ How the exclusion is phrased could potentially include a wider set of cases though, where there is any preparatory act it could be viewed as being a considered action. For example, if D fetches a weapon from a drawer this could be construed as a considered action as D has not only gone to find a weapon but has also judged her response in that she feels that the weapon is necessary to successfully attack V.¹⁷²

¹⁶⁷ David Howarth, March 3, 2009, HofC Committee, 11th Sitting, col 427

¹⁶⁸ Maria Eagle, March 3, 2009, HofC Committee, 11th Sitting, col 436-7

¹⁶⁹ 'Chapter 7 - Law Commission' (n120-4)

¹⁷⁰ See 'Chapter 6 - Subjective Element' (n22-6).

¹⁷¹ C. Withey, 'Loss of Control' (2010) 174 JPN 197

¹⁷² J. Horder, Memorandum to Public Bill Committee (2009): "The removal of the [sudden] requirement will undoubtedly raise questions, not answered in the Bill, about the status of what appear to be 'forearming' actions by D."

A jury may have a difficult task in balancing a non-sudden loss of control killing, a delayed response, with this exclusion and "[t]his is likely to generate case law regarding where the line is to be drawn".¹⁷³ In a House of Lords Committee Lord Kingsland has stated that this exclusion could be "destined to exercise the judiciary's minds for many years to come."¹⁷⁴ In *Evans*, a decision contained in *Clinton*, D stabbed his wife after a prolonged argument. The prosecution argued that D had not lost his self-control and had acted in revenge. The Court of Appeal approved the language which was used by the trial judge on framing a jury question for a considered desire for revenge:

"An act of retribution as a result of a deliberate and considered decision to get your own back, that is one that has been thought about. If you are sure that what the defendant did was to reflect on what had happened and the circumstances in which he found himself and decided to take his revenge on (his wife), that would not have been a loss of self control as the law requires."¹⁷⁵

The overall role of the jury has not changed much even if the language has; provocation has always been about finding a balance in order to exclude revenge killings.¹⁷⁶ However, this task is more complex than ever before. The Law Commission and the drafters have evolved the defence in order to include fear killings and these cases are likely to include an element of rational decision-making which cannot be properly described as vengeful. Complex cases which involve intimate partner violence can involve both triggers of the defence, D displaying anger at past violence and fear of future violence means that such a defence has to cater for both scenarios. The Court of

¹⁷³ C. Withey, 'Loss of control, loss of opportunity?' 267

Mr Garnier, February 5, 2009, HofC Committee, 4th Sitting, col 112: "Are courts going to find it difficult to distinguish between a slow-burn but none the less 'justified' loss of control and a considered desire for revenge? The two may sometimes merge."

¹⁷⁴ Lord Kingsland, July 7, 2009, HofL Committee, 5th Sitting, col 575

Mr Garnier, March 3, 2009, HofC Committee, 11th Sitting, col 430: "It seems to us that the matters referred to in the clause dealing with revenge are in need of tightening and clarification."

¹⁷⁵ *Clinton* 543

¹⁷⁶ *Saulsbury's Case* (1553) Plowd Comm 100: D "took part suddenly" in the killing of V. See 'Chapter 1 - The Early Defence' (n7).

Appeal were wrong, however, to state that "[t]he language is clear. The direction accurately encapsulated the issue to be decided by the jury, and the way they should approach to *[sic]* it."¹⁷⁷ It must be understood how the non-sudden loss of self-control and considered desire for revenge provisions will interact with each other and this is anything but clear; similarly to many aspects of the new defence, much depends on the court's interpretation of the terms.

The factors of the subjective element which need to be considered are more apparent, though. A comparison of the key case of the pre-2009 defence on the issue of delay, *Ahluwalia*, and *Clinton* only has to be made to show this. In *Ahluwalia* it was stated that "[t]ime for reflection" could be "inconsistent" with the loss of self-control requirement but it "depends entirely on the facts of the individual case and is not a principle of law."¹⁷⁸ In *Clinton* this reasoning was followed:

"there does not appear to be very much room for any 'considered' deliberation. In reality, the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self control."¹⁷⁹

It is doubtful whether much has changed with regards to revenge killings as the provision explicitly states the issues which were always a part of the defence, but it is a positive move as it is preferable to have the core issues in the open for a jury to decide. With the use of the term 'a considered desire for revenge' it is implicit that not all vengeful feelings are outside the scope of the defence. It is best that 'considered' is taken to mean a well thought-out plan, it ought not to mean an element of rational thought as D can kill with the emotion even with a degree of rational decision-making. To define revenge as a planned killing means that it is far removed from the core emotion and therefore human frailty; this would be a proper distinction, between a rational killing which takes place owing to the existence of the emotion and a planned killing where the links between the act and the trigger have broken down. However, as D must lose his self-control it is unlikely that these subtle differences can be applied to the new defence

¹⁷⁷ *Clinton* 544

¹⁷⁸ *R v Ahluwalia* [1992] 4 All ER 889, 897–8 (Lord Taylor CJ)

¹⁷⁹ *Clinton* 521

as it ought to be fairly apparent if D's reaction was out-of-control as opposed to a defence which merely relies on the core emotion.

s54(1)(a): D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control

s54(2): For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

D must lose his self-control,¹⁸⁰ but it is only valid if it is caused by one of the three triggers.¹⁸¹ The loss of self-control element remains undefined, but in s54(2) it is stated that "it does not matter whether or not the loss of control was sudden."¹⁸² When it states that "it does not matter" this is not entirely true, delay must be taken to be an evidential factor for the existence of a loss of self-control.¹⁸³ In the explanatory notes it states that for the judge and jury "it will remain open, as at present, ... to take into account any delay between a relevant incident and the killing."¹⁸⁴ The *Clinton* judgment follows this: more deliberation means that the existence of a genuine loss of self-control was "less likely".¹⁸⁵ The wording of the provision effectively re-states the position in *Ahluwalia* with a possibility that it could be interpreted in a more favourable manner to a person who kills with delay; it potentially allows for more delay than before, with the emphasis given, but, as with the revenge exclusion, it becomes another layer in the balance and this is part of the jury's difficult task.

¹⁸⁰ Ibid: "The loss of control need not be sudden, but it must have been lost. That is essential."

¹⁸¹ Mitigation is not occurring solely because D lost his self-control but because he lost it owing to a reason which has been deemed good enough, a warranted loss of self-control. See 'Chapter 3 - Rationale' (n111).

¹⁸² In the pre-2009 defence, in *Duffy*, it was stated that this was a necessary condition of the concept but in *Ahluwalia* it was found to be merely an evidential factor, see 'Chapter 2 - The Post-1957 Defence' (n30-2).

¹⁸³ O. Quick & C. Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45 Australian & New Zealand Journal of Criminology 337, 342: "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."

¹⁸⁴ Explanatory notes of the Coroners and Justice Act 2009 [337]

¹⁸⁵ (n179)

A fundamental concern with the 'removal' of suddenness is that the result would be "illogical" if a loss of self-control "by its very nature" is sudden:¹⁸⁶

"If you say that a loss of self-control need not be sudden, you are forcing the English language into an area where it cannot go. A loss of self-control is sudden or it is not a loss of self-control."¹⁸⁷

It is more straightforward to discuss loss of self-control when D reacts spontaneously as it best suits these sorts of cases but it is clear that the law has embraced 'slow-burn', where D's emotions build up. Despite the pre-2009 approach to suddenness being a concern with the drafters,¹⁸⁸ this provision does not alter the subjective element too much, so the problem over how cases of delay were at odds with common expectations of what it is to lose self-control will still exist.

The reason for its retention¹⁸⁹ is the concern that it "would open the door to cold-blooded killings fitting into the defence",¹⁹⁰ this is despite the revenge exclusion. Loss of self-control was discussed in Chapter 6 and the concept was a great cause for concern and criticism, it was not only questioned whether the loss of self-control requirement could be given a proper definition but also whether it was necessary and able to respond to the demands of the defence. It was determined that the concept ought not to be the basis for the subjective element and it would be preferable, even though it would not settle all the issues, if the defence simply rested on finding if the core emotions were in place at the time.¹⁹¹ The problem is that the 2009 Act does not advance the concept substantially further, the Law Commission's criticism that it is "a judicially invented concept, lacking sharpness or a clear foundation in psychology" remains,¹⁹² so its retention in the 2009

¹⁸⁶ C. Withey, 'Loss of control, loss of opportunity?' 268

¹⁸⁷ Lord Thomas of Gresford, July 7, 2009, HofL Committee, 5th Sitting, col 587

¹⁸⁸ Maria Eagle, March 3, 2009, HofC Committee, 11th Sitting, col 433: "We recognise that if we just used the words 'loss of self-control', it would be read too much within the current requirements in respect of suddenness".

¹⁸⁹ The loss of self-control requirement was abandoned in the Law Commission's proposal, see 'Chapter 8 - Ministry of Justice' (n55-70).

¹⁹⁰ Maria Eagle, February 3, 2009, HofC Committee, 1st Sitting, col 10

¹⁹¹ 'Chapter 6 - Subjective Element' (n79-80)

¹⁹² Law Commission (2004) *Partial Defences to Murder* Report No 290, 36 [3.30]

Act, given that the concept has not been developed in any significant way, cannot be supported.

The retention of it has to be evaluated whilst keeping under consideration the aims of the reform; an overall aim was to create a specific trigger for cases of fear and make the defence more readily applicable for women. The inclusion of the fear trigger combined with the 'removal' of suddenness has been viewed as progress of sorts as the defence is "more accessible to abused women",¹⁹³ but despite these types of cases having a specific route laid out the retention of the loss of self-control requirement surely must limit its effectiveness. This was the conclusion of the Law Commission and it also came out in a House of Commons Committee, that the real problem was that the "whole clause depends on loss of control and that cannot be avoided".¹⁹⁴

"The obvious way to reform the law to help battered wives is to get rid of the idea of loss of control. ... [I]t is not the suddenness of the loss of control that matters; it is having to prove some sort of loss of control."¹⁹⁵

Cases of fear and many of anger do not require a loss of self-control to be genuine and if the defence is striving to be about more than there ought to be no place for the concept.

The judgment in *Dawes* highlights this point. It was found that D had not killed V "in a rage. He was shocked rather than angry ... He had acted in self-defence."¹⁹⁶ D's claimed that he was trying to get V out of his flat and, in doing so, went to the kitchen to retrieve

¹⁹³ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' 226. However, Edwards counters this, below at (n200), and discusses the lack of progress made with the subjective element.

¹⁹⁴ David Howarth, March 3, 2009, HofC Committee, 11th Sitting, col 424

¹⁹⁵ David Howarth, February 3, 2009, HofC Committee, 1st Sitting, col 9

R. Card, *Criminal Law* 259: The retention of loss of self-control "did not accord with its proclaimed intention to correct the imbalance between men and women which existed under the defence of provocation."

¹⁹⁶ *Dawes* [64]. See also (n159).

The impact for the defence's relationship with self-defence will be further discussed at (n202-3).

Also, see *R v Gurpinar* [2015] EWCA Crim 178 [48]: D's counsel described D's conduct as "not indicative of a loss of control", but stated that "[t]he evidence was indicative of an instinctive reaction to hit out at the deceased both in panic to stop the attack and in order to defend himself."

a knife. D argued self-defence, but failed, and could not rely on the loss of control defence as he did not lose his self-control. By D claiming he killed out of fear it made the subjective element difficult to satisfy. This case shows that 'battered women' who kill because of fear will have to face a substantial hurdle, just as before: they must lose their self-control. It is not enough that they genuinely felt afraid for their safety or another's but killed excessively, they must kill in this manner for the defence to apply. The 2009 Act created a specific trigger for fear but also retained a concept which seems to counter much of its effectiveness,¹⁹⁷ so Withey is correct in stating that "[t]he law may 'take back with one hand what it gives with the other'".¹⁹⁸

A view stressed in a House of Commons Committee was that mitigation for anger and fear should not rely on the "same basic concepts" and loss of self-control "has nothing to do with the fear argument."¹⁹⁹ The drafters clung to the concept because they were worried it would lead to revenge killings being accepted into the defence. It was more of a concern that killings in anger, which do not involve a loss of self-control, could be accepted. It may, therefore, be that, with this outlook, the desire to put the two emotions together in a single defence is what has harmed the new defence.

The retention of the loss of self-control element also impacts on the fear trigger in another way. The Law Commission intended that this defence would be a natural step-down for those who failed with self-defence.²⁰⁰ It creates difficulties, as can be seen in *Dawes*, to an extent, to run loss of self-control and argue that there was reasonableness in the response for self-defence. The retention of the loss of self-control requirement means that nothing has changed in this regard. The judge is no longer forced to leave

¹⁹⁷ A. Norrie, 'The Coroners and Justice Act 2009' 285: "its overall approach may be undermined by the final form of the new law."

Also, at 288: "In the case of the abused woman who acts after a time delay, will this not take the law back into disputes about whether there was a loss of self-control, and from there, into questions of suddenness, for, it might be thought, a test for and constitutive feature of any loss of self control in anger is that it have an element of suddenness? ... Will that not work against the core logic of the new defence?"

¹⁹⁸ C. Withey, 'Loss of control, loss of opportunity?' 267

S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' 224: "we can expect a mirror image of the behaviour and legal descriptors that passed for loss of self-control" to be replicated in the new defence.

¹⁹⁹ David Howarth, March 3, 2009, HofC Committee, 11th Sitting, col 444

²⁰⁰ 'Chapter 6 - Subjective Element' (n81-4)

the defence to the jury on trivial evidence of provocation,²⁰¹ but it will create the same choice for someone who has a chance of falling under self-defence.

e) sufficient evidence test

s54(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.

The 2009 Act gives the judge greater and broader powers to prevent the defence from going to the jury. Under s54(5) the judge must decide if the defence can be raised but now can base this on all the conditions referred to in s54(1); the judge can take into account evidence of whether an act or omission caused a loss of self-control, whether there was a qualifying trigger for this and whether the ordinary person test could be satisfied. Therefore, this is far more difficult to satisfy than the pre-2009 defence where all had to be done was to show that some conduct caused a loss of self-control.²⁰²

Under the pre-2009 defence it was a common criticism that the judge was forced to leave the defence to the jury, even if D did not wish it, but this position has not altered under the 2009 Act, the test just makes it more difficult for this to occur.²⁰³ Section 54(6) sees the defence move back to the position in *Holmes*,²⁰⁴ the judge must give an initial ruling on the issues in order for the defence to go to the jury. The intention of this power is clear: to create an additional buffer to prevent certain cases from going as far as the jury:

²⁰¹ See (n205).

²⁰² 'Chapter 2 - The Post-1957 Defence' (n8-11)

²⁰³ *Dawes* [53]: "whether the prosecution has raised the question or not, at the end of the evidence the judge should examine and decide whether, indeed, sufficient evidence relating to all the ingredients of the defence has been raised."

Workman [2014] EWCA Crim 575 [25]: "it would have been known by all concerned that there can be occasions when such a defence, as with provocation before it, is required to be left to a jury even though it has never positively been advanced as part of the defence case."

²⁰⁴ *Holmes v DPP* [1946] AC 588. See 'Chapter 1 - The Early Defence' (n89).

"What the old law entrusted to juries willy nilly, the new law takes out of their hands in cases that are 'purely speculative and wholly unmeritorious', empowering judges to make the moral and political call on what is a justifiable expression of provoked anger, albeit in the name of the 'ideal jury'."²⁰⁵

This provision was introduced by the Law Commission to ensure cases of sexual possessiveness and jealousy, revenge, cases like *Doughty* and cases involving D relying on mental abnormalities were excluded from the defence.²⁰⁶ Just how far reaching the provision is will obviously depend on how it is applied in practice.

Examinations for these powers came in two cases which were decided in *Dawes*. In *Hatter* D went to V's home with a knife, they argued about V's new boyfriend and D stabbed her.²⁰⁷ The trial judge stated that there was no evidence that D lost his self-control and the 'provocation' trigger "did not come anywhere near" being satisfied.²⁰⁸ In *Bowyer* D had planned a burglary and killed V when he returned home. D claimed that he was both angry, at V's comments about a woman, and fearful. The Court of Appeal stated that it was "absurd to suggest" that this could be the basis for the 'provocation' trigger and the killing "bore all the hallmarks of appalling violence administered in cold blood."²⁰⁹ In neither of these cases did D provide any evidence that he lost his self-control and there was clearly insufficient evidence to suggest that a trigger could be satisfied. However, whereas in *Hatter* the defence was not left to the jury in *Bowyer* it was. The Court of Appeal stated, when discussing *Bowyer*, that "[i]f we have any criticism ... it is that the loss of control defence was left to the jury at all."²¹⁰

It is easy to see that this provision could be problematic. Clough has stated that a lot more rests with D as there is a greater task to convince the judge that the defence

²⁰⁵ A. Norrie, 'The Coroners and Justice Act 2009' 280

²⁰⁶ 'Chapter 7 - Law Commission' (n35-9)

²⁰⁷ *Dawes* [16-20]: D was heard to say: "look what you've made me do".

²⁰⁸ *Ibid* [26]

²⁰⁹ *Ibid* [66]

²¹⁰ *Ibid*

should be applied²¹¹ and in *Clinton* it was stated there is a greater opportunity to contest if the defence should go to the jury.²¹² In *Clinton* it was stated that the judge will have to give "a common sense judgment based on an analysis of all the evidence",²¹³ but went on to highlight that the sexual infidelity exclusion could create difficulties:

"The more problematic situations will arise when the defendant relies on an admissible trigger (or triggers) for which sexual infidelity is said to provide an appropriate context (as explained in this judgment) for evaluating whether the trigger relied on is a qualifying trigger for the purposes of subsection 55(3) and (4)."²¹⁴

This is precisely where the judges in *Clinton* went wrong.²¹⁵ There is a greater and a more difficult task for the judge, they must decide what a reasonable jury might conclude and take on board the extra layers to the new defence. It is certain that the test of sufficient evidence is far more stringent than before and a shift needed to occur in the reform. However, the question is not only whether they can undertake this role but, also, whether they should.

The drafters of the 2009 Act had to deal with the problematic cases and even if such cases were not successfully fulfilling the defence they were being considered as being capable of provoking D and going to the jury. The reform had to enforce a tougher test but it is not desirable that the trial judge is given so much power. In repeating the findings in *Holmes* the entire defence must go before a judge before it can reach a jury, but the Homicide Act 1957 was introduced in an attempt to remedy this problem of judicial control with the common law.²¹⁶ The problem with this test in the 1957 Act came from the

²¹¹ A. Clough, 'The Judge's Role Where Provocation Is Evident but Not Discussed' 352

²¹² *Clinton* 540: In the *Parker* judgment it was stated that "[t]he judge was not invited to withdraw the 'loss of control' defence from the jury. With our increased understanding of the differences between the loss of control defence and the former provocation defence, we anticipate that such a submission would now be raised by the Crown for the judge to consider.

