A CRITICAL ANALYSIS OF THE LOSS OF CONTROL DEFENCE IN THE CORONERS AND JUSTICE ACT 2009

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Abstract - The "loss of control" defence to murder as enacted in the Coroners and Justice Act 2009 (CJA) represents a legislative effort to bring greater coherence to an aspect of UK homicide law that has vexed several generations of jurists, practitioners, and academic commentators. The analysis developed in this paper illustrates that the loss of control defence as defined in CJA sections 54 and 55 is a laudable initiative; its fuller assessment must await further appellate court determination before a definitive conclusion of its utility is possible. The CJA amendments tend to embrace a legitimate policy that those who found to be provoked by the activities of others to lose their self-control should be dealt with in a different way than those who commit intentional killings when motivated by their own desires or pursuit of gain. However, the 2012 Court of Appeal decisions rendered in the Parker troika of cases provide useful direction as to how the law is likely to be applied. It shows an attitude in the Court of Appeal that the whole circumstances that challenged the defendant must be examined. The Court of Appeal has introduced an important ingredient into the potential use of sexual infidelity as a section 55 trigger – it is not a permissible stand-alone factor, but it may legitimately form part of an entire qualifying trigger circumstance.

Keywords - Loss of self-control – Coroners and Justice Act 2009 – Provocation – diminished responsibility – qualifying trigger.

I. INTRODUCTION

The analysis undertaken in this paper has three components. In Part One, the law of provocation now abolished in the wake of the CJA amendments is discussed against the outline of the CJA amendments. The revisions to the companion murder defence of diminished responsibility are briefly contrasted to ensure the firmest foundation on which to evaluate the likely impact of the amendments; the loss of control provisions attracts the bulk of the analysis. The CJA loss of control provisions are specifically examined in Part Two, with particular emphasis directed to the section 55 "qualifying triggers" and the apparent interplay between objective and subjective standards that may apply in given circumstances, such as domestic violence. Parker and the extensive consideration of sexual infidelity as a triggering event are considered in this context [1], [2]. The conclusions supported by the analysis are summarised in Part Three.

It is noted in passing that the CJA amendments have been widely criticised as yet another piecemeal approach to what ought to be a comprehensive reform of UK homicide law [3]. A number of persuasive arguments have been advanced with considerable force that the CJA abolition of the provocation defence in favour of loss of control, and the accompanying tweak of the rules concerning the availability of diminished responsibility ought not to have been introduced in a legislative vacuum. The editors of the Criminal Law Review are representative of this perspective. They noted with some aspersion that the new law "… has nothing to say about the definition of murder or about the mandatory penalty of life imprisonment for murder", amongst other serious issues that have been neglected by UK policymakers [4]. A number of commentators noted that prior flexibility of the diminished responsibility concept will be unduly compromised by the insistence reinforced in the CJA amendments on proof of a diagnosable medical condition [5]. Whilst these forceful lines of inquiry are not the primary thrust of the analysis presented below, it is important to read the critical discussion undertaken in this paper with these larger and legitimate systemic concerns in mind.

PART ONE

1. AN OVERVIEW OF THE CJA AMENDMENTS

The amendments address the partial defence to murder of provocation and diminished responsibility. To a large degree, the "loss of control" amendments have incorporated the developments that have been observed in UK homicide law since Duffy, through which the requirement that provocation must result in a sudden deadly response was ameliorated over time as courts gave fuller effect to the realities of domestic violence [6]. It was in the later cases such as Ahluwalia that firm judicial recognition was afforded to provocation as the culmination of a "slow burn" that was driven by subjective considerations. The CJA reshapes this precedent, where the requisite section 54 loss of self-control has a mandated "qualifying trigger" as defined in the objective test stipulated in section 55. A permissible loss of control is stipulated as one that would have been experienced by another "…person of the defendant's sex and age, with a normal degree of tolerance and self-restraint

and in the circumstances of the defendant" [7]. The defendant's circumstances are further defined as "…all of the defendant's circumstances other than those whose only relevance to the defendant's conduct is that they bear on (their) general capacity for tolerance or self-restraint" [8].

