



Coercive and Controlling Men and the Women Who Kill Them

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Abstract

The problem of how to deal with abused women who kill their abusers has taxed the courts since the 1990s, when a series of high-profile cases involving “battered women” were successfully argued in the appeal court. Since then, in addition to physical violence, a new form of domestic abuse has been recognised in law, known as “coercive and controlling behaviour,” and the partial defences to murder of provocation and diminished responsibility have been reformed. This article traces the history of some of the most ground-breaking cases of the past and considers the effect of the new offence on the partial defences, primarily by considering the case of Sally Challen, following her successful appeal in 2019. The reformed defences of loss of control and diminished responsibility are assessed in light of the implications of coercive and controlling behaviour in pleading the defences. The position of domestic abuse in linking both defences and the problem of presenting the defendant to the jury in her victimhood is also considered.

Keywords

Coercive and controlling behaviour, domestic abuse, diminished responsibility, provocation, loss of control, partial defences to murder, Coroners and Justice Act 2009, Serious Crime Act 2015 (UK).

I. DOMESTIC VIOLENCE AND WOMEN WHO KILL

The criminal justice system has wrestled for years with the issue of how to deal with women who kill their abusive partners. Many of the high-profile cases of the past few decades¹ have centred on the effect of prolonged abuse over a number of years; however these cases concentrated on physical violence, given that such behaviours were already criminal acts in

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¹ See, for example, the campaign of <https://www.justiceforwomen.org.uk/> (accessed 01/11/19), following the domestic violence revolution of the 1970s.

law,² and had the benefit of the emerging understanding of the effects of domestic violence.³ Until recently the law was silent on the fact that non-physical domestic abuse can cause extreme harm to the victim, sometimes even driving her to kill in response. It is only within the past decade that the effect of non-physical abusive behaviour has been enshrined in the law as a criminal offence in its own right, with the enactment of s. 76 of the Serious Crime Act 2015 criminalising “coercive and controlling behaviour.” The author acknowledges that domestic abuse is not confined to male/female interactions, but female/male abuse and same-sex abuse is outside of the scope of this discussion. The most recent statistics demonstrate that women are the victims in 74% of all domestic homicides, with the suspect being their partner or ex-partner in 81% of cases. Male victims of domestic homicide account for 26% of the total, with 45% of those having a partner/ex-partner as suspect.⁴

This article will consider the historical development of an understanding of the issues of physical abuse as they pertained to the problem of abused women who were convicted of murder, despite having pleaded the abuse in their defence. The previous partial defences to murder as they existed prior to 2009 will be explored. The article will then consider the changing landscape of the courts’ response to a selection of appeal cases which raised the profile of physically abused women who killed. It will then analyse the effect of a new law regarding non-violent coercive and controlling behaviour and the impact that this may have on future murder defence pleas in the light of the recent appeal of Sally Challen. Finally, consideration will be given to the nature of victimhood in defending women who kill.

Murder is defined as the unlawful killing of a human being under the Queen’s peace, with malice aforethought, meaning with an intention to kill or cause grievous bodily harm.⁵ The mandatory sentence upon conviction is a life sentence, starting with a tariff of time to be served in custody with the potential to serve the rest of natural life in the community on a lifelong licence.

II. PARTIAL DEFENCES TO MURDER – HISTORICAL DEVELOPMENT AND REFORM

There are two murder-specific defences; the function of both defences is primarily to ameliorate the effect of the mandatory sentence for murder⁶ and also accommodate the principle of fair labelling, a principle of social reinforcement⁷ which seeks to ensure that the defendant’s conviction and label reflect the blameworthiness of her actions. Murder is the strongest label which expresses “the revulsion which ordinary people feel for anyone who deliberately kills another human being”⁸ and the law’s function is to “cut up the murder/manslaughter cake in a way which renders the two wrongs meaningfully distinct.”⁹

The defences perform an excusatory function and their partial nature, resulting not in acquittal but in a conviction for manslaughter, serves to acknowledge that a life has been lost.

² Common law offence of battery, s.47, s.20 and s.18 of the Offences Against the Person Act 1861 c.100.

³ Domestic Violence and Matrimonial Proceedings Act 1976 c.50; Chiswick Women’s Aid, first battered women shelter, opened in 1971.

⁴ Office for National Statistics, Domestic abuse victim characteristics, England and Wales: year ending March 2019, available: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019#table-4f16865b> (accessed 26/11/19).

⁵ *R v Vickers* [1957] 2 QB 664.

⁶ Provocation: Royal Commission on Capital Punishment 1949-1953 Report, (1953) Cmd 8932 at para 124; report resulting in defence of diminished responsibility: Homicide Act 1957 c.11, s.2.

⁷ Andrew Ashworth, ‘Reforming the Law of Murder’ (1990) Criminal Law Review 75, 76.

⁸ Criminal Law Revision Committee, Offences Against the Person (1976) Report 14, para 15.

⁹ William Wilson, ‘The Structure of Criminal Homicide’ (2006) Criminal Law Review 471, 475.

The resulting lesser conviction for voluntary manslaughter opens up a range of sentencing options, ensuring that any mitigating features may be considered.

Prior to 2010, these defences were provocation and diminished responsibility. Provocation was a common law defence, partially defined in s. 3 of the Homicide Act 1957 as follows:

“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.”

It was necessary that the loss of control was sudden and temporary¹⁰, a requirement that was said to favour male defendants over female, given the way in which men typically reacted to a provocative situation by exhibiting a hot rage. This may be contrasted with the typical female “slow-burn” reaction, although this was not always supported by empirical research.¹¹

The defence of diminished responsibility was contained in s.2 of the Homicide Act 1957:

“Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.”

