

Think box 7.1

Consider whether the following fall within the definition of section 2 Homicide Act 1957:

- a. A has been physically and mentally abused for several months by her husband B. She has become extremely depressed. One night she stabs and kills B.
- b. A hears voices which tell him to kill his neighbours. A does so.
- c. A becomes depressed when his girlfriend, B, leaves him for another man. After one week, A kills B.
- d. A suffers from a depressive condition causing him to become aggressive. He gets into an argument with B over some tools which he accuses B of having stolen. The argument becomes heated and A stabs and kills B.
- e. A's terminally ill wife has suffered great pain and discomfort for a prolonged period. A has become depressed and kills his wife by suffocation.

Answer guidance

- a. It all depends on whether there is evidence that A suffered from a recognized medical condition so as to amount to an abnormality of mental functioning, which substantially impaired her ability to understand the nature of what she was doing, to be rational or to exercise self-control and which was a causative factor in the killing. If there is evidence of a clinical condition such as extreme depression/anxiety/BWS then – yes.
- b. This person is clearly extremely ill, probably psychotic, and so yes.
- c. The condition has to be a serious medical condition and not just the ordinary lapse into depression that we might all be prone to from time to time. So – probably not.
- d. A depressive condition might be far more serious than the rather more mild and transient depression in c.) above. - so, yes, depending on the evidence.
- e. Probably yes here, again, depending on the severity of the condition.

Think box 7.2

1. Ahmed suspected that his wife, Sophia, was conducting an affair with his best friend, Brian. One day, he found them together and Sophia confessed to Ahmed that the child of their marriage was Brian's. Ahmed immediately strangled Brian to death.

How would the subjective test in the partial defence of loss of control apply?

2. Anne and Bill lived together for eight months. Bill frequently punched and threatened her. One day, she told him she was going out. He said that she could only go out with him and that if she tried to leave on her own she would get what was coming to her. The next evening, Anne stabbed Bill repeatedly with a knife as he lay sleeping in a drunken stupor on the settee. He died in hospital the next day.

- a. What offence/s might Anne have committed?
- b. Did Anne have the mens rea for the offence?
- c. Does Anne have a defence?
- d. What difficulties will Anne face in arguing any defence and how might she overcome them?

Answer guidance

Question 1

Ahmed would need to provide evidence (NB: not proof) that:

1. There was a loss of self-control due to a relevant qualifying trigger under s54 Coroners & Justice Act 2009. Sexual infidelity is now excluded by s55(6)(c). But taunting and humiliation are not (*R v Clinton*). Therefore, the confession regarding the child may qualify as a 'thing said.'
2. As a result, Ahmed lost his self-control and killed, ie: he suffered uncontrollable outrage or boiled over (*Richens [1994]*).
3. The killing was not in a considered desire for revenge (s54 (4)). The loss of self-control was sudden, but this is no longer a requirement (s54(2)).

Question 2

- a. Murder.
- b. Yes, on the facts there is nothing to suggest that she did not directly intend to kill or cause GBH.
- c. Loss of control – qualifying trigger: fear of serious violence (s55(3));
- d. The prosecution might argue that the partial defence should not apply because there has been a day's delay between the last act of violence against Anne and the fatal killing, thus the killing was the result of a considered desire

for revenge (s54(4)). This may be supported by the possibility that she was pre-armed. Without further evidence, it is conceivable that she planned to use the knife all along. There is no indication that she grabbed the nearest object as a weapon at the time of the killing. However, there is no longer a need for a sudden and temporary loss of self-control; and delay by itself, within limits, should not defeat the defence provided Anne killed during a loss of self-control and not in a considered desire for revenge. The lapse of time might be too long here but there is no current guidance on the law yet. The repeated stabbing indicates a loss of self-control. This point raises the issue that battered women who kill may do so in self-defence. If successful, this would provide a complete defence. However, self-defence will not be available unless an attack is imminent and the amount of force used is reasonable (see Chapter 9). There is no imminent attack here and the amount of force used by Anne may be considered excessive. Loss of Control may therefore provide her with a partial defence.

Think box 7.3

Consider whether the following characteristics would be relevant to the objective test in the partial defence of Loss of Control (s54(1)(c)).

Remember that under previous case-law on provocation (particularly Holley) a distinction was made between characteristics relevant to self-control and those relevant to the gravity of the provocation. Although D's circumstances are now also relevant to the new objective test, the former distinction is preserved by s54(3) which states: ' "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance and self-restraint.'

1. Dan has a hot-tempered and jealous disposition. When his girlfriend, Eileen, attempts to leave him one day, he strangles her.
2. Yolanda is 16 and kills an older man with whom she has a relationship because he wishes to force her into prostitution.
3. Nigel, an alcoholic, thinks all Asians are terrorists. Mohammed calls him a racist pig. Nigel then throws a petrol bomb through Mohammed's window and Mohammed is killed in the fire.
4. Zohra has an attention-seeking personality and self-harms. She kills her boyfriend when he threatens her with a gang rape.
5. Delia is dyslexic and cannot read very well. Her boyfriend taunts her about it frequently. One night in desperation, Delia stabs him with a pair of scissors.

6. Look at the question on Anne and Bill at the end of the last section on the subjective test. Suppose that as a consequence of Bill's violence, Anne became anxiety ridden, nervous, depressed and suffered from insomnia. Are these relevant characteristics in provocation? What other defence might Anne plead?

