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CASE COMMENTARY

SEXUAL INFIDELITY AND LOSS OF SELF-CONTROL: CONTEXT OR CAMOUFLAGE?

R v Clinton and others

James Slater[*]

INTRODUCTION

R v *Clinton and others* involved three appeals from trial on various matters concerning the "loss of control" partial defence to murder created by the Coroners and Justice Act 2009 ('the Act').[1] This case commentary is concerned with the appeal of Jon Jacques Clinton, as it addressed the ambit of the Act's controversial exclusion of sexual infidelity from the grounds upon which a defendant can base her loss of self-control.[2] The Court of Appeal's decision (Lord Chief Justice, Henriques J, Gloster J) is not uncontroversial itself, since it has significantly reduced the potential ambit of this exclusion.

THE FACTS

Jon Jacques and Dawn Clinton had lived together for 16 years and been married since 2001. The marriage, hampered by severe financial difficulties and a mutual history of depression, was disintegrating despite a desperate desire on behalf of Mr Clinton for it to work.[3] However, Mrs Clinton had left

[*] BA (Sussex), LLM (Harvard), PhD (Birmingham), Senior Lecturer in Law, the University of Buckingham. I am grateful to Professor Susan Edwards and Damian Warburton for comments on earlier drafts; the usual disclaimer applies.

[1] The defence is called "loss of control" in the heading to s 54 of the Act, but s 54(1)(a) refers to a requirement for a "loss of *self*-control [emphasis added]" as one of the necessary conditions of the defence.

[2] See, for example, Alan Reed and Nicola Wake "Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes" in Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility* (Farnham: Ashgate, 2011) p 115. See also Denis J Baker and Lucy X Zhao "Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity" (2012) 76(3) *Journal of Criminal Law* 254.

[3] [58].

the matrimonial home, leaving behind the children from the marriage, and was conducting an affair. As far as she was concerned the relationship was over.

On 13 November 2010 Mr Clinton, previously suspicious that his wife was having an affair, was informed by her of her extra-marital relationship. This resulted in Mr Clinton, on the evening of that same day, stealing and vandalising Mrs Clinton's Land Rover, her most prized possession. On 15 November, the day of the actual killing, Mr Clinton "tortured himself" by looking at images he found online of his wife in the company of her lover, a Mr Montgomery, and, at about 12:30 that day, was able to confirm her infidelity by viewing sexual images of his wife with Mr Montgomery.[4] By the time husband and wife met later, at about 2pm, Mr Clinton had taken 80mg of Codeine and had drunk about a quarter of a bottle of brandy.[5] Further drink and codeine was consumed by Mr Clinton during the highly emotional encounter that followed, which focused on recrimination concerning Mrs Clinton's affair and other extra marital sexual activity.

According to Mr Clinton the encounter was characterised by Mrs Clinton displaying unprecedented contempt for him, in which she viciously and explicitly taunted him about her sexual activity with 5 other men and cast aspersions on his courage when, having established that Mr Clinton had looked at suicide websites, stated "you haven't got the fucking bollocks".[6] In addition she displayed indifference to their children in the form of hurtful comments to the effect that she had done her bit where they were concerned and that they were Mr Clinton's responsibility from now on.[7] Furthermore, on being reproached by Mr Clinton about her sexual infidelity on her daughter's birthday, Mr Clinton "heard her kind of snigger".[8]

As a result of this behaviour, Mr Clinton claimed he went into some kind of altered state; Lord Judge CJ, who summarised Mr Clinton's evidence in delivering the judgment of the Court of Appeal, said: "...the walls and the ceiling just seemed to close in. She was talking but he could not hear what she was saying. He could see her mouth opening and closing. He could hear a noise, like the distant sea. He wanted everything to stop. He wanted everything to slow down."[9] It was at this point that Mr Clinton killed his wife. The police found evidence of the fatal attack in the form of beating (there were head injuries) and strangulation (there was a ligature around her neck). After the killing he removed most of her clothes and took photographs of her