²¹³ *Ibid* 529

²¹⁴ *Ibid* 530

²¹⁵ (n144-8)

²¹⁶ 'Chapter 2 - The Post-1957 Defence' (n7)

wording in that it was a purely subjective test. It is possible that the 2009 Act has gone too far the other way and reintroduced a problem from the pre-1957 defence.

It has been stressed that the word 'provocation' rather than 'provoked' has to take hold of the defence again,²¹⁷ if this were the case natural, normal conduct and trivial incidents could not be relied upon. 'Provocation' requires not just a *feeling* of being wronged but, also, something which could genuinely be described as grave actually taking place. The word 'provocation', however, is too narrow, it does not include, for example, where D kills a person who is not the provoker. Rather than using the word 'provoked', as the pre-2009 defence did, a phrase such as 'D felt as if he faced provocation' would better suit the defence. If this were the test then a judge could become a better barrier for undeserving cases but the jury would remain as the principal guardians. If that test were applied by a judge then he could state that certain circumstances cannot be deemed to be 'provocation' and the defence should not proceed to a jury.²¹⁸

The problem with the 2009 Act is that in attempting to deal with this issue it has shifted too far and gives the judge free-reign over the whole defence, including on giving a preliminary verdict on whether the trigger is fulfilled and this means he must decide if the emotion could be justified.²¹⁹ In *Dawes* it was expressed that the purpose of the Act was to make it harder for D but that the *only* way that this could be achieved was by handing the judge control over the defence.²²⁰ This is, however, not true; a stricter test ought to be imposed for a case to proceed to a jury but one which retains the jury's say as to whether D met the required standard in the trigger and met the standard of behaviour of an ordinary person.²²¹

²¹⁷ 'Chapter 4 - Adequate Provocation' (n36)

²¹⁸ Also, a set of guidelines could be put into place to assist judgements of this nature, presumptions that the defence should not apply in certain scenarios unless the incident was particularly severe. These points will be discussed further in Part IV.

²¹⁹ *Dawes* [61]: "In our judgment these matters require objective assessment by the judge at the end of the evidence and, if the defence is left, by the jury considering their verdict."

²²⁰ *Ibid* [60-1]

²²¹ This point was key to the discussions of the sufficient evidence test in 'Chapter 4 - Adequate Provocation'. C. Morgan, 'Loss of Self-control: Back to the Good Old Days' (2013) 77 JCL 119, 125: "the focus of the defence should remain with the jury, who will have the power to look at all the evidence and come to a decision which reflects the attitudes of society, with the jurors being its representatives."

When discussing *Clinton* it was stated that the Court of Appeal incorrectly applied the sexual infidelity exclusion, but, also, the trial judge could have allowed the defence to go to the jury. For example, the trial judge stated that, excluding sexual infidelity, the defence should not proceed to a jury even though D had two other reasons to explain why he was provoked.²²² The other two reasons which were given in *Clinton* may not have satisfied a jury but they were strong enough to require a jury to hear the defence. In the partial defence the judge's role ought to be to test if there is strong evidence which suggests that D fulfilled the subjective test and that this stemmed from actual provocation or fear.²²³ This strikes the balance between giving the judge greater powers to exclude cases from the defence which ought to be outside of provocation and maintaining the role of the jury.

Conclusion

Overall, the new loss of control defence is an improvement on the pre-2009 defence. How the 2009 Act relies on triggers which stem from situations where D is fearful and/or faces substantial provocation helps to ensure that the defence only mitigates where there are warranted reasons for D's emotional reaction. The best understanding of the new defence is that it rests on the rationale of a warranted loss of self-control²²⁴ and the requirement of warranted emotions in order for mitigation to be appropriate has been advanced throughout. By the 'provocation' trigger requiring warranted anger it will help to set a higher standard for mitigation but the wording of the triggers and the lack of description, for example, how far characteristics are considered, means that the 2009 Act itself does not give much indication to how successful it will be. Also, the control test was poorly drafted and the fact that sex is a control characteristic seems to go against implementing a gender-neutral defence.

²²² (n144)

²²³ T. Macklem & J. Gardner, 'Provocation and Pluralism' (2001) 64 MLR 6 815, 820: It was suggested that the pre-2009 should only have applied when there was "something intelligible as a provocation". See 'Chapter 4 - Adequate Provocation' (n34).

²²⁴ (n1 & n181)

The new defence differs from what has previously been supported because its subjective element does not merely rely on the existence of an accepted emotion which relates to human frailty but it requires that D's reaction must be in the form of a loss of self-control. The main drawback of the reform is this reliance on a loss of self-control given its flaws. The lack of the suddenness requirement may give a greater emphasis for cases of delay to succeed but there is little difference between this and how the pre-2009 defence ultimately interpreted delay. To have a specific fear trigger ought to be a sign of encouragement but requiring a loss of self-control has the potential to remove its effectiveness. A difficult problem in reforming this area is that cases of anger and fear have the potential to overlap but at the same time the presence of anger is likely undermine fear. How the two emotions interact was not given much explanation and the case of *Dawes* is an indicator that self-defence-type cases have no place in the defence as the subjective element will not be fulfilled.

The sexual infidelity exclusion should not be a part of the defence; it is both too narrow, it does not include cases where V is leaving the relationship, and too broad, it covers all acts of infidelity and any associated acts, such as taunting, which potentially ought to form part of a trigger. The interpretation given to it in *Clinton*, it can be considered in the ordinary person test, follows the intentions of Parliament but undermines the point of the exclusion as it has the potential to be a highly influential factor. Also, the fact that the Court of Appeal wrongly applied the law in the *Clinton* case highlights the complexity of the new defence.

In order to enforce the provisions of the defence there is a reliance on judicial control and it is concerning that the 2009 Act may have reintroduced this problem from the pre-1957 defence. On this issue and on many of the others which have been discussed it is interesting in how it seems that the same mistakes have been made as before and how the elements of the defence have developed to this point. For example, *Dawes* demonstrated that it is likely that there will still be a reliance on the pre-2009 defence, in this case it referred to *Johnson* owing to the lack of guidance for self-inducement cases which are not included in the incitement exclusion, and the similarities between the

interpretations of delay in *Ahluwalia* and *Clinton* have been noted. The 2009 Act is an improvement but it has failed to deal with many issues effectively and has created others because of its poor drafting.

PART IV: PROPOSAL

Chapter 10 looks at two key issues which are central to the reform of this area: shaping the objective and subjective enquiries in order to properly contextualise intimate partner violence and limiting the scope of the defence for those who kill in anger. It is advanced that in order to resolve these issues it must be done proactively and it is advocated that by using guidelines and presumptions, thereby allowing for flexibility, it will help to bring about better outcomes. Also, Chapter 11 sets out an outline for a proposal. In Part IV reference will be made to other jurisdictions. The Australian states, in particular, give a useful comparison because many went through a reform process at around the same time and identified many of the same problems as the pre-2009 defence; also, their responses were not uniformed and various fear-based defences were adopted or self-defence law has been adapted and a discussion of these will help to give insight into the proposal.

CHAPTER 10

CONTEXTUALISING INTIMATE PARTNER VIOLENCE AND CREATING PRESUMPTIONS AGAINST PROVOKED KILLERS

The reform of provocation took place with an emphasis on dealing more appropriately with killings in the "context of domestic violence."¹ The reformers were trying to change the defence on the basis that women struggled with the subjective and temporal elements but when they killed it was often possible to sympathise with their situation and manslaughter rather than murder was the preferable offence. When men killed they tended to fulfil the subjective elements but also the objective elements did not exclude some of the notorious reasons which they had for being provoked. Whereas the paradigm case for the early chance medley defence was the "barroom brawl", thereby covering sudden quarrels in public settings, as the provocation defence expanded it came to deal with killings in a domestic setting:² a woman trying to leave a relationship, a woman who has already left a relationship, a woman admitting to an affair and a woman killing an abusive partner. It is clear that the latter example is very different from

¹ Law Commission (2004) *Partial Defences to Murder* Report No 290, 1 [1.1]

² 'Chapter 1 - The Early Defence' (n16 & n25)

the previous ones and instead of restricting the provocation defence the purpose of the reform was to widen the scope of the partial defence for this scenario. Instead of dealing with this type of case in diminished responsibility there was a desire to create a fear-based partial defence which requires D to meet a common standard and it serves provocation and self-defence to turn the relevant question on to the abuse she faced rather than a mental condition she may have suffered.³

A theme is the issue of male control and men attempting to maintain this when the woman seeks to establish her freedom.⁴ For the partial defence to be acceptable it cannot mitigate owing to D's control over his partner being undermined; in a relationship close bonds are formed and it is natural that emotional scenarios are more likely but when these cases are about mitigating male jealousy or possessiveness such reasons cannot be considered sufficient.⁵

Control is the reason behind male violence but it also has a lot to do with what pushes a woman into killing her abusive partner. A key to reforming partial defences is finding a place for excessive defensive killings, such killings tend to be more worthy of mitigation than provoked aggressive killings.⁶ For example, Baron's objection to provocation was not that it benefited men, this was something to be expected owing to the nature of the defence, but that excessive defensive killings were far more deserving of mitigation yet a partial defence was not designed to serve such cases.⁷ Therefore, a central theme to the

³ M.R. Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 Mich LR 1, 57: "Recognizing the batterer's attempt at domination as the key to battering relationships allows a focus on his motivations rather than the psychology of the victim."

A. Gray, 'Provocation and the Homosexual Advance Defense in Australia and the United States: Law out of Step with Community Values', (2010) 3 Crit 53, 56: "It seems not to matter that the cumulative psychological effect of long-term domestic violence perpetrated against a woman may be far more profound than the single punch or insult at the bar that triggers the violent male response."

⁴ M. Riley, 'Provocation: Getting Away With Murder?' (2008) 1 Queensland Law Student Review 56, 63: "By killing their partner, men are effectively trying to gain control over them. When women kill their partner, it is typically to escape this control, when they have exhausted all other options."

⁵ See the arguments related to the sexual infidelity exclusion at 'Chapter 9 - Coroners and Justice Act 2009' (n109-12).

⁶ 'Chapter 7 - Law Commission' (n106)

⁷ M. Baron, 'Reframing the Issues: Differing Views of Justification and the Feminist Critique of Provocation' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 329, 330

reform of provocation was to create a suitable partial defence for when a woman kills excessively to escape this violence and control. The most desirable approach is to judge all by an ordinary standard but ensure that such a standard acknowledges the social reality for women; when a woman suffers abuse, in whatever form, it will alter that relationship and her response can only be judged when taking into account what she has faced. Therefore, in this Chapter the position is that the defence needs to set out guidelines in order to guarantee that evidence relating to an abusive relationship is properly appreciated so that the standard is more readily applicable. The Chapter will then focus on how to go about restricting the scope of the defence, in particularly for men who kill women, by creating a set of presumptions.

1) Contextualising Evidence

a) battered woman syndrome

Dr Lenore Walker⁸ was a key proponent of battered woman syndrome (BWS) and despite much criticism over her research and findings⁹ BWS has had a significant impact on self-defence and partial defences in many jurisdictions. In the US, Canada and Australia evidence of BWS has been used in order support such defences so that they can thereby address the problematic case of the 'battered woman'.¹⁰ It is suggested that BWS is not suited to such defences and it is better to instead focus on the contextual evidence of the violence.

BWS is made up of two concepts: *the cycle theory* and *learned helplessness*. The cycle theory seeks to explain why defensive action can occur during a period of calm, it supports that D felt she was responding to a threat even in circumstances which can be described as non-confrontational:¹¹ as D goes through the cycle it "instils a constant fear

⁸ L. Walker, *'The Battered Woman'* (1st Ed, Harper Pub, 1979)

⁹ For example, A.S. Burke, 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman' (2002) 81 NCLR 211, 237

¹⁰ How these jurisdictions use BWS evidence will be discussed further (n29-30).

¹¹ For a detailed look of the cycle theory see W. Chan, 'Legal Equality and Domestic Homicides' (1997) 25 International Journal of the Sociology of Law 203, 205.

of what appears to her as imminent harm".¹² It would be incorrect to state that BWS is about supporting an irrational fear, rather it explains why, because she suffers from the syndrome, "her perception of danger extends beyond the battering episodes themselves."¹³ Learned helplessness helps to explain why D did not leave the relationship with her abuser and why she did not appreciate that there were opportunities to leave.¹⁴ For a 'battered woman' the question is often 'why didn't she leave?'¹⁵ and learned helplessness seeks to address this.

BWS fails to give a compelling reason for how such women end up killing their abusers by breaking the 'cycle' and it does not support that an ordinary person in that situation would have acted in that way.¹⁶ Referring to the work of Ewing and other authors, Stark has described this break as a moment of realisation or "a turning point" when D kills out of self-preservation to end her abuse.¹⁷ From the example Stark uses, Nathaline P, it is possible to see that such women realise that there are no viable alternatives and nobody is going to come and protect them.¹⁸ Stark states that without the reference to a BWS-like condition under the traditional self-defence elements it would be viewed as a "a cold

¹² D.L. Faigman & A.J. Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 Ariz LR 67, 73
A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 231: Under BWS D "lives under a constant reign of terror" and through experiencing the cycle she is aware that an attack is "inevitable".

¹³ D.L. Faigman & A.J. Wright, 'The Battered Woman Syndrome in the Age of Science' 72
W. Chan, 'Legal Equality and Domestic Homicides' 205: "a battered woman's perception becomes reality, regardless of whether or not this it is an accurate perception."

¹⁴ *State v Kelly* (1984) 478 A2d 364, 372 (NJ) (Chief Justice Robert Wilentz): "Some women may even perceive the *battering cycle* as normal ... Other women, however, become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation. There is a tendency in battered women to believe in the omnipotence or strength of their battering husbands and thus to feel that any attempt to resist them is hopeless."

¹⁵ M.A. Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1993) 21 Hofstra L R 1192, 1226

In relation to the contextual evidence approach the issue of why a 'battered woman' did not leave will be addressed (n32-43).

¹⁶ A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 245-6: Burke has stated "how women suddenly break from their helplessness" is not really explained, this "shift from passivity to action" could easily be construed as "revenge rather than the need for self-protection."

¹⁷ E. Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 Alb LR 973, 1021-2

¹⁸ *Ibid* 1022: "The other actors in the process - police, hospital staff, the court, even her friends - operated from this same premise, responding only *after* she had been hurt."

The case study of Nathaline P (at 1020-3) details her history of abuse at the hands of her partner.

and calculated decision", it would be a rational decision to kill and they are circumstances without an immediate threat.¹⁹ What the proponents of BWS would argue is that if the killing is viewed through the lens of a BWS sufferer then the threat would seem genuine and a response would be called for.

The reliance on a syndrome to come to this conclusion is neither necessary nor appropriate. Faigman and Wright have stated that there is a "tendency to pathologize battered women" and view them as "victims of an identifiable psychological disability."²⁰ However, as Dutton states, women "do not fit a singular profile - in fact, they vary considerably from each other".²¹ Along these lines, the NGO, Rights of Women have found that BWS is not appropriate for all 'battered women'.²² If defences allow for the medicalised approach and if D is unable to establish that she fits the criteria she may not benefit from this contextual evidence to support her claim.²³ For example, Stark stated that in Nathaline P's case, above, "BWS was contraindicated by a history of aggressive help-seeking",²⁴ because she did not suffer learned helplessness and acted to try to end the violence against her she does not fall into the definition of a BWS sufferer. As the partial defence is about meeting common standards the focus ought to be on the wider contextual evidence relating to the abuse and presenting such evidence in a way which

¹⁹ Ibid 1022

²⁰ D.L. Faigman & A.J. Wright, 'The Battered Woman Syndrome in the Age of Science' 69 A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 243: BWS is about showing that D had "atypical psychology" that impaired her from perceiving threats to her normally. Also, at 303: "Even the very term 'syndrome' implicitly suggests that all battered women suffer from a psychological disability that prevents them from behaving 'normally'."

²¹ M.A. Dutton, 'Understanding Women's Responses to Domestic Violence' 1197 Also, at 1208: "The violence may appear to come 'out of the blue', with no tension-building phase, or there may be no contrition phase following the violence, only the transient absence of violence and abuse."

²² Rights of Women, 'Response to Law Commission Consultation Paper No. 177 - A New Homicide Act for England and Wales?' (2006) 4 (Accessed on 18/07/13 at http://www.rightsofwomen.org.uk/pdfs/consultation/homicide_act.pdf)

Also, at 3: in response to the Law Commission's proposal Rights of Women stated that diminished responsibility needs to be maintained as BWS "has a role to play in some such cases", however, their concern was that women had to rely on BWS as it was "the only means of introducing evidence of ... [an abusive] history at trial."

²³ P.L. Crocker, 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense' (1985) 8 Harv Women's LJ 121, 144: "Unless she fits this rigidly-defined and narrowly-applied definition, she is prevented from benefiting from battered woman syndrome testimony."

²⁴ E. Stark, 'Re-Presenting Woman Battering' 1021

fully supports a claim based on such merits.²⁵ Outside of this, diminished responsibility should be available for those who must rely on a substantial mental condition.

b) adapting the gravity test and understanding fear²⁶

The defence needs to be adapted to cater for fear and fear more generally needs to be interpreted in a more appropriate manner than, for example, it was dealt with in the 2009 Act. Fitz-Gibbon looked at the impact of the 2009 Act and found that without "education" on the emotion of fear and 'battered women' there is a potential that the new law will "continue to provide an inadequate response" in such scenarios.²⁷ How evidence relating to 'battered women' is introduced into the enquiry needs to be addressed and it will be shown how some of the key decisions on BWS can be adapted so that it is possible to tailor the the partial defence in order to acknowledge women's experiences of the violence perpetrated against them.²⁸

Stubbs and Tolmie have discussed how BWS has been adapted in various jurisdictions across the US and Canada into being more about answering the enquiry in self-defence.²⁹ In these jurisdictions BWS is used in an attempt to give a proper context to the killing, as a part of 'social framework evidence'. In the Supreme Court of Canada it was found that the jury must be informed about the following in order for BWS to be applied properly:³⁰

²⁵ A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 266: the issues surrounding 'battered women' who kill "can be explained without resorting to pathology."

