

## Answers to Exam questions

### Chapter 5

#### Question 1

Jack and Kate have been unhappily married for several years. They argue continually and many of their arguments have turned violent. Jack suffers from depression and is impotent. He has also started drinking heavily. One evening, Jack returns home after a night in the pub and finds Kate in her dressing gown, in a passionate embrace with another man. When Jack confronts Kate, she admits to having an affair and taunts Jack, telling him that he fails to satisfy her in bed. Jack waits for Kate to turn around and start to climb the stairs, then he strikes her on the head with a wine bottle, killing her.

Discuss Jack's liability for Kate's death.

#### Bullets

- This is a question on loss of control and you would be expected to identify the relevant limbs of the partial defence and apply the law to the problem scenario.
- Loss of control is a statutory defence which was created by s.54, Coroners and Justice Act 2009. It is a defence to murder only and is a partial defence which reduces liability to manslaughter upon a successful plea: s.54(7). The burden of disproving the defence beyond reasonable doubt rests with the prosecution: s.54(5). The provision governing the old common law defence of provocation was repealed by s.56.
- There are three limbs to the defence: (i) did D lose control? (ii) was there a qualifying trigger? and (iii) might a person of D's age and sex, with a normal degree of tolerance and self-restraint and in the circumstances of D, have reacted in the same or a similar way? Each component should be considered sequentially and separately, and if one component is missing the defence should not be left to the jury (see *Clinton; Parker; Evans* (2012), *Jewell* (2014) and *Gurpinar; Kojo-Smith* (2015)).
- The defence of loss of control is 'self-contained' within the statute and '[i]ts common law heritage is irrelevant' (see Lord Judge CJ in *Clinton; Parker; Evans* [2012] EWCA Crim 2 at [2]). Lord Thomas CJ has also stated that 'it should rarely be necessary to look at cases decided under the old law of provocation' (*Gurpinar*;

*Kojo-Smith* [2015] EWCA Crim 178 at [4]). However, you might occasionally want to point out some of the old cases (if they are relevant to the scenario) in order to show your understanding of how the law has changed.

- Consider the first limb: it must be asked whether Jack lost control. This is a subjective question. The defence of loss of control does not require that the loss of control is sudden: s.54(2). (This can be contrasted to the old defence of provocation which required a “sudden and temporary loss of control”: *Duffy* (1949)).
- The issue of a ‘cooling off’ period might be discussed as Jack waits for Kate to turn and start walking upstairs before he strikes her. The Coroners and Justice Act 2009 does not specifically mention ‘cooling off’ periods and it might be argued that to some degree the problem that existed under the old law is now redundant in light of the fact that the loss of control need not be sudden under s.54(2). (You could compare the old cases of *Thornton* (1994) and *Ahluwalia* (1994), in which it was held that a cooling off period does not preclude a defence of provocation, provided that, at the time of the killing, D suffered a loss of control. So the question is, at the time of the killing, did Jack lose control? However, according to the court in *Ahluwalia*, the longer the delay, the less likely the defence is to be successful).
- Under s.54(1)(b) it must be established that there was a qualifying trigger. There are two types of qualifying trigger under s.55: the fear trigger (s.55(3)) and the anger trigger (s.55(4)), or a combination of both would suffice (s.55(5)). The fear trigger is unlikely to apply here since Jack does not fear serious violence. The anger trigger is more likely to apply but it will only apply if there was something said and/or done which amounted to circumstances of an extremely grave character and caused Jack a justifiable sense of being seriously wronged. Consideration must also be given to s.55(6)(c) which states that sexual infidelity is to be disregarded and to the decision in *Clinton; Parker; Evans* (2012) in which Judge LCJ stated that this did not amount to a blanket exclusion and that where there were other factors in play then context was critical. It might be that the taunts about his sexual performance could constitute sufficient evidence of the anger trigger here.
- The last limb is the objective test and it questions whether a person of D’s age and sex with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way. This objective question is now set out in s.54(1)(c), C&JA 2009.
- You should apply the objective test and question whether the reasonable man would have killed here. Only the D’s age and sex can be taken into account in respect of the level of self-control to be expected (s.54(1)(c), as originally set out in *Camplin* (1978)). Jack’s depression and impotence cannot. Consider *Rejmanski* (2017) on the issue of the relevance of a mental disorder re: loss of control. Any characteristic

which might affect the gravity of the provocation can be taken into account, so Jack's impotence could be taken into account in this respect.

