BATTERED WOMEN: LOSS OF CONTROL AND LOST OPPORTUNITIES

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Abstract: Battered women who kill their abuser and the problem they create in regards to access to justice has been discussed for many years by many academics. The English legal system has attempted to update partial defences to murder to remedy the situation, through the abolition of the problematic and gendered provocation defence, replacing it with another based upon loss of control contained within the Coroners and Justice Act 2009. This work reviews these updates, how effective they may be, and considers, through comparative analysis with other jurisdictions, if other solutions are available, and how English law should proceed.

Keywords: murder; loss of control; battered women; partial defences; manslaughter; comparative reform options

I. Introduction

The issue of battered women who kill was inarguably one of the most compelling reasons for replacing the law of provocation in England and Wales. The new defence contained in the Coroners and Justice Act 2009 is the first attempt made to give these women an adequate defence to murder, albeit partial. To understand if these issues have been resolved by the new provisions, it is important to recognise the problems that the provocation defence caused for such cases, and question if there were other, more appropriate, avenues for change. For example, could the efforts made by other jurisdictions to address the problem presented by battered women who kill be considered? This work will consider these routes to justice in cases of self-preservation, question if the partial defence of loss of control is the solution it claims to be, and provide recommendations for more suitable reform.

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Battered women who kill their abuser, often in non-confrontational circumstances, has long been discussed, debated and deliberated. It is the assumption being made by the defendant that is most problematic; in a pre-emptive attack, how can we be sure there would have been further violence? Even with self-defence, we are dealing with actions that are "inherently predictive", and so seeking to excuse or justify her actions proves difficult. Of course, it would seem that deeming these women murderers is completely inappropriate; but no complete or partial defence seemed to cover them in even a remotely adequate manner before the attempts made by the Coroners and Justice Act 2009. Their plight would mostly fall short of the rules of self-defence, because battered women who kill their abuser tend to act when no immediate physical threat is present. Diminished responsibility would deem them irrational beings, which is an erroneous label to apply to such situations. The most likely candidate did seem to be the partial defence of provocation. Even this defence was impractical for the circumstances, and a great driver in its abolition and replacement. We must remember that battered women killing their abusers have not created a problem in the law; they have simply prompted us to consider problems with the law which have always existed.

To explore the issues surrounding battered women who kill, one must ask not only what problems abused women have experienced in the past in trying to defend their actions under the old law, but what other solutions have been applied to the problem, not only in this jurisdiction but others too. This work theorises how a battered woman might use the partial defence of loss of control, and aims to challenge two misconceptions. The first is that the "fear of serious violence" trigger to the new partial defence provides an adequate pathway for battered women who kill to have murder reduced to manslaughter. The second misconception is that it is this first qualifying trigger alone which is applicable to cases of battered women who kill their abuser. From a theory demonstrating their heightened sense of fear to the acceptance of cumulative provocation, the road to justice in this area of the law has been a long one.

The aim of this article is to deduce if we are at the destination

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5 See the works referred to in note 3.
6 As Edwards has noted, abused women should not be constructed in court through a psychological prism, Edwards, “Descent into Murder” (n.3) p.346.
7 The provocation defence was always a concession to anger-related killings, and has long attracted criticism due to its various components, before the most famous of “battered women who kill” cases came to light in the early 1990s. See case comment “You Started It” (1989) 62 Police Journal 343; case comment “Provocation – Not Part of Defence” (1989) Crim LR 831.
8 For example, Queensland’s partial defence, killing for preservation, in an abusive domestic relationship, contained within Queensland Criminal Code Act 1889, s.304B.
9 The first notable case of a battered women who killed her abuser being convicted of murder is that of R v Duffy [1949] 1 All ER 932, more than 65 years ago.
yet, based on how satisfactorily the new partial defence of loss of control will deal with battered women who kill after a prolonged period of abuse.