²⁶ Many of the authors and arguments below are referring to BWS or 'battered women' in general with regards to providing the basis for self-defence.

²⁷ K. Fitz-Gibbon, 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) 40 Journal of Law and Society 2, 292

²⁸ One of the themes of this section is that the use of such evidence has been stretched in attempts to use it as the basis for self-defence where its proper place will usually be to support a partial defence.

A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 219: It is about excusing "unnecessary killings, simply because they were committed by sympathetic actors."

²⁹ J. Stubbs & J. Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 Melbourne University Law Review 709, 711-2

³⁰ *Malott* [1998] 1 SCR 123, 133-4

M.A. Dutton, 'Understanding Women's Responses to Domestic Violence' 1202: Dutton has stated that evidence for "the overall social context" can be made up of four components. Dutton finds that evidence of the "cumulative history of violence and abuse", the "psychological reactions" of the 'battered woman', the "strategies used (or not

1. Why an abused woman might remain in an abusive relationship.
2. The nature and extent of the violence that may exist in a battering relationship.
3. The accused's ability to perceive danger from her abuser.
4. Whether the accused believed on reasonable grounds that she could not otherwise preserve herself from death or grievous bodily harm.

Without reference to a syndrome, these are factors which a jury should be guided on. The second and third factors are highly relevant in an enquiry into whether D had a genuine fear of violence, D's past experiences of violence will shape her future expectations and how she responds. As the history of the provocation defence is evidence of, from the criticism of *Bedder*,³¹ effective objective standards require the jury to be put into the position of D and the above factors help to focus the evidence of past abuse to assist understanding of D's actual emotion at the time. In the following subsections the four factors which were outlined in *Malott* will be explored, however, the final factor will instead deal with 'battered women' who kill excessively.

i) "why an abused woman might remain in an abusive relationship"

Such evidence would show that 'battered women' "lack ... viable escape options".³² It is evident that women who have suffered abuse could "justifiably fear that leaving would be even more dangerous"³³ because the violence against her could escalate.³⁴ This violence is often called 'separation assault' and this "occurs at or after the moment she

used)" and the "contextual factors" will all "contribute ... significantly to the clarity" of a 'battered woman's' experience and help to show how these factors are relevant to the defences sought to be relied upon.

³¹ *Bedder v DPP* (1954) 38 Cr App R 133. See 'Chapter 1 - The Early Defence' (n132-40).

³² A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 268

M.A. Dutton, 'Understanding Women's Responses to Domestic Violence' 1226: "Why didn't she leave? ... [T]he question assumes not only that there are viable options for alternative behavior, but that she should have employed them, and that doing so would have lead [*sic*] to her safety."

³³ A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 268

³⁴ *State v Norman* (1989) 324 NC 253, 378 SE 2d 8: this was a high profile US case involving a 'battered woman' who attempted to leave but V brought her back and the abuse got worse; V threatened to kill her and she shot him whilst he was asleep. Self-defence failed as the harm was not deemed to be imminent.

decides on a separation or begins to prepare for one."³⁵ Mahoney states that "these attacks are aimed at preventing or punishing the woman's autonomy"³⁶ and, likewise, Stark finds that through the man seeking to maintain control over the relationship "the extreme dangers of separation" are displayed.³⁷

The 2010/11 British Crime Survey supports this factor.³⁸ 23% of victims³⁹ shared accommodation with their abusive partner and 42% of these left the accommodation because of this for some period.⁴⁰ Interestingly, 23% of partner abuse victims reported it to the police⁴¹ and for those who did 55% felt safer but 14% felt less safe.⁴² These statistics help to support that it is understandable that women find it difficult to leave, there are a lack of viable options and women fear an escalation of violence. There are a number of varied other reasons to explain why 'battered woman' do not leave,⁴³ but the separation assault is a key one to bring out because it directly relates to a fear of future violence.

³⁵ M.R. Mahoney, 'Legal Images of Battered Women' 65

³⁶ Ibid

³⁷ E. Stark, 'Re-Presenting Woman Battering' 981

³⁸ Home Office (2012) 'Homicides, Firearm Offences and Intimate Violence 2010/11: Supplementary Volume 2 to Crime in England and Wales 2010/11' 20: "Female victims were more likely than male victims to be killed by a partner or ex-partner (47% and 5% respectively)".

³⁹ Ibid 83: 6% (900 000) of women and 4% (600 000) of men.

⁴⁰ Ibid 96: "Reasons mentioned for not leaving the shared accommodation were presence of children (38%), love or feelings for partner (34%), and having nowhere to go (21%)."

⁴¹ Ibid 97: "For those that did not report the abuse to the police, the most common reasons given were the abuse was too trivial or not worth reporting (42%), it was a private, family matter and not the business of the police (34%) and the victim did not think the police could help (15%)."

⁴² Ibid 98

⁴³ M.A. Dutton, 'Understanding Women's Responses to Domestic Violence' 1232: "(1) fear of retaliation; (2) the economic (and other tangible) resources available to her; (3) her concern for her children; (4) her emotional attachment to her partner; (5) her personal emotional strengths, such as hope or optimism; (6) her race, ethnicity, and culture; (7) her emotional, mental, and physical vulnerabilities; and (8) her perception of the availability of social support."

A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 271-2: "It may be economically infeasible for the woman to leave because she has no money, job, child care, or housing ... Battered women often suffer marked feelings of shame for the abuse they have endured, rendering them reluctant to seek help. The isolation from family and friends that is common during the course of an abusive relationship further restricts potential avenues of support." Also, at 272-3: Burke cites religious reasons, a desire not end the marriage, V threatening to commit suicide, D's love for V and D's promises of change as other reasons.

ii) *"the nature and extent of the violence that may exist in a battering relationship"*

There needs to be an understanding of the sort of behaviour which can be the basis of an abusive relationship, but, also, that the circumstances may be varied. Indeed, one of the problems with BWS is that it sets out a template for all 'battered women'.⁴⁴

Stark has stated that *"physical violence may not be the most significant factor about most battering relationships"* and that an act of abuse may be just one instance of an *"ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life."*⁴⁵ Abuse may take various forms⁴⁶ and Munjal has stated that it is used for the purpose of preserving power and control:⁴⁷ *"Men resort to violence when their control is or appears to be under threat by their partner."*⁴⁸

The Rights of Women have argued in favour of a "more expansive definition of violence", by doing so "it would be more appropriate at reflecting the reality of violence" and would help to provide "clarity ... where there is a history of violence."⁴⁹ Such an insight into the types of conduct which may form part of a pattern of domestic abuse would inform decision-making when it comes to the elements of the defence. The Australian case *Lock*⁵⁰ is important because of how such evidence was used in this manner, to support self-defence instead of relying on BWS. In *Lock* D stabbed her husband and claimed

⁴⁴ (n20-5)

⁴⁵ E. Stark, 'Re-Presenting Woman Battering' 987

R. Busch & N. Robertson, "'What's Love got to do with it?' An Analysis of an Intervention Approach to Domestic Violence' (1993) 1 Waikato LR 109, 117: "[A]n act of physical violence is part of a continuum of power and control, rather than an isolated, uncontrollable eruption."

⁴⁶ M.A. Dutton, 'Understanding Women's Responses to Domestic Violence' 1206: "coercion and threats; intimidation; emotional abuse; isolation; minimization, denial, and blaming; use of the children to control the victim; use of 'male privilege'; and economic/resource abuse."

R. Busch & N. Robertson, "'What's Love got to do with it?'" 116: "Other tactics of power and control utilised by abusers include emotional and verbal abuse; intimidation; isolation; treating the victim as subservient while the abuser reserves to himself the right to make all major decisions in the relationship; minimising and trivialising the violence; blaming the victim for such violence."

⁴⁷ Control was discussed, see (n3-5).

⁴⁸ D. Munjal, 'Intimate Partner Violence - Is There a Solution?' (2012) 19 Duke JGL&P 347, 351

⁴⁹ Rights of Women, 'Response to Law Commission Consultation Paper No. 177 - A New Homicide Act for England and Wales?' (2006) 4-5 (Accessed on 18/07/13 at http://www.rightsofwomen.org.uk/pdfs/consultation/homicide_act.pdf)

In the approach from Victoria, Australia, which is advocated, a template for the various forms of abuse is set out (n75).

⁵⁰ (1997) 91 A Crim R 356

because of past experience she knew that he would use violence against her. To support her claim she used police and medical records as evidence. *Lock* shows how contextual evidence relating to the nature and extent of the violence can be used effectively.⁵¹

iii) D's "ability to perceive danger from her abuser"

A seemingly minor incident could be interpreted by D as an indicator of future abuse and cause a genuine fear even when a threat of bodily harm is not immediately present at the time.⁵² An example of this can be found in the pre-2009 defence:⁵³ in *Humphreys*⁵⁴ it was appreciated that an innocuous act could be considered provocative. In the pre-2009 defence strides were made to make the ordinary person test more inclusive of D's past experiences. The development of that test in *Camplin*⁵⁵ and *Morhall*⁵⁶ was on the same basis as has been suggested in this Chapter and there is no reason why the same principles cannot be extended even further when dealing with the emotion of fear in the objective and subjective components.

A reason why the pre-2009 defence struggled and the 2009 Act will struggle to deal with fear correctly is that they require a loss of self-control.⁵⁷ If the partial defence was merely about showing that D was genuinely fearful then the defence would be more effective and able to deal with the 'battered woman' scenario based on the fact that D had a belief that she was subjected to a threat but it was ultimately an excessive reaction. Evidence of past abuse and this influencing how D perceived events will not add anything to the enquiry over whether D did in fact lose her self-control when she killed. Therefore,

⁵¹ J. Stubbs & J. Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 Melbourne University Law Review 709, 739: Stubbs and Tolmie refer to two other unreported Australian cases, *Stephenson* and *Stjernqvist*, where self-defence was also relied on in such a manner without the use of BWS. For example, in *Stjernqvist* D shot V in the back as he walked out of the room, but the entire history of violence between was used as context to show the threat that she faced.

⁵² P.L. Crocker, 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense' 127: "Battered women in particular may perceive danger and imminence differently from men ... A subtle gesture or a new method of abuse, insignificant to another person, may create a reasonable fear in a battered woman."

⁵³ 'Chapter 5 - Objective Element' (n39 & n48)

⁵⁴ (1995) 145 NLJ 1032

⁵⁵ [1978] AC 705. See 'Chapter 2 - The Post-1957 Defence' (n26-30).

⁵⁶ [1996] AC 90

⁵⁷ 'Chapter 6 - Subjective Element' (n59-70)

extending the use of contextual evidence would not be likely to improve the effectiveness of the defence without the removal of the loss of self-control requirement.⁵⁸

iv) when 'battered women' kill excessively

Fitz-Gibbon⁵⁹ finds the idea that a partial defence should exist as "a 'safety net' for women" loses credibility if the position is taken that a full defence is appropriate.⁶⁰ The greater danger, though, would be that there is no defence at all or provocation has to be relied upon in an undesirable fashion. This Chapter has been about constructing a suitable partial defence for excessive fear-based killings and a key area is to define the necessary temporal standards which characterise an excessive response.

Burke states that her aim is to "present to the jury an accurate and complete depiction" of what happened and "not a change in formal legal standards."⁶¹ She finds that self-defence should be about "a reasonable fear that it is inevitable, but not necessarily imminent."⁶² It is by making the temporal issues of self-defence more flexible that is the basis for her proposal. Along similar lines, Kaufman finds that "imminence and necessity sometimes diverge", meaning that even though the harm was not imminent there may be a necessity to act.⁶³ Stubbs and Tomlie have cited examples of Australian jurisdictions where necessity is not equated to imminence.⁶⁴ For example, in the case of *Secretary* from the Northern Territory it was stated that the "common law has moved

⁵⁸ At 'Chapter 9 - Coroners and Justice Act 2009' (n182-5) the loss of self-control requirement was discussed and it was concluded that there was no reason to believe that it would be interpreted differently.

⁵⁹ K. Fitz-Gibbon, 'Provocation in New South Wales: The need for abolition' (2012) 45 Australian & New Zealand Journal of Criminology 194, 207

⁶⁰ R. Bradfield, 'Domestic Homicide and the Defence of Provocation' 26: "The danger in recognising fear as an emotion capable of founding the defence of provocation, is that women (and the courts) may rely on provocation rather than give consideration to the potential application of the defence of self-defence ... The tendency automatically to classify women who kill after prolonged domestic abuse as provoked killers has meant that the fact that these women were predominantly acting in self-preservation has been obscured."

⁶¹ A.S. Burke, 'Rational Actors, Self-Defense, and Duress' 217

Also, at 219: For her it is about "realigning, rather than expanding" self-defence.

⁶² Ibid 274

Also, at 297: a consequence of this approach is that it would "permit fewer non-confrontational uses of force than the battered woman syndrome theory would".

⁶³ W.R.P. Kaufman, 'Self-defence, Imminence, and the Battered Woman' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 407, 408

⁶⁴ J. Stubbs & J. Tolmie, 'Falling Short of the Challenge? 733-6

away from the requirement of immediacy, favouring a more flexible approach to the law relating to ... self-defence."⁶⁵ In *Secretary* D shot her partner whilst he was asleep. There was a history of violence and V threatened D before he went to sleep. The Northern Territory Code⁶⁶ required a threat and it was adjudged that a sleeping aggressor could be viewed as a continuing threat.⁶⁷ Angel J stated that "the deceased's ability to carry out the threat continued",⁶⁸ pre-emptive strikes were allowed⁶⁹ and owing to "the nature of the threat and the relationship" self-defence could succeed.⁷⁰

The problem is that these arguments strain self-defence beyond recognition and are not consistent with *defensive* justificatory force. In Chapter 3 justifications were discussed⁷¹ and they are to do with "*necessary and proportionate response[s]*" when there is a threat of substantial harm.⁷² There is a distinction between self-defence and self-preservation, a reasoned and/or emotional-based response which may be closer to what an excessive killing by a 'battered woman' is.⁷³ Finding that killing another is justifiable when there are alternative options and the danger is not present at that moment is not a view which can be supported. However, this reasoning, looking for an inevitable threat, could be applied to a partial defence and this is the correct category for such circumstances. In this vein, Ramsey has stated that by arguing in favour of self-defence it may "distort" the temporal

⁶⁵ *Secretary* (1996) 5 NTLR 96 [16]

⁶⁶ *Criminal Code 1983* (NT) s187(b).

⁶⁷ J. Stubbs & J. Tolmie, 'Falling Short of the Challenge?' 735: The judges viewed the words as an "assault against which the accused was defending herself ... rather than the general threat he represented in the relationship with her."

⁶⁸ *Secretary* (1996) 5 NTLR 96 [6]

⁶⁹ *Ibid* [8]

⁷⁰ *Ibid* [9]

H. Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 Australian & New Zealand Journal of Criminology 367, 377: "in *R v Falls* [(2010) (unreported, QSC, 26/5/10)] Applegarth J stressed that the threat could continue regardless of the fact that the deceased was temporarily unable to carry out the threat (i.e. asleep)."

⁷¹ 'Chapter 3 - Rationale' (n13-45)

⁷² P. Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997) 98

G. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 775: Necessity requires that the conduct helps to "avoid an imminent and impending danger of harm" and proportionality requires that there must not be an "alternative reasonable means for avoiding the threatened harm".

⁷³ K.K. Ferzan, 'The Values and Cost of Imminence' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 419, 419

requirements but that this "surely has no place when the outcome sought is only mitigation, not exoneration."⁷⁴

General expert evidence

The use of general expert evidence regarding domestic violence and victims of abuse killing is only possible if such evidence is admissible.⁷⁵ Apart from the evidence being relevant, the key consideration, expressed in *Turner*, for expert evidence is that it "is likely to be outside the experience and knowledge of a judge and jury."⁷⁶ This principle has often led to "psychological and psychiatric evidence" being found to be inadmissible, except where insanity and diminished responsibility are being considered as these issues naturally rely on such evidence.⁷⁷ The jury need the expert evidence on certain matters in order aid their decision-making but an essential point is that it should ultimately be their decision.⁷⁸

However, the restriction on admissibility of evidence in the way which *Turner* outlines has been criticised and Roberts and Zuckerman have stated that the principle found in *Turner* is not really the one which is being applied, admissibility of expert evidence is governed by its "helpfulness",⁷⁹ thereby potentially expanding the scope of admissible evidence. Firstly, expert evidence has been used in areas where it has been helpful to

⁷⁴ C.B. Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100 Journal of Criminal Law and Criminology 33, 102

⁷⁵ Examples of US jurisdictions which allow such evidence include California (s1107 - Evidence Code: "...expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects...") and Oklahoma (Code of Criminal Procedure: Rule 22-40.7 'Expert Testimony – admissibility': "...testimony of an expert witness concerning the effects of such domestic abuse on the beliefs, behaviour and perception of the person being abused shall be admissible as evidence.").

⁷⁶ *R v Turner* [1975] QB 834, 841 (Lawton LJ): "Our law excludes evidence of many matters which in life outside the Courts sensible people take into consideration when making decisions ... An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge and jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

⁷⁷ A.M. Colman & R.D. Mackay 'Equivocal rulings on expert psychological and psychiatric evidence: turning a muddle into a nonsense' (1996) Crim LR 88, 88: "The *Turner* rule has been used to exclude psychological and psychiatric evidence on issues of, *inter alia*, duress, provocation, and *mens rea*, but the courts have generally adopted a more indulgent attitude towards evidence regarding diminished responsibility".

⁷⁸ *Davie v Edinburgh Magistrates* [1953] SC 34, 40: by hearing expert opinion it can "enable the judge and jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

⁷⁹ P. Roberts & A. Zuckerman, *Criminal Evidence* (2nd ed, OUP, 2010) 286: the author's title of the relevant section is "Helpfulness - the one and only authentic criterion of admissibility".

At 287: common knowledge and other principles are "never more than rough rules of thumb to guide the application of the helpfulness standard".

the jury but within common experience and knowledge. In *Stockwell*⁸⁰ expert evidence was given on the matter of looking at photographs and in *DPP v A & BC Chewing Gum Ltd* expert evidence was given on child psychology.⁸¹ Secondly, on the face of it the *Turner* principle seems to apply in the partial defence as the jury are required to judge D's circumstances and behaviour by normal and ordinary standards, so expert evidence ought not to apply where it is within *common experience and knowledge*. However, expecting a jury to have suitable knowledge on some matters of "normal psychology", such as victim's responses to rape and domestic violence, may not be reasonable⁸² and the consequences of this, as discussed below, may be at the heart of why such areas are so problematic.