The defences were reformed in 2010¹² but remain relevant to this discussion in that the defendants concerned in the cases discussed here were convicted under the law as it existed prior to reform.

Historically, the defences were used in circumstances which may seem surprising. As recently as 1997, a defendant was sentenced to just 200 hours of community service after pleading provocation when stabbing his wife eleven times because she threatened to leave.¹³ In 1992 a husband successfully pleaded the defence after killing his wife in front of her children whilst “seeing a red mist” upon discovering her infidelity.¹⁴ He was sentenced to just seven years in prison. Most disturbingly in 1991, the defence was successfully pleaded by a man who kicked his partner to death claiming she provoked him by nagging and being drunk. He walked free from court with a suspended sentence after being told by the judge that “he

¹⁰ *R v Duffy* [1949] 1 All ER 932.

¹¹ Law Commission, *Partial Defences to Murder* (LC 290, 2004), RD Mackay, ‘The Provocation Plea in Operation: An Empirical Study’ Appendix A.

¹² With the enactment of the Coroners and Justice Act 2009, c.25.

¹³ Joseph Swinburne, reported at <https://www.telegraph.co.uk/news/uknews/law-and-order/2469112/Murder-law-shake-up-brings-legislation-into-line-Analysis.html> (accessed 01/11/19).

¹⁴ Les Hulme, reported at <http://news.bbc.co.uk/1/hi/uk/7530582.stm> (accessed 01/11/19).

expressed every sympathy” for the killer and that “this lady would have tried the patience of a saint.”¹⁵

The landscape of the use of the provocation plea in the early 1990s demonstrates that although the plea was being successfully used in cases where men killed women for infidelity and nagging, it was almost impossible to plead as an abused wife, given that the loss of control had to be sudden and temporary. This issue was examined during the decade as a result of several appeals involving women convicted of murder following prolonged domestic abuse.

One of the most ground-breaking cases involving physical violence was that of Kiranjit Ahluwalia.¹⁶ In 1989, Ahluwalia killed her husband by setting light to his bedroom, after having suffered years of violence and humiliation at his hands, including during pregnancy. On the night of the killing, her husband had threatened to burn her face with a hot iron. The effect of prolonged abuse on her self-esteem is evidenced by a letter to her husband, clearly containing elements of complete denial of autonomy:

"Deepak, if you come back I promise you - I won't touch black coffee again, I won't go town every week, I won't eat green chilli, I ready to leave Chandikah and all my friends, I won't go near Der Goodie Mohan's house again, Even I am not going to attend Bully's wedding, I eat too much or all the time so I can get fat, I won't laugh if you don't like, I won't dye my hair even, I don't go to my neighbour's house, I won't ask you for any help."¹⁷ (sic)

Despite raising a defence of provocation at trial, Ahluwalia was convicted of murder and sentenced to life. Upon appeal,¹⁸ it was acknowledged for the first time that although provocation required a sudden loss of self-control, in cases of domestic abuse, the defendant may lose control at the end of a “slow-burn” reaction to prolonged provocation. Ahluwalia won her appeal against conviction and at a retrial in September 1992,¹⁹ the court accepted her plea to the lesser charge of manslaughter on the grounds of diminished responsibility, a defence not raised at trial and based on new psychiatric evidence as to the effects of the abuse in terms of “Battered Woman Syndrome,” a form of post-traumatic stress disorder²⁰ which has now been somewhat discredited.²¹ Ahluwalia was sentenced to time served and released.

A second high-profile case was that of Sara Thornton, who, after repeated violence and threats to the life of herself and her ten-year old daughter, killed her husband with a single stab wound. Despite a plea of diminished responsibility, she was convicted of murder on 23 February 1990.²² She had not raised a defence of provocation, but the judge left this defence to the jury. Thornton unsuccessfully appealed her conviction, revisiting the “suddenness” requirement of provocation.²³ It was held that there had been no sudden loss of self-control

¹⁵ Joseph McGrail, reported at <http://news.bbc.co.uk/1/hi/uk/7530582.stm>, ‘Spotlight on Domestic Abuse Laws’ (29 July 2008) (accessed 04/11/19).

¹⁶ *R v Ahluwalia* [1989] Lewes Crown Court (7 December 1989).

¹⁷ *R v Ahluwalia* [1992] EWCA Crim 1, 892.

¹⁸ *R v Ahluwalia* [1992] EWCA Crim 1.

¹⁹ *Ibid.*

²⁰ Available: <https://pro.psychcentral.com/battered-woman-syndrome-key-elements-of-a-diagnosis-and-treatment-plan/> (accessed 05/11/19); Lenore E Walker, *The Battered Woman* (Harper & Row, 1980); *The Battered Woman Syndrome* (Springer Publishing, 1984) cited in J Loveless, ‘R. v GAC: battered woman “syndromization”’ (2014) 9 *Crim LR* 655, 655.

²¹ Loveless (n20) 655.

²² *R v Thornton* (No 2) [1996] 2 All ER 1023 at 1025, citing original trial date.