II. The Problem

One of the biggest problems with the old provocation partial defence was its gender-biased nature, resulting in many women being denied access to legally relevant defences.10 Most notably, the defence lending itself towards men acting out of anger. Women acting out of fear and desperation were left without adequate protection from a murder conviction and accompanying mandatory life sentence. In particular, the most significant problems to emerge were cases of battered women killing their abuser. The early 1990s saw a stream of appeal cases involving women acting in such circumstances.11 In most cases, the appeals were allowed and the murder verdict was substituted for one of manslaughter, although not necessarily on grounds of provocation. This situation was not unique to English law. A Canadian judge’s report found cause for concern, noting that some women serving life sentences may have actually killed in self-defence, with some entering a guilty plea due to feeling remorseful rather than based on the merits of the case.12 It seemed that finally, in English law, the plight of the battered woman killing in a final and desperate act of self-preservation was being noticed.13

The reason why women had originally not been convicted of manslaughter stemmed from various components of s.3 of the Homicide Act 1957, barring them access to a successful partial defence plea of provocation. Not only was a loss of self-control mandatory, but also the objective element to the defence required that a reasonable person might have taken the same actions.14 The “suddenness” requirement that remained good law since Duffy,15 resulted in an unfair and capricious situation for battered women. As Hemming has asserted: “Why should the Defence of provocation put a premium on homicidally violent anger through the requirement to have lost self-control?”16

Each case of battered women killing their abuser is unique, but there is much common ground. For example, the outwardly calm manner displayed by the woman

11 See R v Thornton (No 1) [1992] 1 All ER 306; R v Thornton (No 2) [1996] 1 WLR 1174; R v Ahluwalia [1992] 4 All ER 889; R v Rossiter [1994] 2 All ER 752; R v Humphreys [1995] 4 All ER 1008.
12 Judge Lynn Ratushny, Report on Sentencing for Manslaughter in Cases Involving Intimate Relationships (Department of Justice Canada, March 2003) para.84.
13 Although the first important case where such issues were discussed was long before this; see Duffy (n.9).
14 Section 3 of the Homicide Act 1957 stated: “the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury”.
15 Duffy (n.9); despite being left out of the wording of the act eight years later.
“self” should apply only to one’s physical being or body, with complete disregard for psychological attributes and processes. Mental health and psychological well-being are as important to a person as a limb. Just as a person would act to protect losing an arm, a battered woman reaches a point where she must act or risk losing her “self” altogether. It is a practical need. It is possible the reason why many battered women who ultimately kill their abuser have previously attempted to commit suicide is because they feel they have no “self” left to speak of, or there is no hope left for their “self”.

Speaking of battered women who kill their abuser acting in this manner, Ewing stated: “They kill to prevent their batterers from seriously damaging, if not destroying, psychological aspects of the self which give meaning and value to their lives.”

If this statement is true, it should provide an excuse to homicide. The question is, does the first qualifying trigger of the new partial defence of loss of control cover this concept adequately? Fear of serious violence is not stipulated as being “physical” violence, so it is safe to assume that this would also include mental, emotional or psychological abuse. Wake’s perception of a partial defence of psychological self-defence (or self-preservation) would equally include battered women, startled householders, and even cases like that of *R v Clegg.*

If the first qualifying trigger, a fear of serious violence, includes protection from either physical or psychological violence or abuse, then all three of these situations might amply be included, should the loss of self-control element be removed.

**X. Conclusion**

With the modern-day societal awareness of violence and emotional abuse within relationships, this subject is no longer taboo, and therefore needs to be acknowledged within legal concepts and rules. A decent and thorough understanding of intimate partner violence within the criminal justice system is vital to ensure both sexes are treated equitably before the law. There have been important advancements made for battered women by the creation of this new partial defence. Firstly, by swapping the word “characteristics” for the word “circumstances”, and most importantly, accepting a fear of serious violence as a qualifying trigger. This advancement is further enhanced by the idea that this trigger might not only include physical violence, but psychological violence too. Unfortunately, the courts are yet to define fear and terror, or how they will fit within the all-important

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236 See Walker, *Terrifying Love* (n.52) p.42. More than one third of the 50 women in Walker’s study had attempted suicide.


238 [1995] 1 AC 482.
loss of self-control element, which must be evident for the defence to apply. This remains troublesome. The overall concept is certainly a leap forward from the old provocation defence, but we have not come quite far enough. Hopefully, the recent advancements in regards to recognising coercive control within relationships and placing such behaviour in a criminal context will extend how we see the creation of terror. 239