The helpfulness of such evidence will be discussed below, with reference to research regarding rape cases, but, firstly, the policy concerns, which are at the centre of restricting expert evidence, will be outlined. Protecting the role of the jury in the face of expert evidence is a concern. The principle from *Turner* is that when the field is within common experience and knowledge it is found that the matter is best left in the hands of the jury:

"Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life."⁸³

Limiting the role of expert evidence is a way of reducing the risk of "juror deference" on all sorts of matters which should really be under their ambit, a jury could simply go along with the expert and their function would be undermined.⁸⁴ This is why even where expert

⁸⁰ (1993) 97 Cr App R 260. This case was reaffirmed in *R v Atkins* [2009] EWCA Crim 1876

⁸¹ [1968] 1 QB 159, 165: "when dealing...with children from five upwards, any jury and any justices need all the help they can get."

⁸² P. Roberts & A. Zuckerman, *Criminal Evidence* 287: "*Turner's* critics rightly observe that expert testimony might still be helpful to jurors even if it concerns matters broadly within the sphere of general knowledge or questions of normal psychology. Jurors are unlikely to share an expert's detailed, systematic knowledge of specific aspects of normal psychological processes, for example."

A.M. Coleman & R.D. Mackay, 'Legal issues surrounding the admissibility of expert psychological and psychiatric testimony' in N.K. Clark and G.M. Stephenson (eds), *Children, Evidence and Procedure* (Leicester: British Psychological Society, Issues in Criminological and Legal Psychology No 20) 49: "Our view is that expert psychological evidence should be admitted whenever it is both relevant and potentially helpful to the jury in explaining aspects of human behaviour that are not easily understood with common sense alone."

⁸³ *Turner* 841 (Lawton LJ)

⁸⁴ P. Roberts & A. Zuckerman, *Criminal Evidence* 473-4

evidence is given the jury have been reminded to approach it with "caution"⁸⁵ and make their own determinations.⁸⁶ Therefore, this concern can be overcome by reassuring the jury it is their decision after evaluating the expert evidence themselves and the existing case law cited supports this.

A second policy concern is to do with psychological and psychiatric evidence being used to undermine the function of objective tests, akin to expanding the application of control characteristics in the ordinary person test,⁸⁷ and such evidence being a burden on the system.⁸⁸ The *Martin* case, where D alleged that he killed burglars in self-defence, helps to show that these concerns are not present in the partial defence. In *Martin*, to support that D's fear and conduct were reasonable in self-defence, arguments in favour for the admissibility of evidence that D suffered from "a long-standing paranoid personality disorder" were heard.⁸⁹ It was stated that for self-defence the "evidence could be said to fall within the admissibility test set out by Lawton LJ in *Turner*" as it was "scientific information" which was "likely to be outside that range" of a jury.⁹⁰ However, the Court of Appeal went about "distinguishing self-defence from provocation" and deemed such evidence inadmissible for "policy reasons" in self-defence but acceptable in provocation; such a divergence in approach was justified by considering the applicability of self-defence to "all assaults" and the limited scope of the provocation defence.⁹¹

A limited expansion of expert evidence in the partial defence is outside the scope of the policy concerns raised in *Martin* and as the evidence would relate to general contextual

⁸⁵ *R v Emery* [1993] 14 Cr App R 394, 399: "...consider the experts' evidence. Do not accept it even then without question because it is for you and not any expert to decide the effect that ... [the] violence would have upon her. They are there to help you make the decision ... It is for you to decide whether their evidence helps you to decide the matters that are for you. So it is for you to accept or reject the experts' evidence..."

⁸⁶ *R v Stockwell* (1993) 97 Cr App R 260, 265: "It is important, however, that the judge should make clear to the jury that they are not bound by the expert's opinion, and the issue is for them to decide."

⁸⁷ 'Chapter 5 - Objective Element' (n64-70)

⁸⁸ G. Douglas, 'Self-defence and Expert Evidence in the Light of *R v Martin*' (2002) 166 JPN 368: "to allow expert evidence will increase both the time and cost of the trial and also, on occasions, the difficulty for the jury."

⁸⁹ *R v Martin (Anthony)* [2002] 1 Cr App R 27, 338

⁹⁰ *Ibid* 342

However, for diminished responsibility it was stated (at 343): "The position as to the fresh evidence relating to diminished responsibility is different. Here the evidence is admissible and relevant. The jury did not have the opportunity of considering this issue."

⁹¹ *Ibid* 341: "Is the same approach appropriate in the case of self-defence? There are policy reasons for distinguishing provocation from self-defence. Provocation only applies to murder, but self-defence applies to all assaults. In addition, provocation does not provide a complete defence; it only reduces the offence from murder to manslaughter. There is also the undoubted fact that self-defence is raised in a great many cases resulting from minor assaults and it would be wholly disproportionate to encourage medical disputes in cases of that sort."

information regarding domestic violence and abuse, rather than psychiatric evidence, it would be consistent with a moderate excuse theory and the reasoning in *Camplin*, to aid the understanding of the situation which D faced.⁹² The following categories of expert evidence which are proposed are in line with this:

- a) the nature and extent of the violence,
- b) wider contextual evidence (for example, evidence which relates to why D remained in the relationship and the strategies D used),
- c) how the threat of violence would have been perceived.

The first two categories are similar to the response characteristics which have been used in the ordinary person test since *Camplin*, applying such information to the relevant tests in the partial defence would support that a threat was present and that D was fearful of it. The third category is, again, supporting that D experienced fear but is key to the ordinary person test, it would demonstrate that a link between the fear and the killing was present and therefore how D behaved was consistent with the excessive but understandable reactions which are mitigated in the defence.

If the policy concerns identified above are not applicable for the use of expert evidence which is advanced then in order to justify its use the helpfulness of the evidence needs to be highlighted. Simply put, the perceptions and expectations placed on victims of abuse are incorrect and this leads to a difficulty in satisfying the standards which the partial defence imposes; the reactions are only ordinary in the light of what D was subjected to and with a greater understanding of such situations, so the jury need this evidence to truly understand the circumstances so they can properly apply the tests in the partial defence.

This problem also exists in rape cases owing to the similarity of the scenarios. The justification in a proposal advancing expert evidence in rape cases has been put forward in a consultation report by the Office for Criminal Justice Reform in 2006:⁹³

⁹² 'Chapter 5 - Objective Element' (n92-100)

⁹³ Office for Criminal Justice Reform, 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (2006) 17: even though the proposal limits expert evidence to rape case it also acknowledges that "general expert evidence would be likely to be beneficial in cases of domestic violence too."

"The aim of 'general expert evidence' is to dispel myths and stereotypes concerning how a victim should behave, and help a judge and jury understand the normal and varied reactions of such victims."⁹⁴

The report put forward a non-exhaustive list of relevant topics with which the evidence could relate.⁹⁵ Ellison and Munro have done research looking into how juries came to decisions in mock trials.⁹⁶ In their deliberations jurors often based their judgements on misguided views on rape and ignored evidence to the contrary, also, there was an element of victim blaming.⁹⁷ Ellison and Munro would "insist" on "educating jurors on the empirical realities" of such cases but this would be "insufficient" if the "expectations" and "assumption[s]" were not challenged.⁹⁸ The 2006 report discusses whether such evidence is within common knowledge and, despite favouring its use, acknowledges it could be argued either way.⁹⁹

The conclusion from this is that it is necessary to supply the jury with more information on the nature of domestic violence and the consequences of abuse as it would benefit the jury's decision-making process, particularly given that this is a key factor in why this area has been problematic and the use of such evidence would be limited. While it is doubtful that these areas can realistically be described as being within the common knowledge of a jury, with the misconceptions surrounding these areas, it is likely that such a move would require a statutory intervention to implement such changes. Without more information being supplied to the jury it is difficult to envisage how the reforms to the partial defence could lead to it becoming more open to women who kill excessively

⁹⁴ Ibid 16

Also, at 17: "At the moment, the only evidence as to what allegedly occurred is being considered against a background of misperceptions and myths as to how 'proper' victims should behave which is going unchallenged."

⁹⁵ Ibid 20: "The anticipated issues that the expert may give general evidence upon include: The common misconception that if the rape occurred against a domestic abusive background, then the victim would leave; The common misconception that a victim would willingly come to court to give evidence against his/her abuser; Why victims delay reporting; Why victims blame themselves; Why victims minimize the events and their injuries; Why victims have incomplete, discrepant or inconsistent memories of the incident; Why victims do not always physically resist or escape."

⁹⁶ L. Ellison & V.E. Munro, 'Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations' (2013) 4 International Journal of Evidence and Proof 17

In the consultation report conducted by the Office for Criminal Justice Reform, 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (2006), Annex C, at 40, contains a list on the 'Research on Myths and Misconceptions about Sexual Assault'.

⁹⁷ Ibid 17

⁹⁸ Ibid

⁹⁹ Office for Criminal Justice Reform, 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (2006) 18-9

in fear because it requires a true understanding for the standards, subjective and objective, to become accessible for those relying on the defence.¹⁰⁰

Victoria, Australia

What has been advanced is that if the proper context is given to the history of abuse which D suffered not only will it make her belief of fear more believable to a jury but it will also shape the objective element in favour of the 'battered woman' as her experiences will be considered. Below are the key provisions from Victoria's offence of defensive homicide, which carries a discretionary sentence, set out in a condensed form.¹⁰¹ It lays down a non-exhaustive list of the factors which may be evidence in such cases:

"Without limiting the evidence that may be adduced", evidence which may be helpful includes evidence of (a) "the history of the relationship", (b) "the cumulative effect, including psychological effect", (c) "social, cultural or economic factors" and (d) "the general nature and dynamics of relationships affected ... including the possible consequences of separation from the abuser".

Violence is also defined and may include "(a) physical abuse", "(b) sexual abuse" and "(c) psychological abuse". More specifically, reference is made to certain forms of violence: "(i) intimidation", "(ii) harassment", "(iii) damage to property", "(iv) threats of physical abuse, sexual abuse or psychological abuse" and (v) subjecting children in some way to the abuse.

In order to not limit the definition of violence it is stated that "(a) a single act may amount to abuse" or "(b) a number of acts that form part of a pattern of behaviour may amount to abuse ... even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial."

¹⁰⁰ K. Fitz-Gibbon, 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) 40 Journal of Law and Society 2, 292: without "education" on the emotion of fear and 'battered women' there is a potential that the 2009 Act will "continue to provide an inadequate response" in such scenarios.

¹⁰¹ Crimes Act 1958 - s9AH (Victoria, Australia).

The provisions make constant references, which have been removed, to violence done by and to family members as s1 of this offence limits its application to "defensive homicide or manslaughter, in circumstances where family violence is alleged".

Victoria have appreciated the issues which have been discussed and through the provisions have set clear guidance for all concerned about the nature of the offence and what can be used to support it. The 2009 Act does not provide detail for how the emotion of fear or how domestic violence is to be treated and without the sort of structure which has been argued in favour of it could be detrimental to the success of the reform. Focusing the questions and guiding the jury on how to interpret the evidence provided will help to make the partial defence more effective; identifying the various types of abuse, how each type of abuse helps to make up the overall abuse and how this creates a fear of future violence for the 'battered woman' needs to be reflected in the defence if the emotion of fear is to be properly appreciated.¹⁰²

2) Creating Presumptions

The reform of provocation was also influenced by the desire to restrict the defence through setting tougher standards. By requiring warranted emotion it ensures a higher standard of comparison as it is determined by the values of society.¹⁰³ Aside from altering the rationale, there are various ways of dealing with the most problematic cases; by looking at the definition of provocation and the role of exclusions and presumptions it is possible to give more structure to the sufficient evidence test and the gravity test.

a) redefining provocation

The requirement for a provoking stimulus is a part of the sufficient evidence test. The post-1957 defence did not set a strict enough barrier as all that was required was for D to feel provoked and this was a purely subjective question.¹⁰⁴ The 2009 Act is similar to the pre-1957 case of *Holmes*¹⁰⁵ in that the trial judge needs to inspect all the aspects of the defence and be satisfied before the jury can hear the defence.¹⁰⁶ It has been argued

¹⁰² N. Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77(5) JCL 433, 454: "the fact remains that in order to understand the 'circumstances' of the 'abused woman', contextual information must be adduced and the introduction of a social framework model, with appropriate limitations, would assist in ensuring that such evidence is made available under the same conditions in each case."

¹⁰³ 'Chapter 3 - Rationale' (n121-4)

¹⁰⁴ 'Chapter 2 - The Post-1957 Defence' (n12-20)

¹⁰⁵ *Holmes v DPP* [1946] AC 588. See 'Chapter 1 - The Early Defence' (n87-9).

¹⁰⁶ 'Chapter 9 - Coroners and Justice Act 2009' (n226-30)

that this is the incorrect approach,¹⁰⁷ the jury should unequivocally be the primary guardians as they are best placed to judge the justifiable emotions of an ordinary person and it is not desirable to give a judge too much power, this being a major influence of the Homicide Act 1957.¹⁰⁸

Neither of these approaches, outlined above, for the test of sufficient evidence set the correct balance. When discussing the 2009 Act it was advanced that the judge's role ought to be to test if there is strong evidence which suggests that D fulfilled the subjective test and that this stemmed from *provocation*. Testing whether D faced provocation is really about avoiding the cases where D relied on "blameless or trivial" conduct.¹⁰⁹ It is important to note that the test for sufficient evidence should not be about attempting to rule out every case that in all probability will not succeed, it is about the defence not being used in circumstances which are inappropriate. The role of the judge ought to be to inspect the case and decide if there is something which an ordinary person could describe as provocation which explains D's emotional killing.

Altering the sufficient evidence test would help to create the first substantial hurdle for men who kill women owing to sexual jealousy or possessiveness. Bradfield has stated that many of these instances are "just the confirmation of what has already been strongly suspected, or hurt and brooding emotions following rejection."¹¹⁰ Good examples of this sort of case came up in *Clinton*¹¹¹ as *Clinton*¹¹² and *Parker*¹¹³ both dealt with a D who killed his partner post-separation.¹¹⁴ Mahoney has stated that in such cases the true nature of the killings "may remain disguised" if it is indeed "an attack on

¹⁰⁷ Ibid (n218-25)

¹⁰⁸ 'Chapter 2 - The Post-1957 Defence' (n7)

¹⁰⁹ Law Commission (2004) Partial Defences to Murder Report No 290, 46 [3.65]

¹¹⁰ R. Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 U Tas L Rev 5, 24

W. Gorman, 'Provocation: The Jealous Husband Defence' (1999) 42 Crim LQ 478, 495: "There is nothing wrong with putting the act or insult in context ... The approach [could potentially allow] a jealous husband to brood over his spouse's conduct and then to use one act by her, particularly if she finally leaves him, as an excuse to kill her. This is not provocation."

¹¹¹ *R v Clinton* [2012] 3 WLR 515

¹¹² 'Chapter 9 - Coroners and Justice Act 2009' (n143-7)

¹¹³ Ibid (n124-5)

¹¹⁴ Post-separation assaults were discussed previously in relation to women's fear of violence (n33-37).

separation, rather than on the woman's sexual provocation".¹¹⁵ A judge would have to be convinced that this is a case of provocation and not revenge being masked by an argument of provocation nor merely natural behaviour on the part of his partner. In the Nova Scotia Court of Appeal, Canada, it was stated that it would set a "dangerous precedent" to portray this scenario as provocation.¹¹⁶ This is an entirely appropriate position to take and one which the drafters of the 2009 Act seemed to share,¹¹⁷ however, how they dealt with the issue was not only confusing but the wording of the sexual infidelity exclusion means that it will be ineffective for the cases where the exclusion is most needed.¹¹⁸

The first barrier in the defence is altering the rule of sufficient evidence to remove scenarios not involving provocation, cases of revenge and cases involving natural, trivial or blameless behaviour. It also means that the emphasis is placed on the jury to determine the next step, the justifiable emotion element, this being the central part of the rationale.

b) exclusions

It has been stressed that exclusions should only operate in the provocation defence if the circumstances in which they apply indisputably call for an exclusion,¹¹⁹ meaning all the cases which fall under its ambit are pre-judged as being insufficient. Where there is any legitimate chance for a case to succeed then an exclusion should not exist as it may cause hardship and as here, where it is the difference between murder and manslaughter, the consequences would be significant.

¹¹⁵ M.R. Mahoney, 'Legal Images of Battered Women' 79

If, as in *Clinton*, D claims that he was provoked by other factors then these instead may be deemed sufficient for the defence to proceed.

¹¹⁶ *R v Young* (1993) 78 CCC (3d) 538, 542

¹¹⁷ 'Chapter 9 - Coroners and Justice Act 2009' (n110)

¹¹⁸ *Ibid* (n122-5)

¹¹⁹ 'Chapter 3 - Rationale' (n126-8)

Even though sexual infidelity still has the potential to be a significant factor in the new defence where there are multiple reasons for the trigger¹²⁰ it still must be questioned whether sexual infidelity is an appropriate set of circumstances to exclude.¹²¹ Firstly, it would only take a very extreme case of taunting over sexual infidelity to highlight that there are such cases where mitigation should run. Secondly, if the drafters were seeking to create an exclusion then one which is more focused on the problematic cases would serve the reform better. The problematic cases involve sexual jealousy and possessiveness, this includes, for instance, where a woman seeks to end a relationship, or already has, and the man kills her because of these reasons. An exclusion in these circumstances, though, would also be incorrect as there may be a range of factors which lead to the end of a relationship and something which could be categorised as provocation could arise.

The only set of circumstances where an exclusion ought to exist involve certain cases of self-induced provocation and honour killings. The Law Commission distinguished between narrow and broad self-induced provocation and it is the narrow category where the defence should not apply.¹²² In the narrow category D plans to use V's anger, which he incites, in order to rely on a defence. Honour killings involve D killing V because V broke some sort of code of conduct within their society and D kills to "uphold the honour of the family".¹²³ As these circumstances have such a purpose behind them they ought to be barred.¹²⁴ In comparison to sexual infidelity these two examples, the self-induced provocation exclusion already being in place in the 2009 Act, are much more deserving of an exclusion. It is appropriate for the judge to apply the exclusion before the case reaches the jury as the warranted emotion element could not be satisfied.

These two exclusions are to do with the objective gravity assessment but a revenge exclusion should also be in place to rule out where the subjective element could not be satisfied.

