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Mercy Killing: Three's a Crowd?

The partial defence of loss of self control, contained within the Coroners and Justice Act 2009, replaced provocation as an emotion-based defence which operates to reduce murder to manslaughter. It was essentially enacted to encompass two types of cases. Firstly, those of excessive force self-defence, where a defendant acted from a fear of serious violence, to provide a partial defence route for situations such as battered women who kill their abuser. Secondly, those of imperfect angry retributive actions where a defendant had an overwhelming sense of being wronged. The new partial defence's remit was to end the doctrine of the retaliatory defence of provocation by replacing it with a defence which acknowledged a broader spectrum of emotions. This article questions why the emotion-based situation of compassionate killers was not included within this revamp of a tired and out-dated defence, and provides a pathway to include cases of mercy killing and compassionate killings within the ambit of the loss of control partial defence. In this article, mercy killing refers to cases where a family member or partner has killed a loved one to end their pain and suffering. This includes both cases which involve express consent¹ or requests by the victim and those which do not.²

Anger always had a premium over other emotions under the provocation defence³ and this has been retained under the new partial defence of loss of control, with fear being the new addition to the emotions which could make out a successful defence.⁴ However, compassion is a feeling that appears to remain outside the range of emotions covered in the new partial defence of loss of control.⁵ Unfortunately, because provocation was not the only partial defence to be revamped by the Coroners and Justice Act 2009⁶, killings of compassion, or so-called mercy killings, might now have no defence at all. It seems absurd that the emotion of compassion has been overlooked, when it is compassion itself that is the foundation for the partial defences as a concession to the human experience:

¹ *Cocker* [1989] Crim L.R. 740

² Such as *Inglis* [2010] EWCA Crim 2637

³ See generally S Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 *Journal of Criminal Law* 223

⁴ Coroners and Justice Act 2009 s55

⁵ Mainly described as anger and fear, although betrayal might now be acceptable after the case of *Clinton, Parker, Evans* [2012] EWCA Crim 2 see A Reed, 'Quasi-Involuntary Actions and Moral Capacity: The Narrative of Emotional Excuse and Psychological-Blow Automatism', Chapter 7, B Livings A Reed N Wake *Mental Condition Defences and the Criminal Justice System*, (Cambridge Scholars Publishing, 2015); Edwards n(4)

⁶ Mackay speculates that diminished responsibility was revisited and modernised purely because of the review of provocation. See R Mackay, 'The Coroners and Justice Act 2009- Partial Defences To Murder (2) The New Diminished Responsibility Plea', [2010] *Criminal Law Review* 290, 302

*“As a general matter, when society excuses an offender it demonstrates its compassion for him”.*⁷

Excuse defences exist because society views compassion as a moral and respectable virtue and seeks to act upon this in providing a just legal system⁸. Considering this, acting compassionately should surely be excused as much as acting under the stress of fear or anger⁹.

The intention here is certainly not to provide any kind of full discussion on the partial defence of diminished responsibility, but merely to consider if mercy killings, which were previously shoehorned into that defence, might now need to be covered by another partial defence. If so, it is relevant to debate if there is any chance that loss of control could fit the bill. It is also both intriguing and essential to discuss why some categories of cases or types of defendant are elevated above others when it comes to defences. The partial defences to murder provide a concession to human frailty against the backdrop of a very harsh and inflexible mandatory life sentence to a murder conviction.¹⁰ The law has evolved from allowing anger and jealousy related murders being reduced to manslaughter, to including fear, at the same time seeing the demise and exclusion of killings with a sexual jealousy or revenge motive. Whether or not the law should evolve to include compassion, so that such defendants may avoid the ‘murderer’ label and stigma associated with it, will be discussed below.

The Homicide Act 1957

Before the Coroners and Justice Act 2009 reformed the partial defences of provocation and diminished responsibility, both battered women and mercy killers were considered to be outside the scope of either defence. Cases of battered women killing their abuser were eventually accommodated through judge-made law, with the limitations of provocation being stretched to the limits to include slow-burn responses and killings with no immediate threat present. Diminished responsibility was also used, for example, in the case of *Ahluwalia*¹¹, as was the same plea in the case for mercy killers. There existed what has been referred to as both an ‘uneasy truce’¹² and a ‘benevolent conspiracy’¹³ between psychiatrists and the courts to have the partial defence of

⁷ J Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code’ (1987-1988) 19 Rutgers Law Journal 671, 672

⁸ *Ibid.*, 674

⁹ A Reed, ‘Quasi-Involuntary Actions and Moral Capacity: The Narrative of Emotional Excuse and Psychological-Blow Automatism’ Chapter 7, B Livings A Reed N Wake *Mental Condition Defences and the Criminal Justice System*, (Cambridge Scholars Publishing, 2015) 212

¹⁰ Criminal Justice Act 2003 Sched 21 s269, which sets out the minimum terms framework

¹¹ *Ahluwalia* [1992] 4 All ER 889

¹² P Dargue, ‘Mercy Killers and the Sentencing Rules – An Uneasy Fit?’ (2011) 75 Journal of Criminal Law 105, 106

¹³ B Mitchell and R Mackay, ‘Loss Of Control And Diminished Responsibility: Monitoring The New Partial Defences’ (2011) 3 Archbold Review 5

diminished responsibility successfully raised in cases of mercy killing. The conditions of s2 Homicide Act 1957 required an abnormality of mind which substantially impaired mental responsibility for the fatal act, as Mackay has observed:

*“For while provocation requires that loss of self-control be tested in the light of a reasonable person’s response to extreme circumstances, by way of contrast diminished responsibility is premised on the need for the accused to be mentally abnormal”.*¹⁴

A spouse ending the life of their terminally ill partner might well have some kind of mental problem such as depression stemming from the hopeless state of affairs, and in such a situation they will likely be covered satisfactorily by diminished responsibility. It is just as likely that the act was merely generated by feelings of compassion or despair, meaning they will fall outside of this defence. Mousaourakis pointed out that if it was a case that evoked sympathy, abnormality of mind might not be made out, yet still result in a successful diminished responsibility plea:

*“This explains why the defence has been accepted, despite the absence of clear evidence of abnormality of mind”.*¹⁵

Not only is mercy killing a category of cases so deserving of mitigation that they are included in a partial defence without real scope to embrace them, but they also are granted sympathy by juries. This is inexorable proof that mercy killing cases need a defence which adequately covers the situation.