Answer guidance

1. These characteristics relate to D's capacity for tolerance and self-restraint. They were always intended to be excluded by the objective test in provocation (Lord Hoffman in *(Morgan) Smith* [2000]) and will continue to be excluded by the new objective test in the defence of loss of control. They are inconsistent with the normal tolerance and self-restraint required by s54(1)(c) and are expressly excluded by s54(3).

2. Sex and age are specifically included within s54(1)(c). Even though V's conduct is not specifically aimed at Yolanda's age and sex, they will be relevant for a jury to consider.

3. Nigel's alcoholism and racism are not the target of Mohammed's comment. They relate to his capacity for self-restraint and will be excluded. Any offence taken at Mohammed's comment will not be justifiable objectively and may, in any case, have been incited. Therefore, S55(6)(c) will apply so as to defeat the defence.

4. Attention-seeking and self-harming characteristics would reduce Zohra's capacity for self-restraint and would now be excluded. This is a restriction of the law. See, eg: *Humphreys* [1995] where it was stated that such characteristics would be relevant to the objective test in provocation.

5. Delia's dyslexia is the target of her boyfriend's provocative conduct and is relevant to the gravity of his conduct to her. It will be included.

6. BWS will continue to be relevant to the objective test in loss of control even though not fitting within it terribly well. The alternative defence would be diminished responsibility.

Think box 7.4

1. Can you think of a manslaughter case by omission in which recklessness was described as foresight of an obvious risk of injury to health?
2. How does Lidar establish a more limited mens rea for reckless manslaughter?

Answer guidance

1. Stone & Dobinson.
2. It seems to suggest that there has to be foresight of a high probability of serious injury as opposed to a lower risk of some harm.

Think box 7.5

1. In what ways are subjective recklessness and gross negligence different?
2. In what way could it be useful to a jury to be told that a defendant who was reckless is more likely to be grossly negligent?

Answer guidance

1. Recklessness refers to foresight of the risk of some harm, whereas gross negligence is not a state of mind but a highly unreasonable level of conduct carrying an obvious risk of death which is determined objectively.
2. It could be regarded as a matter of common sense that if D perceived a serious risk of harm but went on to take it, he is more likely to be 'grossly' or 'criminally' negligent.

Think box 7.6

- Are Jones and Rowley compatible?

Answer guidance

No!

Think box 7.7

1. Looking at the Bateman test, what is the standard of negligence against

which the jury are asked to compare D's negligence?

Do you think this would help a jury to identify gross negligence?

2. The jury are asked if the negligence is so bad as to amount to a crime. Why could this be confusing?
3. How do you think the test could be improved?

Answer guidance

1. The civil standard. This is not a definition of gross negligence. Something far more culpable would be required here but there is no definition.
2. Because there are many crimes of negligence of varying degrees of gravity eg: driving without due care and attention.
3. By making clear that the test involves negligence of such a high degree that it is greater than the negligence required for minor crimes, and so bad as to amount to a manslaughter offence, not just any crime.

Think box 7.8

Is there a parallel between asking a jury to decide whether D's negligence is gross and therefore a crime and asking a jury to decide whether a defendant was dishonest, intentional or reckless?

Answer guidance

No.

Think box 7.9

1. If there was no unlawful act for the purposes of unlawful act manslaughter, what other offence might Lamb have committed?
2. Could Lamb have been guilty of that offence even though he thought there was no risk of harming his friend?

Answer guidance

1. Gross negligence manslaughter: he demonstrated a very high degree of incompetence by engaging in activity which posed a risk of death to his friend.
2. Gross negligence is not a state of mind but an extremely incompetent level of carelessness which is so bad as to amount to a crime. Therefore, lack of awareness of risk by D is irrelevant. Foresight of harm is not a pre-requisite to conviction for this offence but, where it does exist, may be relevant as part of all the circumstances.

Think box 7.10

The House of Lords failed to identify any relevant unlawful act in this case. What do you think it was? Do you agree that the boys should have been convicted of this serious offence?

Answer guidance

Criminal damage.

Think box 7.11

In the course of an argument in a shop D punches V slightly. V hits her head against a metal object. She is knocked unconscious and later dies from internal bleeding to the brain.

Has D committed unlawful act manslaughter?

Answer guidance

Yes, the unlawful act is an assault. Provided some injury to the person or harm is foreseeable by an ordinary person, D is guilty.

Think box 7.12

Given that D does not commit unlawful act manslaughter where D supplies Class A drugs and prepares a syringe for immediate injection by another, can you think of an alternative homicide offence?

What are the elements of the offence? Can you think of any relevant cases? Would causation continue to be a problem?

Answer guidance

Gross negligence manslaughter: Duty, breach involving a risk of death, causation and gross negligence: Khan & Khan, Ruffel, Gemma Evans. Causation is less of a problem because in Kennedy, the chain between supply of drug and death was broken by the victim's deliberate act of self-injection. In Evans, self-injection occurred before the relevant duty arose. It did not arise until V had collapsed and D realized V's life was in danger but failed to obtain medical assistance. Causation is therefore less problematic.

Think box 7.13

D is standing in a post-office queue and gets into an altercation with the person standing behind him (A). He pushes A who falls on top of an elderly woman (V). V sustains fractured bones and later dies from her injuries. Is D guilty of unlawful act manslaughter in respect of V's death?

Answer guidance

Yes, since the unlawful act does not need to be directed at V. These were essentially the facts of Mitchell [1983] QB 741.