

The partial defence loss of control



Introduction

The introduction of the Coroners and Justice Act 2009 which came into force in October 2010 brought a significant change through a new defence of loss of self-control which replaced the defence of provocation. The defence of provocation was existed at common law and was guided by the Homicide Act 1957. However, before the enactment of the 2009 Act only provocation not the fear of violence was considered as partial defence of loss of control.

[1] But the 2009 Act includes both provocation and apprehension of serious violence as partial defence of loss of control. Both defences have the similarity of reducing the charge of murder to manslaughter when it is proved that the defendant (D) had committed the murder as he was so provoked or lost his self-control. Thus, it is a partial defence only applicable to murder if committed. While the previous defence of provocation required one subjective and one objective question to be answered to find the extent of criminal liability, sec. 54 (1) requires two subjective and one objective question to be answered in finding criminal liability.[2] The aim of my discussion will be thus to find out whether the court's interpretation of these subjective and objective requirements of partial defence have been correctly balanced or not in assessing criminal liability. In doing so, my discussion will go through academic's views as well as various case studies and journals/articles reviews.

Subjective and Objective requirements

Two questions were asked to the defence of provocation prior to the inception of the Coroners and Justice Act 2009; the subjective question was whether the defendant was provoked to lose his self-control and objective

question was whether a reasonable man would have committed the same act in the same situation by losing his temper (Allen, 2015).[3] This requirement was derived from the interpretation of the s. 3 of the Homicide Act 1957. However, s. 54 (1) of the Coroners and Justice Act 2009 sets out the main elements of the partial defence of loss of control. S. 54 (1) (a) and (b) represent the subjective elements which requires that D must have lost self-control due to qualifying trigger and (c) represent the objective element which requires whether a person of same sex and age of D with normal degree of tolerance and self-restraint would have committed the same act in the same situation.[4]

Main Body of Analysis

While according to S. Parsons (2015) the Act has been drafted poorly and may not provide intended outcome as he believes the new Act is very restrictive[5], Allen (2015) believes that we should wait for longer time to get the best out of the Act.[6] Horder (2016) stated that the 2009 Act brought significant changes to the law of partial defences.[7] He discussed while the term ‘provocation’ has been replaced by ‘loss of control’ in s. 54 of the 2009 Act, it retains the concept of provocation in a way that such loss of self-control generates from a qualifying trigger when D has a justifiable sense of being seriously wronged (the anger trigger) due to things done or said (or both) to him in an extremely grave situation and has an apprehension of serious violence (the fear trigger) from V.[8] However, according to s. 54 (4) and 55 (6) (a, b) such loss of self-control will not be counted if D acts in vengeance or incite V to provoke him so that he can commit the offence. [9] This has been affirmed in the judgement of *Clinton* (2012).[10] Horder

suggests that these are restatement of ancient common law doctrines which restrict the defence being misused.[11]But S. Parsons believes that now the threshold for the loss of control is very high compared to previous law of provocation as now it has be overwhelmed.[12]S. 54 (2) of the 2009 Act states the loss of self-control need not be sudden any more. According to Allen (2015), this is particularly useful in domestic violence (DV) cases as the requirement of suddenness has now been abolished.[13]Now how the subjective elements could be interpreted today requires a brief explanation of case laws. As mentioned in Horder, the requirement of sudden loss of control was controversial and in many instances this requirement was ignored by judges and juries and it resulted as prejudiced against female D's. [14]However, he showed his concern on how sec 54 (2) and 54 (4) can be interpreted together. But he further argued that these could be interpreted together based on the circumstantial evidence and provided his consent to the idea of ' cumulative impact' derived from *Dawes* (2013). Horder discussed the cases of *Doughty* (1986) and *Naylor* (1987)where he believed the concept of provocation was wrongly applied. He suggested that if those cases were tried today then facts were interpreted in line of the sec. 55 (4) (b) in conjunction with sec. 55 (2). Therefore, the judgements might have been different today as the previous subjective notion of provocation has been replaced by ' justifiable sense of being seriously wronged' which were absent in both *Doughty* and *Naylor* .[15]Thus it may be argued that now the court's interpretation has been changed significantly through objective judgmental approach. In terms of the objective consideration, Horder compared the previous law with the new one and found the old concept has been conceptualized in more sophisticated form into the new one.

