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# *Going Full Circle: Gender and the 'Loss of Control' Defence under the Coroners and Justice Act 2009*

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## **Introduction**

It has long been acknowledged that the old provocation defence not only privileged male emotional states but also excluded battered women who killed their abusers out of fear (Horder, 1992). The defence was too often relied on by violent men who killed their partners out of sexual control and possessiveness; yet, battered women who killed their abusers were often denied the defence because their 'slow-burn' reactions were incongruent with the requirement that the loss of control had to be sudden and temporary.

Partly in response to these criticisms, the provocation defence was reformed and recast as a 'loss of control' defence (Edwards, 2010). The elements of the new loss of control defence are outlined in s 54(1) of the Coroners and Justice Act 2009 ("CJA"):

- (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.

Aimed at bringing battered women within its ambit, the CJA removed the requirement that the loss of control had to be sudden (s 54(2)) and recognised 'fear of serious violence' as a qualifying trigger (s 55(3)). On the other hand, the requirement that only a 'justifiable sense of being seriously wronged' (s 55(4)) could constitute a qualifying trigger and the exclusion of sexual infidelity as a qualifying trigger (s 55(6)(c)) clearly aimed at delegitimising male feelings of possessiveness over women.

This article argues that the changes evinced by the CJA have not corrected the gender bias that afflicted the old provocation defence. It goes on to examine the theoretical basis of the new loss of control defence and argues that its theoretical incoherency reinforces gendered thinking which continues to penalise women. Finally, this article concludes that 'fear of serious violence' should be removed as a qualifying trigger and supports proposals to establish a partial defence of excessive self-defence instead.

### **'Loss of Control' Defence and Gender Bias**

Despite the aforementioned changes under the CJA, the retained requirement of loss of control is likely to continue disadvantaging battered women who killed their abusers. Admittedly, the courts have attempted to move towards an interpretation of loss of control which is more favourable to battered women; in *R v Jewell* (2014), the Court of Appeal stated that loss of control means loss of the ability to act in

accordance with considered judgement or a loss of normal powers of reasoning. However, the concept of loss of control nonetheless inherently privileges male manifestations of anger. Edwards (2011: 88) makes the point that loss of control is normatively associated with outward expressions of anger such as ‘went berserk’, ‘snap’ and ‘exploded’. Similarly, Mitchell (2011: 47) notes that loss of control is ‘more difficult to reconcile with other reactions’ such as fear or desperation because individuals may remain outwardly calm when experiencing these emotions. Since the concept of loss of control is inextricably bound up with physical expressions of anger, battered women who killed their abusers will have to ‘conform to an outward expression of loss of self-control predicated on the vehement passion of anger when her emotional state and her state of mind are intractably one of a state of fear’ (Edwards, 2011: 88). As such, the loss of control defence is still structured around masculine experiences and battered women may continue facing difficulties availing themselves of the defence.

Furthermore, it is unclear how far the removal of the suddenness requirement in the CJA goes to protect battered women. Even before the CJA formally removed the requirement that loss of control had to be ‘sudden and temporary’, the common law had already moved towards a broader interpretation of this requirement. In *R v Ahluwalia* (1993), the court held that the provocation defence would not be automatically ruled out if there was a delay between the loss of control and the killing; however, the longer the delay, the more likely that the defendant will be found to have not lost self-control. While the CJA explicitly precludes a requirement of suddenness, the time lapse between the loss of control and the killing is nonetheless a factor to be considered in determining whether the defendant indeed lost self-control (Coroners and Justice Act Explanatory Notes). As Withey (2011: 267) notes, the loss of control defence may fail ‘if abused partners kill after a period of delay, even though they experience a loss of self-control in being unable to refrain

from killing'. Battered women who displayed slow-burn reactions may be in a no better position pleading the new loss of control defence as compared to the old provocation defence.

On the other hand, the exclusion of sexual infidelity as a qualifying trigger has been severely watered down. In *R v Clinton* (2012), the Court of Appeal held that 'where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it'. The practical effect of *Clinton* is that sexual infidelity will rarely be excluded as a qualifying trigger because it is unlikely that sexual infidelity will be raised in isolation from other factors (Wake, 2012). While it would be easy to blame the courts for re-introducing sexual infidelity as a qualifying trigger, *Clinton* was a necessary response to the fact that the exclusion of 'sexual infidelity' created too many arbitrary distinctions for it to be a workable legal criterion. The crux of the problem was that the term sexual infidelity 'focuses on sexual jealousy' at the 'unjustified expense of sexual envy' (Horder, 2009). In attempting to delegitimise male feelings of sexual possessiveness, the CJA had instead ironically relied on language drawn from a paradigmatically masculine enterprise.

As the law stands, the changes engendered by the CJA have not gone far enough in addressing the gender bias afflicting the old provocation defence. The loss of control defence is still structured in a way that is insensitive to the experiences of battered women who killed their abusers; it is likely that battered women will continue to face problems fitting their experiences within a framework that is ultimately constructed on the image of masculinity. On the other hand, sexual infidelity has been re-admitted as a qualifying trigger through the back door and the law continues to legitimise male feelings of sexual

possessiveness over women. The law has gone full circle; the new loss of control defence under the CJA continues to be laden with a gendered dimension.

### **In Search of Theoretical Consistency**

On a broader level, the theoretical incoherency underlying the loss of control defence reveals gendered thinking which continues to disadvantage women. Norrie (2010) argues that the reform proposed by the Law Commission (which removed the loss of control requirement) is based on a model of imperfect justification, although he notes that the retained loss of control requirement in the CJA undermines this model. Under this model, fear and anger are both justified emotional responses to unjust conduct, albeit imperfectly justified because killing is nonetheless wrong (Norrie, 2010). This article, however, argues that the qualifying triggers of fear and anger should not be underpinned by the same theoretical principles.