²³ *R v Thornton* [1992] 1 All ER 306.

when Thornton had fetched and sharpened a knife. A further successful appeal²⁴ considered diminished responsibility due to “Battered Woman Syndrome” and a personality disorder and the court further acknowledged that the effect of the abuse, if causing these psychiatric conditions, would be relevant not just to the issue of diminished responsibility but also to the issue of provocation in that it may form part of the circumstances of the defendant when considering the objective element of the defence.²⁵ A retrial was ordered and Thornton was convicted of manslaughter on the grounds of diminished responsibility.²⁶

Thirdly, Emma Humphries,²⁷ who killed her abusive pimp at the age of 17, did not plead the defence at trial despite being subjected to repeated rapes and other violent acts. In light of the Thornton and Ahluwalia cases she successfully appealed²⁸ and was released from custody, only to die of an accidental overdose of prescription medication within three years.²⁹

These appeals succeeded in changing judicial attitudes to the effect of physical abuse in terms of both partial defences but did not expressly consider the effect that non-physical abuse could also have upon the abused. As prominent sociologist Professor Evan Stark wrote in 2007,

“The domestic violence revolution appears to have had little effect on coercive control, the most widespread and devastating strategy men use to dominate women in personal life”³⁰ and “Because of its singular emphasis on physical violence, the prevailing model minimises both the extent of women’s entrapment by male partners in personal life and its consequences.”³¹

In 2010, both partial defences were reformed,³² and the current law reflects some changes to how these defences operate, in particular that removal of the “sudden” requirement from loss of control after provocative behaviour and the exclusion of sexual infidelity from its ambit. There are some changes to the language of mental impairment requirement in diminished responsibility and the effect that the impairment must have on the defendant’s abilities.

III. LOSS OF CONTROL – REPEALING THE PROVOCATION DEFENCE

Following the Law Commission’s proposals in its 2004 Partial Defences to Murder report³³ the defence of provocation was abolished and replaced with the defence of loss of control, contained in ss. 54-56 of the Coroners and Justice Act 2009. The Law Commission Report acknowledged that the existing defence was “inherently gendered”³⁴ in its tendency to favour the typically male reaction of explosive rage whilst restricting the availability of the defence to a female defendant killing out of fear or panic.

²⁴ *R v Thornton* (No 2) [1996] 2 All ER 1023.

²⁵ *Ibid*, at 1031.

²⁶ Available: <https://www.independent.co.uk/news/sara-thornton-is-cleared-of-murder-1349913.html> (accessed 05/11/19).

²⁷ *R v Humphreys* [1995] 4 All ER 100.

²⁸ *Ibid*.

²⁹ Available: <https://www.justiceforwomen.org.uk> (accessed 05/11/19).

³⁰ Evan Stark, *Coercive Control – How Men Entrap Women* (Oxford University Press, 2007) 8.

³¹ *Ibid*, 10.

³² Coroners and Justice Act 2009, c.25.

³³ Law Commission, *Partial Defences to Murder*, Final Report, (LC290, 2014).

³⁴ 2004 Rights of Women response to the Law Commission, *Partial Defences to Murder* (Consultation paper no. 173, 2003) available: <https://rightsofwomen.org.uk/wp-content/uploads/2014/10/Partial-defences-to-murder-pdf> (accessed 29/10/19) 3.

A successful plea of loss of control requires that the defendant loses control as a result of a qualifying trigger.³⁵ The trigger may consist of fear of serious violence from the victim against the defendant or another identifiable person;³⁶ or may be attributable to a thing or things done or said (or both) which constituted circumstances of an extremely grave character and caused her to have a justifiable sense of being seriously wronged.³⁷ The terms “justifiable” and “extremely” require an objective assessment, an element which has been criticised not least for the problem that the abused woman will need to persuade a jury that her loss of control was justified, but that it was so even in circumstances where the last act of provocation may have been relatively minor in its overall contribution to the cumulative effect of abuse.³⁸

Whichever trigger is cited, the defendant must then be judged by an objective standard, the test being whether a person of her sex and age, with a normal degree of tolerance and self-restraint and in her circumstances, might have reacted in the same or similar way.³⁹ No elaboration is given on the role of the defendant’s sex and how or why this may impact upon her tolerance or self-restraint.⁴⁰ As Mitchell has noted,

“The difficulty here is that there are no clear objective or scientific data about consistency in levels of self-control. We do not know how much consistency there is in people’s views about when self-control should or should not be exercised, nor do we know the degree of similarity in people’s ability to exercise self-control in any given set of circumstances.”⁴¹

The defence cannot be used where the defendant acted out of a considered desire for revenge⁴² and to combat the historic use of the provocation defence for adultery, sexual infidelity was expressly excluded as a qualifying trigger.⁴³ The fear trigger was included as a concession to battered women as historically the defence only allowed for reactions borne out of anger, not from fear, panic or horror.⁴⁴

IV. DIMINISHED RESPONSIBILITY – REFORMED DEFENCE

The defence of diminished responsibility in s. 2 of the Homicide Act 1957 was amended by section 52 of the Coroners and Justice Act 2009. It requires the defendant to be suffering from an abnormality of mental functioning arising from a recognised medical condition.⁴⁵ This must substantially impair her ability to understand the nature of her conduct, form a rational judgment or exercise self-control.⁴⁶ This in turn must provide an explanation for her conduct in relation to the killing⁴⁷ and will do so if it causes, or contributes significantly to that conduct.⁴⁸

³⁵ Coroners and Justice Act 2009 c.25, s.54(1)(a) and (b).

³⁶ s.55(3).

³⁷ s.55(4)(a) and (b).

³⁸ S Edwards, ‘Anger and Fear as Justifiable Preludes for Loss of Self-Control’ (2010) 74(3) *Journal of Criminal Law* 223.

³⁹ s.54(1)(c).

⁴⁰ A Norrie, ‘The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control’ (2010) 4 *Criminal Law Review* 275, 281.

⁴¹ BJ Mitchell, ‘Years of Provocation, Followed by a Loss of Control’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 122.

⁴² s.54(4).

⁴³ s.55(6)(c).

⁴⁴ Edwards (n38) 223.

⁴⁵ Homicide Act 1957 c.11, s.2(1).

⁴⁶ s.2(1A).

⁴⁷ s.2(1)(c).