[4] [67].
[5] [68].
[6] [68], [72] and [75].
[7] [75].
[8] Ibid.
[9] [75].

in various positions, which he then sent via text to Mr Montgomery.[10] He was found by the police in the loft with a noose around his neck attached to the rafters.[11]

THE LAW AND THE DECISIONS

In order for the "loss of control" partial defence to reduce murder to manslaughter, there must be a loss of self-control rooted in a qualifying trigger as defined by the Act. Section 55(4) of the Act states that a qualifying trigger is:

> "...a thing or things done or said (or both) which—
> (a) constituted circumstances of an extremely grave character, and
> (b) caused [the Defendant] to have a justifiable sense of being seriously wronged."[12]

At trial Judge Smith, before addressing her mind to the potential presence of this trigger, excluded all the evidence relating to sexual infidelity in the name of s 55(6)(c) of the Act, which states:

> "In determining whether a loss of self-control had a qualifying trigger—
> (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded."

Judge Smith then considered whether the additional explanations for Mr Clinton's loss of self-control, which were Mrs Clinton's contempt for his supposed lack of courage to commit suicide and her indifference to the children, satisfied the requirements of s 55(4). She was concerned with this question because s 54(6) of the Act stipulates that the judge must be persuaded, before allowing the jury to consider the defence, that evidence has been adduced such that a "jury, properly directed, could reasonably conclude that the defence might apply", including, therefore, whether evidence has been adduced to enable a jury reasonably to conclude that a qualifying trigger is operative. Thus the presence of a qualifying trigger is made subject to

[10] [54].
[11] [53].
[12] This is not the only matter defined by the Act as a qualifying trigger: s 55(3) refers to "fear of serious violence from [the victim] against [the defendant] or another identified person." Furthermore, s 55(5) allows a qualifying trigger to be made up of a combination of the matters mentioned in s 55(3) and (4).

control not only, axiomatically, by the jury when deciding whether certain facts meet the statutory definition of a qualifying trigger, but also, as a result of s 54(6), by the judge in the form of a preliminary filter to ensure that claims of loss of self-control are not improperly put to the jury. Judge Smith concluded that a jury, properly directed, could not reasonably conclude that the defence might apply once she had excluded the evidence of sexual infidelity; as a result, she removed the defence from the jury's consideration and Mr Clinton was convicted of murder.

On appeal, Lord Judge CJ acknowledged that if Mrs Clinton's sexual infidelity and her references to it had to be ignored under section 55(6)(c), then Judge Smith's decision to withhold the defence from the jury under s 54(6) "was unassailable".[13] Thus it was agreed that no jury could reasonably conclude that Mrs Clinton's comments about Mr Clinton's lack of courage to commit suicide and his having to look after the children could, together, constitute "circumstances of an extremely grave character" and could cause Mr Clinton "to have a justifiable sense of being seriously wronged". However Lord Judge CJ rejected Judge Smith's exclusion of sexual infidelity for the following reason:

> "However, to seek to compartmentalise sexual infidelity and exclude when it is integral to the facts as a whole ..... is unrealistic and carries with it the potential for injustice. ...In our judgment, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of sub-ss 55(3) and (4), the prohibition in s 55(6)(c) does not operate to exclude it."[14]

As a result of what shall be termed the contextual approach, Lord Judge CJ concluded that Judge Smith had "...misdirected herself about the possible relevance of the wife's sexual infidelity".[15] In light of this, he also concluded that "the totality of the matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to the wife's sexual infidelity, and examined as a cohesive whole, were of sufficient weight to be left to the jury".[16] He therefore ordered a retrial. In so doing, Lord Judge CJ confined s 55(6)(c) to those occasions when the defendant seeks to rely *exclusively* on sexual infidelity as the explanation for a loss of self-control. His Lordship

[13] [77].
[14] [39].
[15] [77].
[16] Ibid.

