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Sexual infidelity: the exclusion that never was?

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Case: [R. v Clinton \(Jon-Jacques\) \[2012\] EWCA Crim 2; \[2013\] Q.B. 1 \(CA \(Crim Div\)\)](#)

***J. Crim. L. 382** The provisions of the Coroners and Justice Act 2009 have been no stranger to scrutiny since enactment in regard to the partial defences to murder, but none more so than the sexual infidelity exclusion that somehow appeared sitting neatly within s. 55(6)(c). The exclusion means that when considering if the loss of self-control had a qualifying trigger, one must disregard things done or said which constituted sexual infidelity. This must have come as quite a surprise to the Law Commission, as its report preceding this change to the law eventually formulated by the government did not mention an exclusion of this kind, and it does not appear to be a welcomed change. Of course, the reasoning underpinning such a bold move is sound; a sole confession of sexual infidelity and subsequent killing from anger and jealousy should not partially excuse such actions. The problem is that such circumstances are rare. In most cases involving an admission of sexual infidelity, there is often much more to the situation than meets the eye. This comment considers the repercussions of having this exclusion included in the 2009 Act and how it will actually affect both genders, not just jealous men.

Why this particular exclusion?

Hansard is a good place to start as to how and why this exclusion came to be:

We are not trying to legislate away people's natural and normal upset, concern and anger about these circumstances, but we do not accept that that itself ought to lead to reducing a murder finding.¹

The point is to increase the standard at which one can act out of anger before a qualifying trigger will have been met, with particular regard to male killers acting on the notion of ownership of their partners.² With this in mind, the language used is bound to cause a host of problems. Reed and Wake described 'interpretational difficulties'³ which would be ***J. Crim. L. 383** encountered, and I am inclined to agree. It was suggested that the word 'disregarded' should be replaced with 'insufficient',⁴ which would have more adequately portrayed that the point is for sexual infidelity alone not to be a qualifying trigger. As Leigh points out,⁵ the law would have been clearer if the legislation itself had expressed this. What seems to have been forgotten is that context is critical, and to view any other circumstances without shedding light on infidelity claims too would give a very blurred picture of what had happened.

Evidently, the exclusion of sexual infidelity could also be thought of in connection with the considered desire for revenge exclusion, as such motives can often be interpreted in these situations.⁶ One must wonder, if the rationale of the sexual infidelity exclusion is because the jealousy motive largely relates to revenge, why the considered desire for revenge exclusion alone did not suffice. This is also the problem foreseen for battered women who kill their abuser, where some amount of premeditation is sometimes evident.⁷ Deciding what amounts to a 'considered' desire for revenge is another concept which the courts will be left to determine. This was noted by Ashworth:

A desire for revenge that may fairly be described as fleeting or instinctive stands at one end of a spectrum, and a 'considered desire for revenge' is well on the way to the other end of that spectrum.⁸

Courts' interpretation

In the recent case of *R v Clinton*,⁹ it was established that sexual infidelity may in fact be the background, just not the qualifying trigger itself. In this case, a man killed his partner after he found out that not only had she started a relationship with another man, but she had also boasted to sleeping with many more, had expressed amusement at his looking at suicide websites and told him he did not have the courage to commit such an act. She also told him that she would not only leave him, but leave their children with him too. What a shame that the courts have had to establish this when the government recently had the perfect opportunity to provide clarity in this area. Several other issues came to light in this case too, all surrounding this particular exclusion. What if the infidelity claim was made to hurt the other party? Could a boast of sleeping with five other men be taken seriously? It would be unreasonable for an intentional lie to be considered as a qualifying trigger, but not ***J. Crim. L. 384** a truthful statement. One of the most important points made was why this form of betrayal has been singled out, whilst other forms of disloyalty and humiliation of sufficient gravity may constitute a qualifying trigger. That being said, most of us realise that a relationship comes complete with the prospect of being one of two things--happy or heartbroken. Therefore, if the possibility of the relationship ending badly can be foreseen or half-expected, why should this be not only a reason to act irrationally, but reason enough to reduce a charge of murder to manslaughter? It may seem a very pessimistic way to look at the issue, but optimism will not make out a defence here. Having high expectations for a relationship and an absolute level of trust which is then shattered will not create an exception to the exclusion if it stands alone, no matter how much worse it may make the infidelity appear.