Recognising Fear but Not Compassion

It is fascinating that the law was changed to cover killings instigated by fear and terror, but not despair or compassion. Battered women and mercy killers equally found themselves outside of the law when it came to partial defences under the Homicide Act 1957. Why reform partial defences to include one but not the other? The law was widely criticised for giving an advantage to killings born of anger rather than embracing a range of emotions, but the reforms continue to exclude the emotions driving mercy killings. The Law Commission’s recommendations of situations where the diminished responsibility defence might appropriately be used included both battered women killing their abusers and mercy killing¹⁶, suggesting that these cases have some common ground. In fact, they might both be more akin to provocation, having similar cumulative effects building up to the

¹⁴ R D Mackay, ‘Diminished Responsibility and Mentally Disordered Killers’ Chapter 3, B Mitchell and A Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 74

¹⁵ G Mousourakis, ‘Cumulative Provocation and Criminal Liability’ (2000) 64 *Journal of Criminal Law* 335

¹⁶ Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004) [5.22] suggesting battered women need to rely on diminished responsibility. [5.22] it is noted that mercy killers are convicted of manslaughter by way of diminished responsibility purely because due to honourable motives. They also refer to this as the ‘smuggling in of mercy’ into the partial defence, [5.43]

fatal event.¹⁷ Yet the government found it necessary to reform provocation in a way that would promote the inclusion of battered women who kill their abusers, and at the same time push mercy killers even further outside of the scope of partial defences.¹⁸ Compassion is not alone in being excluded. Uniacke has commented that not only are emotional responses such as pity, shame and embarrassment to a situation beyond their control not covered in general by partial defences, their presence might actually hinder the defences that do exist.¹⁹ Compassion is set apart from these emotions. It has been described as an altruistic emotion which reflects the moral values and emotional sense of the actor.²⁰ It is not a primitive emotion like fear and anger might be described, but is not morally inappropriate like the emotion of jealousy. Compassion is generally deemed to be a virtue to a person's character, and so should not contribute negatively to their culpability when acted upon.

The Changes to Diminished Responsibility

It has been claimed that the diminished responsibility defence was only reformed because it was swept up with the changes to provocation²¹. It was possibly in need of modernisation rather than having the scope of the defence itself changed²². The changes to the partial defence were much larger than that. It should be pointed out that several academics have claimed that the results of section 52 of the Coroners and Justice Act 2009, which replaces s2 of the Homicide Act 1957, are a whole new plea²³. It has been described as being narrowed, and in the process:

"Depriving it of much of its considerable utility as a safety valve on the mandatory life sentence".²⁴

If mercy killings were already being shoehorned into a defence which could barely accommodate them, and the defence has been significantly narrowed, it is now even less likely that a case of mercy killing will be able to meet the requirements of a successful diminished responsibility plea. As Livings has noted, mercy killers often display a lack of mental disorder or condition which would adequately

¹⁷ C Foster, 'Mercy Killing: All Change, or Business as Usual' (2006) 156 Law and Justice Christian Law Review 48, 50

¹⁸ With loss of control being extended only for fear, Coroners and Justice Act 2009 s55 and diminished responsibility now requiring a recognised medical condition, Coroners and Justice Act 2009, s52

¹⁹ S Uniacke, 'Emotional Excuses' (2007) 26 Law and Philosophy 95, 95

²⁰ H Keating and J Bridgeman, 'Compassionate Killings: The Case For a Partial Defence' (2012) 75 Modern Law Review 697, 711

²¹ Ibid., 6, diminished responsibility was caught up in the "provocation whirlwind"

²² J Miles, 'The Coroners and Justice Act 2009: A "Dog's Breakfast" of Homicide Reform' (2009) 10 Archbold News 6, 6

²³ Mackay n(6) 290

²⁴ Miles n(22) 8

meet the criteria of the partial defence, old or new.²⁵ Therefore, using diminished responsibility as a partial defence for mercy killers shows an ‘implicit relaxation’ of the law in this area,²⁶ and causes an unfair labelling of the defendant as experiencing an abnormality of mind when it was, in fact, the suffering of the victim which was an abnormal situation.

It is possible that the ‘benevolent conspiracy’, and understanding between the courts and psychiatrists, might continue to benefit mercy killers, if they stretch the term ‘recognised medical condition’ to its absolute limits. Ashworth noted that the Court of Appeal has called this the ‘unspoken backdrop’ to the new defence²⁷. Fortson also addressed this issue:

*“It is unlikely that the revised definition of diminished responsibility will see the end of a practice that has (it is submitted) worked satisfactorily”.*²⁸

If that really is the situation then why not legislate to provide an actual defence for cases of mercy killers that is both definite and certain? The reality is that such conduct, continuing with the charade of including mercy killers in a defence they do not meet the criteria for, is no different to the situation the courts found themselves in over battered women twenty years ago²⁹. Thomas has speculated that mercy killings which would previously been deemed worthy of a diminished responsibility plea would fail under the new rules³⁰. For example, in the case of *Webb*³¹, the defendant smothered his wife with a plastic bag and towel after she had taken a number of pills with some brandy. She specifically asked him not to let her wake up, and so when she stirred in her sleep he proceeded to end her life. She had previously told him on several occasions she might need him to do this for her, having become convinced the cancer she was in remission from had returned and this would cause her to suffer a stroke. A plea of manslaughter by reason of diminished responsibility was accepted, based only on a diagnosis of ‘adjustment disorder’, with the psychiatric report reading that the defendant had not recognised his ‘emotional distress’ in the circumstances.³² This sounds much more like a situation which would fit with an emotional response defence than diminished responsibility, and this observation is worthy of note.