found support for this conclusion in statements to the same effect made by Government spokespersons in the Parliamentary debates.[17]

Thus the effect of sexual infidelity *as context* is that it is no longer excluded by s 55(6)(c) and, once admitted, can convert evidence insufficient to satisfy s 55(4)'s demanding definition of a qualifying trigger into evidence that is sufficient. This potential of sexual infidelity, when conceived as 'contextual', to supplement and reinforce factors not caught by s 55(6)(c) so that the evidence as a whole constitutes a qualifying trigger means that sexual infidelity can, on occasion, become part of the make-up of a qualifying trigger despite s 55(6)(c).[18]

This commentary will argue that his Lordship was wrong to adopt the contextual approach for 3 reasons. Before outlining these reasons, it is necessary briefly to discuss a point of clarification made by Lord Judge CJ concerning in what ways, if at all, s 55(6)(c) embraces verbal references to sexual infidelity, in addition to acts of sexual infidelity.

"THING DONE OR SAID"

Section 55(6)(c) presents many difficulties of interpretation, as noted by Lord Judge CJ.[19] One particular difficulty is how "a thing...said", as opposed to "a thing done", can *constitute* sexual infidelity.[20] This issue was pertinent to *Clinton* because Mr Clinton sought partly to rely, in explaining his loss of self-control, on his wife's taunting regarding her sexual activity with other men. It is arguable that such taunts are not excluded from being a qualifying trigger by s 55(6)(c) because they do not *constitute* a form of sexual infidelity, but merely refer to it. Such a literal approach to the provision would confine it

[17] [40] to [44]. These statements are from Angela Eagle on 3 March 2009, Claire Ward on 9 November 2009 and Lord Bach on 26 October and 11 November 2009. They can be found at www.parliament.uk.

[18] Lord Judge CJ cites an example at [24]: he refers to a history of physical abuse followed by a taunt of sexual infidelity: the sexual infidelity would be considered "the final straw" according to Lord Judge CJ. Lord Judge CJ also states that the sexual infidelity in this case would enable the defence to be available even when the previous abuse alone would not be enough. For further discussion of this example, see n 27 below and associated discussion in the text.

[19] Counsel for the Crown described the provision as "formidably difficult", counsel for Clinton as "extremely ill drafted". (I am indebted to counsel for the Crown, Andrew Edis QC, and counsel for Clinton, Michael Birnbaum QC, for sending me their skeleton arguments, which were very helpful in my research for this case commentary.) Lord Judge CJ acknowledged the difficulties of interpreting the provision at [14].

[20] This difficulty has been noted by David Ormerod: see *Smith and Hogan's Criminal Law* (Oxford: Oxford University Press, 13th edn, 2011) p 521.

to those occasions, perhaps rare, where the words used are in fact a form of sexual interaction, for example 'phone sex' and words of a sexual nature uttered during sexual activity.

However, where "a thing...said" is concerned, Lord Judge CJ did not adopt a literal approach. Stating that confining the ambit of the provision to "words spoken to his or her lover by the unfaithful spouse or partner during sexual activity" would be "unrealistic",[21] he gave the provision a wider meaning, stating: "In our judgment things 'said' includes admissions of sexual infidelity (even if untrue) as well as reports (by others) of sexual infidelity".[22] As a result, according to Lord Judge CJ, Mrs Clinton's taunts regarding her sexual infidelity, true or otherwise, are, subject to the contextual approach, embraced by the s 55(6)(c)'s exclusion of sexual infidelity, in addition to her affair.

This broader view of the range of behaviour embraced by s 55(6)(c) must be correct, since it would be both illogical and impracticable to permit taunts regarding sexual infidelity to constitute a qualifying trigger, whilst simultaneously excluding acts of sexual infidelity. As will be discussed in greater detail below, s 55(6)(c) is targeting a possessive and controlling attitude to sexual partners, and such an attitude is triggered as much by verbal references to sexual infidelity as it is by knowledge of acts of sexual infidelity.