¹²⁰ 'Chapter 9 - Coroners and Justice Act 2009' (n143-7)

¹²¹ *Ibid* (n111-2)

¹²² 'Chapter 7 - Law Commission' (n127-31)

¹²³ Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304, 82 [5.25]

¹²⁴ See 'Chapter 11 - Proposal' (n11) for the definition of an honour killing.

c) presumptions

It has been suggested that in order to make the provocation defence tougher a warranted emotion element, a provocation requirement in the judge's sufficient evidence test and exclusions in limited circumstances all should be in place. It is proposed that the best way to deal with the remaining problematic and controversial cases would be to lay down presumptions; these would help to restrict the defence but allow deserving cases to succeed where it is appropriate, it would put the onus on D to show that the circumstances which fell under a presumption were exceptional.¹²⁵

i) how the presumptions would work

In cases where the partial defence is invoked the prosecution must first show, beyond reasonable doubt, that D murdered V and then sufficient evidence must arise for the defence to be left to the jury, a determination for the judge and not necessarily stemming from D's representation.¹²⁶ For the prosecution to then disprove the defence they must show, beyond reasonable doubt, that it is not satisfied.¹²⁷ This is consistent with what was described as the "golden thread" of criminal law, that the prosecution must prove the D's guilt.¹²⁸ However, for exceptions and the like, the onus has often been placed on D.¹²⁹ In particular, statutory law has frequently created presumptions against D which require him to meet a burden on the, lesser, balance of probabilities,¹³⁰ for specified

¹²⁵ K. Fitz-Gibbon, 'Replacing Provocation in England and Wales' 294: a senior judge stated that in the 2009 Act, rather than using a sexual infidelity exclusion, "it was better to lay down the general principles".

¹²⁶ 'Chapter 9 - Coroners and Justice Act 2009' (n226-30)

¹²⁷ s54(5) of the 2009 Act it states that the onus is on the prosecution: "the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

¹²⁸ *Woolmington v DPP* [1935] AC 462, 481-2

¹²⁹ P. Roberts & A. Zuckerman, *Criminal Evidence* (2nd ed, OUP, 2010) 234: "At the same time as the prosecution is relieved of its burden, a corresponding probative burden is placed on the accused to rebut the presumption, on the balance of probabilities." See *R v Hunt* [1987] AC 352.

For example, s101 Magistrates' Courts Act 1980: "Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification, whether or not it accompanies the description of the offence or matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negating the exception, exemption, proviso, excuse or qualification."

¹³⁰ *Sheldrake v DPP* [2005] 1 AC 264, 290 (Lord Bingham): "One form of statutory exception arose where a defendant sought to rely, in answer to a criminal charge on indictment, on any statutory exception, exemption,

matters. Williams states that the purpose of such clauses are "largely for practical reasons".¹³¹ The burden placed on D can either be a *legal* burden,¹³² which requires D to provide evidence on a matter unless he is convicted, or an *evidential* burden, which requires him to raise sufficient evidence so that the prosecution must then provide evidence on the matter beyond reasonable doubt.¹³³

Under certain circumstances reverse burdens have been found to be compliant with human rights obligations.¹³⁴ In the leading case, *Salabiaku*, the European Court of Human Rights stated that "the Convention does not prohibit such presumptions in principle ... It requires States to confine them within reasonable limits" which balances the aim of the clause with the individual's rights.¹³⁵ With the proviso from Lord Hope that this balancing "is not an exact science",¹³⁶ *Kebeline* sets out greater guidance in how to determine if a reverse burden is compliant by highlighting three areas related to these issues: firstly, what the prosecution have to prove, secondly, what the burden relates to

proviso, excuse or qualification. It was clearly established that the burden of proving such ground of exoneration, on a balance of probabilities, lay on him".

¹³¹ G. Williams, "The Logic of 'Exceptions'" [1988] CLJ 261, 269: "The principle is that the prosecution must give evidence on the bare bones of the charge, while the defendant must normally offer evidence on matters of justification or excuse on which he wishes to rely."

Also, 290: "That it is easy for the defendant to give evidence on an issue, and relatively difficult for the prosecution, may be an excellent reason for placing an evidential burden upon the defendant."

R v DPP Ex p Kebeline [2000] 2 AC 326, 379 (Lord Hope): "It is quite common in summary prosecutions for routine matters which may be inconvenient or time-consuming for the prosecutor to have to prove but which may reasonably be supposed to be within the accused's own knowledge to be dealt with in this way. It is not suggested that statutory provisions of this kind are objectionable."

¹³² *ibid* 289 (Lord Bingham): "a legal or persuasive burden on a defendant in criminal proceedings to prove the matters respectively specified in those subsections if he is to be exonerated from liability on the grounds there provided. That means that he must, to be exonerated, establish those matters on the balance of probabilities. If he fails to discharge that burden he will be convicted."

¹³³ *ibid* 289 (Lord Bingham): "An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant."

¹³⁴ Article 6(2) of the European Convention on Human Rights: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

¹³⁵ *Salabiaku v France* (1991) 12 EHRR 379 [28]

¹³⁶ *Kebeline* 380 (Lord Hope)

P. Roberts & A. Zuckerman, *Criminal Evidence* 280: "it seems that each and every reverse onus clause in English criminal law must be reconsidered on an individual, case-by-case, basis."

and how easily D will be able to prove that and, finally, what the nature of the threat the offence is designed to combat.¹³⁷

It is proposed that a list of circumstances can be constructed where a reasonable presumption can be made that the defence will not usually apply.¹³⁸ If D's case falls into one of these categories an evidential burden would be placed on him to provide sufficient evidence, on the balance of probabilities, to demonstrate that his case was not a typical case of sexual infidelity, for example, and that the circumstances were exceptional; by doing so this would require the prosecution to prove, beyond reasonable doubt, that D does not meet the warranted emotion standard. Alternatively, D could argue that his case falls outside the category and then the burden would not be reversed.

In the proposal an evidential burden is sought as a legal burden may be too onerous for D, especially considering the seriousness of the offence and punishment; these factors being under consideration in the acceptability of reverse burdens.¹³⁹ In limited circumstances, where the partial defence ought not to usually apply, by creating an evidential burden on D it would create the correct balance of restricting the defence and ensuring the defence is still available where appropriate. The 2009 Act goes further, on the matter of sexual infidelity, and does not allow it to be considered in any circumstances, even where it is exceptionally grave. Also, D is best placed to make arguments in favour that his anger stemming from infidelity, for example, was exceptional and therefore a display of warranted emotion, and owing the nature of the defence and purpose of the reform it is consistent that the burden is placed on him.

¹³⁷ *Kebele* 386 (Lord Hope)

Sheldrake 297 (Lord Bingham): "Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption."

¹³⁸ 'Chapter 10 - Contextualising and Presumptions' (n147-67)

¹³⁹ *R v Hunt* [1987] AC 352, 374: in Lord Griffiths warned that for such clauses it should not be an "onerous duty" for D to reverse the burden.

A significant aspect of this area is how to word such a clause. The judgments in the case of *Kebeline* offer a good example of how difficult it can be to interpret reverse burdens, but they give a lesson in how to construct an evidential reverse burden clause by discussing if it was possible to 'read down' a legal burden to an evidential burden as a legal burden would have been incompatible.¹⁴⁰ In that case s16A(3) of the Prevention of Terrorism (Temporary Provisions) Act 1989 was being considered as it required D to "prove" a matter regarding the possession of materials relating to terrorism.¹⁴¹ Lord Cooke discussed the possibility that if instead of "prove" a phrase such as "'unless sufficient evidence is given to the contrary'" could be used and this could be an acceptable evidential burden.¹⁴² Lord Bingham, in *Sheldrake*, discussed *Kebeline* and stated that subsequently "Parliament paid attention to these observations"¹⁴³ by enacting a new provision in s118(2) of the Terrorism Act 2000 with such language:

"If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

Another example of such a reverse burden is contained in s75 of the Sexual Offences Act 2003.¹⁴⁴ In s75(2) six categories are set out where there is an evidential presumption that V did not consent to the sexual act, if the circumstances relate to one of these categories then, according to s75(1)(c), the onus is placed on D to rebut the

¹⁴⁰ *Kebeline* 373 (Lord Cooke): "It seems distinctly possible that it may require section 16A of the Act of 1989 to be interpreted as imposing on the applicant an evidential, but not a persuasive (or ultimate), burden of proof. I agree that such is not the natural and ordinary meaning of section 16A(3)."

¹⁴¹ s16A(3) of the Prevention of Terrorism (Temporary Provisions) Act 1989: "(1) A person is guilty of an offence if he has any article in his possession in circumstances giving rise to a reasonable suspicion that the article is in his possession for a purpose connected with the commission, preparation or instigation of acts of terrorism to which this section applies (3) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence the article in question was not in his possession for such a purpose as is mentioned in subsection (1) above..."

¹⁴² *Kebeline* 373 (Lord Cooke)

¹⁴³ *Sheldrake* 298 (Lord Bingham)

¹⁴⁴ s75(1) Sexual Offences Act 2003: "the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it."

presumption by providing sufficient evidence that V consented and if this is done then the burden reverts back to the prosecution.¹⁴⁵ In *Ciccarelli* Lord Judge CJ stated that s75 "relates to matters of evidence" and is justified because "as a matter of reality and common sense, the strong likelihood is that the complainant will not, in fact, be consenting";¹⁴⁶ a similar justification can be made on behalf of the reverse burden clause which will be proposed.

There seems to be necessary conditions for evidential reverse clauses: D must meet the evidential burden, clarity of the circumstances which this takes place and a guarantee that, if successful, the consequences of this are that the onus is then back on the prosecution. Therefore, by using the terms "is to be taken" and "unless sufficient evidence is adduced", from the Sexual Offences Act 2003, and reference to a successful production of evidence, from the Terrorism Act 2000, a clause can be constructed using the language found to be compliant with Article 6(2):

If D's reason falls within the following it is to be taken to not have satisfied the trigger unless sufficient evidence is adduced to show that it is. If sufficient evidence is adduced it shall then be assumed that the trigger is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

ii) creating a list of presumptions

An example of where presumptions operate can be found in Queensland, Australia, where they have reformed their provocation defence; it "does not apply, other than in circumstances of a most extreme and exceptional character, if" the provocation is based on the following:

"(i) to end the relationship; or

(ii) to change the nature of the relationship; or

¹⁴⁵ In *Ciccarelli* [2011] EWCA Crim 2665 [18] Lord Judge CJ stated that for there to be sufficient evidence against the presumption "some evidence beyond the fanciful or speculative" needs to be produced.

¹⁴⁶ *ibid*

(iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship."¹⁴⁷

Brown and Ramsey have both designed lists of exclusions for a provocation defence but many of their suggestions would be better suited, for the reasons already referred to, to be presumptions for when the defence should not succeed. Brown states that even though her exclusions are in "gender-neutral language" their purpose is to deal with male killings:¹⁴⁸

- "(i) Where a defendant alleges provocation where the deceased has left, attempted to leave or threatened to leave an intimate sexual relationship
- (ii) Where a defendant alleges provocation because of suspected, discovered or confessed infidelity
- (iii) Where a defendant alleges provocation due to a non-violent sexual advance"

The first of Brown's exclusions, (i), regards separation killings. There should be a presumption that the defence will not run when this is the reason behind the killing but, as previously stated, in many of these cases there is no actual provocation, V is merely attempting to leave the relationship. The infidelity exclusion, (ii), is reminiscent of the 2009 Act.¹⁴⁹ As has previously been discussed, it is proper that this is not always excluded owing to the fact that the situation could turn into a provocation scenario but there should be a presumption against it.¹⁵⁰ A difference can be appreciated between when the parties are in a relationship, in (ii), compared to when V is leaving the

¹⁴⁷ s304 Criminal Code of Queensland, Australia

¹⁴⁸ H. Brown, 'Provocation As A Defence To Murder: To Abolish Or To Reform?' (1999) 12 Australian Feminist Law Journal 137, 140

¹⁴⁹ Another example of where it is in place is in Maryland, US: "The discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery." (Maryland Criminal Code, CODE Ann, § 2-207(b))

¹⁵⁰ (n94-5)

relationship, in (i). If there is still a relationship in place an act of infidelity, by definition,¹⁵¹ would breach the trust between the parties and should be considered a more solid base than when D is provoked by the fact that V no longer wishes to be in a relationship. Neither scenario is particularly appealing to be the basis for mitigation but where there is a relationship in place the anger, comparatively, should be viewed as more understandable. With regards to non-violent sexual advances, (iii), they usually should not be considered to be provocation at all, but if they do pass the sufficient evidence test a presumption ought to be in place.¹⁵²

Ramsey states that "it is preferable to list the things which *cannot* constitute the basis of a provocation claim" rather than positively state categories of provocation "because it is difficult to anticipate every conceivable wrong":¹⁵³

- "(1) a decision by the victim to terminate or decline to begin a romantic or sexual relationship with the defendant or to have sex with another person;
- (2) a non-violent homosexual advance by the victim toward the defendant;
- (3) any behavior by a child, except for an aggressive act that posed a risk of death or serious bodily injury to the defendant or another;
- (4) and mere words."¹⁵⁴

The first two exclusions, (1) and (2), are similar to those put forward by Brown but Ramsay enhances her exclusion by referring to the "decline to begin a romantic or sexual relationship", this is consistent with the theme of the defence not mitigating owing to a man's feeling of rejection. Ramsay then refers to, (3), conduct carried out by children. In Minnesota, US, an exclusion is in place to rule out cases similar to *Doughty* as it states that "the crying of a child does not constitute provocation".¹⁵⁵ Once again, if

¹⁵¹ 'Chapter 9 - Coroners and Justice Act 2009' (n127-9)

¹⁵² 'Chapter 4 - Adequate Provocation' (n52-4): as Dressler points out it only takes D to claim that V touched him and then this turns into a violent sexual advance.

¹⁵³ C.B. Ramsey, 'Provoking Change' 82

¹⁵⁴ Ibid 93

¹⁵⁵ Minnesota Stat Ann, Chapter 609: Criminal Code § 609.20(1)

the defence required something which could be properly described as provocation then the defence would not even reach the jury as the child is blameless and the conduct is entirely natural.¹⁵⁶ The "mere words" exclusion, (4), is not appropriate for the same reasons which were outlined when supporting *Camplin*,¹⁵⁷ there could be cases, given proper context, where some words may have added meaning; there is no reason not to believe that certain instances of 'words alone' could have the same impact as actions.

The presumptions which are outlined are issues which have been discussed throughout, but, in particular, were in Chapter 4, and are all examples of male violence:

- 1) when V is trying to leave or already has left the relationship;
- 2) when V refuses to begin a relationship;
- 3) when D seeks to rely on V's sexual activity;
- 4) non-violent sexual advances.

Presumption 1-3) are to do with jealousy and possessiveness. The 2009 Act only deals with sexual infidelity, and excludes it, but these scenarios are, on the whole, all on par with each other and together they would cover the killings behind these motivations. Presumption 4) will mainly be concerned with homosexual advances and in Chapter 4 it was expressed, despite the motivation being intolerance, that there were similarities in so far as all these cases can be about such disagreeable motivations being masked behind a claim of provocation. Through these presumptions being set out it would place an emphasis that the notorious reasons where male violence has been mitigated should not usually be able to satisfy the partial defence, this is in line with the structure and rationale of the defence and with the objective of bring about better outcomes.

These circumstances potentially could succeed but it would take a very strong reason to satisfy the objective requirements of the defence; possibly a combination of factors or

¹⁵⁶ On the broader point of all conduct done by a child, the control test should place expectations on D to maintain self-control in the face of conduct by a child.

¹⁵⁷ 'Chapter 5 - Objective Element' (n32-3)

the nature of the events were particularly severe. To avoid one of the great concerns with the sexual infidelity exclusion in the 2009 Act the proposal¹⁵⁸ refers to a rule that the control test can only be satisfied by "[t]aking into consideration the events which satisfied the limb". This helps to ensure that if, for example, sexual infidelity was deemed not to be sufficient in the gravity test then this must be ignored in the control test too; the consequence being that sexual infidelity will not ultimately become the most significant factor in the objective assessment.¹⁵⁹

Conclusion

In this Chapter it has been suggested that the use of guidelines, for contextual evidence, and presumptions, for where the defence should not usually run, would serve the defence better than the pre-2009 defence or the provisions of the 2009 Act. Evidence which relates to 'battered women' needs to be tailored in order to meet the requirements of the defence, as the defence is not about mental abnormalities, like diminished responsibility, but instead about reaching standards. Such evidence needs to be focused on showing that the fear was genuine, this fear was a warranted emotion and an ordinary person may react in such a manner too. The evidence needs to relate to the overall context of the history of violence D experienced, the types of abuse she suffered and, if applicable, why she remained in the relationship. It is important that these factors all relate to the elements of the defence. Such evidence may be important in arguing self-defence but for a fear-based partial defence it can be acknowledged that the reaction was excessive, so, for example, the threat may not have been imminent, but the emotion was genuine.

On the other hand, there is a need to restrict the reach of the defence when the reasons behind provoked anger relate to normal, blameless and trivial conduct by the 'provoker'. Requiring that the defence should only go to the jury when a judge finds evidence which supports that D experienced such provoked anger and faced provocation will help to focus the defence on cases which are appropriate for a provocation defence to deal

¹⁵⁸ See 'Chapter 11 - Proposal'.

¹⁵⁹ It could still be relevant in the subjective element as this is a factual test.

with. The role of the jury and the rationale of warranted excuse combined with presumptions will guide the defence in expressing society's values. There are four key presumptions: when V is trying to leave or already has left the relationship, when V refuses to begin a relationship, when D seeks to rely on V's infidelity and cases of non-violent sexual advance. If these presumptions are in place it will assist the jury in making these judgements and, more broadly, it will help the defence track common views over what is acceptable to get angry over. Instead of excluding circumstances such sexual infidelity, as the 2009 Act does, creating presumptions where the onus is on D to rebut them is more likely to create an effective defence as it would be able to allow such cases to succeed if they were shown to be exceptional.

CHAPTER 11

PROPOSAL

The following proposal has been devised whilst taking on board the other defences and proposals referred to and is based on the conclusions which have been drawn throughout the thesis, including the solutions put forward for tackling the key problematic areas in Chapter 10. The proposal is for a provocation and fear partial defence, entitled excessive warranted emotional killing, based on warranted emotion, that is, mitigation of an excessive killing to manslaughter if the emotion, by society's standards, is viewed to be warranted and D experienced such an emotion. D's behaviour, through the control test, must also be inspected to ensure he lived up to ordinary standards.