It is now evident that battered woman syndrome does not serve these women well. It portrays a less than ideal stereotype and makes her an irrational being. After all, if her reaction to her situation includes a syndrome, it is unlikely it can be deemed as justifiable behaviour, or even excusable. 241 Justifiable behaviour is not merely tolerated, but actually encouraged. 242 Most unfortunate is her predicament to the point where she goes from being a victim of abuse to a victim of the state, her reactions misunderstood and the stigma of a conviction rather than acquittal to deal with. 243 We are yet to see how the courts will define fear and terror. It is always tempting to ask, if she was so afraid of the abuser and the violence, why did she not leave? Rather than focusing on this question, which should probably be irrelevant in the circumstances, we should instead ask if she was living with “a knife held above her head”. 244 A violent background does not excuse offending outright, 245 but unfortunately, it outwardly appears as though her choosing to stay in the relationship means the domestic violence must have been minimal, or at least tolerable. In such circumstances, we could not explicitly say her fear was reasonable. This seeming “duty” of the woman to avoid the violence before the confrontation rather than taking action with a pre-emptive strike, seems unrealistic and excessive. We would not ask a man to avoid a particular bar because it is renowned for violence, and he may become involved in an altercation. A battered woman should be afforded the right to protect not only her physical state, but her psychological state too, and the emotional control the abuser has over the abused in cases of domestic violence does not begin and end like a violent episode. It is continuous. Therefore, acting at any point to break free of the psychological prison a battered woman lives in might be deemed as an immediate reaction to grave conduct. Wells and Wake both promoted a theory of psychological self-defence, 246 based on self-preservation, to form a new partial defence to murder. This is almost certainly akin to the

239 Serious Crimes Act 2015, s.76.
243 See Kirsta, Deadlier than the Male (n.23) p.208.
244 See Nourse, “Self-Defense and Subjectivity” (n.117) p.1280.
“fear of serious violence” limb we have now, but without the problematic loss of control concept.

The difficulty caused to the new partial defence by the loss of self-control element, which remains a quagmire for these women, will therefore represent an obstacle to justice. As Norrie observes, the loss of self-control concept has remained, but compassion has not.\textsuperscript{247} The concept remains unexplained and indistinct — we are still unsure as to whether the defence operates for those who had an inability to control themselves, or merely failed to do so.\textsuperscript{248} Its inclusion, at least in relation to the first limb of the new partial defence, seems redundant when considering not only that there are safeguards in place to prevent revenge killings,\textsuperscript{249} but also the essence of the new law was to protect defendants acting from an emotion which does not tally with an instant frenzied attack. A much more relevant phrase to use with the “fear of serious violence” limb would be that the defendant’s actions were spontaneous, but not instantaneous.\textsuperscript{250} Wells argued that the attempts of battered women to convert the provocation defence to meet their needs is “paradoxical”.\textsuperscript{251} It appears that with the loss of self-control concept still paramount for both qualifying triggers, this has not changed. As Hemming has noted, if there is no concession for compassionate killings, why should we have one for those borne of a loss of control?\textsuperscript{252}

There is much to be gained from continuously observing the reforms of other jurisdictions and their development through the courts. The Australian territories have certainly been making an effort to solve the provocation problem, albeit with several different solutions. Queensland’s innovative legislation, opting to create a partial defence designed specifically for battered women who kill out of self-preservation,\textsuperscript{253} is an optimal pathway for achieving successful reform and should be praised for ingenuity. It is a shame that this unique parliamentary creation is applicable to only one type of emotion-driven killing, although it should be noted that the defence of provocation also exists in this territory, meaning other emotional-response killings, such as mercy killing, also have a chance at a successful partial defence.\textsuperscript{254} The American Institute Model Penal Code’s notion of EMED is fairly vague, but it embraces a wide range of emotions, and requires that only those feelings be reasonable, and not the actions they caused. For these reasons, it should be commended. The Law Commission described it as being

\textsuperscript{247} See Norrie, “The Coroner’s and Justice Act 2009” (n.2) p.288.
\textsuperscript{249} Coroners and Justice Act 2009, s.54(4).
\textsuperscript{251} See Wells, “Battered Woman Syndrome and Defences to Homicide” (n.163) p.272.
\textsuperscript{252} Hemming, “Provocation (n.16) p.4.
\textsuperscript{253} Criminal Code 1899 (Qld), s.304B introduced by Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld), s.3.
\textsuperscript{254} Criminal Code 1899 (Qld), s.302.
preferable to a loss of self-control defence,255 and this was also remarked by Cairns.256 This partial defence is certainly a much more satisfactory way to deal with battered women who kill rather than trying to fit them into self-defence, which often occurs,257 with some states even going as far as preparing guidelines for jury instruction in such cases.258

Reed promotes extreme emotional distress as a partial defence, without a need for a loss of self-control, whilst still acknowledging that many more emotions than anger and fear would cause severe emotional turmoil:

“The emotional narrative in terms of disproportionate angry reaction to provoking stimuli, contextualisation of sexual humiliation or breach of trust, and even extreme grief, despair and frustration attached to witnessing the pain and suffering of a cherished individual, ought to be evaluated by the jury as moral arbiters”.259

This is an attractive option for reform, recognising that trying to categorise all the emotions which might sufficiently adduce a partial defence is futile, whilst addressing the fair labelling problem adequately.