²⁵ B Livings, ‘A New Partial Defence for the Mercy Killing: Revisiting Loss of Control’ (2014) 65 Northern Ireland Legal Quarterly 187, 191, also see R D Mackay n(13)

²⁶ A Ashworth, and B Mitchell, ‘Introduction’ Chapter 1, B Mitchell and A Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 12

²⁷ Ashworth, ‘Homicide: Coroners and Justice Act 2009 s.54 – Loss of Control – Qualifying Trigger’ [2012] Criminal Law Review 539, referring to *Dowds* [2012] EWCA Crim 281 [35]

²⁸ R Fortson, ‘Homicide Reforms Under the Coroners And Justice Act 2009’ Seminar 16th October 2010, Criminal Bar Association of England and Wales, [58]

²⁹ See *Thornton* (No1) [1992] 1 All ER 306, *Thornton* (No2) [1996] 2 All ER 1023, *Ahluwalia* [1992] 4 All ER 889, *Rossiter* [1994] 2 All ER 752, *Humphreys* [1995] 4 All ER 1008

³⁰ Mackay n(6) 294

³¹ *Webb* [2011] EWCA Crim 152

³² *Ibid.*, [16]

The new plea of diminished responsibility basically has a three part test. It requires an ‘abnormality of mental functioning’³³ stemming from a recognised medical condition, which not only substantially impaired the defendant’s ability to understand the nature of their conduct, form a rational judgment or exercise self-control, but also provides an explanation for the killing. There are three remarkable changes here. The first is the change of the word ‘mind’ to ‘mental functioning’. In discussion of the bill, a reason for this variation was given:

*“Overall the concept of abnormal mental functioning is better than the current concept of abnormality of mind because it emphasises processes rather than a static idea”.*³⁴

The most important aspects of the changes are the inclusion of the term ‘recognised medical condition’, as well as the consequential link that the third part of this test provides, which is a completely new addition to the plea. Although it seems, on a fundamental level, to be a much more restricted defence than that provided by the Homicide Act 1957, it is possible that it has actually been widened to include physical conditions such as sleep disorders and epilepsy.³⁵ Meeting the criteria of a ‘recognised medical condition’ will be problematic in some cases. Thomas claimed the phrase would “exacerbate the difficulty”³⁶, and not only for mercy killers. Cases like *Humphries*³⁷, an abused woman with attention-seeking behaviour, would no longer meet the strict parameters of the diminished responsibility defence. As Fortson has pointed out:

*“Concern has been expressed that the revised, tighter, definition of diminished responsibility might reduce the potential usefulness of the defence as a means of giving judge’s discretion when sentencing persons who have killed but who ought not to be stigmatised as ‘murderers’ “.*³⁸

Mackay has noted that section 52 of the Coroners and Justice Act 2009 has some problematic terms just like the new loss of self control plea.³⁹ Not only this, but the courts have already rejected opportunities to provide clarity. In the case of *Golds*⁴⁰, the trial judge would not give further clarification on the meaning of ‘substantial’ on the grounds that it was a plain word the jury could use common sense to determine its meaning. It would have been useful for the judge in this instance to try and provide some clarity on the difference between impaired and substantially

³³ Coroners and Justice Act 2009, s52

³⁴ Hansard HL Vol 712, Col. 177 (June 30, 2009)

³⁵ Mackay n(6) 294

³⁶ Mackay n(6) 295

³⁷ *Humphreys* [1995] 4 All ER 1008

³⁸ R Fortson ‘The Modern Partial Defence of Diminished Responsibility’ Chapter 2, Reed and Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011) 27

³⁹ Mackay n(6)

⁴⁰ *Golds (Mark Richard)* [2014] EWCA Crim 748

impaired, much like juries in cases of loss of self-control might need some guidance on the distinction between violence and serious violence.

Can Loss of Control Cover The Cases The New Diminished Responsibility Defence Will Not?

Previously, an overlap existed between provocation and diminished responsibility as they stood at common law prior to the enactment of the Coroners and Justice Act 2009. After the case of *Morgan Smith*⁴¹, which allowed a mental abnormality to be attributed to the reasonable person to explain why self-control was lost in a provocation plea, the overlap was greater than ever. This seems highly unlikely now. Not only does the loss of control partial defence restrict merely sex and age to being attributed to the reasonable person when assessing tolerance and self-restraint, but the diminished responsibility plea now requires that the abnormality stems from a recognised medical condition:

*“Both new pleas are drafted in a manner which militates against possible overlap”*⁴²

This seems regrettable. With the two partial defences contained within the Coroners and Justice Act 2009 now distant relatives, is it likely that a category of cases previously accommodated by one defence could be provided for by the other? It seems more likely that mercy killers will no longer have any adequate path to reducing a murder charge to manslaughter. What is most unfortunate is that the law does not distinguish between the motives of love and malevolent reasons when it comes to murder.⁴³ For a mercy killer to successfully raise the diminished responsibility plea now, a diagnosis of a medical condition would be required, and this might not necessarily be the case.

The partial defence of loss of self-control caters mainly for two emotions – fear and anger. Is there room for a killing committed due to despair or compassion? The defendant does not fear serious violence, but does fear that a loved one will suffer much pain. It could be said that the circumstances of a loved one dying a slow painful death are grave. It could also be said that the defendant may well have had a justifiable sense of being seriously wronged, by losing someone before old age. The difference is that these emotions are directed towards a disease rather than a person. The perpetrator of the provocative conduct is intangible. Livings has argued that the scope of the second qualifying trigger is much wider than it is given credit for.⁴⁴ Rather than being based upon a notion of anger, he argues that there is no such stipulation narrowing the new partial defence, and indeed

⁴¹ *Smith (Morgan James)* [2001] 1 AC 146

⁴² Mackay n(6) 295

⁴³ *Inglis* [2010] EWCA Crim 2637

⁴⁴ Livings n(25) 195

there was not under section 3 of the Homicide Act 1957.⁴⁵ He speculates that, due to anger not being a defined prerequisite for the second qualifying trigger, killings for compassionate reasons as well as a range of other emotions might now fit into this category.⁴⁶ He theorises that loss of self-control, in its meaning within the context of the new partial defence, is merely a lack of ability to behave in a way expected by society, referencing the removal of the suddenness requirement as evidence of this determination.⁴⁷ Also, that each element of the second qualifying trigger can be met by a mercy killing case if the legislation is interpreted with a liberal perspective:

*“A person can have a sense of being wronged as a result of circumstance, or as a result of decisions taken by people or bodies, and that this can both satisfy the broad requirement of ‘things done or said’ and induce a reaction that will fulfil the loss of control provisions”.*⁴⁸

It is true that the word ‘anger’ is not used to express the criteria for the second qualifying trigger. It is an evident implied underpinning to the trigger. The symptoms of an illness may be humiliating and distressing, but there are no ‘things said and done’ to direct that sense of injustice towards. A terminally ill person might make repeated requests to their partner to end their suffering, but the intense emotions experienced by a defendant on hearing these requests are not directed at the victim and their having expressed such desires, but at the suffering causing the victim to say it. The substance of the second qualifying trigger is predominantly anger, and anger related emotions, and while this is not expressed in the Coroners and Justice Act 2009, nor was it in s3 Homicide Act 1957, it is legislatively inferred.⁴⁹ Reed has described anger and fear as being “the only emotions legitimated”, deemed as deserving a defence under the new provisions, which is an accurate argument.⁵⁰ This is not to say he views this as apposite:

*“Extreme reactions are common under other types of emotional conditions, and there is significant psychological literature in support of this proposition”.*⁵¹

This was also pointed out during parliamentary debate, with the new defence being described as an extension of a defence to those killing from anger to include killing from fear or serious violence

⁴⁵ Section 3 Homicide Act 1957 actually states: “Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, 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; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man” the word ‘anger’ is not used.

⁴⁶ Livings n(25) 203

⁴⁷ Livings n(25) 197

⁴⁸ Ibid., 199

⁴⁹ See generally, S Edwards, ‘Loss of Self-Control: When His Anger is Worth More Than Her Fear’ Chapter 6, A Reed and M Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing, Surrey 2011)

⁵⁰ Reed n(9) 184

⁵¹ Ibid., 187

too.⁵² Whilst there is certainly no express exclusion of mercy killings as there is for revenge and sexual infidelity killings⁵³, this does not mean the partial defence was designed to include them.

What would be beneficial is a third limb to this defence, where the qualifying trigger is an overwhelming sensation of compassion or extreme grief and the defendant finally snaps. There might not appear to be a loss of self-control, and possibly there will be evidence of planning or premeditation in cases of mercy killing. The loss of self-control concept is likely to be problematic in other categories of cases too, especially battered women. For this reason, it is likely that there will be a flexible approach taken to the concept, which could be extended to mercy killings. In both situations, the defendant has dealt with an exhausting emotional experience causing great distress.⁵⁴ As Simester and Sullivan have noted:

*“Exactly what psychological state represents a loss of self-control cannot precisely be pinned down”.*⁵⁵

Could it be the psychological state of a battered woman who finally acts in fear and desperation to protect herself or her children from serious harm or death? Or a man who finally relents and ends his wife’s intolerable pain and suffering in a moment of despair? With these categories of killings so comparable, it is regrettable that reforms did not encompass both standardisations. A more intrinsic look at mercy killing cases shows a parallel with cases of battered women who kill their abusers. There will often be many events having a cumulative effect on the emotions and state of mind of the defendant. For battered women, this is previous occasions of violence, degradation, torture, threats and humiliation. For a man who has a terminally ill wife, it may be previous requests from her, even begging, to end her life. It could also be watching her suffer, either due to pain or unpleasant side-effects from treatment like chemotherapy, with each moment witnessing the victim in these condition being a form of provocation in itself. As Taylor states:

*“The illness of the ‘victim’ often manifests itself in numerous acts, often seen by the defendant as being humiliating for the victim”.*⁵⁶

Cases like *Inglis* only provide proof that English law’s approach to mercy killing is unsatisfactory.⁵⁷ Williams had speculated that the old provocation defence could have been stretched to include compassion killings just as it was for battered women because of the parallels between the two,

⁵² Maria Eagle’s statement, Hansard Public Bill Committee, Tuesday 3 February 2009

⁵³ Coroners and Justice Act 2009 s54 (4) and s55(6) (c)

⁵⁴ G Williams ‘Provocation and Killing with Compassion’ (2001) 65 Journal of Criminal Law 149, 157

⁵⁵ AP Simester JR Spencer GR Sullivan GJ Virgo, *Simester and Sullivan’s Criminal Law Theory and Doctrine* (4th Edition, Hart Publishing Oxford, 2010) 383

⁵⁶ P Taylor, ‘Provocation and Mercy Killing’ [1991] Criminal Law Review 111, 113

⁵⁷ D Thomas and A Ashworth, ‘Sentencing: Murder – Mercy Killing’ [2011] Criminal Law Review 243, 247

because both situations involve emotions other than anger and rely on the juries' sympathy.⁵⁸ In the case of *Cocker*, the defendant's wife suffered from an incurable disease called friedreich ataxia. She had become severely incapacitated and the defendant had spent over ten years looking after her. Throughout this time, she had told him her life was not worth living and he should end it for her. On the fatal evening that he eventually strangled and suffocated her, she had kept him awake clawing at his back and repeatedly requesting for him to end her life. The defendant's leave for appeal was dismissed on the grounds that the behaviour he displayed was the opposite of someone losing control. The defendant had told the police several times that it was the 'last straw'.⁵⁹ That term is often associated with a loss of control. It provides further evidence that there is an argument for having compassion killings covered by the loss of control partial defence. Uniacke once stated that the provocation defence was for someone who:

*"Acts under pressure of external circumstances that generate a powerful emotional response from which a wrongful action results".*⁶⁰

This statement very adequately sums up the circumstances of the mercy killer just as much as a battered woman killing her abuser, or the man who kills the person who raped his daughter. If the law could view a person giving up or giving in when it comes to self-restraint as having lost control, these individuals would have a chance at an adequate defence. Furthermore, Fortson has speculated that loss of self-control is no longer a literal concept under the Coroners and Justice Act 2009, with focus instead being on the defendant's circumstances.⁶¹ While this would give mercy killers a better chance at a defence, the qualifying triggers would still be an impossible obstacle.