In the introduction to Part IV it was stated that the best way to design an effective defence is to deal with the contentious issues proactively. The prescriptive approach which is advanced, the use of exclusions, presumptions and guidelines for contextual evidence, is done because the best way to confront the problems which have arisen is to tackle them and fashion a defence with such considerations in mind. Throughout various other approaches have been referenced and the flaw behind them is that there is no guarantee that they would be effective. Certain jurisdictions, such as Germany,¹ have shown preference for broad defences which simply contain the key elements and some reject the objective components which ought to be viewed as necessary.² This route, as would making it a consideration in sentencing if the mandatory sentence were removed,³ would mean that there would be little opportunity to control the operation of the defence and it would be more difficult to appreciate if an issue such as gender bias, for example, has been resolved.⁴ In other words, it is better to design a defence which can deal with

¹ See 'Chapter 7 - Law Commission' (n33).

s213 of the German Criminal Code: "If the murderer (under section 212 [but not including a 'Murder under specific aggravating circumstances' under section 211]) was provoked to rage by maltreatment inflicted on him or a relative, or was seriously insulted by the victim and immediately lost self-control and committed the offence, or in the event of an otherwise less serious case, the penalty shall be imprisonment from one to ten years."

² South African provocation law, although not a defence, is seen to be subjective, see 'Chapter 3 - Rationale' (n9).

J.K. Weber, 'Some Provoking Aspects of Voluntary Manslaughter Law', (1981) 10 Comm L World R 159, 160: "All in all, though with an attitude of caution, it seems possible to conclude that heat of passion alone would be justification for reducing an offence from murder to voluntary manslaughter." See 'Chapter 3 - Rationale' (n98).

³ For example, as was the case in France, see 'Chapter 3 - Rationale' (n37).

⁴ See 'Chapter 7 - Law Commission' (n37-41).

the circumstances in an appropriate manner, evaluate the individual elements of the defence and then if there is a problem it is possible to reform an element which proves to be deficient.

With this approach, however, there is a clear divide between the objective and subjective elements. For objective tests it is beneficial to give structure and guidance; these will assist answering enquiries on expected standards of behaviour, over the gravity assessment and contextual evidence. Some aspects relating to the subjective tests of the defence are difficult, maybe impossible, to resolve in a legislative format;⁵ when asking a jury to consider the impact of delay and whether D genuinely felt emotional these are matters which require balance, based on the facts of the case, and understanding of common human experience. The best approach to move forward on these issues is to give freedom to a jury by using a test which examines the authenticity of the emotion and not to try to place restrictions on matters of this nature.⁶

Proposal

The proposal, below, begins by outlining the basic elements of the defence (s1): subjective test, gravity test and control test. Then the rules relating to the operation of the defence are set out, the trial judge's sufficient evidence test (s2) and the burden of proof for the prosecution (s3). The exclusions for the trial judge to apply in the sufficient evidence test are specified (s10). Whilst the subjective test is further clarified (s4), the more complicated triggers are contained in various sections (s5). The provoked anger (s6)⁷ trigger is connected to the provision relating to the presumptions (s7), likewise, the contextual evidence provision (s9), where relevant, is applicable to the fear of violence trigger (s8). Finally, for the control test, the limited role of control characteristics and how

J. Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] NZLR 25, 36: "If injustices occur - like those that have historically taken place in relation to battered defendants or battered victims - it is difficult to know what is taking place and what might be done."

⁵ In the introduction of 'Chapter 1 - The Early Defence' it states that "provocation has perpetual issues which cannot truly be settled" and in 'Chapter 9 - Coroners and Justice Act 2009' (n24-5) it states that it is better to design a consistent defence based on a structured objective element.

⁶ For example, in the 2009 Act the jury is required to balance the revenge exclusion, the loss of self-control element and the provision which stipulates that "it does not matter whether or not the loss of control was sudden", even though it clearly does. See 'Chapter 9 - Coroners and Justice Act 2009' (n78-85).

⁷ 'Warrant' in (s6) would be given a definition in supplementary notes.

the control test needs to operate differently depending on the emotion involved is set out (s11).

Excessive warranted emotional killing

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

(a) the killing resulted from

i) provoked anger against V or another or

ii) fear of violence against V or another,

(b) the emotions in section (1)(a) had a qualifying trigger, and

(c) taking into consideration the events which satisfied the qualifying trigger, an ordinary person might have reacted in the same or in a similar way to D.

(2) To raise the defence sufficient evidence, in the opinion of the trial judge, must be adduced. The trial judge, considering the relevant circumstances, must be satisfied that sufficient evidence exists to support that the killing resulted from—

a) provoked anger and D faced provocation or

b) fear of violence and there was a threat of violence.

(3) On a charge of murder, if sufficient evidence is adduced to raise the defence under section (2), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(4) For the purposes of section (1)(a), the provoked anger or fear of violence at the time of the killing, taking into account all relevant evidence, must be genuine.

(5) A qualifying trigger exists if section (6) or (8) applies.

(6) Provoked anger: considering the relevant circumstances, the provocation which D faced caused anger which was warranted and D had a reasonable belief in this.

(7) If, within section (6), D's reason falls within the following it is to be taken to not have satisfied the trigger unless sufficient evidence is adduced to show that it is:

- a) when V is trying to leave or already has left the relationship,
- b) when V refuses to begin a relationship,
- c) when D seeks to rely on V's sexual activity,
- d) non-violent sexual advances.

If sufficient evidence is adduced it shall then be assumed that the trigger is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(8) Fear of violence: considering the relevant circumstances, D feared violence from an identifiable threat which was imminent or inevitable.

(9) Where relevant, D may support the claim of fear of violence throughout the defence with the use of general expert evidence regarding domestic violence and victims of abuse on the following matters:

- a) the nature and extent of the violence,
- b) wider contextual evidence (for example, evidence which relates to why D remained in the relationship and the strategies D used),
- c) how the threat of violence would have been perceived.

(10) For the purposes of section (2), the trial judge must exclude the defence if D's reason falls within one of the following:

- a) if the killing was carried out with the purpose of revenge,
- b) if D incited the circumstances with the purpose of providing an excuse to use violence,

c) if the killing has been committed to protect or defend the honour of the family and/or community.

(11) In determining, in section (1)(c), whether an ordinary person might have reacted in the same or in a similar way to D—

a) the only characteristics of D which may be considered are D's age and sex if D is under the age of 18, and only in so far as they would impact on an ordinary person's maturity.

b) an ordinary person's reaction is dependent on which qualifying trigger is raised in section (1).

Discussion of the proposal

a) sufficient evidence and role of the trial judge

The defence may only go to the jury where there is evidence of a subjective basis, that D experienced the emotion in the trigger, and an objective basis, that there were proper grounds for D's emotion; either D must have experienced provoked anger and faced provocation (s2(a)) or D must have feared violence and there was a threat of violence (s2(b)). With s2 framed in this manner it means that there must be subjective and objective grounds for the defence to advance and this is a reasonable demand as satisfaction of these two areas are the pillars of the defence. If sufficient evidence is adduced then the burden is placed on the prosecution, beyond reasonable doubt, to provide evidence that the defence is not satisfied (s3).

The trial judge must consider "the relevant circumstances", this means that response characteristics and contextual evidence must inform the decision-making process (s2). Also, if D's reason falls under the fear of violence trigger then expert evidence, if relevant, can be used to support the claim "throughout the defence" (s9), thereby not just covering the trigger but the sufficient evidence test, the subjective test and the control test. Combined these two provisions would help to support the objective grounds for the fear trigger, that there was a threat of violence, as determining whether a threat existed

would requires contextual information to be considered and may lead to expert evidence supporting the claim. For the fear trigger, the gravity test component of the objective element, in any event, is not a substantial hurdle, the trigger refers to an "identifiable threat" rather than "serious violence" as the 2009 Act does; the purpose of the objective element running through the fear trigger is to ensure that threatening circumstances existed and it is not entirely subjective, this is because human frailty only exists where the circumstances lead to the emotion and an excessive reaction, this being the rationale behind why mitigation is available.

The proposal gives the trial judge the power to exclude the defence at this stage in limited circumstances (s10); the aim of this approach is to set the correct balance between the role of the judge and jury, the judge is given the authority to exclude cases where the defence cannot possibly apply. Chapter 10 sets out that exclusions should only exist if the circumstances are indisputable,⁸ therefore the language of s10 is very specific so it is correct that this is a mandatory requirement for the trial judge. If the killing was carried out owing to revenge then the judge will be able to exclude the case as this simply cannot be the basis for the defence (s10(a)).⁹ The over-arching purpose of the subjective element is to exclude revenge and this is best done by having a clear exclusion. This provision has a very limited scope, it only applies when there is evidence that D's actions were inspired "with the purpose of revenge". The exclusion is not to be exercised merely because, for example, delay has occurred or there is evidence of a preparatory act, as these are factors to be considered and something more substantial needs to be found to satisfy the language of the provision.

If D incites the circumstances of the trigger on "purpose" (s10(b)) then the defence cannot apply as D's emotion will not be genuine, nor will his reason be warranted. Again, this is a very limited exclusion and for the broader category of incitement the normal rules of the defence should apply with the understanding that self-induced provocation

⁸ 'Chapter 10 - Contextualising and Presumptions' (n119)

⁹ 'Chapter 6 - Subjective Element' (n6-10)

can only be considered if V's response to the inducement goes beyond what is reasonable.¹⁰

If the killing fell under the definition of an honour killing the trial judge would also be able to rule out the defence (s10(c)), whilst D may experience anger the reason behind it either cannot properly be described as provocation, nor can it be classified as warranted anger. The provision is based on a definition which is used by the Crown Prosecution Service, Association of Chief Police Officers and the Forced Marriage Unit at the Home Office: "'Honour based violence' is a crime or incident which has or may have been committed to protect or defend the honour of the family and/or community."¹¹

As was outlined in Chapter 10,¹² in certain circumstances (s7) there is an evidential burden which requires D to produce evidence to show that his reason could satisfy the warranted emotion standard imposed in the provoked anger trigger (s6), otherwise his reason "is to be taken to not have satisfied the trigger". D must provide evidence to show that, on the balance of probabilities, his reason could satisfy the trigger or he could contest that his reason did not fall into one of the categories. If this is achieved then the prosecution need to produce evidence beyond a reasonable doubt that the defence is not satisfied (s3). The four categories in s7 are not deserving of exclusion, but, owing to their nature, these circumstances should not be able to be the basis of such a defence without more. The justification for s10, and using an evidential burden in this manner, is that it is the best way to create a balance between two competing factors:¹³ a purpose of the reform process was to limit the scope of the defence in cases where D relies on undesirable reasons, but, on the other hand, the function of the defence must be respected once its rationale is made clear as it is correct to mitigate where warranted emotion has led to human frailty.

¹⁰ See 'Chapter 4 - Adequate Provocation' (n37-45) for the *Edwards* rule.

¹¹ CPS, 'Honour Based Violence and Forced Marriage' (accessed on 03/06/15 http://www.cps.gov.uk/legal/h_to_k/honour_based_violence_and_forced_marriage/#a04) & CPS, 'Honour Based Violence and Forced Marriage: Guidance on Identifying and Flagging cases' (accessed on 03/06/15 http://www.cps.gov.uk/legal/h_to_k/forced_marriage_and_honour_based_violence_cases_guidance_on_flagging_and_identifying_cases/)

¹² 'Chapter 10 - Contextualising and Presumptions' (n125-46)

¹³ *ibid* (n135)

b) subjective test

The subjective test should always be an entirely factual question: it ought to ask whether D experienced the required emotion at the time of the killing. The proposal simply enquires, after taking into account all relevant evidence, whether the provoked anger or fear of violence was "genuine" (s4). In terms of the intensity of the emotion, for it to be genuine it requires that it was sufficiently severe that D's anger or fear led him to form his murderous intent; it would not be acceptable that D felt a slightly aggrieved or that he was concerned over his safety.¹⁴ As was discussed in Chapter 6,¹⁵ it is preferential that this test is aligned to its function and this is achieved; requiring a loss of self-control, for example, is not a true reflection of the required emotions as provoked anger and fear of violence can exist outside of this concept and the case for mitigation remains equal.¹⁶ The subjective element proposed is intended to be broader and more realistic of the circumstances which the defence covers, which will be particularly beneficial to those who kill in fear.

If all that matters is the authenticity of the emotion then a factor such as delay will be significant to this determination. The decisions, pre-2009, in *Ahluwalia*,¹⁷ and post-2009, in *Clinton*,¹⁸ found that if D's response was delayed then this could be an indicator of revenge but much depends on the circumstances and it needs to be a decision taken on a case-by-case basis.¹⁹ The principle of this is correct as it is a factual question and it ultimately comes down to whether a jury believes that D was angry or fearful. These judgments, however, concerned defences requiring D to lose his self-control and in the language used there was an awareness that finding delay to be compatible with a loss of

¹⁴ This is also tested in another way, by evaluating D's behaviour in the control test by comparing him to an ordinary person (s1(c)).

¹⁵ 'Chapter 6 - Subjective Element' (n6-10)

¹⁶ Ibid (n45-5)

¹⁷ [1992] 4 All ER 889

¹⁸ [2012] 3 WLR 515

¹⁹ *Ahluwalia* 897–8 (Lord Taylor CJ): "In some cases, such an interval may wholly undermine the defence of provocation; that, however, depends entirely on the facts of the individual case and is not a principle of law."

self-control was problematic.²⁰ The proposal would put the defence on a better footing to deal with delayed responses as this issue does not exist, but delay still could be perceived to be an indicator of revenge and decisions would need to be taken on a case-by-case basis. The language of the provision is focused on the key concern and clearly whether D's emotion is genuine is a determination which naturally requires consideration of all the surrounding factors.

c) triggers

The defence contains two triggers which reflect the emotions which are consistent with the human frailty rationale of the defence. However, the triggers are framed in a manner which acknowledges that not all provoked anger and fear of violence cases are deserving of mitigation, even where the emotion is genuine: the defence requires that the emotion stems from events which are of sufficient gravity in order for the emotion to have legitimacy.²¹

Provoked anger would mainly consist of feelings of being wronged and/or insulted as it requires "anger which was warranted" (s6). The fear of violence trigger includes provisions which ensure that a threat existed but it gives leeway on what can cause the fear by requiring "an identifiable threat which was imminent or inevitable" (s8).²² Both of the triggers would allow for the emotion to emanate from anger or fear "against V or another" (s1(a)). There is not a combination trigger, so D would have to run the triggers independently, this is with the concern that even though the two emotions may overlap anger may be seen to undermine the emotion of fear.²³ However, the fact that D felt anger or resentment, as well as fear, does not mean that D should be viewed as having killed in revenge.²⁴

²⁰ *Clinton* 521: "In reality, the greater the level of deliberation, the less likely it will be that the killing followed a true loss of self control."

²¹ 'Chapter 3 - Rationale' (n99)

²² A justificatory self-defence ought to only allow responses to immediate threats as justificatory killings need to be necessary, but as this trigger involves excessive killings there should be greater scope on what is a sufficient threat.

²³ 'Chapter 7 - Law Commission' (n102-9)

²⁴ *Ibid* (n109)

Warranted emotion demands that the circumstances were grave and that D appreciated this, so that D's emotion was caused by the recognition of the gravity of the circumstances.²⁵ Therefore, the jury must be satisfied that a normal person in society would view D's emotion as warranted, this is according to society's contemporary norms and values²⁶ (warrant at being provoked or an identifiable threat which was imminent or inevitable) and, also, they must believe that D himself felt this warranted emotion at the time (D felt warrant in being provoked or feared such violence). Therefore, the triggers contain both objective and subjective elements and are specific to the emotion involved. There is a platform for contextual information to support decision-making in both triggers, with the consideration of "relevant circumstances" the jury can to appreciate how provocative or threatening the incident was to D and a normal person in D's circumstances. In line with the 2009 Act, intolerant beliefs, such racist and homophobic views, cannot be relied upon as they are outside the warranted emotion standard.²⁷

The fear trigger requires the jury to inspect the circumstances from D's perspective but in judging this they need to look at the nature of the threat and consider temporal issues in order to see if the threat was present. It must be appreciated when applying this that D's response was an excessive killing and the purpose of the objective component of the trigger is to merely assess if the circumstances existed, that is why there is a place for inevitable future violence.²⁸ all that matters is that some form of threat existed and that D's fear stemmed from this. If relevant, when the jury apply the fear trigger, as with all the elements of the proposal, "general expert evidence regarding domestic violence and victims of abuse" may be used to assist them in interpreting the contextual evidence (s9). It is of importance that this evidence helps to support the elements of the defence

²⁵ 'Chapter 3 - Rationale' (n124)

²⁶ A possible definition of warrant was referred to at 'Chapter 3 - Rationale' (n121-3) from D.J. Baker & L.X. Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 254, 262: "the defendant's sense of being seriously wronged must be one that accords with contemporary society's norms and values. In other words, it must be shown that a normal person in contemporary Britain would have felt seriously wronged in the same situation. This is judged according to the normative standards of a normal person communally situated in Britain."

²⁷ This approach by focusing on warranted emotions rather than ordinary ones, in relation to response characteristics, is a modified version of *Camplin*, see 'Chapter 5 - Objective Element' (n62-3).

²⁸ 'Chapter 10 - Contextualising and Presumptions' (n59-74)

and is about the threat which such women face and how they would perceive it, that is why it is based on the specified areas, as discussed in Chapter 10.²⁹

d) control test

The partial defence rests on D reaching the minimum expected standard of behaviour for an ordinary person in D's situation.³⁰ In order to avoid a major criticism with the 2009 Act, that whilst sexual infidelity ought to be excluded in the trigger D can use it to satisfy the ordinary person test,³¹ this proposal limits what can be considered to "the events which satisfied the qualifying trigger" (s1(c)); this also makes the defence simpler as the judge and jury will not have to disregard sexual infidelity and then apply it in the next evaluative element of the defence.³²

The proposal also contains two others provisions relating to the control test. Firstly, the extent to which control characteristics may be considered is limited as a moderate excuse theory is followed.³³ Adults are judged by the same standard and the only deviation in the control test is for those under the age of 18 where age and sex may naturally impact on their maturity (s11(a)).³⁴ Defences such as this one are reliant on D meeting a minimum standard of behaviour which is based on how ordinary people would react so that mitigation is only granted when it can be found that D acted like anyone else might have done in that situation.³⁵

Secondly, for the control test to have any meaning the expected behaviour levels must be in line with the emotion involved. When the provoked anger trigger is applied this test will be more to do with ordinary levels of self-restraint and self-control but when fear is dealt with it will be focused on how people respond to threats (s11(b)). This is a key provision as, in combination with the use of expert evidence (s9), it ought to allow a

²⁹ Ibid (n26-31)

³⁰ 'Chapter 5 - Objective Element' (n19-24)

³¹ 'Chapter 9 - Coroners and Justice Act 2009' (n144-8 & n152)

³² By contrast, everything can be considered in the subjective element as it is a factual enquiry.