The defence reflects an insanity plea in that the burden of proof shifts to the defendant to prove the defence⁴⁹ on the balance of probabilities, a requirement that relies on adducing supporting medical evidence.

In addition to the reformed partial defences, a further recent change to the law sheds some light on the legal understanding of non-physical abuse.

V. COERCIVE AND CONTROLLING BEHAVIOUR DEFINED

A new crime of coercive or controlling behaviour in an intimate or familial relationship was introduced by s. 76 of the Serious Crime Act 2015. The offence requires repeated or continuous behaviour by the perpetrator, who must be personally connected to the victim in the sense of being in a current or previous intimate relationship or a family member. The behaviour must have a serious effect on the victim, which means that the victim must have feared that violence would be used against her on at least two occasions or that the behaviour caused serious alarm and distress and has had a substantial adverse effect on the victim's day to day activities.⁵⁰ The effect of this behaviour must be known by the perpetrator, or he ought to have known that it would have such effect.⁵¹ In the year ending March 2019, there had been 17,616 offences of coercive control reported to the police.⁵²

The cross-Government definition of domestic violence and abuse defines this category of behaviour in these terms:

“Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour is a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.”⁵³

The statutory guidance refers to the behaviour as limiting space for action and exhibiting “a story of ownership and entitlement over the victim.”⁵⁴ For the first time, actions such as isolating a person from their family, monitoring their time, continuously putting them down, telling them they are worthless, enforcing rules and activities which humiliate, degrade or dehumanise the victim⁵⁵ have been included in the guidelines for a statutory offence, thus

⁴⁸ s.2(1B).

⁴⁹ s.2(2).

⁵⁰ “The phrase 'substantial adverse effect on B's usual day-to-day activities' may include, but is not limited to: Stopping or changing the way someone socialises; Physical or mental health deterioration; A change in routine at home including those associated with mealtimes or household chores; Attendance record at school; Putting in place measures at home to safeguard themselves or their children; Changes to work patterns, employment status or routes to work.” available: <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship> (accessed 05/11/19).

⁵¹ Serious Crime Act 2015 c.9, s.76.

⁵² Office for National Statistics, Crime and Justice Domestic Abuse, available: <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenlandandwales/yearendingmarch2019> (accessed 26/01/19).

⁵³ Home Office, *Controlling or Coercive Behaviour in an Intimate or Family Relationship*, Statutory Guidance Framework (December 2015) 3.

⁵⁴ *Ibid*, 4.

⁵⁵ *Ibid*, 4.

acknowledging a much broader range of activities than previously enshrined in law. Previous law concentrated on the application or threats of physical violence, albeit accepting the effect that fear of such violence may induce psychiatric illness in the victim⁵⁶ and that harassment, from any source, amounted to a criminal act.⁵⁷

The threshold for when the conduct amounts to an offence is dependent upon the facts of each case. The Crown Prosecution Service has produced extensive guidelines which highlight the range of behaviours that may apply, including the following advice:

“There might be confusion about where the 'appropriate' dynamic of a relationship ends and where unlawful behaviour begins. The College of Policing Authorised Professional Practice on Domestic Abuse states: "In many relationships, there are occasions when one person makes a decision on behalf of another, or when one partner takes control of a situation and the other has to compromise. The difference in an abusive relationship is that decisions by a dominant partner can become rules that, when broken, lead to consequences for the victim."”⁵⁸

Behaviour contrary to s. 76 constitutes an offence and does not operate as a defence. It should however be evaluated in the light of its effect on the murder-specific defences outlined previously.

VI. SALLY CHALLEN APPEAL – AN AMALGAMATION OF OLD AND NEW LAW

A case that considers the interplay between the partial defences and the new coercive and controlling behaviour offence is that of Sally Challen, whose appeal against her murder conviction was heard in the Court of Appeal in 2019.⁵⁹ The case does need to be assessed with some caution, however, given that it is based on an appeal considering the effect of coercive and controlling behaviour on the partial defences as they existed prior to the 2010 reforms. Nonetheless, some themes have emerged which will apply to the current defences.

Sally was 15 years old when she met her husband Richard Challen who was 22 at the time. Richard was unfaithful on many occasions and Sally was referred to a psychiatrist in 2009, who noted alcohol abuse, marital problems and psychosexual stresses. A disorder, however, was not diagnosed.

In 2009, Sally left Richard and began divorce proceedings, but she found it impossible to live without her husband. She began to engage in obsessive behaviour, accessing his text messages and voicemails in order to discover details of the women with whom her husband had been associating.

In 2010 Richard agreed to reconcile with his wife but only if she signed a post-nuptial agreement which contained unfavourable terms. Despite agreeing to reconcile it was clear that the affairs continued. Sally asked her husband about this and was told “Don’t question me.”⁶⁰

⁵⁶ *R v Ireland and Burstow* [1997] UKHL 34.

⁵⁷ Protection from Harassment Act 1997, c.40.

⁵⁸ Available: <https://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship> (accessed 05/11/19).

⁵⁹ *R v Challen (Georgina Sarah)* [2019] EWCA Crim 916.

⁶⁰ *Ibid*, para 10.