Mercy Killing As a Sentencing Mitigation

Unsurprisingly, given its reputation for being the proverbial square peg, mercy killing does not sit comfortably within mitigation at the sentencing stage either. The case of *Inglis* proves this point exceedingly well.⁶² After her son was involved in an accident, his mother (the defendant) tried twice to end his life, succeeding in her second attempt. She believed he was suffering a living death, with no hope for recovery, even though a specialist had informed the family that he might live an independent life one day. She injected him with heroin and was arrested for attempted murder, and after lying to the police about her intentions in order to be released on bail, she tried again. This time she had studied the nurse's notes to discover at which time she would be able to sneak into his

⁵⁸ Williams n(54)

⁵⁹ *Cocker* [1989] Crim L.R. 740

⁶⁰ Uniacke n(19) 95

⁶¹ Fortson n(28) [106]

⁶² *Inglis* [2010] EWCA Crim 2637

room, brought superglue to squeeze into the lock so the medical staff would be unable to enter the room and intervene, as well as a fatal dose of heroin. Her belief was that she alone cared about her son, and genuinely believed that she needed to end his suffering. The defendant had a nursing diploma, which might have suggested she was well-informed on how to end his life. On the other hand, it could be that it gave her a better knowledge and understanding of how deficient her son's life would be prospectively. The judge commented that there was love and not malice in her heart when she killed her son.⁶³ It was also noted that there was evidence of stress, anguish and despair. Considering this, a defence of diminished responsibility might have been successfully raised. The defendant rejected taking this route, favouring a defence of loss of self-control, negated by the apparent amount of planning and supposed deliberation. This refusal to plead diminished responsibility, in spite of compelling evidence, ended in the defendant being found guilty of murder.

At the sentencing stage, acts of mercy are a mitigating factor under Para 11(f) Sched 21 s269 Criminal Justice Act 2003. Clearly, this mother was committing an act of mercy in her own mind. However, Para 10 (a,b) lists planning and the victim being vulnerable due to disability as aggravating factors. These issues featured significantly in the decision in *Inglis*⁶⁴, and constitutively it highlighted that, in terms of sentencing guidelines, mercy killing cases represent a contradiction. This led to what Dargue describes as the "only meaningful precedent" born of the *Inglis* case.⁶⁵ The Court of Appeal gave guidance that in cases of mercy killing, the mitigation provided by Para 11(f) would have no validity at all unless Para 10 was ignored, and therefore this should be good practice in future cases. Yet again, the law is stretched to include the most deserving of cases because the situation is not covered by any specific offence, defence, partial defence or even sentencing rules.

It is not merely the life sentence attached to a murder killing which is problematic. It would still be essential from the point of view of societal values to differentiate between loss of control and diminished responsibility killings from murderers.⁶⁶ Reed has raised genuine concerns over the dangers of having only anger and fear benefit from a label other than murder, noting that a more 'enlightened' review of the partial defences is needed in order to be more inclusive to other emotions⁶⁷ As well as having the correct label for the offence to acknowledge the level of culpability

⁶³ *Ibid.*, [32]

⁶⁴ *Ibid*

⁶⁵ Dargue n(12) 107

⁶⁶ Mackay and Mitchell n(13)

⁶⁷ Reed n(9) 186

involved, the defence should be equally labelled in an accurate manner which reflects the circumstances of the case.⁶⁸

Thomas and Ashworth are of the opinion that dealing with the situation at sentencing might not be adequate, noting that the issue should be dealt with in front of a jury rather than a judge after the already stigmatic conviction for murder. This point had also been argued by Reed:

*“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”.*⁶⁹

If the rationale for the killing is purely to avoid the victim suffering, it is extremely harsh to find such a defendant guilty of murder, the most heinous of crimes, when the level of culpability is clearly reduced. Nonetheless, it would seem that this is all that is available for now.⁷⁰

Dealing with a mitigating issue at the sentencing stage has already proved troublesome for New Zealand. Over the years before abolition, it was a hot topic, and abolition without replacing the partial defence was warned against. Lord Cooke noted that although provocation is only dealt with as a mitigation at the sentencing stage for all other crimes, the gravity of murder justifies it being singled out as needing to be considered before the penalty stage.⁷¹ Brookbanks has noted that the result of abolition of the provocation defence can only end in more elaborate sentencing hearings.⁷² Cutting the jury out of consideration of this issue is not particularly helpful and does not promote a reasonable system of justice by one’s peers. Brookbanks described this as defendants being “forced to take their chances with sentencing judges”,⁷³ which is an issue on its own without the fair labelling concerns.

Other Jurisdictions

In the United States, the Model Penal Code provides a defence for a defendant acting under extreme mental or emotional disturbance, as discussed earlier.⁷⁴ This covers a wide range of emotions, as long as there is a reasonable explanation, therefore acknowledging that an ordinary person’s self-control can be affected by emotions other than those of fear and anger. The jury need only decide if

⁶⁸ Keating and Bridgeman n(20) 709

⁶⁹ Reed n(9) 186

⁷⁰ Thomas and Ashworth n(57) 248

⁷¹ R Cooke, ‘The Crimes Bill 1989: A Judge’s Response’ (1989) *New Zealand Law Journal* 235, 239

⁷² W Brookbanks, ‘Partial Defences to Murder in New Zealand’ Chapter 16, Reed and Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011) 275

⁷³ *Ibid.*, 272

⁷⁴ American Law Institute Model Penal Code (1981) S210.3

there is a reasonable explanation for the emotional disturbance, without speculation over which emotions might cause such a disturbance. Such a defence would surely cover battered women and mercy killers, as well as the type of situations the second qualifying trigger of the loss of control defence is designed to accommodate. Schoenfeld⁷⁵, in discussing the New Jersey case of *Quinlan*⁷⁶, contemplated whether or not there is any value or “social interest” in prolonging the life of someone who has the chance of a much less painful death. *Quinlan* was the case of a twenty-one year old girl in a vegetative state. Her father asked the courts to appoint him as her guardian so he could discontinue the treatment sustaining her. The courts decided that although they had an interest in protecting the life of Karen Quinlan, her right to privacy superseded this factorisation. The case being discussed in this article is of factual irregularity to the typical mercy killing cases this chapter is considering, but some valid points are made. Schoenfeld notes:

“A gap between the law in words and the law in action is not at all unusual when the public is of two or more minds about a matter”⁷⁷

In other words, although these situations are not legislated for, they are dealt with by the courts as if provision has been made. This is what is meant by the ‘uneasy truce’ of mercy killing and diminished responsibility.⁷⁸ Legislating on such a controversial subject as mercy killing, where protecting the vulnerable must be weighed up against ending pain and suffering, would be difficult and possibly contentious to the public. For this reason, it is dealt with surreptitiously.

It is interesting that the Model Penal Code finds it adequate to refer to emotions as a whole, whilst English law has deemed it necessary to specify which emotions are worthy of providing a defence to murder. Perhaps it is because anger and fear are considered to be primitive emotions that can be almost uncontrollable, while other emotions like guilt and pity are not.⁷⁹ Wake has observed that whilst English law provides several avenues for householders who have killed in defence of their home, New South Wales have at times extended the same aid to battered women.⁸⁰ The Model Penal Code is not without criticism. In regards to extreme mental and emotional disturbance, Dressler stated:

⁷⁵ CG Schoenfeld, ‘Mercy Killing and the Law – A Psychoanalytically Oriented Analysis’ (1978) 6 *Journal of Psychiatry and Law* 215, 218

⁷⁶ *In Re Karen Quinlan*, 70 N L 10 (1976)

⁷⁷ Schoenfeld n(75) 220

⁷⁸ See generally, R Mackay, ‘The Coroners and Justice Act 2009- Partial Defences To Murder (2) The New Diminished Responsibility Plea’, [2010] *Criminal Law Review* 290; R D Mackay, ‘Diminished Responsibility and Mentally Disordered Killers’ Chapter 3, B Mitchell and A Ashworth, *Rethinking English Homicide Law*, (Oxford University Press, 2000)

⁷⁹ Uniacke n(19) 99

⁸⁰ Self-defence(Crimes Act 1900 s418), excessive self-defence(Crimes Act s421(1)), Substantial impairment of the mind (Crimes Act 1900 s23A), Provocation (Crimes Act 1900 s23)

*“Although it frees the law from some undesirable common law restrictions, it is a flawed statute”.*⁸¹

In fact, the Model Penal Code attracts a similar criticism as the Coroners And Justice Act 2009 in some respects. Of the latter, while some areas seem to be too expansive, such as the courts willingness to consider sexual infidelity cases despite their express exclusion from constituting a qualifying trigger under the loss of control partial defence⁸², others such as the introduction of the term ‘recognised medical condition’ into diminished responsibility seem too narrow. In regards to extreme mental or emotional disturbance, Dressler observed:

*“Today, some call for “tougher justice” while others want the law to recognise still more excusing conditions”.*⁸³

The Model Penal Code’s approach to the partial defence of extreme mental or emotional disturbance is considered a widening of the scope of the provocation defence, giving it a much broader scope than the common law provocation defence previously boasted, including a far-reaching range of emotions capable of causing an extreme emotional response from the defendant.⁸⁴ This is comparable to our journey from s3 of the Homicide Act 1957 to the partial defence of loss of control contained within the Coroners and Justice Act 2009. The purpose of this transition was to allow more emotions than mere anger to account for an emotional outburst, therefore giving the defence a much broader approach. Unfortunately, the changes under domestic law were not quite as comprehensive.

In New Zealand, the partial defence of provocation was abolished in 2009,⁸⁵ leaving such cases with mitigating circumstances to the sentencing stage. It has since been recommended on review that some form of the provocation defence be reinstated, because dealing with such an issue at the sentencing stage, after the defendant has been convicted of murder and labelled as so, is inadequate.⁸⁶ With self-defence in New Zealand having an immediacy requirement, it is highly unlikely a battered woman killing her abuser would have a defence.⁸⁷ This is comparable to the current situation for compassionate killings under English law, relying on the leniency of the sentencing judge after being convicted of murder.⁸⁸ As previous chapters have concluded, this is

⁸¹ J Dressler, ‘Why Keep The Provocation Defense: Some Reflections’ (2002) 86 Minnesota Law Review 959, 963

⁸² See earlier discussion of *Clinton, Parker, Evans* [2012] EWCA Crim 2, Chapter Four

⁸³ Dressler n(7) 715

⁸⁴ D B Broussard, ‘Principles for Passion Killing: An Evolutionary Solution to Manslaughter Mitigation’ (2012) 62 Emory Law Journal 179, 183; Dressler n(81)

⁸⁵ Crimes (Provocation Repeal) Amendment Act 2009 No 64, Section 4

⁸⁶ Family Violence Death Review Committee, *Fourth Annual Report*(2014) 6

⁸⁷ Crimes Act 1961 Section 48

⁸⁸ It can be a mitigating factor in establishing minimum term, as discussed above, Criminal Justice Act 2003 Sched 21, s269 11(f)

completely inadequate. The punishment might fit the crime with more lenient sentencing having abolished the mandatory life sentence for murder,⁸⁹ but the label does not fit the crime. Classifying killings which would garner much public sympathy with the same identity as the most callous, premeditated killings is undeserved. This is further compounded by the three strikes rule, which dictates that a second or third killing by any defendant must carry a mandatory life sentence, no matter what the circumstances.⁹⁰ This would apply equally to a battered woman, a mercy killer, or a mother attacking her child's rapist.

