

# Law dissertation guide on provocation as a defence to murder.

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The following article is a dissertation guide produced for a our site client. The Working Title is: “ The problems with provocation as a defence to murder: Has the Coroners and Justice Act 2009 provided the solution for those who suffer from domestic violence and battered women’s syndrome?

## Part 1 My understanding of the topic

The problems with provocation have been well documented in recent years owing to the law commission’s two reports and consultation[1] which have ultimately led to the 2009 Act referred to above. Provocation is a partial defence to murder which reduces such a charge to voluntary manslaughter[2]. The old Homicide Act of 1957 utilised a two-part test: firstly was the defendant provoked into having a sudden and temporary loss of self-control Secondly, would a reasonable person have been provoked to react in this way The first part was subjective and the second part was objective but there were myriad problems with the old Homicide Act which we must analyse and assess the 2009 Act: the “ cooling-off” period introduced in 1949[3] which attempted to mitigate against calculated revenge discriminates against women who are not so prone to violent outbursts[4], the defence had no moral foundation where someone who was motivated out of compassion would not have the benefit of the defence whereas someone who had lost their temper suddenly was[5], the culture of blaming the victim for their own murder was insensitive[6], the definition of what was capable of provoking a defendant to kill was open-ended and was even stretched to a 17-day old baby crying[7] and finally the very divisive schism between the House of Lords[8] and the Privy Council[9] led to confusion on

the objective standard: is it proper for the jury to weigh the provocation against a reasonable person who shares the characteristics of the accused?

The Law Commission recognised three specific problems:“ In the first report, the three main problems with the existing law were identified as being that: provocation had become too loose so that a judge may be obliged to leave the issue to the jury where the conduct or words relied upon are trivial; the concept of loss of self-control had proved to be troublesome, giving rise to serious problems, to complaints of gender bias, and of the law having to be stretched in the “ slow burn” type cases; and the objective, reasonable person test under the 1957 Act had become too subjectivised in the interpretation given to it in *Morgan Smith*, enabling a D to rely on “ personal idiosyncrasies which make him or her more short tempered than other people”.”[10]

There was clearly a need for reform: of that there is no doubt. But is the Coroners Act 2009 and the new defence of “ loss of self control” under s. 56 the solutionNorrie points out that the three problems identified by the Law Commission have been addressed in the new law with the problem now the exclusive preserve of the judge[11], removal of the requirement of a “ sudden” loss of control albeit qualified by a caveat to prevent revenge killing and upholding the Privy Council decision in *Holley* by in drawing a distinction between “ control characteristics”[12] and “ response characteristics”[13]. But these welcome changes mask some persistent problems such as only age and sex being retained as general characteristics: Norrie rightfully asks what of the immature adult?

The New Act just whitewashes this part however and considered that any such questions would undermine the objective test[14]. There is also the question of sexual infidelity which has been expressly disregarded[15]. The test of the reasonable person is now very restrictive, as it follows the Privy Council's decision in denying factors such as alcoholism, which are extraneous to the object of the provocation, and will deny many the benefit of the defence where they might rightfully expect its protection: "Anything else that affects the defendant's general propensity to be provoked, apart from age and sex, is ignored. Thus if a person suffers from alcoholism, this is irrelevant to the loss of self-control unless a taunt was levelled at the fact that the defendant was an alcoholic. If there is not that link, then the defendant must look to the defence of diminished responsibility, even though the characteristic in fact caused them to lose their self-control and to be provoked. This is a significantly narrower test, but an irrational one because it does not address the nub of the problem under the old law." [16]

Norrie argues that the real stumbling block of the new legislation is the lack of moral progress in that there is no moral assessment of the provocative conduct. Miles agrees and also points out that many who previously enjoyed the test will not now be able to be protected by it and specifically questions whether women with "battered wives" syndrome will be able to avail themselves of it despite concessions made towards fear as a motivation[17]. Now the Act has come into force and has been operational for 9 months[18]. As yet there are no cases which have made use of it but there have been a few cases which have commented upon it most notably *R v Evans*[19] which I propose to look at as extensive commentary is made upon the application of

the new act which quite simply would have produced a different result. From my preliminary research my hypothesis will be that the new Act is a welcome step in the right direction but that much more work is needed if the proposals of the law commission are to be fully implemented and brought into line with international standards. To this end I propose examining the legal systems of Canada, Germany and America (which are composed of different legal systems with different traditions) to analyse our new law and see where it stands in comparison. I would also seek to address problems such as erotomania, honour killings and other problems such as provocation for a racist. From all the above research I would propose this structure as a first draft:

## Part 2 The proposed structure of the dissertation

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### Part 3 Other comments

As I have mentioned above the subject is very challenging and interesting and merits a dissertation. The fact that there are no cases so far should allow me to propose some hypothetical examples of cases based on a century of old case law. In terms of research I could look at cases over a ten year period (say leading up to the enactment of the 2009 Act) to look at the success or otherwise of the provocation defence: ie was it truly too expansive? Were women, the victims of domestic violence, really too easily using the defence? Furthermore the latest statistics on domestic violence (2010) have tended to show that men are increasingly becoming the victims of domestic abuse: what are the implications of this?

[1] Law Commission, Partial Defences to Murder (2004), Law Com. No. 290; Law Commission, Murder, Manslaughter and Infanticide (2006), Law Com. No. 304; Ministry of Justice, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law (2008), Consultation Paper CP No. 19/08.

[2] Elliott, Catherine & Quinn, Frances (2006) Criminal Law  
Pearson Education: GB p. 73

[3] R v Duffy (1949)

[4] As men are according to American research by Walker (1999)

[5] Elliott, Catherine & Quinn, Frances (2006) Criminal Law Pearson  
Education: GB p. 85

[6] Herring, Jonathan (2005 4th ed) Criminal Law Palgrave Macmillan: Basingstoke p. 221

[7] R v Doughty [1986]

[8] R v Smith (Morgan) (2000)

[9] Attorney General for Jersey v Holley (2005)

[10] Norrie, Alan (2010) 'The Coroners and Justice Act 2009 – partial defences to murder (1) Loss of control' Criminal Law Review 4, pp275-289

[11] s. 54(6) Coroners and Justice Act 2009

[12] Those characteristics which merely have an effect on the defendants' ability to control themselves and should not be taken into account for the objective test.

[13] These characteristics, such as a boy who is sensitive about his appearance is then taunted about that appearance, are relevant to the test. If, for example, a boy with big ears is teased about his football playing ability then the aspect of the big ears is not relevant as a boy with ordinary ears would be just as provoked to being teased about footballing ability.

[14] Norrie, Alan (2010) 'The Coroners and Justice Act 2009 – partial defences to murder (1) Loss of control' Criminal Law Review 4, p 283

[15] S. 55(6)(c) of the 2009 Act

[16] *ibid* p. 283

[17] Miles, Jo (2009) 'The Coroners and Justice Act 2009: A "Dog's Breakfast" of Homicide Reform' Archbold News 10 pp6-9

[18] It came into force on October 4th 2010

[19] R. v Evans (John Derek) [2009] EWCA Crim 2243; [2010] Crim. L. R. 491 (CA (Crim Div))