Having witnessed Richard's continued contact with other women despite their agreement to reconcile, Sally made her husband something to eat and then took a hammer from her handbag and repeatedly hit her husband of thirty-one years over the head with the hammer, killing him. She covered his body with blankets, rested his head on a pillow and left a note which read "I love you, Sally."⁶¹ She then left the house, typed a note and returned to the house to place it in the kitchen. The note read:

"Richard said he would take me back if I signed a post-nuptial agreement. I said I would and we both saw solicitors yesterday. I then found out he was seeing someone and sleeping with them and had no intention of taking me back. It was all a game so he could get everything. He was going to get me to sign and then issue divorce proceedings. I can't live without him. He said it would take time, but he felt the same. Now I find he is seeing women and sleeping with them. He did this in order to get his own back on me. All those prostitutes and other women. How could he? Please look after David, James and Peppy. I'm sorry but I cannot live without Richard. All my love, Sally."⁶²

Having spent the evening with one of her sons without any indication of what had occurred, the following day Sally called her cousin from Beachy Head, a notorious suicide spot. She was approached by a chaplain as she neared the edge of the cliff. The chaplain reported that she said that she had killed her husband and that "If I cannot have him, no-one can."⁶³

Sally maintained that she had been subjected to appalling treatment by her husband for years, further stating "I should be put in a padded cell somewhere, because I have gone completely off my rocker. I am just so very depressed."⁶⁴

At her trial for murder, Challen raised the defence of diminished responsibility, which at the time of the murder in early 2010 was contained in the unamended s. 2 of the Homicide Act 1957, requiring an abnormality of mind which substantially impaired her mental responsibility. Although Sally did not rely on the defence of provocation it was put to the jury by the judge. Provocation was still governed by common law and s. 3 of the Homicide Act 1957, requiring the defendant to suffer a "sudden and temporary"⁶⁵ loss of self-control after being provoked by things said or done (or both), which would then be objectively assessed in terms of the effect that the provocation would have on a reasonable woman.

The prosecution's case was that Challen was a jealous and obsessive wife. Her actions in taking the hammer to the house demonstrated that the murder was premeditated. Dr Paul Gilluley, a consultant forensic psychiatrist, gave evidence that Challen had long-term low self-esteem and was suicidal at times, exhibiting alcohol dependency syndrome which affected her mental health, but not to the extent that she was suffering from a disorder or depression. He referred to feelings of jealousy, anger and resentment.

The defence based the diminished responsibility plea on evidence from expert witness Dr Exworthy along with evidence from Challen. Richard was described as controlling by friends and family and their two sons made statements supporting their mother, describing how their father had controlled her for some years. A picture was painted of a marriage where

⁶¹ *Ibid*, para 11.

⁶² *R v Challen (Georgina Sarah)* [2019] EWCA Crim 916, para 16.

⁶³ *Ibid*, para 13.

⁶⁴ *Ibid*, para 14.

⁶⁵ Tindal CJ in *R v Hayward* (1833) 6 C & P 157 at 159, 172 ER 1188 at 1189.

Sally was dominated by Richard and, in the words of her cousin, the deceased had pulled the strings in their marriage and the defendant had danced. The defence maintained that Challen was suffering from a depressive disorder at the time of the killing, which in the opinion of Dr Exworthy amounted to an abnormality of mind.

It is relevant that Sally Challen alleged that her husband had anally raped her as punishment for being hugged or kissed by another man whilst on holiday, an element of the case facts which receives very little attention. Challen is generally presented as a woman suffering no physical violence, yet this is an incidence of physical and sexual violence in the extreme and a fundamental example of the exertion of control over her by her husband.

Neither defence was accepted by the jury, and on 23 June 2011 in Guildford Crown Court, Challen was convicted of murder and sentenced to life imprisonment with a minimum custodial term of twenty-two years, later reduced on appeal to eighteen years. In the summing up regarding the reduction of the minimum term in November 2011, Royce J made the following observations about the opinions of Richard and Sally's sons:

"We have had the opportunity of considering with care the statements from both sons made to the police in August 2010, and an additional statement made more recently. They make compelling reading. They do not demonstrate that the sons harbour any bitterness towards their mother for what she has done, only sadness about her predicament. One son is bitter towards the deceased father for, as he saw it, driving her to do what she did. While we must approach such statements with some caution, sometimes they can be instructive in considering what the real background to an offence has been and the extent of culpability."⁶⁶

Shortly after the murder, the amended law for the two partial defences came into force. At the time, it was hoped that the new defences would redress the gender bias from the previous unreformed position. The intention was that abused women who kill would plead the new loss of control defence, given that the requirement for a sudden loss of control had been explicitly excluded by the statute.⁶⁷

In 2018, Challen sought permission to appeal the conviction⁶⁸ in light of the new coercive and controlling behaviour offence and the existence of fresh psychiatric evidence concerning the effect of her husband's behaviour on her mental health at the time of the killing and since her conviction. Leave to appeal was granted.

The appeal, to the Court of Appeal in 2019,⁶⁹ was based on post-conviction psychiatric evidence that Sally was suffering from a moderately severe personality disorder and had symptoms of a severe clinical mood disorder, which was in this case most likely to be bipolar affective disorder. This meant that she was dependent upon her husband and especially vulnerable to his control.

The appeal was advanced on two grounds, one for each of the partial defences. In respect of diminished responsibility, it was argued that the fresh evidence on both coercive control and the psychiatric evidence supported the fact that Challen suffered an abnormality

⁶⁶ *R v Georgina Sarah Anne Louise Challen* [2011] EWCA Crim 2919, per Royce J, at 15-16.

⁶⁷ Law Commission, *Partial Defences to Murder*, Final Report, (LC290, 2014), paras 3.75-3.78.

⁶⁸ *R v Challen (Georgina)* [2018] EWCA Crim 471.

⁶⁹ *R v Challen (Georgina Sarah)* [2019] EWCA Crim 916.

of mind. It was argued that had evidence on coercive control been available in 2011, the jury may have decided differently with respect to this defence.

Regarding provocation, it was argued that the fresh evidence on coercive control illustrated that Challen was provoked into killing her husband because of his behaviour, which was coercive and controlling for several years.