Conclusion

English law is inadequate when it comes to providing a suitable partial defence for those who kill a loved one who is in pain and suffering, motivated wholly by compassionate reasons. As Kadish put it:

"Preservation of human life is generally seen as a supreme good in our culture".⁹¹

To this end, even if consent is given, the act is deemed no less culpable in the eyes of the law. To successfully plead the partial defence of diminished responsibility, the defendant must be said to have a recognised medical condition. While that may be true for some defendants, it will not always adequately fit the case of the compassionate killer. The sole aim of partial defences might be to avoid a murder conviction and the mandatory life sentence attached, but it is also important that defendant's are not only labelled with the correct conviction, but also the correct defence. Huxtable astutely described use of the diminished responsibility defence for mercy killers as 'recasting' and inaccurate.⁹² This truthful statement also recognises that this approach to mercy killings fails to recognise the complexity of such cases and how they are morally different to other killings falling within the partial defences.⁹³ That being said, Chalmers has argued that the labelling is irrelevant to the reality of the situation, as long as the appropriate sentence can be passed to fit the culpability level of the crime:

"Why does it matter so much what the offence is called, so long as the degree of punishment is not excessive?"⁹⁴

Having a sentence which fits the crime could be said to be the primary concern with cases involving mitigating circumstances, however, it is also necessary to have a process that incorporates fair labelling because of the stigma attached to the most heinous of crimes. At present we have only

⁸⁹ Sentencing Act 2002 s102

⁹⁰ Sentencing and Parole Reform Act 2010 (amending Sentencing Act 2002 with the addition of s86A to 861)

⁹¹ S Kadish 'Letting Patients Die: Legal and Moral Reflections' (1992) 80 California Law Review 857, 858

⁹² R Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Routledge, Cavendish 2007)

⁹³ Keating and Bridgeman n(20) 697

⁹⁴ J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 Modern Law Review 217, 226

murder or manslaughter labels for compassionate killings, which as Rogers has pointed out, is lacking a broader consideration of the range of killings they cover.

Loss of control, as it presently exists, is also incapable of providing a partial defence for mercy killers. It is true that the second qualifying trigger, things done or said which constitutes circumstances of extremely grave character giving the defendant a justified sense of being seriously wronged, does not expressly ask for the reaction to be one of anger. Even so, it cannot be said that a loved one asking to die meets the criteria of this trigger. The defendant does not feel a justifiable sense of being wronged at the request to die. The defendant's sense of being wronged is aimed at the medical affliction their loved one is suffering from for making them feel like their situation is desperate and hopeless. Both Livings and Taylor argue that the situation of a defendant in the case of a mercy killer could have led to a sense of being wronged, but the only examples given are requests to die and the way in which the illness manifests itself, which can be visibly humiliating for the victim.⁹⁵ Seeing a cherished spouse or family member suffering so badly might cause an extreme amount of grief for the defendant, but to say each sight of the victim amounts to accumulating provocative conduct capable of invoking the second qualifying trigger to the loss of self-control defence is overstating the boundaries of the defence at best.⁹⁶ Had English law adopted a similar framework to that of the Model Penal Code's extreme mental or emotional disturbance, which may arise from any source and does not even require a provocation as such, mercy killing would sit more comfortably.⁹⁷

Regardless of whether or not the word anger is used to describe elements necessary for successfully raising the partial defence based on the second trigger, it is construed to be read that way. Reed claimed the second qualifying trigger was to be 'viewed through a prism of imperfectly justified retributive anger', and a similar idea has been remarked by others⁹⁸, supporting the validity of this contention.⁹⁹ Edwards described it as the 'anger' trigger which could only be founded on moral indignation or outrage, neither of which comes close to the experiences of the compassionate killer.¹⁰⁰

⁹⁵ Livings n(25), Huxtable n(92)

⁹⁶ It does not reflect the essence of the second qualifying trigger, making it much more likely it will continue to be squeezed into the diminished responsibility parameters

⁹⁷ See P H Robinson, 'Abnormal Mental State Mitigations of Murder: The US *Perspective*' Chapter 17, Reed and Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011) 294, also Dressler n(110) 989

⁹⁸ A Norrie, 'The Coroner's and Justice Act 2009 – Partial Defences To Murder (1) Loss Of Control' [2010] 4 Criminal Law Review 275

⁹⁹ Reed n(9) 207, see also Keating and Bridgeman n(20) 704 and Edwards generally

¹⁰⁰ Edwards n(3) 224

If a partial defence of diminished responsibility or loss of self-control fails, both are also considered as mitigating circumstances at the sentencing stage.¹⁰¹ This gives defendant's acting out of fear or anger an advantage over those acting from compassion. Even if the defence they are afforded fails, they still have the opportunity to have their sentence reduced in the same way as a mercy killer. There is simply no explanation for the exclusion of at least a partial defence to murder without a diagnosis of a recognised medical condition, other than the concern that some less than genuine cases might reach jury consideration. This could be said equally for loss of control cases, and in that situation the jury have been deemed able to sort the sheep from the wolves in most situations.

A third qualifying trigger added to the partial defence of loss of control is a very promising option for reform to satisfactorily include mercy killers. Given that the qualifying triggers of this partial defence also rely upon evidence of emotional outbursts, adding a third trigger for compassionate killings would be a good fit. Such a provision would certainly need some restrictions to try and seek out the genuine cases from those perhaps motivated by selfish reasons. The key elements for such a partial defence could be extracted from the Director of Public Prosecution's policy on assisted suicide¹⁰². This is a different issue to mercy killing, but much can be ascertained from the list of factors as to whether or not to prosecute. For example, factors in favour of prosecution include the victim not having the capacity to make an informed decision, a suspect being motivated by something other than compassion (such as financial gains), the suspect being unknown to the victim or the suspect pressuring the victim to commit suicide. Factors tending against prosecution include the victim having reached their own clear and informed decision on wanting to die, the suspect being wholly motivated by compassion, the suspect having made an effort to dissuade the victim, and the suspect having reported the event to the police and fully assisted them. These guidelines really put compassion at the very centre of assisted suicide, and it has even been suggested that this should be reflected in the offence rather than just the sentencing guidelines:

"The insertion of motive into the wording of the offence would have the benefit of providing effective notice to the public".¹⁰³