The loss of control defence based on the qualifying trigger of fear can be explained by the model of imperfect justification. This is especially so since the loss of control defence in reality functions as a partial defence to self-defence (Horder, 2005); in *R v Dawes* (2013), the Court of Appeal noted the factual overlap between the two defences and stated that a defendant is likely to rely on the loss of control defence if he used excessive force to defend himself. On this view, individuals who killed out of a fear of serious violence are justified in their killing because they did so to protect themselves. Their killing is, however, imperfectly justified if they lost self-control and over-reacted to the threat they were facing.

However, it is unclear how the qualifying trigger of anger fits within the framework of imperfect justification. Norrie argues that anger is a

justifiable emotional reaction to unjust conduct; yet, there is a clear difference between the justifiability of anger as an emotional reaction and as a reason for killing (Horder, 1992). Where an individual kills out of anger, he is not doing so to protect himself but instead to 'negate a threat, inherent in the provocation, to the self-worth of (himself), to the values to his self-conception' (Horder, 1992: 192). Regardless of how justifiable the emotional reaction of anger was, killing out of anger should be excused rather than justified.

The loss of control defence thus combines two qualifying triggers of fear and anger which are respectively based on justification and excuse. While there may be no practical difference between justification and excuse, they are characterised by different moral marks; conduct under the former is morally appropriate whereas conduct under the latter is wrongful but nonetheless excused as a concession to human frailty (Norrie, 2010). Yet, by explicitly positioning fear and anger as alternative qualifying triggers under the same defence, the law suggests that both qualifying triggers should be treated with similar moral turpitude. The result is that battered women who killed their abusers to protect themselves are painted with the same moral brush as violent males who killed their partners to vindicate their sense of self-worth and sexual possessiveness over women. Edwards (2011: 95) makes the point that the law 'continues to excuse his anger more than it excuses her fear'. But the law does more than that: by suggesting the moral equivalence of her fear and his anger as a reason for killing, the law continues to perpetuate a system that validates and prioritises male concerns over that of females. By attempting to bring battered women within the ambit of the loss of control defence, the law ironically perpetuates discourse that downplays the experiences of women.

## Further Reform

McColgan (1993) argues that self-defence is a good fit for battered women who killed their abusers and used reasonable force to protect themselves against their abusers. Yet, under the current law, battered women who feared serious violence from their abusers but used disproportionate force in defending themselves must plead the loss of control defence. As argued above, the loss of control defence continues to be rooted in masculine experiences and battered women must fit their experiences within a framework that is fundamentally insensitive to them. Furthermore, the theoretical incoherency of presenting fear and anger as alternative qualifying triggers silences the experiences of battered women by suggesting the moral equivalency of her fear and his anger.

This article proposes that ‘fear of serious violence’ should be removed as a qualifying trigger under the loss of control defence and a new partial defence of excessive self-defence should be created in its place. Under this new partial defence of excessive self-defence, the charge of murder is reduced to manslaughter if the defendant feared violence from the victim but cannot plead self-defence because he used excessive force to defend himself in the circumstances (Edwards, 2004). There will be no need for the defendant to have lost self-control to plead this defence.

A new partial defence of excessive self-defence is a better fit for battered women who currently must plead the loss of control defence. Battered women will no longer have to pigeonhole their experiences into a requirement of loss of control but will instead only need to show that they feared violence from their abusers. And with a defence of excessive self-defence, battered women who killed their abusers but used disproportionate force in doing so will finally be recognised to be doing so out of self-preservation rather than a loss of control.

## References

- Edwards, S. (2004) 'Abolishing Provocation and Reframing Self-Defence - The Law Commission's Options for Reform', *Criminal Law Review*, pp. 181–197.
- Edwards, S. (2010) 'Anger and fear as justifiable precludes for loss of self-control', *Journal of Criminal Law*, 74(3), pp. 223–241.
- Edwards, S. (2011) 'Loss of Self-Control: When His Anger is Worth More than Her Fear', in: A. Reed & M. Bohlander, eds. *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*. Ashgate Publishing, Ch 6.
- Horder, J. (1992) *Provocation and Responsibility*, Oxford: Clarendon Press.
- Horder, J. (2005) 'Reshaping the Subjective Element in the Provocation Defence', *Oxford Journal of Legal Studies*, 25(1), pp. 123–140.
- Horder, J. (2009) 'Memorandum from Professor Jeremy Horder, Law Commissioner for England and Wales' (CJ 01), Available at: <https://publications.parliament.uk/pa/cm200809/cmpublic/coroners/memos/ucm102.htm> (Accessed March 14, 2020).
- McColgan, A. (1993) 'In Defence of Battered Women who Kill', *Oxford Journal of Legal Studies*, 13(4), pp. 508–529.
- Mitchell, B. (2011) 'Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!', in: A. Reed & M. Bohlander, eds. *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*. Ashgate Publishing, Ch 3.
- Norrie, A. (2010) 'The Coroners and Justice Act 2009-Partial Defences to Murder (1) Loss of Control', *Criminal Law Review*, (4), pp. 275–289.

Wake, N. (2012) 'Loss of Control beyond Sexual Infidelity: R v Clinton (Jon-Jacques) (2012) EWCA Crim 2', *Journal of Criminal Law*, 76(3), pp. 193–197.

Withey, C. (2011) 'Loss of control: Loss of opportunity?', *Criminal Law Review*, 4, pp. 263–279.