³³ 'Chapter 5 - Objective Element' (n92-5)

³⁴ D would not be judged by his own level of self-control if he was 17 and male, for example, but an ordinary person from that set. See *ibid* (n110-1 & n117-9).

³⁵ *Ibid* (n143-55)

greater scope for excessive reactions in fear. Unlike the 2009 Act, which does not differentiate between the two emotions in this manner,³⁶ it means that there is a framework in place where the jury can acknowledge that an ordinary person acting in fear may react in a specific way to a threat in those circumstances, this could be very different from a paradigm provocation case where anger may be expected to lead to a more impulsive reaction.

Conclusion

The proposal is split into two; fear and anger may overlap but to have a defence which rests on aggressive and defensive reactions and to treat them with an identical loss of self-control requirement and ordinary person test, like the 2009 Act does, is not appropriate. The proposal instead tailors the elements of the defence to the relevant emotion. It would be possible to split the defence up into two but by keeping them together it not only acknowledges the potential overlap but that both triggers are about providing a partial defence for excessive killings where the emotion is warranted by society's standards and genuinely felt by D. Fear is an emotion which is more deserving of recognition than anger and that is why the aim has been to make the fear trigger more accessible but restrict the provoked anger trigger.

The proposal works on two fronts for victims of domestic violence and abuse in order to best remedy the problems which have traditionally meant that relying on a defence has been difficult.³⁷ immediacy of the threat of violence and the labelling of D's behaviour as ordinary. The trigger allows for a wide definition of what is an acceptable threat and with the ordinary person test being tailored for the emotion the minimum expected standards of behaviour will be more respectful of the situation which D was placed in. Therefore, in this proposal a victim of abuse who kills can claim a partial defence if the threat she experienced was not immediate but existed, so was inevitable, and if her reaction, whilst obviously being excessive, was consistent with a normal person who killed with a fear of violence. An essential element of this proposal is that a greater amount of contextual

³⁶ 'Chapter 9 - Coroners and Justice Act 2009' (n92)

³⁷ See 'Chapter 6 - Subjective Element' (n58-70), 'Chapter 5 - Objective Element' (112-9) and 'Chapter 10 - Contextualising and Presumptions' (n59-74).

and expert evidence can be used to support the objective and subjective elements. The proposal is about ensuring that the legal terms used, such as 'fear', 'threat', and 'ordinary', are better at reflecting what has occurred and this can be achieved, partly, by giving more information to the decision-makers in the process and, partly, by looking at this trigger independently without the constraints which a loss of self-control provocation defence requires.

The proposal, as discussed in Chapter 10,³⁸ looks to restrict the provoked anger trigger in three ways: firstly, by requiring a subjective and an objective basis for the defence in the sufficient evidence test, so the trial judge can act as an appropriate filter by determining if D was emotional and if there was something intelligible as the basis of the emotion; secondly, by setting out exclusions in limited, specific scenarios where the defence could never be established; finally, by creating presumptions for where the defence ought not to usually apply but where in exceptional circumstances D can provide evidence that his anger was warranted. These three ways attempt to create the correct balance between the aim of restricting the anger-based partial defence and allowing its use where there is a legitimate basis for arguing that D was both emotional and had a warranted emotion.

The wide range of problems and various attempts to reform the defence have shaped this proposal and it is acknowledged that it may be impossible to resolve certain issues, such as how to conclusively deal with delayed responses. As was set out in the Introduction, an aim was to form provisions which were practical and consistent with the broader aims of the defence; the factual elements are in line with how an individual would respond in such scenarios and the evaluative elements stem from the expectations and values of society. The assessments which have been made with regards to the warranted emotion standard, exclusions and presumptions all flow from the viewpoint which finds that labelling conduct as provocative has meaning and the defence can only operate when it is in line with society's values of respecting individual freedoms and tolerance. Only by raising the bar and being realistic for the provoked

³⁸ 'Chapter 10 - Contextualising and Presumptions' (n103)

anger trigger and by giving the judge and jury more information and education for the fear trigger can the aims of reforming the partial defence can be achieved.

CONCLUSION

The success of the reform contained in the 2009 Act is significant owing to the areas which the defence touches on, in terms how to respond to killings concerning domestic violence and abuse, honour killings, violence against women and homosexuals. The proposal outlined in Part IV is in light of these issues, the aims of the reform process and the problems identified with the pre-2009 provocation defence, whilst, also, being in response to the evaluation made of the loss of control defence. Basically, the 2009 Act needed to create a partial defence which responded to those who kill in fear, particularly when the fear is derived from experiences of domestic violence and abuse, and to restrict the provoked-anger element of the defence where the reasons which are relied upon do not merit mitigation. In Part IV solutions were put forward as it was adjudged that the 2009 Act failed to suitably resolve these issues.

The fear trigger, although an improvement, is undermined by the retention of the loss of self-control element and the maintenance of the control test in this manner as neither represent the emotion of fear nor how people actually behave in such circumstances. To improve the fear trigger two key reforms are suggested. Firstly, for both emotions in the partial defence, it is discussed how the subjective element ought to focus on the existence of the core emotion as this is the true function of the test, to lose self-control is a specific response which only covers a limited area and the partial defence ought to allow for a greater span of excessive responses in order for it to be effective.

Secondly, throughout the thesis a greater role for contextual evidence in the partial defence is supported. The pre-2009 law, following *Camplin*, had recognised that in order to gauge the gravity of the situation and understand the circumstances, so behaviour can properly be assessed, there was a need determine the evaluative elements in light of D's history, circumstances and, where appropriate, characteristics. The proposal outlines how the partial defence could go further with this and how the use of general expert evidence could be used to support D's claim of an excessive killing in fear throughout the defence. By giving the trial judge and jury more information in their decision-making process on such matters it could make the partial defence more

accessible to deserving cases as the sufficient evidence test, subjective test, gravity test and control test would all be impacted as how D felt and responded would be grounded in evidence which supports that this was ordinary in the circumstances.

In the 2009 Act the provoked-anger element of the defence was improved by requiring a warranted emotion from the jury's perspective in order to align society's view on the gravity of the provocation with the availability of mitigation, however, the provisions surrounding this trigger lacked clarity and the sexual infidelity exclusion will not touch on some of the most controversial reasons which were relied upon as a basis for a defence in the pre-2009 law. The proposal sets a fourfold approach towards the provoked-anger trigger which is consistent with the warranted emotion rationale discussed in the thesis and specifically targets the flaws of the 2009 Act, in particular, with regards to how it inadequately deals with male possessiveness and jealousy.

Firstly, in the sufficient evidence test it requires the existence of provocation, not D being provoked, thereby ensuring that there must be a solid basis for the claim and not merely D getting angry at a natural or normal situation. Secondly, the trigger itself is similar to the warranted emotion test contained in the 2009 Act, but the proposal goes further by requiring D himself to feel his emotion was warranted, ensuring that the anger D experienced actually stemmed from a source he appreciated to be severe provocation. Thirdly, the proposal sets out a limited scope for exclusions which are only in place when there is no prospect for the defence to succeed. Finally, the proposal identifies a class of cases where the defence is not normally expected to succeed but could potentially, in these scenarios an evidential burden would be placed on D to provide sufficient evidence, on the balance of probabilities, to demonstrate that the case was not a typical case of sexual infidelity, for example, and that the circumstances were exceptional; by putting in place presumptions it creates a balance between restricting the defence in cases, for instance, of male jealousy but, also, allowing for the possibility that such cases could succeed in exceptional circumstances. The advantages of the approach outlined is that by focusing the defence on provocation it ensures that the cases which fall under its ambit are appropriate, the test in the trigger raises the bar but is compatible

with rationale and reasoning behind the defence and there are mechanisms in place to prohibit or limit the scope of the trigger for the most controversial reasons which have traditionally been relied upon.

The proposal, entitled excessive warranted emotional killing, is based on the rationale which has been supported throughout the thesis, that if D's anger or fear was warranted, by society's standards, in the circumstances and genuine then this is a solid base for a partial excuse as such defences operate when D's choice was difficult and an ordinary person would have found it difficult too. By supplying this rationale it not only gives a framework for the elements of the defence but it also gives the defence standing and justifies its existence. It acknowledges that D's killing is always an excessive act and this means that the focus is on D's reason and emotional difficulty. As long as the defence is grounded in providing a partial defence for reactions which are the result of a common human frailty and the source of the emotion is deemed to be particularly severe then the defence has its own space, distinct from justificatory actions in self-defence or the abnormal actors in diminished responsibility, based on such understanding.

It is possible to argue alternate approaches to deal with excessive emotion killings: these issues do not need to be acknowledged at all, they could be dealt with in sentencing or they could be tied together with diminished responsibility to create a single overarching partial defence. The reasons why the three most credible alternate approaches are not suitable can be brought out in the justification of the warranted emotion/partial excuse approach: firstly, there is a necessity to respond to such circumstances as it would lead to disproportionate labelling and punishment if provisions are not made, this is partly owing to the mandatory life sentence for murder but such arguments still have force if this were not in place; secondly, if provocation was a matter of mitigation in sentencing there would be less opportunity to scrutinise and review its operation as it would be more difficult to assess its significance in the punishments handed out and in the defence it contains evaluative elements where the jury should be in place to make those judgements; finally, provocation and diminished responsibility function to award partial defences on different grounds, basically provocation deals with

excessive but ordinary responses and diminished responsibility looks after abnormal actors, and it is better if, along with self-defence which deals with justificatory defensive action, that they operate cohesively so that the overall operation of the defences is the most effective. A partial defence, entitled excessive warranted emotional killing, as suggested, would set the correct label, allow for a flexible level of punishment whilst acknowledging that there may be differentials between killing in anger and fear, have a clear rationale as to why mitigation is provided and the specific provisions would be in line with this.

One unavoidable consequence of an excessive emotion defence is that V's own conduct is inspected, in terms of evaluating the gravity of the provocation, and the proposal put forward would not entirely extinguish the prospect of victim blaming. However, the defence is centred on D's reasoning, D's emotional difficulty and D's own fault for retaliating when he should not have done so. The proposal puts in place provisions which would reduce the scope for victim blaming, though: the warranted emotion element of the trigger means that something particularly substantial is required to satisfy the requirements of the defence; by requiring provocation, rather than D being provoked, it means that V's conduct must be something more than normal or natural behaviour and as this is contained within the sufficient evidence test then the defence would be unlikely to even advance to the jury in this scenario; the presumptions combat the sorts of cases where victim blaming has been most troublesome, partners or ex-partners blaming V for the breakdown of their relationship or V's sexual activity with others and cases of non-violent homosexual advance.

A key flaw with the 2009 Act is that there has been a failure to adapt the defence to deal with both emotions and the reform is too entrenched in the language of provocation and this may lead to the utility of having a fear trigger being lost. Despite excessive emotional reactions being linked behind the same rationale, a common human frailty to act excessively when placed in certain situations, the specific provisions which deal with each emotion have to be tailored to the relevant emotion: the loss of self-control element, at the least, should be confined to the provoked-anger trigger and the control

test in the 2009 Act fails to address that truly assessing ordinariness, particularly in terms of feminine responses in fear, only comes from greater context and understanding.

Despite two of the key elements of the 2009 reform, the fear trigger and the sexual infidelity exclusion, being well-intentioned it has been shown that they will struggle to achieve what was intended in the reform process, and the success of the reform is likely to rest on how the problematic cases which arise in these areas are dealt with. As it is most likely that in the 2009 Act the loss of self-control element was retained because of the provocation trigger it would have been better if two separate partial defence were created, an excessive self-defence or self-preservation partial defence would have been more suitable than the reform which ultimately was adopted. It will be interesting to see how the judiciary continue to interpret the defence, considering the flaws with the provisions, though, as how the fear trigger interacts with the loss of self-control element requirement and what the span of sexual infidelity exclusion is will be significant in determining the effectiveness of the defence's key reforms.

The proposal which has been outlined seeks to resolve the long-standing problems with the partial defence, but in a different way to the 2009 Act. The loss of control defence should be seen as a stricter version of the pre-2009 provocation defence with a fear trigger added on, an emotion which had already begun to be recognised as being a part of the defence. The proposal put forward comes from the perspective that anger and fear are similar and potentially connected emotions, but are separate as fear is to do with self-preservation and about excessive defensive conduct but provoked-anger is to do with a loss of temper and is aggressive. The provisions in the proposal have been constructed following a look at the rationale of the defence and its overall function, and the key elements of the defence stem from this outlook. The sufficient evidence test ensures the trial judge can filter out cases and juries are ones who are essential in determining whether the evaluative aspects of the defence are satisfied, the triggers are grounded in warranted emotion so that mitigation is consistent with how society views the circumstances, the subjective test requires genuine and realistic responses, and the

control test relies on ordinariness as mitigation can only occur when D has acted like others may in those circumstances. The proposal for the use of contextual evidence is in order to assist this process leading to a better outcome, so that the decision-making for the factual and evaluative tests are more informed, and presumptions are a workable compromise in order to limit the scope of the defence. All in all, this is about constructing a partial defence which is effective, is able to restrict and allow mitigation appropriately, and there is a clear basis for why this is done.

APPENDICES

Appendix A

Law Commission proposal:

1) Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to

(a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); or

(b) fear of serious violence towards the defendant or another; or

(c) a combination of (a) and (b); and

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

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

3) The partial defence should not apply where

(a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence, or

(b) the defendant acted in considered desire for revenge.

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

5) The partial defence should not apply to a defendant who kills or takes part in the killing of another person under duress of threats by a third person.

6) A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

Appendix B

Ministry of Justice's 2008 proposal:

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

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

(4) A loss of self-control had a qualifying trigger if subsection (5), (6) or (7) applies.

(5) 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.

(6) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which -

- (a) amounted to an exceptional happening, and
- (b) caused D to have a justifiable sense of being seriously wronged.

(7) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (5) and (6).

(8) But subsection (1) does not apply if the qualifying trigger to which the loss of self-control is attributable is itself predominantly attributable to conduct engaged in by D which constitutes one or more criminal offences.

(9) For the purposes of subsection (6) -

- (a) an act of sexual infidelity is not, of itself, an exceptional happening;
- (b) a sense of being seriously wronged by a thing done or said is not justified if D incited the thing to be done or said for the purpose of providing an excuse to use violence.

(10) 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.

(11) 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.

Appendix C

Coroners and Justice Act 2009 provisions:

s54 Partial defence to murder: loss of control

(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.

s55 Meaning of "qualifying trigger"

(1)This section applies for the purposes of section 54.

(2)A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.

(3)This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4)This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which—

(a)constituted circumstances of an extremely grave character, and

(b)caused D to have a justifiable sense of being seriously wronged.

(5)This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).

(6)In determining whether a loss of self-control had a qualifying trigger—

(a)D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;

(b)a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;

(c)the fact that a thing done or said constituted sexual infidelity is to be disregarded.

(7)In this section references to "D" and "V" are to be construed in accordance with section 54.

BIBLIOGRAPHY

- P. Alldridge, 'Self-Induced Provocation in the Court Of Appeal' (1991) 55 JCL 94
- M.J. Allen, 'Provocation's Reasonable Man: A Plea for Self-Control' (2000) 64 JCL 216
- A. Ashworth, *Principles of Criminal Law* (Oxford University Press, Oxford, 2009)
- A. Ashworth, 'The Doctrine of Provocation' (1976) 35(2) Cambridge Law Journal 292
- J. Austin, 'A Plea For Excuses' (1956-7) 57 'Proceedings of the Aristotelian Society', New Series 1
- D.J. Baker & L.X. Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 254
- S. Bandalli, 'Provocation - A Cautionary Note' (1995) 22 Journal of Law and Society 398
- M. Baron, 'Reframing the Issues: Differing Views of Justification and the Feminist Critique of Provocation' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 329
- M. Baron, 'The Provocation Defense and the Nature of Justification' (2009-10) 43 U of Mich JLR 117
- K. Bennardo, 'Of Ordinarity and Excuse: Heat-Of-Passion and the Seven Deadly Sins' (2007) 36 Cap ULR 675
- V. Bergelson, 'Justification or Excuse? Exploring the Meaning of Provocation' (2009-2010) 42 Tex Tech LR 307
- M.N. Berman & I.P. Farrell, 'Provocation as Partial Justification and Partial Excuse' (2010) U of Texas Law, Public Law Research Paper No 166
- Michael Bohlander, 'COMMENT: Battered Women and Failed Attempts to Kill the Abuser – Labelling and Doctrinal Inconsistency in English Homicide Law' (2011) 75 JCL 279
- A. Botterell, 'A Primer on the Distinction between Justification and Excuse' (2009) 4(1) Philosophy Compass 172
- R. Bradfield, 'Domestic Homicide and the Defence of Provocation: A Tasmanian Perspective on the Jealous Husband and the Battered Wife' (2000) 19 U Tas L Rev 5
- P. Brett, 'The Physiology of Provocation' (1970) Crim LR 634
- B. Brown, 'The "Ordinary Man" In Provocation: Anglo-Saxon Attitudes And "Unreasonable Non-Englishmen"' (1963) 13 International and Comparative Law Quarterly 203
- H. Brown, 'Provocation As A Defence To Murder: To Abolish Or To Reform?' (1999) 12 Australian Feminist Law Journal 137
- A.S. Burke, 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman' (2002) 81 NCLR 211
- M. Burton, 'Intimate Homicide And The Provocation Defence – Endangering Women? *R V. Smith*' (2001) 9 Feminist Legal Studies 247
- R. Busch & N. Robertson, '"What's Love got to do with it?" An Analysis of an Intervention Approach to Domestic Violence' (1993) 1 Waikato LR 109
- R. Card, *Criminal Law* (20th ed, Oxford University Press, 2012)
- 'Case Comment: Homicide - Murder - Provocation - Characteristics of Reasonable Man', (2000) Crim LR Dec, 1004

