

Defence of 'loss of control' Assignment

under the new law³⁰, but the defence of LOC is excluded where the defendant was the initial aggressor (section 55(6)(a)), whereas the same is not true of self-defence. 'The limitation based on incitement (section 55(6)(b)) represents a move away from the law of provocation where self-induced provocation could be relied upon'³¹, which effectively overrules the case of *R v Johnson*³².

The second qualifying trigger, a 'justifiable sense of being seriously wronged' must come from something said or done, which leads to the feeling on the part of the defendant, amounting to 'circumstances of an extremely grave character' (section 55(4)(a)). Although these terms have not been defined, the issue of whether this sense of being seriously wronged is justifiable will be objectively assessed, such as in the case of *R v Humphreys*³³, where the defendant lost control, stabbing her partner to death, after being assaulted and mentally/sexually abused over several years. Therefore, one might conclude that this was a circumstance of extremely grave character, causing her to feel justifiably wrong.

The new law appears to narrow the scope of the defence, as under the old common law on provocation, anger was a sufficient basis for a LOC - the only requirement being that the LOC was 'sudden and temporary', provoked by things said or done to him. 'Previously, whether things said or done were sufficient to amount to provocation was left to the jury entirely and the judge would only try and explain the objective and subjective test.'³⁴

Despite the restrictive wording used to establish a qualifying trigger, under section 55(6)(c) CJA 2009 the LOC defence will not be available to a defendant who kills by the discovery of sexual infidelity. This change is based on the view that in a civilised society there can be no excuse for killing due to infidelity, therefore, in the case of *Downs* the defence would no longer be available to the defendant. 'Whilst this sentiment is commendable its inclusion has received widespread criticism as to its workability in practice.'³⁵ In *R v Clinton*; *R v Parker*; *R v Evans*³⁶ the court considered the full extent of the prohibition against 'sexual infidelity' as a qualifying trigger. 'If the defendant kills the victim after she was unfaithful to him, but he could point to some other trigger, which justified him having the defence, this would be permissible.'³⁷ The term 'sexual infidelity' is narrow, so it would not cover comments about a partner's sexual performance, but the courts will still need to consider what counts as infidelity.

The third requirement under the new law, states that the defendant's reaction is to be compared to that of a person with a normal degree of tolerance and self-restraint, sharing the age and sex of the defendant (s54(1)(c)). It replaces the old law, where the jury was asked to consider whether a reasonable man, would have acted as the defendant did under such provocation. 'This objective limb of the test proved highly problematic for the old

³⁰ BPP Constitutional law lecture (2012), *Homicide 1* (n 2).

³¹ E-law Resources (2012), *The Defence of Loss of Control* (n 1).

³² [1989] 1 WLR 740.

³³ [1995] 4 All ER 1008.

³⁴ Legal Norms (2010), *The New Partial Defence of Loss of Control* (n 15).

³⁵ E-law Resources (2012), *The Defence of Loss of Control* (n 1).

³⁶ [2012] EWCA Crim 2.

³⁷ Herring, *Criminal Law: Text, Cases and Materials* (n 3) 248.