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Loss of control and diminished responsibility: monitoring the new partial defences

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Coroners and Justice Act 2009 (c.25)

***Arch. Rev. 5** The Coroners and Justice Act 2009 replaced the partial defence of provocation with loss of control in murder cases and redefined diminished responsibility. If successful, the new defences still reduce liability to manslaughter.

Of the two, provocation was surely the more controversial. Although it had been part of English criminal law for centuries its interpretation had varied over the years. Indeed, the last 35 years or so of its existence were marked by a crescendo of criticism on the grounds that it was biased in favour of men and against women, that the loss of self-control requirement had never been properly explained, and that the objective test--that the reasonable person would have done what the defendant did in the same circumstances--had been anthropomorphised to an absurd degree.

Battered women who killed their abusive partners were effectively being forced to rely on diminished responsibility in an attempt to avoid a murder conviction and mandatory life sentence because they fell foul of the loss of self-control requirement. Such a requirement reflected the way in which men were likely to respond when provoked, but battered women instinctively knew they could not afford to do so; they had to choose their moment to get rid of their abuser and such deliberation and premeditation pointed all too clearly to a murder conviction. Moreover, it was never made clear whether the court had to be satisfied that the defendant was incapable of controlling his reaction or merely that he failed to do so.

The objective test laid down by Lord Diplock in *Camplin* [1978] A.C. 705 became the source of much expensive litigation and the appeal courts produced a series of conflicting cases about the extent to which the defendant's personal characteristics could be taken into account. The basic rule was that gender and age could be considered even though they only related to the defendant's ability to exercise self-control; otherwise characteristics were only relevant if they related to the provocation itself.

Yet some appeal court decisions flew directly in the face of this, and the situation was further complicated when some decisions indicated that socially undesirable characteristics--including attention-seeking personality and glue-sniffing addiction--might be legitimate considerations. To make matters worse, some appellate decisions held that mental abnormalities which explained why the defendant had lost his self-control (but were not otherwise connected to the provocation) could be taken into account, thereby implying a potential overlap between provocation and diminished responsibility. Matters came to a head when the Privy Council (in *Attorney General for Jersey v Holley* [2005] UKPC 23) did what law students *Arch. Rev. 6 are (initially) told is impossible--they overruled the House of Lords (in *Smith* [2001] 1 A.C. 146).

Although the law seemed to have been restored to the position it occupied after Camplin, there was a feeling that enough was enough. The Law Commission was asked to review the law and it concluded that the old law was too generous in some instances and too harsh in others. The Law Commission, unsurprisingly, recommended abandonment of the loss of self-control requirement but the then Labour government was worried that without it the law would be exploited in undeserving cases, such as those committed out of a considered desire for revenge--which was regarded as the very antithesis of a "genuine" provocation case. But not only has the requirement been preserved; it has been placed at the heart of the new plea!

The loss of self-control must have been triggered in one of two ways--either by a fear of serious violence from the victim against the defendant or another, or by words and/or conduct of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged. The fear trigger is generally to be welcomed; it is *prima facie* of assistance to battered women, but they will still face the formidable loss of self-control hurdle. The words or conduct trigger is littered with ambiguities and elastic terminology--"extremely grave character", "seriously wronged", etc. Whilst it was perhaps not surprising to find the government expressly excluding cases where words or conduct were incited by the defendant, the decision to exclude sexual infidelity--what many commentators traditionally regarded as a paradigmatic example of provocation --is much more controversial. In addition, the court now has to be satisfied that a person with normal tolerance and self-restraint would have reacted in the same or similar way as the defendant did. It is assumed that there is a common standard of tolerance and self-control, but it is difficult to avoid the view that this is a recipe for inconsistency.

It is also difficult to avoid the suspicion that, had the government not already decided to review the old provocation defence, it would not have felt there was sufficient reason to re-examine the diminished responsibility law. Nevertheless, although expert psychiatrists who advise in such cases had managed to work with the law, the original wording of s.2(1) of the Homicide Act 1957 had been heavily criticised. The terminology in the subsection was almost certainly not what the psychiatric profession would currently choose, and the phrase "abnormality of mind" which lay at the heart of the plea was somewhat ambiguous. The requirement that the abnormality must have substantially impaired the defendant's "mental responsibility" was also rather puzzling --the two words "mental" and "responsibility" do not obviously go together--though the intended meaning was presumably that the defendant's mental condition significantly reduced his moral responsibility for his actions. Other obvious problems included the precise meaning of "substantial impairment". That the large majority of diminished manslaughter cases did not go to trial did not, of course, negate the problems with the wording of the old law.

The wording of the new law is considerably different from the original drafting of s.2(1) of the 1957 Act. "Abnormality of mind" has now been replaced with "abnormality of mental functioning". The words in parenthesis in the old law have been replaced with the requirement that the abnormality "arose from a recognised medical condition". The abnormality must have substantially impaired specific abilities of the defendant--understand the nature of his conduct, form a rational judgment, or exercise self-control--which were not spelt out in the original subsection. The abnormality must also explain the defendant's conduct in the killing, and it will do this if it caused the defendant to act as he did or if it was a significant causal factor. Again, this is a new feature of the law.

We would like to monitor these two defences for a minimum of twelve months to see how the new law works in practice. Professor Mitchell (Coventry University Law School: aa9112@coventry.ac.uk) is interested in the loss of control cases and Professor Mackay (De Montfort University School of Law: rdm@dmu.ac.uk) the diminished pleas. We therefore invite practitioners to contact us by e-mail if they are involved in a case in which one of the defences is raised (expressly or by implication), and we will then arrange a convenient method of obtaining relevant case data.