[16] However, he showed his concern regarding the interpretation of the ‘reasonable man’ by the courts and questioned whether a reasonable man would always be reasonable in different situations. In defining reasonable person Keating (2014) seems confused on the meaning of ‘reacted in the same or in a similar way’.[17] While according to S. Parsons objective standard has now been conservative, Keating discussed the issue in line of Lord Nicholls’s comment on *AG for Jersey v Holley*. The previous slippery precedents must now be set aside and read the reasonable man in accordance with s. 54 (1) (c) that is jury should not consider D’s psychological make-up, the term ‘reasonable’ or ‘ordinary’ has been dropped from the new Act. Therefore, ‘a person’ should be considered according to D’s sex and age.[18] Alan Norrie (2010) argued while there are some discrepancies in defining ‘person’ considering D’s age and sex with a normal degree of tolerance and self-restraint (objective consideration), it would be better for the juries to deploy objective reasonableness test.

[19] While he shows how sex could play a role in the new law nonetheless he agreed that this objective requirement of D’s sex and age is correct in deciding criminal liability. A 12-year-old boy’s act cannot be compared with that of an adult male. The subjective requirement of s. 55 (3) that is loss of control due to fear of serious violence also opens the gate to law for abused women and it also covers overreaction as well as pre-emption. Thus, the law according to Norrie is rightly balanced. However, Horder argued that wording of s. 55 (4) (a) makes the objective requirement very clear that D’s loss of self-control defence will not be considered unless supported by an extreme grave character where he was forced to commit the offence of murder.

[20] This line of argument had resonance in Baroness Scotland’s speech in <https://assignbuster.com/the-partial-defence-loss-of-control/>

2008-09 in the parliamentary debate on the issue of what would be considered as exceptionally grave and suggested that it must be judged through context. In *Morhall* (cited in Horder (2016)), the House of Lords held every single matter should be considered to find the strength of provocation. And Horder suggested that this approach remain same in the new law.

[21]While s. 55 (6) (c) of the 2009 Act concerned sexual infidelity is to be disregarded, in *Clinton* it was held by the Court of Appeal that if sexual infidelity is a part of the whole context then it should be taken into account.

[22]Therefore, there is a need of objective evaluation of the whole situation case by case basis.

In discussing D's loss of self-control which is a subjective in nature, Herring (2016) argues in line with *Jewell* (2014) and concludes that it is something which severely impairs one's powers to restrain from acting and impede normal reasoning.[23]To his view, this subjective notion plays a minor role rather the court would emphasize on the qualifying trigger mechanism if there is no sign of acting out of revenge or incitement on D's part. To his view, the new Act has significantly narrowed the scope of the laws of loss of self-control as now there must be a trigger to lose self-control. While the fear of serious violence need not be in reality or even if D believes that his child is going to be harmed by V, then D can rely on this. The qualifying trigger of 'being seriously wronged' must be judged objectively case by case basis as now the threshold is very high. Herring finds the objective consideration of 'person' very problematic. However, s. 54 (1) (c) is such that jury must consider D's act in the given situation. In the following three cases such as *R v Dawes*, *R v Hatter* and *R v Bowyer* the court had rightly interpreted the

subjective and objective considerations of the partial defence of loss of control in line with s. 54 and 55 of the 2009 Act.[24]

Conclusion

Just after ten years of the enactment of the new Act, we cannot come to a definitive conclusion that there is balance between subjective and objective requirements in assessing criminal liability. But as suggested by different scholars, the new Act makes the subjective and objective requirements very precise. Therefore, it should be given more time to get the best out of it. As there are some confusion regarding subjective and objective requirements of the Act[25], it is now up to the government whether they will go for reform or give more time to see the outcome of the Act.[26]

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