A crucial distinction between the former provocation defence as it evolved in cases such as Thornton and the CJA-defined loss of self-control is that the amendments do not include the requirement that the response be "sudden" [9]. The most important qualification attached by the CJA to the removal of a temporal connection between the triggering act and the subject killing is the stipulation that the defendant is not permitted to act out of a "…considered desire for revenge" [10]. The prosecution bears the burden of proof where the defence establishes the evidentiary foundation that the defendant did not act as a consequence of a loss of self-control [11]. It is here that the second crucial change is brought to trial procedure. Unlike the former provocation regime, in which the trial judge was obliged to leave the partial defence to the jury irrespective of the strength or cogency of the evidence tendered on the issue, the CJA places the trial judge in the position of gatekeeper, where the loss of control defence is only left to the jury where the trial judge determines that the evidence relied upon by the defence will satisfy the further test that a "properly directed" jury might reasonably apply loss of control to the facts [12].

Section 55 of the CJA is a self-contained protocol that specifies the circumstances where the qualifying triggers are permitted. These are summarised by Norrie as the "fear trigger" and the "anger trigger" [13]. In the first, it is where the defendant's loss of self-control is attributable to a fear of serious violence at the hands of the deceased against the defendant or another person [14]. Alternatively, the defendant's fear must be connected "…to a thing or things done or said (or both)" that (i) constitute "…circumstances of an extremely grave character" and (ii) "caused the defendant to have a justifiable sense of being seriously wronged" [15]. The defendant is precluded from raising loss of control as a partial defence where the defendant incited the victim to act violently in the first place [16]. An amendment that is the point of commencement for the Court of Appeal in the Parker cases is the apparent blanket exclusion of sexual infidelity in all loss of control considerations made under section 55 [17].

2. THE WEAKNESSES IN THE FORMER LAW

The philosophical underpinning revealed by the CJA amendments is discussed at length by several of the commentaries cited in the attached bibliography. These are well summarised by Norrie as tending to revolve around the concept of imperfect justification, where the defendant's actions tend to be understandable as a legitimate response to fear or anger that falls short of attracting a full legal excuse [13]. The current UK law confirms the overarching principle that, in some well-defined circumstances, raw visceral anger must be understood as "…a normal and, at one level, appropriate, even perhaps virtuous, response to certain forms of words or action" [13]. It is this precise place in the modern UK legal landscape that the strongest views are elicited concerning the appropriate scope of the loss of control defences. On one side the argument is advanced with its own logical force that anger alone cannot properly constitute the basis for the mitigation of intentional killing [18]. The opposition counters with a position grounded as much in the appreciation of human frailty as anything else, one expressed by the Law Commission as the understanding that anger "….can be an ethically appropriate emotion and that … it may be a sign of moral weakness or human coldness not to feel strong anger" [19]. It is this position that carries the day in the framing of the CJA amendments, where anger can never justify outright an intentional killing, but "…a killing in anger produced by serious wrongdoing is ethically less wicked, and therefore deserving of a lesser punishment, than, say, killing out of greed, lust, jealousy or for political reasons" [19].

PART TWO: THE QUALIFYING TRIGGERS

The analysis of the manner in which the qualifying triggers will operate under the regime created by CJA sections 54 and 55 centres on those that often arise in domestic violence circumstances. The exclusion of sexual infidelity as a CJA trigger is evaluated in this context.

1. DOMESTIC VIOLENCE

The former law of provocation acquired significant portions of its pre-CJA shape in the case law that considered the relationship between domestic violence, both as historical backdrop and as the basis for legitimate future fears as to its re-appearance in the domestic relationship. It is evident from the language employed in the amendments that the putative bar that must be hurdled to establish the fear trigger is high. Edwards notes that the conjunctive use of the expressions "extremely grave", a requisite of the qualifying trigger to the proof of loss of self-control, is a jury question, and that the existence of a "justifiable sense of being seriously wronged" is to be judged on objective grounds [20]. She expresses the further concern that, even though the CJA requirement concerning the capacity for self-control is now expressed in terms of the "tolerance" and "restraint" otherwise required of the defendant, these factors are to be decided on the application of an objective test [20].