These guidelines, built on a foundation of compassion as a motive, could be moulded into a framework for a third qualifying trigger¹⁰⁴. For example, the defendant should have had a close and personal relationship with the victim, as this is a key element to the emotion of compassion:

¹⁰¹ Diminished responsibility –Criminal Justice Act 2003 Para 11(c) Sched 21 s269, Provocation –Justice Act 2003 Para 11(d) Sched 21 s269 Criminal

¹⁰² Policy for Prosecutors In Respect of Cases of Encouraging or Assisting Suicide

¹⁰³ Keating and Bridgeman n(20) 709

¹⁰⁴ Keating and Bridgeman described compassion as being a "central factor" of the guidelines. See n(20) 711

*“Compassion is a complex human emotion. To express it, a person must feel an affinity...with the object of his attention, be sympathetically aware of the other’s pain or distress, and desire to alter it”.*¹⁰⁵

In tandem with articulated factorisations, the judge having the power to withdraw the defence if there is evidence that the defendant was acting for selfish or malevolent reasons, would also be crucial. Norrie referred to the judge’s role under the new loss of self-control defence as allowing them to make the moral and political decision deemed necessary by the situation¹⁰⁶. The judge could be relied upon to make such a call in cases of compassionate killings, allowing a principled judgment to take place before the issue reaches the jury. The following is an optimal model for a third qualifying trigger to be added to the partial defence:

Unlawful homicide that would otherwise be murder should instead be manslaughter if the defendant acted in response to:

- (a) gross provocation (meaning words or conduct or a combination of words and conduct which caused the defendant to have a justifiable sense of being seriously wronged); and/or*
- (b) fear of serious violence towards the defendant or another; or*
- (c) watching a loved one suffer from a terminal illness or severe disability*

*In regards to (c), a person must have acted because the victim had either a terminal illness or a disease/disability which would substantially impair both life expectancy and the quality of life, had a reasonable and genuine belief that the act was necessary to end the victim’s suffering, and been motivated wholly by compassion.*¹⁰⁷

It is questionable as to whether any form of consent would actually need to be an issue. In cases like *Cocker*, the victim asked to be killed several times. In *Inglis*, the victim was unable to communicate any such consent. Yet both are equally cases of mercy killing, with the defendant believing they were acting in the victim’s best interests to end their pain and suffering. The victim’s wishes are not overridden if the victim is not in a position to express their wishes. For this reason, the defence should not fail if consent was not given, it should merely be stipulated that if it was possible, the wishes of the victim should have been ascertained. Of course, if the defendant was acting against the wishes of the victim, no defence would or should be available to them. It could be argued that gaining any kind of consent in such cases is futile in any regard, as it would be questionable if it was genuine. For example, an elderly woman might ask her elderly husband to kill her, not because her

¹⁰⁵ Dressler n(7) 682

¹⁰⁶ Norrie n(98)

¹⁰⁷ Further safeguards would still be required, along with an objective element. This is merely to show how a third trigger might be worded alongside triggers to continue to cover fear and anger.

pain was so great that she wanted to die, but because her infirmities meant that her husband had to provide her with a great level of care and she felt burdensome. Consent is a less significant element because the partial defence is based upon the state of mind of the defendant, not the victim. Consent would merely mean a case like *Cocker*, where requests to die from the victim were constant, would be a little more clear-cut than that of *Inglis*.

Also note the removal of the problematic loss of self-control element, in incompatible concept to the situation of the compassionate killer. This is not unique to mercy killing cases. It has already been speculated that battered women who kill their abuser will also experience difficulty in pleading the very defence designed for them, because there is no outward display of loss of self-control present in such cases. It is a behaviour much more readily associated with anger. Cases concerning mercy killings and battered women who kill their abuser are not alone in experiencing trouble meeting the loss of self-control threshold. Recent cases of men trying to successfully plead the fear of serious violence qualifying trigger have also failed on this ground.¹⁰⁸ This is because the emotion of fear and loss of self-control are not compatible concepts in any situation. It is quite therefore quite obvious that the element of loss of control itself might better be left out of the equation altogether when reducing culpability based upon an extreme emotional outburst.

Dargue raised concerns that a new review is needed in regards to mercy killing, and given the arguments within this chapter, this statement is supported.¹⁰⁹ With cases like *Inglis* reaching national headlines, it might not be a concern the government can shy away from for much longer. It is obvious that it needs to be brought in line with other emotional response defences. With safeguards in place to ensure the partial defence was used only in the most genuine of cases wholly motivated by compassion, a partial defence of killing for compassionate reasons would not be dangerous to the vulnerable. Some value needs to be placed on a defendant acting because they did not want a loved one to be desperately miserable and in pain any longer, with a premature death being an agonising eventuality.¹¹⁰ The situation of the mercy killer is unique because the defendant acts in part to end both the intolerable suffering of their loved one, but also to end their own devastation and pain in watching them suffer.¹¹¹ The sanctity of human life is to be valued above all else, but there is some merit to the thought that continuing a dreadfully dismal life has very little value at all.¹¹² The very fact, that the English legal system can declare mercy killers to be murderers by handing them such a conviction, then failing to punish those who engage in it in a manner that fits the premeditated

¹⁰⁸ Gurnipar, Kojo-Smith and another [2015] EWCA Crim 178

¹⁰⁹ Dargue n(12) 110

¹¹⁰ J Glover, *Causing Death and Saving Lives* (Penguin, London, 1977) 45

¹¹¹ Keating and Bridgeman n(23) 715

¹¹² Glover n(110) 45

murder, shows the shortcomings of the partial defences. The courts are acting as though such a partial defence already exists, so why not create one? This issue continues to build in importance, with new medical techniques and advancements in treatment meaning terminally ill patients can be kept alive longer.¹¹³ This situation is in urgent need of remedial legislation to provide a cathartic panacea to current ills. It is far beyond the scope of the courts and needs legislative attention. An offence or defence designed specifically for compassionate killings would be ideal, but a third qualifying trigger would also be a satisfactory solution, short of overhauling the partial defence of loss of control altogether in favour of a new emotion based partial defence akin to that of extreme mental or emotional disturbance.

¹¹³ Glover n(110) 197