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Was it Murder? Recent cases for Loss of Control

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This article examines recent Court of Appeal decisions on the Loss of Control defence, which replaced the common law defence of provocation in October 2010. It does not purport to cover every Loss of Control case decided since then – the decision in *R v Clinton* [2012] EWCA Crim. 2 has already been examined in Volume 18(1) of this *Review*. The Loss of Control defence, set out in ss.54 and 55 of the Coroners and Justice Act 2009 (the 2009 Act), provides a partial defence to murder. There are three fundamental aspects to the defence: there must be a loss of self-control; D's loss of self-control must have a 'qualifying trigger'; D's response to the trigger has to be compared to that of 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D'.

'Sufficient Evidence' to raise the defence (s.54(5) and (6))

The burden of proof in cases where Loss of Control is raised is placed on the prosecution, who must disprove the defence beyond reasonable doubt – but only once D has provided 'sufficient evidence' (s.54(5) and (6) of the 2009 Act). Three Court of Appeal cases decided in 2014 saw murder convictions upheld on the basis that the accused had failed to provide 'sufficient' (or indeed any) evidence to support their Loss of Control defences. In *Jewell* [2014] EWCA Crim. 414, D had driven to V's house, ostensibly to pick him up for work, and shot him at point blank range, twice, with a shotgun. D was convicted of murder but appealed on the basis that he had lost his self-control. However, Rafferty LJ said that the evidence that 'this was a planned execution is best described as overwhelming'. In *Workman* [2014] EWCA Crim. 575, the Court of Appeal rejected D's appeal against his conviction for murdering his ex-wife. D contended that the trial judge should have directed the jury on Loss of Control but the appeal court held that in this case there was simply no evidence to support that defence. Most recently, the same result was seen in *R v Barnsdale-Quean* [2014] EWCA Crim. 1418. D had been charged with the murder of his wife, V. The Crown case was that D had strangled V to death with a chain; D denied this and claimed that V had attacked him before committing suicide by self-strangulation. The jury rejected D's version of events and he was convicted of murder. He appealed, contending that the trial judge should have directed the jury on Loss of Control, but the Court of Appeal again held that there was simply no evidence of it.

The loss of self-control need not be 'sudden' (s.54(2))

Perhaps the most important change made to the law in the 2009 Act was the removal of the need for D's loss of self-control to have been 'sudden' (s.54(2) of the 2009 Act). This point was emphasised by the Court of Appeal in *Dawes* [2013] EWCA Crim 322, [2014] 1 WLR 947. Lord Judge CJ said that:

'Provided there was a loss of control, it does not matter whether the loss was sudden or not. A reaction to circumstances of extreme gravity may be delayed. Different individuals in different situations do not react identically, nor respond immediately.'

The first qualifying trigger: a 'fear of serious violence' (s.55(3))

Section 55(3) states that 'This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person'. The cases of

Ward [2012] EWCA Crim. 3139 and *Lodge* [2014] EWCA Crim. 446 illustrate the application of this trigger. In *Ward*, D successfully pleaded Loss of Control after killing V, who had physically attacked D's brother at a house party. In *Lodge*, D also pleaded Loss of Control successfully on the basis that he had lost his self-control and killed V (a "small scale drugs dealer") after V had attacked him with a baseball bat. In both cases, the jury accepted that D had lost his self-control in response to serious violence from V. It is worth noting that in *Ward*, D did not fear serious violence personally, but s.55(3) nevertheless applied because he feared that V would use serious violence on his brother.

The second qualifying trigger: a thing or things done or said (or both) (s.55(4))

In *Clinton* (2012), Lord Judge CJ referred to s.55(4) of the 2009 Act, specifically the requirement that the circumstances must be 'extremely' grave and that D must have a 'justifiable' sense of being 'seriously' wronged. He stated that 'By contrast with the former law of provocation, these provisions have raised the bar'. The Lord Chief Justice reiterated this view in *Dawes* [2013] EWCA Crim 322, [2014] 1 WLR 947 when he said that the Loss of Control defence was:

'much more limited than the equivalent provisions in the former provocation defence... some of the more absurd trivia which nevertheless required the judge to leave the provocation defence to the jury will no longer fall within the ambit of the qualifying triggers defined in the new defence.'

In *Dawes* (2013), one of the questions for the Court of Appeal was whether the concept of 'cumulative provocation' applied in the context of the new defence. Lord Judge CJ answered in the affirmative, on the basis that 'the loss of control may follow from the cumulative impact of earlier events' although he noted that 'perhaps 'cumulative impact' is the better phrase to describe this particular feature' of the Loss of Control defence.

Self-inflicted triggers may not be relied upon (s.55(6)(a) and (b))

Section 55(6)(a) and (b) of the 2009 Act preclude reliance on Loss of Control where D's fear of serious violence, or sense of being seriously wronged by a thing or things done or said, was incited by D 'for the purpose of providing an excuse to use violence'. In *Dawes* (2013), Lord Judge CJ considered the impact of these provisions and concluded:

'The mere fact that in some general way D was behaving badly and looking for and provoking trouble does not of itself lead to the disapplication of the qualifying triggers unless his actions were intended to provide him with the excuse or opportunity to use violence.'

In *Dawes*, D had come home to his flat to find V asleep on the sofa with D's estranged wife. Both were fully clothed. The Crown case was that D flew into a jealous rage, grabbed a kitchen knife and stabbed V in the neck, killing him. The defence case was that V had woken up and then attacked D, who had acted in self-defence. As an alternative, D suggested that the trial judge should direct the jury on Loss of Control. However, the judge decided that D did not qualify for that defence because he had incited the violence offered to him by V, so that no qualifying trigger was available because of s.55(6). The jury convicted of murder and the Court of Appeal upheld the conviction.

The normal person test (s.54(1)(c))

Section 54(1)(c) of the 2009 Act requires the jury to decide whether a 'person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D'. In *Asmelash* [2013] EWCA Crim 157, [2014] QB 103, the Court of Appeal decided that D's intoxication was not a relevant 'circumstance' and should therefore be 'disregarded' when the jury applied the test in s.54(1)(c). D and V were flatmates who often used to drink together. One night, when both men were drunk, they began arguing and eventually D stabbed V twice, killing him. At his trial for murder, D pleaded Loss of Control. The trial judge directed the jury to consider whether they were sure that a person of D's sex and age with a normal degree of tolerance and self-restraint and in the same circumstances, but unaffected by alcohol, would not have reacted in the same or similar way. D was convicted of murder and appealed, arguing that the fact that he was drunk at the time of the stabbing was a relevant 'circumstance'. The Court of Appeal disagreed and upheld his murder conviction. Lord Judge CJ said:

'The only relevance of the drunkenness was that it affected [D's] self-restraint, and caused him to act in a way in which he would not have acted if sober. Such drunkenness was an irrelevant consideration. It may have had some relevance to his general capacity for tolerance or self-restraint: but no more.'

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