Stark's definition of coercive and controlling behaviour was considered, with the following passage from his report to the court being cited:

"In coercive control, abusers deploy a broad range of non-consensual, non-reciprocal tactics, over an extended period to subjugate or dominate a partner, rather than merely to hurt them physically. Compliance is achieved by making victims afraid and denying basic rights, resources and liberties without which they are not able to effectively refuse, resist or escape demands that militate against their interests."⁷⁰

VII. ANALYSIS

Perhaps frustratingly, the court made no comment upon the issue of whether Challen's relationship, which was acknowledged to be abusive even by the prosecution by 2019, amounted to one of coercive and controlling behaviour. The appeal was allowed on the basis that the fresh psychiatric evidence had rendered the murder conviction unsafe and a retrial was ordered. Challen's subsequent plea of manslaughter on the grounds of diminished responsibility was accepted and no retrial occurred.

In light of Challen's appeal and the consideration given to coercive control, the impact of s. 76⁷¹ upon the existing partial defences requires evaluation and it has been suggested that the partial defences are interpreted as far as possible to align with the offence.⁷²

a. *Loss of Control*

Regarding loss of control, the fear of serious violence trigger would seem to be of little help to the psychologically controlled women as she will find it impossible to evidence violence, let alone serious violence. The word "violence" imports a physical attack which would not fall under the ambit of psychological control. This leaves the alternative trigger of things said or done. These, however, have to constitute circumstances of an extremely grave character, causing her to have a sense of being seriously wronged; elements which are objectively assessed. The nature of coercive control is that it can remain hidden and can be implemented by subtle elements of control, some of which fall on the very edge of unfortunately socially acceptable control by men over women's behaviour.⁷³

This sense of being seriously wronged still has to be justifiable and this is also an objective assessment; what may be justifiable subjectively to the victim of the coercion may not be so to the jury members not suffering under such control.⁷⁴ A common response to

⁷⁰ *R v Challen (Georgina Sarah)* [2019] EWCA Crim 916, para 38.

⁷¹ Serious Crime Act 2015 c.9, s.76.

⁷² Vanessa Bettinson, 'Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour' (2019) 83(1) *Journal of Criminal Law* 71, 71.

⁷³ C Bishop, 'Evidencing domestic violence, including behaviour that falls under the new offence of 'controlling or coercive behaviour' (2018) 22(1) *International Journal of Evidence & Proof* 3, 9.

⁷⁴ See, for example, Edwards (n38) 223.

domestic abuse, whether physical or psychological, is to ask “Why did she not just leave him?” demonstrating naivety in recognising the effect upon the victim, “partly because her cognitions have been so distorted by the years of abuse that she does not perceive the options for escape, for example legal options, at all in the same way as an ordinary person would do.”⁷⁵ Indeed, in the Thornton trial, the judge at first instance posited that “there are ... many unhappy, indeed miserable, husbands and wives. It is a fact of life. It has to be faced, members of the jury. But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs.”⁷⁶ Regarding this element of the defence, Herring has argued that domestic abuse in and of itself should be enough to satisfy the component of being seriously wronged.⁷⁷

Even if the hurdles of establishing the qualifying trigger and its associated requirements are met, the final objective assessment of the defence then requires a consideration of whether a person of her sex and age and in her circumstances might behave in the same or similar way. At least Challen’s case opens up the possibility that expert evidence on the provoking effect of the coercive behaviour resulting in her loss of control may be advanced in court. The protective statutory exclusion for acting out of a considered desire for revenge would generally operate to exclude cases such as Challen’s, where her premeditated actions in taking the hammer to the house suggest an element of planning that is inconsistent with the idea of a loss of control, albeit that this now does not need to be sudden and can now follow a “slow-burn” pattern of development. This acts to level the playing field between typically male and typically female responses to provocative conduct, but the jury must consider to what extent the law should justify a murder, as many may well be uncomfortable with finding any excusatory element in the actions of a wife who carries out a planned attack on her husband. The legislature has spoken on this matter in terms of the revenge exclusion and it is for the jury to weigh the evidence in each case as to whether this should apply to prevent loss of control from operating as a valid defence.

b. *Diminished Responsibility*

In terms of pleading diminished responsibility, the problem with adducing this defence is that it centres the responsibility for the killing in the mental condition of the killer. As Norrie asserts, an abused woman “should not be pressed into the law of diminished responsibility.”⁷⁸ There may be circumstances where someone’s mental state is such that their responsibility is indeed diminished but there is no identifiable disorder to plead; indeed, their response to the abuse may be a “normal response to the denial of their autonomy.”⁷⁹ Loss of control may be the preferable defence. In such instances, “lawyers will need the assistance of experts who no longer speak of syndromes but speak of her reaction as a reasonable response to habituated violence.”⁸⁰ Naturally, if there is a recognised medical condition as required by the defence, then this may be evidenced by medical reports and expert witnesses, hopefully with a clearer understanding of how coercive control may impact upon mental health.

⁷⁵ Royal College of Psychiatrists in response to Law Commission Consultation Paper No 173, cited in *Partial Defences to Murder, Final Report*, Law Commission (LC290, 2014), para 3.99.

⁷⁶ *R v Sarah Elizabeth Thornton*, Birmingham Crown Court (23 February 1990) per Judge J.

⁷⁷ JW Herring, ‘The Serious Wrong of Domestic Abuse and the Loss of Control Defence’ in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility* (Ashgate, 2011) 65–78.

⁷⁸ Norrie (n40) 285.

⁷⁹ Bettinson (n72) 79.

⁸⁰ Edwards (n38) 223.

c. *The link between both partial defences in abusive situations*

The two defences are generally separate. Loss of control depends upon the actions of the victim and is therefore independent and external to the mental faculties of the defendant. Diminished responsibility is concerned only with the mental abnormality of the defendant and thus the victim bears no element of responsibility for his own death and can be plead even if the victim is a stranger to the defendant.