## Question 2

The defence of loss of control introduced by the Coroners and Justice Act 2009 greatly clarifies the law.

To what extent, if at all, do you agree with the above statement?

### Bullets

- You should begin by addressing the question. You will need to address the reforms to the law on loss of control introduced by the Coroners and Justice Act 2009. Begin by explaining that s.54, Coroners and Justice Act 2009 introduced a new defence of loss of control and s.56 repealed the old defence of provocation under s.3, Homicide Act 1957. It is a defence to murder only and is a partial defence which reduces liability to manslaughter upon a successful plea: s.54(7). The burden of disproving the defence beyond reasonable doubt rests with the prosecution: s.54(5).
- Again, you might refer to the fact that the defence of loss of control is 'self-contained' within the statute and '[i]ts common law heritage is irrelevant' (see Lord Judge CJ in *Clinton; Parker; Evans* [2012] EWCA Crim 2 at [2]). Lord Thomas CJ has also stated that 'it should rarely be necessary to look at cases decided under the old law of provocation' (*Gurpinar; Kojo-Smith* [2015] EWCA Crim 178 at [4]). Later authorities have stressed the need for a more rigorous evaluation than was required under the old law of provocation: *Martin (Jovan)* (2017) and *Goodwin* (2018).
- You might explain why the law on provocation was in need of reform by addressing the criticisms of the defence. One criticism might refer to the requirement that the defendant must suffer a sudden and temporary loss of control: *Duffy* (1949). The argument put forward was that the defence does not apply where the defendant killed after a delay (see *Ahluwalia*).
- As the loss of control had to be "sudden", provocation was criticised for failing to cater for those defendants who kill after a delay. Arguably, this problem has now been addressed in relation to the new defence of loss of control by the inclusion of s.54(2), which states that the loss of control need not be sudden and thus clarifies the law in this regard.

You should address the issue of whether the defence was available where there is evidence of a “cooling off” period or delay. In *Ibrams and Gregory* (1981), a delay of 7 days between the provoking conduct and the killing was too long and the defence of provocation was not available. A delay of too long may provide evidence that the killing was in fact a revenge attack. You should discuss cases such as *Thornton* (1994) and *Ahluwalia* (1994). In *Ahluwalia*, it was held that the defence may be available where there is a delay, but the longer the delay, the less likely the defence is to succeed. At this stage, you should address the criticism of this limb made in the question. In fact, as a result of the principle in *Ahluwalia*, it may be argued that the defence does still cater for those who kill after a delay. However, the defence will not cater for those who kill in revenge.

- Another criticism might refer to the last limb – the reasonable man test. The reasonable man test has been very problematic over the past decade. You should explore the development of the law in this area. This limb has traditionally been objectively assessed. The reasonable man does not share the characteristics of the defendant. In *Camplin* (1978), some subjective characteristics, such as age and sex could be taken into account. In *Smith (Morgan James)* (2001), the House of Lords held that the test should be subjective. However, in *AG for Jersey v Holley* (2005), the Privy Council reverted to objective test in *Camplin*. You should address the fact that s.54(1)(c) and s.54(3), C&JA 2009 adopt the objective approach from *Camplin* and consider the case of *Rejmanski* (2017) on ‘the circumstances of the defendant’.
- You should consider the introduction of the requirement of a qualifying trigger (fear or anger). You might offer some criticism of these, such as the expansion of the defence through the introduction of fear as a basis for the application of the defence of loss of control – consider the overlap here with self-defence and the authorities of *Martin (Jovan)* and *Goodwin* on this point. You might also consider the lack of definition of the anger trigger requirements and the case of *Meanza* (2017). Finally, you might consider the introduction of the controversial provision regarding the exclusion of sexual infidelity (s.55(6)(c)) and the recent decision of the Court of Appeal in *R v Clinton* (2012).
- Finally, you should proffer a conclusion addressing the question of whether the reforms have clarified the law or not.