What constitutes infidelity?

Sexual infidelity implies there is an ongoing relationship--without the relationship, no level of loyalty or faithfulness can be expected or presumed. Therefore if this exclusion is taken literally, cases where a relationship was near enough at an end will be wavering on a very fine line. Of course, it would be absurd to think that a jury could find someone to have a justifiable sense of been seriously wronged if his or her former partner was involved in any such activity after a break-up, but technically it would be there for consideration if the

exclusion did not apply. Through this perspective, the word 'infidelity' itself is problematic because there is uncertainty as to which relationships acquire such a bond of loyalty and at what point towards the end of the relationship this bond is severed. The word 'sexual' is as much a problem. What if a woman told her partner she was completely in love with another man, although no physical intimacy had taken place yet? Surely he could experience the same emotions as if she had just told him she had been intimate with another man, yet the exclusion would not apply. The term 'sexual infidelity' is not defined or explained within the new law, and this has been justifiably criticised.[10](#)

In discussing the exclusions chosen,[11](#) Withey[12](#) highlights the fact that sexual infidelity has been excluded when it is actually something the public would normally sympathise with, whilst honour killings, which receive no compassion from the public, have not. As Edwards points out,[13](#) it is strange how juries can be relied upon to disqualify honour killings, but not cases of sexual infidelity.

***J. Crim. L. 385 Women and sexual jealousy--an unlikely combination**

An interesting perspective comes from Fitz-Gibbon and Pickering[14](#) with regard to how such cases of men killing women over claims of infidelity and the like play out, noting how such trials often turn into a slanderfest:

Women killed by their male partners are often stereotyped according to their alleged infidelity, nagging, or other undesirable characteristic.[15](#)

Conversely, this exact occurrence also happens in the case of battered women who kill their abusers, with the victims becoming merely violence personified, and no one seems to mind. The gender bias in this area of the law is nothing new. Commentators before the Coroners and Justice Act 2009 illustrated the bias towards men and the anger-related defence of provocation. Now there is the concern that the changes have gone too far in the other direction. What must be remembered is that it was not only men seeking to rely on sexual infidelity to make out a successful provocation plea. There are cases where women have acted violently in such situations. The difference between cases of men and women killing in circumstances of sexual infidelity seems to be motive. Men kill in a jealous rage which may stem from their dated perception of women as property. On the other hand, in some cases, women seem to act out in violence as a form of hurting their male counterparts to the extent that they themselves have been hurt, with physical harm substituting for emotional hurt. It would appear that women care much less about the physical acts involved in infidelity, and more about the man they love having strong feelings for someone else, which takes us back to the issue of what constitutes infidelity in the first place.

Consider the case of Eileen Smith,[16](#) who shot her husband in the hip (a wound which later proved fatal), telling police she wanted to 'pepper his behind' to teach him a lesson and stop him from leaving her. She had been married to her husband for 30 years. She became increasingly depressed and threatened to commit suicide, when not only did he embark upon an affair, but he actually moved his other woman into an outbuilding on their property. Note that the conduct sparking the violent outburst is still sexual infidelity, although the defendant did not seem to intend to do anything more than give her husband a serious wound and a warning. She loved him and she did not want him dead; she just wanted him

to stop the affair and come back to her.

This is not always the case with women scorned. In the case of *R v Challen (Georgina Sarah)*,¹⁷ a woman took a hammer to her husband's head whilst he sat at the table eating his dinner, after suspecting he was to meet another woman the next day. She had been suspicious of her husband's unfaithfulness for several years, suspicions which were often ***J. Crim. L. 386** accurate. She had left him on a previous occasion, moving into a property she had bought, only to ask him for a reconciliation a few months later. She started to check some social networking sites he used, and discovered he had made arrangements to meet another woman. Unbeknownst to her, he had called this woman to cancel the arrangement. Although she appeared to act out of jealousy, there was no suggestion of any sexual infidelity having actually taken place (on that occasion), and for that reason it can only be assumed that it was the mere fact that the husband wanted to start a relationship with someone else, or spend time with another woman, which angered her. It was not the threat to their sexual relationship that wounded her; she was feeling emotionally upset and hurt at the realisation that her feelings for him were not reciprocated.