In New Zealand, the Law Commission has realised that complete abolition of the partial defence of provocation has caused problems for victims of family violence who kill.260 It may be that if self-defence was more lenient in New Zealand, especially in regards to the imminence requirement, as recommended in the Law Commission’s recent report, this advancement would have been easier to swallow. As the decision in Wang261 proved, where the defendant killed her violent and abusive husband while he slept, this is not the case. With the strict application of self-defence, this situation is unacceptable, and gives new appreciation for domestic reform rather than a route of abolishing provocation along with the mandatory sentence for murder. This idea seems pragmatic at first glance, however, dealing with mitigating factors only at sentencing would mean that the conviction label would not reflect culpability, as we cannot stigmatisate some without stigmatising all. Wilson cogently sums up this dual demarcation: “Conviction-labels are as important as justice in the distribution

255 Law Commission for England and Wales, Partial Defences to Murder (n.97) para.3.49.
257 See Bechtel (n.116).
258 See California Jury Instructions, Criminal s.9.35.1 (2009).
261 Wang (n.165).
of punishment. They identify distinctive wrongs underscored by corresponding social obligations.  

The only way to protect categories of defendants who are less culpable than others is through the partial defences. The place for these mitigations to be debated is in front of a jury, not the sentencing judge. As Lacey notes, in modern society, there is a good, sound and well-reasoned case not only for keeping the partial defences we have, but actually expanding them to cover the likes of mercy killing and excessive force self-defence.

We have not quite grasped the nettle as well as Queensland, which fully takes into account and appreciates the reality of a battered woman’s situation and reaction. However, we are on the same page as them, as opposed to other Australian territories, and the trend in the United States to allow these women an acquittal. We may be some way towards having a happy medium between the extremes of acquitting her when she did act in a way which should not be encouraged, yet still recognising the reality of human weakness, and her particular situation, by lessening the conviction from murder to manslaughter. Coupling this with lenient sentencing to reflect the circumstances is the best approach possible. Cases like these are the precise reason why the law needs “excuses”. Sometimes we just cannot manage to act in the most rational manner when confronted with an abnormal situation. There is no fair opportunity to do so. Even more important is to bear in mind that when under the influence of strong emotions, anyone can be dangerous, even battered women. The provocation defence was fundamentally flawed, and the partial defence of loss of self-control is by no means perfect, but it does potentially make manslaughter an available outcome for battered women who kill. Yet several barriers appear to remain before the path will be clear to justice, which would only be remedied by further reform. At the very least, the loss of control element to the defence will need to be removed to give battered women who kill the true path to justice they deserve.

We have moved closer to being able to deliberate over a battered woman’s experiences when we consider her actions; this much is true. The step from characteristics to circumstances was certainly a victory for battered women killing the men who abuse them. Yet we still need to ask about the reasonableness of the victim: for example, whether or not a reasonable man would make his wife suffer such degradation. It is probably safe to say that, in this area, we have changed the scenery but not the situation. The first limb of the new partial defence is meant to be a solution to the battered woman dilemma, but instead we are still

263 Lacey, “Partial Defences to Homicide” (n.44) p.129.
264 See Morse, “The Irreducibly Normative Nature of Provocation/Passion” (n.129).
left with an anger-related concept which will not meet the needs of those acting out of despair, fear or terror. Recognising and accrediting fear is crucial; it needs to be more than purely an academic exercise, appearing only by name and not by meaning in the new partial defence.\textsuperscript{266} Regardless of which qualifying trigger a battered women pursues, we are still left with one remaining problem: loss of self-control. This needs to be remedied, and pathways to reform are available. Either removing loss of control from the current partial defence, or creating a new partial defence without it as Queensland has, are without doubt the most attractive solutions available. It is imperative that such solutions become integrated into English law to continue the road to justice that the Coroners and Justice Act has only begun to create.

\textsuperscript{266} See Stanley Yeo, “The Role of Gender in the Law of Provocation” (n.29) p.438 for a discussion on fear showing women are targets rather than instigators of violence.