- Case Comment, 'Prosecution: Crown Court - supervisory jurisdiction of High Court' (2000) Crim LR 486
- W. Chan, 'Legal Equality and Domestic Homicides' (1997) 25 International Journal of the Sociology of Law 203
- S. Christie, 'Provocation-Pushing the Reasonable Man Too Far?' (2000) 64 JCL 409
- C.M.V. Clarkson, H.M. Keating, S.R. Cunningham, *Criminal Law: Text and Materials* (7th ed, Sweet & Maxwell, 2010)
- A. Clough, 'Loss of Self-Control as a Defence: The Key to Replacing Provocation' (2010) 74 J Crim L 118
- A. Clough, 'The Judge's Role Where Provocation Is Evident but Not Discussed' (2011) 75 JCL 350
- E. Coke, *Institutes of the Laws of England* (W. Clarke & Sons, 1817)
- A.M. Colman & R.D. Mackay 'Equivocal rulings on expert psychological and psychiatric evidence: turning a muddle into a nonsense' (1996) Crim LR 88
- A.M. Coleman & R.D. Mackay, 'Legal issues surrounding the admissibility of expert psychological and psychiatric testimony' in N.K. Clark and G.M. Stephenson (eds), *Children, Evidence and Procedure* (Leicester: British Psychological Society, Issues in Criminological and Legal Psychology No 20)
- E. Colvin, 'Abusive Relationships and Violent Responses: The Reorientation of Self-Defense in Australia' (2009-10) 42 Tex Tech LR 339
- E. Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27 Monash ULR 197
- C. Cookson, 'Confronting Our Fear: Legislating Beyond Battered Woman Syndrome and the Law of Self-Defense In Vermont' (2009-10) 34 Vt LR 415
- R. Cotterrell, 'Law in Culture' (2004) 17 Ratio Juris 1
- Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) Cmnd 2345
- P.L. Crocker, 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defense' (1985) 8 Harv Women's LJ 121
- K. Z. Csefalvay, 'Taunts , Chapati Pans And The Case Of The Reasonable Glue-Sniffer: An Examination Of The Normative Test In Provocation After Smith And Holley' (2006) Cambridge Student Law Review 45
- 'Death before dishonour', The Observer, 21 November 2004 (accessed on 03/06/13: <http://www.guardian.co.uk/world/2004/nov/21/gender.features?INTCMP=SRCH>)
- R. Dogan, 'Did the Coroners and Justice Act 2009 get it right? Are all honour killings revenge killings?' (2013) 15 Punishment & Society 488
- D.A. Donovan & S.M. Wildman, 'Is The Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation' (1981) 14 Loy LALR 435
- G. Douglas, 'Self-defence and Expert Evidence in the Light of R v Martin' (2002) 166 JPN 368
- H. Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45 Australian & New Zealand Journal of Criminology 367
- H. Douglas, 'Assimilation And Authenticity: The 'Ordinary Aboriginal Person' and the Provocation Defence' (2006) 27 Adelaide LR 199

- J. Dressler, 'New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking' (1984) 32 UCLA LR 61
- J. Dressler, 'Partial Justification or Partial Excuse?' (1988) 51(4) MLR 467
- J. Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) 73 J Crim L and Crim 421
- J. Dressler, 'When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the 'Reasonable Man' Standard', (1995) 85 Journal of Criminal Law and Criminology 3, 726
- M.A. Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1993) 21 Hofstra L R 1192
- H. Edwards & J. Robson, 'Caging the Green-Eyed Monster - Restrictions on the Use of Sexual Infidelity as a Defence to Murder' (2012) 21 Nottingham LJ 143
- S. Edwards, 'Abolishing Provocation and Reframing Self Defence - The Law Commission's Options for Reform' (2004) Crim LR 181
- S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control', (2010) JCL 74.3, 223
- S. Edwards, 'Justice Devlin's legacy: Duffy - a battered woman "caught" in time' (2009) 12 Crim LR 851
- L. Ellison & V.E. Munro, 'Better the devil you know? 'Real rape' stereotypes and the relevance of a previous relationship in (mock) juror deliberations' (2013) 4 International Journal of Evidence and Proof 17
- P. English, 'What DID Section Three do to the Law of Provocation?' (1970) Crim LR 249
- D.L. Faigman, 'Discerning Justice When Battered Women Kill' (1987) 39 Hastings LJ 207
- D.L. Faigman & A.J. Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 Ariz LR 67
- K.K. Ferzan, 'The Values and Cost of Imminence' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 419
- B. Fitzpatrick & A. Reed, 'Sound of Mind and Body: Psychological Characteristics and the Reasonable Man Test in Provocation', (1999) 63 JCL 365
- K. Fitz-Gibbon & S. Pickering, 'Homicide Law Reform In Victoria, Australia: From Provocation to Defensive Homicide and Beyond' (2012) 52 BRIT JC 159
- K. Fitz-Gibbon, 'Provocation in New South Wales: The need for abolition' (2012) 45 Australian & New Zealand Journal of Criminology 194
- K. Fitz-Gibbon, 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' (2013) 40 Journal of Law and Society 2, 280
- G. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000)
- G. Fletcher, 'The Right Deed for the Wrong Reason: A Reply to Mr. Robinson' (1975) 23 UCLA LR 293
- R. G. Fontaine, 'Adequate (Non)Provocation and Heat of Passion as Excuse Not Justification' (2009) Arizona Legal Studies, Paper 08-07
- R.G. Fontaine, 'The Wrongfulness Of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, And Heat Of Passion Homicide' (2009) 12 NCLR 1, 69
- S.P. Garvey, 'Passion's Puzzle' (2005) 90 Iowa LR 1677

- 'Go soft on killer women, courts told' Daily Mail 30 November 2006 (accessed on 03/06/13: <http://www.dailymail.co.uk/news/article-419559/Go-soft-killer-women-courts-told.html#ixzz2VFtkK3bn>)
- W. Gorman, 'Provocation: The Jealous Husband Defence' (1999) 42 Crim LQ 478
- S. Gough, 'Taking the Heat out of Provocation' (1999) 19 OJLS 481
- A. Gray, 'Provocation and the Homosexual Advance Defense in Australia and the United States: Law out of Step with Community Values', (2010) 3 Crit 53
- K. Greenawalt, 'Distinguishing Justifications From Excuses' (1986) 49(3) Law and Contemporary Problems 89
- K. Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 Columbia LR 1897
- J. Greene, 'Provocation Defence for Battered Women Who Kill' (1989-90) 12 Adelaide LR 145
- M. Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736, Volume I)
- H.L.A. Hart, *Punishment and Responsibility* (Clarendon Press, 1968)
- C.B. Hessick, 'Is an Act Reasonableness Inquiry Necessary?' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 434
- B. Hogan, 'The Dadson Principle' (1989) Crim LR 679
- R. Holton & S. Shute, 'Self-Control in the Modern Provocation Defence', (2007) 27 OJLS 1, 49
- Home Office (2012) 'Homicides, Firearm Offences and Intimate Violence 2010/11: Supplementary Volume 2 to Crime in England and Wales 2010/11'
- J. Horder, 'Autonomy, Provocation and Duress' (1992) Crim LR 706
- J. Horder, 'Between Provocation and Diminished Responsibility' (1999) 10 KCLJ 143
- J. Horder, Memorandum to Public Bill Committee (2009)
- J. Horder, *Provocation And Responsibility* (Oxford University Press, 1992)
- J. Horder, 'Provocation's "reasonable man" reassessed' (1996) 112 LQR 35
- J. Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) OJLS 25 (1) 123
- A. Howe, 'Mastering Emotions or Still Losing Control? Seeking Public Engagement with "Sexual Infidelity" Homicide' (2013) 21 Fem Leg Stud 141
- A. Howe, 'Provocation in Crisis - Law's Passion at the Crossroads? New Directions for Feminist Strategists' (2004) 21 Australian Feminist Law Journal 53
- A. Howe, 'Red mist' homicide: sexual infidelity and the English law of murder (glossing Titus Andronicus)' (2013) 33 Legal Studies 3, 407
- A. Howe, 'Reforming Provocation (More Or Less)' (1999) 12 Australian Feminist Law Journal 127
- K. Huigens, 'Provocation at Face Value' (2011-2) 95(2) Marquette Law Review 409
- R. Hunter, 'Narratives of Domestic Violence' (2006) 28 Sydney LR 733
- D.N. Husak, 'Partial Defences', (1998) 11 Can JL and Jurisprudence 167
- E.O. Isedonmwun, A Requiem For Provocation [1988] 32 Journal of African Law 194
- M.T. Huss, A.J. Tomkins, C.P. Garbin, R.F. Schopp & A. Kilian, 'Battered Women Who Kill Their Abusers: An Examination of Commonsense Notions, Cognitions, and Judgments' (2006) 21 Journal of Interpersonal Violence 8, 1063

- D.M. Kahan & M.C Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 Columbia LR 269
- W.R.P. Kaufman, 'Self-defence, Imminence, and the Battered Woman' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 407
- 'Killers could get away with murder' Daily Mail 20 December 2005 (accessed on 03/06/13: <http://www.dailymail.co.uk/news/article-372168/Killers-away-murder.html#ixzz2VFtt9QNN>)
- J.H. Krause, 'Tolerating the Loss of Self-control' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 331
- Law Commission (2004) *Partial Defences to Murder* Report No 290
- Law Commission (2006) *Murder, Manslaughter and Infanticide* LAW COM No 304
- Law Commission (2003), 'The Law of Murder: Overseas Comparative Studies' Consultation Paper No 173 (available at http://lawcommission.justice.gov.uk/docs/Murder_comparative_studies.pdf)
- C. Lee, 'Reasonable Provocation and Self-defence: Recognizing the Distinction Between Act Reasonableness and Emotion Reasonableness' in P.H. Robinson, S.P. Garvey & K.K. Ferzan (ed), *Criminal Law Conversations* (Oxford University Press, 2009) 427
- L.H. Leigh, 'Loss of control: the significance of sexual infidelity and other matters' (2012) 2 Arc Rev 4
- A.M. Lunny, 'Masculinized Subjects Under Threat Provocation and 'Homosexual' Advance: Masculinized Subjects as Threat' (2003) 12 Social & Legal Studies 311
- R.D. Mackay & B.J. Mitchell, 'But is this provocation? Some thoughts on the Law Commission's report on partial defences to murder' (2005) Crim LR 44
- T. Macklem & J. Gardner, 'Provocation and Pluralism' (2001) 64 MLR 6 815
- T. Macklem, 'Provocation and the Ordinary Person' (1987) 11 Dalhousie LJ 126
- J.M. Maher, M. Segrave, S. Pickering & J. McCulloch, 'Honouring White Masculinity: Culture, Terror, Provocation And The Law' 23 (2005) Australian Feminist Law Journal 147
- M.R. Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 Mich LR 1
- F.McAuley, 'Anticipating the Past: the Defence of Provocation in Irish Law' (1987) 50 MLR 133
- E. McDonald, 'Defending Abused Women: Beginning a Critique of New Zealand Criminal Law' (1997) 27 VUWLR 673
- B. McSherry, 'It's A Man's World: Claims of Provocation and Automatism in 'Intimate' Homicides' (2005) 29 Melbourne University Law Review 905
- Ministry of Justice (2008) *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* Consultation Paper CP19/08
- Ministry of Justice (2009) *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law: Summary of Responses and Government Position* CP(R) 19/08
- R.B. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 Cal L Rev 133
- B.J. Mitchell, R.D. Mackay & W.J. Brookbanks, 'Pleading for provoked killers: in defence of Morgan Smith' (2008) 124 LQR 675
- M. Moore, *Placing Blame: A Theory of the Criminal Law* (Clarendon Press, 1997)
- C. Morgan, 'Loss of Self-control: Back to the Good Old Days' (2013) 77 JCL 119

- J. Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them' (1997) 21 Melbourne University Law Review 237
- D. Munjal, 'Intimate Partner Violence - Is There a Solution?' (2012) 19 Duke JGL&P 347
- A. Norrie, 'The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control', (2010) 4 Crim LR 275
- V. Nourse, 'Passion's Progress: Modern Law Reform and the Provocation Defense', (1997) Yale LJ Vol 106, No 5, 1331
- Office for Criminal Justice Reform, 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' Spring 2006
- G. Orchard, 'Provocation - Recharacterisation of 'Characteristics' (1996) 7 Canterbury LR 202
- D. Ormerod, *Smith and Hogan's Criminal Law* (13th ed, Oxford University Press, Oxford, 2011)
- D. Pallister and R. Stevenson, 'Plans to reform murder laws unveiled', The Guardian 29 July 2008 (accessed on 03/06/13: <http://www.guardian.co.uk/politics/2008/jul/29/justice.ukcrime>)
- S.Parsons, 'The Loss of Control Defence - Fit for Purpose?' (2015) 79(2) JCL 94
- H. Power, 'Provocation and culture' (2006) Crim LR 871
- O. Quick & C. Wells, 'Partial Reform of Partial Defences: Developments in England and Wales' (2012) 45 Australian & New Zealand Journal of Criminology 337
- C.B. Ramsey, 'Provoking Change: Comparative Insights on Feminist Homicide Law Reform' (2010) 100 Journal of Criminal Law and Criminology 33
- R.S. Regan, 'Indirect Provocation and Misdirected Retaliation' (1968) Crim LR 319
- K. Reid, 'COMMENT – The Media and Uninformed Law Reform: The Case of the Provocation Defence (2011) 75 JCL 185
- W.N. Renke, 'Calm Like a Bomb: An Assessment of the Partial Defence of Provocation' (2009-10) 47 Alta LR 729
- Rights of Women, 'Response to Law Commission Consultation Paper No. 177 - A New Homicide Act for England and Wales?' (2006) 4 (Accessed on 18/07/13 at http://www.rightsofwomen.org.uk/pdfs/consultation/homicide_act.pdf)
- M. Riley, 'Provocation: Getting Away With Murder?' (2008) 1 Queensland Law Student Review 56
- P. Roberts & A. Zuckerman, *Criminal Evidence* (2nd ed, OUP, 2010)
- P. Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 UCLA 272
- P. Robinson, *Structure and Function in Criminal Law* (Clarendon Press, 1997)
- S.D. Rozelle, 'Controlling Passion: Adultery And The Provocation Defense' (2005-6) 37 Rutgers LJ 197
- A. Samuels, 'Excusable Loss of Self-Control in Homicide' (1971) 34 MLR 163
- A. Samuels, 'The Coroners and Justice Act 2009' (2010) (<http://www.criminallawandjustice.co.uk/index.php?/Analysis/the-coroners-and-justice-act-2009.html> - Accessed 11/12/12)
- D. Shaw, 'Tidying up the murder law "mess"', BBC 29 July 2008 (accessed on 03/06/13: <http://news.bbc.co.uk/1/hi/uk/7530186.stm>)

- D.W. Selfe, 'Key criteria in the "loss of control" defence: case comment' (2014) 218 *Criminal Lawyer* 2
- J. Silverman, 'Messy' murder law a hot potato', BBC 24 May 2005 (accessed on 03/06/13: <http://news.bbc.co.uk/1/hi/uk/4576169.stm>)
- A. P. Simester & G. R. Sullivan et al, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th ed, Hart Publishing, 2010)
- R. Singer, 'The Resurgence of Mens Rea: I – Provocation, Emotional Disturbance, and the Model Penal Code', (1986) 27 *BCLR* 243
- J. Slater, 'Sexual Infidelity and Loss Of Self-Control: Context or Camouflage?' (2012) 24 *Denning Law Journal* 153
- J.C. Smith, 'Case Comment' (1995) *Crim LR* 890
- J.C. Smith, *Justification and Excuse in the Criminal Law* (Stevens & Sons, 1989)
- C. De Souza, 'Diminished Responsibility: A Less Vindictory Excuse Than Provocation' (2005) 17 *SAC LJ* 793
- M. Spencer, 'Provocation and the Reasonable Man', (1978) *New Law Journal* 615
- E. Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 *Alb LR* 973
- J.F. Stephen, *A History Of The Criminal Law Of England* (MacMillan 1883, Volume III)
- T. Storey, 'Loss of Control: the Qualifying Triggers, Self-induced Loss of Control and 'Cumulative Impact' (2013) 77 *JCL* 3, 189
- T. Storey, 'Raising the Bar: Loss of Control and the Qualifying Triggers' (2013) 77 *JCL* 17
- J. Stubbs & J. Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709
- K.S. Suffredini, 'Pride and Prejudice: The Homosexual Panic Defense' (2001) 21 *Boston College Third World LJ* 279
- S. Tarrant, 'A Feminist Perspective' (1990) 15 *Legal Service Bull* 147
- L.J. Taylor, 'Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense' (1985-6) 33 *UCLA LR* 1679
- 'Three tiers for reform', *The Guardian* 21 December 2005 (accessed on 03/06/13: <http://www.guardian.co.uk/uk/2005/dec/21/ukcrime.prisonsandprobation?INTCMP=SRCH>)
- R. Taylor, 'The Nature of 'Partial Defences' and the Coherence of (Second Degree) Murder' (2007) *Crim LR* 345
- J. Tolmie, 'Is the Partial Defence an Endangered Defence? Recent Proposals to Abolish Provocation' [2005] *NZLR* 25
- S. Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (Cambridge University Press, 1994)
- N. Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77(5) *JCL* 433
- N. Wake, 'Loss of control beyond sexual infidelity' (2012) 76 *JCL* 193
- L. Walker, *The Battered Woman* (1st Ed, Harper Pub, 1979)

- J.K. Weber, 'Some Provoking Aspects of Voluntary Manslaughter Law' (1981) 10 Comm L World R 159
- C. Wells, 'Provocation: The Case for Abolition' in A. Ashworth & B. Mitchell, *Rethinking English Homicide Law* (Oxford University Press, 2000)
- P. Westen, 'How Not to Argue that Reasonable Provocation is an Excuse' (2009-2010) 43 U of Mich JLR 175
- G. Williams, "The Logic of 'Exceptions'" [1988] CLJ 261
- P. Wintour, 'Battered women: Change in murder law seeks to aid victims of domestic abuse', The Guardian 28 July 2008 (accessed on 03/06/13: <http://www.guardian.co.uk/uk/2008/jul/28/ukcrime.law?INTCMP=SRCH>)
- C. Withey, 'Loss of Control' (2010) 174 JPN 197
- C. Withey, 'Loss of control, loss of opportunity?' (2011) 4 Crim LR 263
- S. Yeo, 'English Reform of Provocation and Diminished Responsibility: Whither Singapore?' (2010) Sing JLS 177
- S. Yeo, 'Ethnicity and the Objective Test in Provocation' (1987-88) 16 Melbourne University Law Review 67
- S. Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 Sydney LR 3
- A. Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press, Oxford, 1992)