It is in the sphere of domestic abuse, however, that the two defences become inextricably linked. In these cases, the argument is not solely that the defendant suffers from a mental abnormality, nor is it that the victim provoked her to lose her self-control, it is often that the defendant suffers from a mental abnormality because of the actions of the victim, which in turn were provocative in the extreme. The victim in this instance therefore bears a responsibility for the existence of evidence to support both defences, given that his behaviour has induced both internal and external states in the defendant. He should perhaps therefore bear more blame for causing the victim's responsibility to be diminished as well as causing her to lose control by his treatment of her.

Argument has been made for the potential reform of the murder specific defences to include coercive control as a defence in its own right,⁸¹ however, the nature of coercive control only applies in the context of the current framework of defences.

Although the case of Sally Challen has been described as having limited application in terms of the fact that the appeal applies to pre-2009 defences,⁸² nevertheless it may break new ground in terms of understanding the effect of coercive control in intimate relationships much as Ahluwalia did for physical abuse. There is still a long way to go with regards to coercive control. The existence of s. 76 of the Serious Crime Act 2015 alone does not mean that the section will be well implemented and that actors within the criminal justice system will be well versed in the effects of coercive control upon victims. The hidden nature of coercive control, the gendered normalisation of so much of it as socially acceptable in the context of typical male/female interactions, the problems of evidencing the coercion and the tendency for victims to try to minimise the situation and want to continue the relationship, all present difficulties with its implementation.⁸³ The Crown Prosecution Service has been at pains to point this out in its guidance, which states:

“Controlling or coercive behaviour can be overlooked as victims might be seen as colluding or consenting to the behaviour. In some circumstances the victim may not be aware or be ready to acknowledge, least of all be ready to report, that they are being abused. Do not assume that compliance, dependence, denial and other responses are collusive. Rather, these reactions might better be understood as ways of coping or adapting to the abuse.”⁸⁴

⁸¹ Bettinson (n72) 72, 80.

⁸² Karl Laird, 'Case comment: Homicide: *R v Challen (Georgina)* Court of Appeal Criminal Division [2019] EWCA 916' (2019) 11 *Crim LR* 980, 980-982.

⁸³ All elements referred to in Bishop (n73).

⁸⁴ Crown Prosecution Service Legal Guidance, *Controlling or Coercive Behaviour in an Intimate or Family Relationship* (30 June 2017) Part 7.

Nevertheless, the new offence has been validly criticised for underuse and for the fact that many police officers simply do not understand the nature of the offence or the effect that it can have on its victims⁸⁵, preferring the concrete evidence of physical violence over the hidden insidious damage wrought by coercive control.

Since the implementation of s. 76 of the Serious Crime Act 2015 and the greater understanding of the nature of non-physical domestic abuse, further developments in criminal law may be welcomed. The Domestic Abuse Bill,⁸⁶ which seeks to define domestic abuse as a standalone criminal offence, is currently in the Committee stage of the House of Commons. On 2 October 2019 the Bill was carried over into the next session of Parliament,⁸⁷ unfortunately delaying its passage still further in a Parliament fraught with Brexit concerns.

The Bill creates an offence of domestic abuse, which is defined in s. 1 as where A and B are personally connected to each other and the behaviour is abusive. "Abusive" consists of the following behaviours:

- (a) physical or sexual abuse;
- (b) violent or threatening behaviour;
- (c) controlling or coercive behaviour;
- (d) economic abuse;
- (e) psychological, emotional or other abuse.

The Bill also makes provision for the appointment of a new Domestic Abuse Commissioner. The current Government definition of domestic abuse does not have the force of law but also includes,

"Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to the following types of abuse: psychological, physical, sexual, financial or emotional."⁸⁸

Despite the existence of a specific statutory offence of domestic abuse, if the bill becomes law, being a victim of the crime is not in itself able to be used as a separate defence for murder in the same way that the s. 76 offence⁸⁹ does not have that effect. It does however impact upon the legal landscape for the operation of the existing defences, in light of the legislature's growing acceptance of recent psychiatric evidence that damaging domestic abuse goes way beyond the bruises and broken bones of its traditional physical construct.

Following Challen's appeal, on 1 April 2019, at the Old Bailey, Packiam Ramanathan, a 73-year old woman, was found not guilty of murdering her husband after just half an hour of jury deliberations.⁹⁰ She pleaded guilty to manslaughter on the grounds of loss of control after citing years of abuse at the hands of her husband during their arranged marriage. In summing

⁸⁵ Jon Robins, 'Coercive Behaviour in the Spotlight' (2018) *JPN* 182, 182.

⁸⁶ Domestic Abuse Bill (HC Bill 422).

⁸⁷ Hansard, House of Commons (2 October 2019) Vol 664, column 1333.

⁸⁸ Available: <https://www.gov.uk/government/news/new-definition-of-domestic-violence> (accessed 26/11/19).

⁸⁹ Serious Crime Act 2015 c.9.