It appears likely to Edwards, and the Parker decisions discussed below tend to affirm her assertion, that the

former common law of provocation will remain a vital source for judges in their instructions provided to juries concerning the proper ambit of the loss of self-control experienced by the defendant and claimed as a basis to reduce a murder charge to manslaughter. Proof of such circumstances as moral indignation or outrage, which meet Norrie's suggested "imperfect justification" standard, will require physical evidence of the defendant's reaction to the victim's provocative act to buttress the defence [20]. Acceptable evidence to confirm "loss of self-control" is likely to include the outwardly visible and physical signs of a sudden outburst by the defendant. Edwards and Withey [21] each observe that the evidentiary formulae that succeeded in the provocation cases included readily understandable expressions, such as "... he spun round quickly and then appeared to go berserk" [21]. It is apparent that the CJA has delineated the loss of self-control partial defence as an all or nothing proposition.

The former judicial acceptance that provocation could legitimately arise in the form of a "slow burn" as opposed to an immediate violent reaction to a provocative act is challenged in the CJA amendments. For many commentators, the most egregious weakness in the former law was the Duffy-mandated requirement that legitimate provocation was founded on the suddenness of the defendant's response. Cases such as Ahluwalia that purported to deny provocation because the response was seemingly more measured that human nature might otherwise countenance as true provocation were manipulated into a fairer result through the introduction of the diminished responsibility alternative [22].

Two crucial policy points are distilled from the earlier jurisprudence that remains unsettled under the CJA loss of control regime. On one hand, the law of lost control cannot be capable of extension to permit those that coolly calculate their revenge to taken against an enemy to rely on the defence. The removal of "suddenness" from the equation must logically strike this barrier. However, the CJA appears primed to generate new problems associated with the "slow burn" that some defendants may legitimately experience as an emotional/psychological response to a victim's actions. Withey observes with concern that judges will likely instruct juries that the time elapsed between the "provocative" act that precipitated the loss of control and the killing itself is not determinative, but it will be important. It is difficult to conceive of timing as anything but an apparent objective means to evaluate the genuineness of the alleged loss of control. This approach in turn raises the legitimate fear that objective time lines may trump honest subjective delayed reactions to fear engendered by the victim that the defendant decides requires a physical response that results in the victim's death.

A stoical person that "cracks" under the pressure imposed by fear of what the victim might do to them days after the precipitating event will be less likely to establish CJA loss of control than the fiery tempered party that immediately reacts in a visceral way to take the life of the person they fear. The concern can be taken to this logical conclusion: "…the term loss of self-control is itself ambiguous because it could denote either a failure to exercise self-control or an inability to exercise self-control" [13]. These terms are likely to be conflated; failure suggests a culpable mindset where the defendant acts volitionally in response to the fear or anger generated by the victim, where inability is more consistent with a fundamental psychological flaw that would logically permits a jury to use the subsequent deadly reaction to support the differentiation between murder and manslaughter.

A further potential weakness in the CJA qualifying triggers is revealed in the academic commentaries that have considered the likely outcomes where the defendant deliberately provokes an attack on the victim with the intention of killing the victim in purported self-defence [23]. It is noted that where the unpleasant behaviour of the defendant leads to the victim's provocative attack, which in turn provokes the defendant, the CJA language does not exclude this possible defence.

PARKER – THE RELATIONSHIP BETWEEN EVIDENCE OF SEXUAL INFIDELITY AND THE SECTION 55 CJA QUALIFYING TRIGGERS

The three Parker cases heard by the Court of Appeal in early 2012 provide an important commencement point concerning one of the age-old rationales for provocation in murder cases – the archetypical "crime of passion", in defence of which sexual infidelity was often cited as a partial defence that tended to blur the lines between mitigation and a complete excuse for the subject killing.