In the case of *R v Sangha*,¹⁸ a woman found out her husband of 22 years had not only begun a relationship with another woman, but the other woman had also become pregnant. She stabbed him and then herself. There was a background of intolerable physical and mental abuse, and she had attempted suicide before, but her realisation of the extent of her husband's betrayal was the straw that broke the camel's back. After considering the gender issues involved, there appears to be an extra level to these particular circumstances. Should two questions be asked here: (1) how can any of these events be viewed without the context of the sexual infidelity; and (2) does the fact that the victim impregnated this 'other woman' not make the situation a tad more serious? Surely the fact that the defendant's husband was facing the prospect of being responsible for another woman's child should be part of the 'circumstances of D', even though it is related to an act of sexual infidelity? Perhaps such a great breach of trust should be given more scope for compassionate excuse.

Does the sexual infidelity exclusion achieve its purpose?

The government's rationale for bringing in the sexual infidelity exclusion was obviously to prevent cases slipping through to jury consideration where there were aggravating features of a revelation of infidelity, for example, in the case of *Sanchez Williams*,¹⁹ where the defendant who had a history of sexual possessiveness beat his ex-girlfriend to death in front of their three-year-old daughter, stopping on four occasions to return the child to her room. However, excluding all situations involving the jealous/sexual infidelity component in order to achieve this does seem somewhat unsound. Already *R v Clinton*²⁰ has shown that the new two-limbed defence is flawed. Where we go from here is something that the courts may need to address in the very near future. Interestingly, in Scotland, one of the only ways to plead provocation successfully is to ***J. Crim. L. 387** show there was an act or admission of sexual infidelity.²¹ Is it right for such an act or admission to be completely excluded south of the border? In *R v Mellentin*,²² it was held that taunting a man about sexual infidelity or performance does involve striking at his character at its most vulnerable. If this is truly the case, to exclude it is to ignore completely some emotion-driven aspects

of human frailty. Norrie was quick to point this out:

Sympathy for human frailty is rejected in favour of recognition of imperfectly justified anger.[23](#)

The essence of the defence of provocation was always as a concession to human frailty; a way to prevent the maximum sentence being passed on those whom one could feel sympathy for because their actions and the situation they were reacting to was beyond their control. The point of abolishing the partial defence of provocation and replacing it was to give the law clarity and ensure that emotions other than mere anger would be considered, not to change its fundamental reason for existing. Of course, the courts will need to establish where boundaries lie in regard to taunts in the context of sexual infidelity. Reed and Wake have further explored this point, particularly as to how sexual infidelity can ever be detached from taunts relating not only to infidelity, but also inadequacy:

It may be troublesome to disentangle the nature and import of excessive taunts relating to cheating, inadequacy and disaffection.[24](#)

In such cases, the whole picture really cannot be seen without the consideration of the sexual infidelity factor. This does not mean the sexual infidelity is the qualifying trigger--merely that the sexual infidelity is a significant component to the emotional disturbance the defendant suffered at the time of the killing. Baker and Zhao have taken a different view to this.[25](#) They believe that being able to consider sexual infidelity when investigating the defendant's circumstances is letting the disqualified event in 'through the back door'.[26](#) This is also noted by Leigh.[27](#) Arguably, a qualifying trigger should be established on the basis of something other than mere confession or observing sexual infidelity. But how can a trigger be established at all without looking at all the circumstances? It cannot be compartmentalised without creating injustice.

***J. Crim. L. 388 Conclusion**

As regards *R v Clinton*,[28](#) Baker and Zhao suggest that the victim's taunts about the defendant considering suicide should have been viewed without the knowledge that the defendant was already upset about her infidelity. However, if he had been upset already because he was unfairly dismissed from his employment earlier that day, clearly this would have been considered as part of the circumstances surrounding the event. Baker and Zhao also suggest that an ordinary person would not kill over taunts on contemplating suicide; but the ordinary person is not suicidal. Being suicidal is nonetheless a circumstance which would make such acts more provocative to that person. Consequently, with all the circumstances taken into account, it may well be thought of as a qualifying trigger. As long as the infidelity alone does not constitute the qualifying trigger, then surely this is enough to meet the objectives of what the new law tries to accomplish by implementing such an exclusion at all? Leigh comments that this is indeed the result of the *Clinton* decision:

The effect of all of this is that sexual infidelity is only to be disregarded where it stands alone in isolation from a qualifying trigger.[29](#)

Finding a case where the sexual infidelity component is completely separate from other events will no doubt be difficult, therefore reference to it in the Coroners and Justice Act

2009 seems purely academic. It will in reality only cover a small number of cases,³⁰ those of pure sexual jealousy and anger of an almost possessive nature--possibly making it a virtually moot point for women who kill in such circumstances.³¹ It may be assumed that the safeguards in place within the 2009 Act could have frustrated any attempt at a successful plea. Indeed, not only would the judge have the power to withdraw the defence, any reasonable jury left to debate the issue could surely be trusted to make a moral and just decision.

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1. *Hansard*, HC, Public Bill Committee, Maria Eagle, 9 March 2009, col. 440.
2. See A. Ashworth, 'Homicide: Coroners and Justice Act 2009 s.54--Loss of Control--Qualifying Trigger' [2012] Crim LR 539 at 543 for a good discussion on this point.
3. A. Reed and N. Wake, 'Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes' in A. Reed and M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate Publishing: London, 2011) 117.
4. *Hansard*, HC, Public Bill Committee, Jeremy Wright, 9 March 2009, col. 440.
5. L. H. Leigh, 'Loss of Control: The Significance of Sexual Infidelity and Other Matters' [2012] Crim LR 4 at 4.
6. See D. J. Baker and L. Zhao, 'Contributory Qualifying and Non-qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 254. The authors considered the action of the appellant in *R v Clinton* [2012] EWCA Crim 2, [2012] 1 Cr App R 26 discussed below to be that of revenge, largely due to an act committed only days before the killing in which the defendant vandalised the victim's car (her most treasured possession).
7. Consider the case of *R v Ahluwalia* [1992] 4 All ER 889, where the defendant waited until her husband was sleeping before pouring petrol on his feet and the bottom of his bed and then setting it alight.
8. Ashworth, above n. 2 at 542.
9. [2012] EWCA Crim 2, [2012] 1 Cr App R 26.
10. See Reed and Wake, above n. 3 and Leigh, above n. 5 on this issue.
11. Not only sexual infidelity, but also a considered desire for revenge and if the conduct was self-induced as a reason to commit violence, see s. 54(4) and s. 55(6).
12. C. Withey, 'Loss of Control: Loss of Opportunity?' [2011] Crim LR 263.
13. S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-control' (2010) 74 JCL 223 at 230.
14. K. Fitz-Gibbon and S. Pickering, 'Homicide Law Reform in Victoria, Australia; From Provocation to Defensive Homicide and Beyond' (2012) 52 *British Journal of Criminology* 159.
15. *Ibid.* at 162.
16. *R v Smith (Eileen Gladys)* (1988) 10 Cr App R (S) 120.
17. [2011] EWCA Crim 2919, [2012] 2 Cr App R (S) 20.
18. *R v Sangha (Bakhshish Kaur)* (1997) 1 Cr App R (S) 202.

- [19.](#) *Attorney-General's Reference (No. 23 of 2011) (R v Williams (Sanchez))* [2011] EWCA Crim 1496, [2012] 2 Cr App R (S) 45.
- [20.](#) [2012] EWCA Crim 2, [2012] 1 Cr App R 26.
- [21.](#) As decided in *Drury v HM Advocate* 2001 SLT 1013, where it was held that sexual infidelity could constitute provocation as well as the usual violent situations because of 'overwhelming emotions on discovery of sexual infidelity'.
- [22.](#) (1985) 7 Cr App R (S) 9.
- [23.](#) A. Norrie, 'The Coroners and Justice Act 2009--Partial Defences to Murder (1) Loss of Control' [2010] Crim LR 275.
- [24.](#) Ashworth, above n. 2 at 118.
- [25.](#) Baker and Zhao, above n. 6.
- [26.](#) Ibid. at 256.
- [27.](#) Leigh, above n. 6.
- [28.](#) [2012] EWCA Crim 2, [2012] 1 Cr App R 26.
- [29.](#) Leigh, above n. 5 at 5.
- [30.](#) Since the precedent set by *R v Clinton* [2012] EWCA Crim 2, [2012] 1 Cr App R 26.
- [31.](#) As discussed earlier, their motives appear fairly dissimilar to that of pure sexual jealousy.