⁹⁰ Available: <https://www.theguardian.com/uk-news/2019/apr/01/woman-73-who-beat-husband-to-death-cleared> (accessed 30/10/19).

up, the judge referred both to the physical and verbal violence she had endured, referring to her husband as a “control freak” and acknowledging his coercive and controlling behaviour. The manslaughter conviction meant that the mandatory life sentence was avoided, and Ramanathan was sentenced to two years and four months in prison.⁹¹

On 10 December 2019, Emma-Jayne Magson’s appeal is scheduled to be heard at the Court of Appeal.⁹² Magson was convicted of murdering her violent boyfriend and is serving a minimum tariff of seventeen years. Although the appeal is not based solely on coercive control, it reflects the Challen appeal in that new psychiatric evidence has come to light since the original trial that Magson was suffering from a number of problems including a personality disorder, the trauma associated with a very recent miscarriage, an undiagnosed autistic spectrum disorder and a history of abuse both as an adult and a child, including abusive behaviour at the hands of her victim.⁹³ Given the success of Challen’s appeal, Magson may succeed on the basis of new psychiatric evidence as it relates to diminished responsibility.

VIII. CONCLUSION

There is something inherently unsettling about the nature of defending women who kill their abusers, because they have spent years, sometimes decades, in a prison of their abuse, before taking the one single action to break free of control. In defending them, the task requires a further underlining of their victim status, indeed it requires proof of the suffering they have endured. This process concentrates the mind of the jury on the woman as victim, helpless, worthy of pity, returning them to their status as powerless. The language used in both the media and the court is inherently gendered, the women who kill have been described as “a meek little mouse”⁹⁴ (Challen); frail and slight, reserved⁹⁵ (Ramanathan); slight, nervous, begging,⁹⁶ helpless⁹⁷ (Ahluwalia). The need to define the woman as victim in order to prevent imprisonment in an abusive situation being exchanged for prolonged incarceration as a life prisoner is an unfortunate requirement of raising either partial defence. In painting the picture of the abused woman, it also seems incumbent on her defence lawyers to try to establish some level of previous goodness, a “nice” person, who would never normally resort to violence. This may be contrasted with the position of male defendants who are assessed on the actual moment of the criminal offence, rather than relying on establishing a history of “niceness.”

In coercive control the sense of victimhood may be stronger than where physical violence has been used as the defendant is asserting that she was passive, controlled by her male partner rather than the recipient of violence from an often-stronger male. The defence of women who kill their coercive abusers needs to be framed in terms of the “woman’s defence of her privacy and liberty rights, contrasting her ‘survivor self’ with her ‘victim self,’”⁹⁸ with the “survivor self” being described by Stark as “strong, resourceful, reasonable, insightful and aggressive,”⁹⁹ comparing her actions to free herself as akin to a hostage taking actions to

⁹¹ *Ibid.*

⁹² Available: <https://www.justiceforwomen.org.uk/> (accessed 30/10/19).

⁹³ *Ibid.*

⁹⁴ *R v Challen (Georgina Sarah)* [2019] EWCA Crim 916.

⁹⁵ Barrister Stephen Kamlisch QC at trial, *R v Sarah Elizabeth Thornton*, Birmingham Crown Court (23 February 1990).

⁹⁶ *R v Ahluwalia* [1992] 4 All ER 889, at 892.

⁹⁷ *Ibid.*, at 897.

⁹⁸ Stark (n30) 389.

⁹⁹ *Ibid.*, 389.

remove herself from a kidnapping situation.¹⁰⁰ Viewing the female victims of coercive control who kill through the lens of an aggressive kidnapped woman¹⁰¹ reaffirming and re-establishing her rights turns the narrative into one of strength in escape rather than one of weakness, whilst still acknowledging that another human being has lost his life with the conviction and associated label of voluntary manslaughter.

The law has travelled some distance in accepting the effect that abusive behaviours have upon the mind and actions of the victim. The partial defences have always served not to relieve the defendant of liability, but to explain why she acted as she did. Never a full defence, the partial defences instead seek to strike a balance in sentencing and in labelling, either by acknowledging that in law, the defendant's responsibility for her actions was diminished by her mental state, or in law she was so provoked by her abuser's behaviour that she can fulfil the stringent criteria of the loss of control defence. From the early piecemeal acceptance of the effects of physical violence to the modern view of coercive and controlling behaviour, the changing attitudes to the effect of one person exercising power and control over another have been gradually recognised by both the legislature and the judiciary.

Time will tell whether the offence of coercive and controlling behaviour will have significant impact upon murder defence pleadings, but cases such as Challen and the comments of the judge in summing up in Ramanathan certainly indicate that coercive and controlling behaviour is now in our collective legal consciousness. Violence can be psychological as well as physical, with long term damage to the psyche remaining long after any physical injuries may have healed. It is hoped that if the Domestic Abuse Bill¹⁰² is passed, with the definition of abuse acknowledged in statute to consist of non-physical as well as physical behaviours, future pleas of loss of control on the basis of the qualifying trigger of "fear of serious violence"¹⁰³ can include fear of serious non-physical as well as physical violence. This would bolster pleas of loss of control and would alleviate the need to rely on the "things said or done" trigger¹⁰⁴ alone. The benefit of a successful plea of loss of control is that the defence turns wholly on the provocation offered to the defendant by the victim, rather than on her resulting mental state, though it is clear from the cases discussed herein, including the 2019 Challen appeal, that a woman suffering under abuse is still more likely to succeed in an appeal if she pleads diminished responsibility than if she pleads loss of control. This serves to underline the argument that she has killed because she suffers from an abnormality of mental functioning (albeit caused by her abuser), rather than the fact that she has killed because of his criminal treatment of her in a way that legally amounts to a partially excusatory response to his provocative and unlawful conduct.

¹⁰⁰ *Ibid*, 389.

¹⁰¹ B Midson, 'Coercive control and Criminal responsibility: Victims Who Kill Their Abusers' (2016) 27(4) *Criminal Law Forum* 417, 433; cited in Bettinson (n72) 78.

¹⁰² Domestic Abuse Bill (HC Bill 422).

¹⁰³ Coroners and Justice Act 2009, c.25, s.55.

¹⁰⁴ *Ibid*.