In each of the three cases cited as Parker, the defendant claimed that sexual infidelity was the triggering event. The CJA provisions expressly exclude this often provocative act as a qualifying trigger. The important point taken from the Parker cases is the express recognition that, in some (albeit tightly prescribed) circumstances, sexual infidelity may support the finding that a legitimate trigger was present that led to the killing. The Court of Appeal noted that, under section 55, the qualifying triggers must involve circumstances that are both "extremely grave" and ones where the defendant had to be subject to "…a justifiable sense of having been seriously wronged" [24]. These are questions that are fact specific. In one of the appeals, the Court found that, as opposed to a prohibited cause and effect relationship between sexual infidelity and murder, 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".

II. CONCLUSION

The recent CJA amendments and their piecemeal quality tend to disguise and distort an elemental question – should an intentional killing ever be partially excused by the defendant's loss of control or diminished responsibility? There is significant intellectual appeal in the position advanced by Reid that it is never a reasonable reaction "…to kill someone after being 'provoked'" [18]. The defence should simply be abolished and judicial discretion substituted where in truly exceptional cases the murder sentence is appropriately reduced. Leaving aside the apparent utility of comprehensive reform of UK homicide law where this elemental question is addressed, the CJA amendments reflect the legitimate policy that those who are legitimately provoked by the actions of another to lose their self-control ought to be treated differently than those who commit deliberate killings when motivated by their own desires or pursuit of gain. The Parker decisions reveal a pragmatic attitude in the Court of Appeal that the totality of circumstances that faced the defendant must be assessed, as opposed to a reflexive application of the CJA provisions rooted in more literal interpretations.

REFERENCE

[1] As discussed in J. Wilson, "Cases covered: Loss of Control; Joint Enterprise", (2012) (5), CL&J 176.
[2] C, R v; R v Parker[2012] All ER (D) 73 (Jan); [2012] EWCA Crim 2.
[3] See e.g. C. Withey, "Loss of control, loss of opportunity?" [2011] (4) Crim. L.R. 263-279, 265, 266; see also B. Mitchell and R. Mackay, "Loss of control and diminished responsibility: monitoring the new partial defences", (2011) 3, Arch. Rev. 5-6.
[4] Editor, "Editorial", [2009] (10) Crim. L.R. 687-688.
[5] J. Miles, "The Coroners and Justice Act 2009: a "dog's breakfast" of homicide reform", (2009) 10 Archbold News 6-9, 7.
[6] Duffy, R v [1949] 1 All ER 932; see also Clough, A "Loss of self-control as a defence: the key to replacing provocation", [2010] JoCL 74(118).
[7] Coroners and Justice Act 2009, s. 54(1)(c).
[8] H. William, H. David and G. Felicity, "Loss of Control: Comparisons and anomalies", (Spring 2011) (1), C.B.Q. 10-12, 11.
[9] A. Norrie, "The Coroners and Justice Act 2009 – partial defences to murder (1) Loss of control", [2010] (4) Crim. L.R. 275-289, 277.
[10] Coroners and Justice Act 2009, s. 55(3).
[11] K. Reid, "The Media and Uninformed Law Reform: The Case of the Provocation Defence", (2011) 75(3), J. Crim. L. 185-193, 187.
[12] Law Commission Partial Defences to Murder, 2004, Law Com. No.290, para 3.38.
[13] S. S. M. Edwards, "Anger and Fear as Justifiable Preludes for Loss of Self-Control", (2010) 74(3), J. Crim. L. 223-241
[14] C. Withey, "Loss of control", [2010] 174(14), C.L. & J. 197-199.
[15] Ahluwalia, R v [1992] 4 All ER 889, 899.
[16] Brown, R v [1993] 2 All ER 75, 82.
[17] C, R v; R v Parker[2012] All ER (D) 73 (Jan); [2012] EWCA Crim 2, 7.

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