However, having decided, correctly, that the exclusion embraces references to sexual infidelity in addition to sexual infidelity itself, nevertheless Lord Judge CJ held, as we have seen, that, on this occasion, evidence of such references were admissible, along with the evidence of Mrs Clinton's affair, because he felt that her sexual infidelity, and her references to it, formed part of the context of other factors not excluded by s 55(6)(c). The question is whether this contextual approach is the correct interpretation of s 55(6)(c)? There are three reasons for thinking not.

THREE REASONS FOR REJECTING THE CONTEXTUAL APPROACH

Reason 1 for Rejecting the Contextual Approach: a Contrasting Use of the Singular and Plural

A contrasting use of the singular and the plural within s 55 suggests a literal reason for rejecting the contextual approach. To explain, it is necessary to quote s 55 almost in full:

[21] The quotes both come from [26].
[22] [26].

"(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
(3) This subsection applies if [the Defendant's] loss of self-control was attributable to [the Defendant's] fear of serious violence from [the Deceased] against [the Defendant] or another identified person.
(4) This subsection applies if [the Defendant's] loss of self-control was attributable to a thing or things done or said (or both) which—
(a) constituted circumstances of an extremely grave character, and
(b) caused [the Defendant] to have a justifiable sense of being seriously wronged.
(5) This subsection applies if [the Defendant's] loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).
(6) In determining whether a loss of self-control had a qualifying trigger—
...;
(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded."

It is argued that, given the use of the singular and plural in s 55(4) ("was attributable to a thing *or things* [emphasis added] done or said (or both)"), a qualifying trigger can be made up of several things said and/or done. Furthermore, such things can also be accompanied by fear of serious violence as a result of s 55(5). Thus a qualifying trigger can be made up of a multiplicity of factors. Attention should now turn to the contrast between the use of the singular *and* plural in s 55(4) ("thing or things") and the exclusive use of the singular in s 55(6)(c): "the fact that a thing done or said constituted sexual infidelity is to be disregarded". The fact that a qualifying trigger can be made up of several elements, and the contrast between the use of the plural in s 55(4) and the use of the singular in s 55(6)(c), would seem to result in the following literal meaning: whether by itself or amongst other factors, sexual infidelity is to be disregarded. This appears to be s 55(6)(c)'s plain meaning, requiring that sexual infidelity be ignored even when accompanied by other factors.

Reason 2 for Rejecting the Contextual Approach: the Contextual Approach as Camouflage for Avoiding s 55(6)(c)

A closer examination of the outcome of *Clinton* and the implications of the contextual approach reveal that it enables sexual infidelity to act as the main and indeed predominant qualifying trigger despite s 55(6)(c).

Lord Judge CJ agreed with Judge Smith that, by themselves, Mrs Clinton's remarks concerning courage and having to look after the children would not enable a jury reasonably to conclude that s 55(4)'s definition of a qualifying trigger might apply ("circumstances of an extremely grave character"; "justifiable sense of being seriously wronged"). Indeed, as indicated above, he described her decision to withhold the defence if these were the only admissible taunts as "unassailable".[23] This must be correct: such taunts, though hurtful and mildly humiliating, are not even close to satisfying the language of s 55(4).

In light of this and the fact that the most prominent feature of Mr Clinton's narrative was his wife's sexual infidelity, it is clear that, where s 55(4) is concerned, Lord Judge CJ saw sexual infidelity performing the predominant normative work at Mr Clinton's retrial. Thus, though the language of 'context' implies the framing of other factors that themselves are central, the contextual approach as applied in *Clinton* means sexual infidelity can be the *principal* reason for the presence of a qualifying trigger despite s 55(6)(c).[24] It therefore turns out that the contextual approach is not 'contextual' at all. Furthermore, where the result in *Clinton* is concerned, a form of alchemy is occurring: factors that it is agreed are not even close to satisfying the language of s 55(4) are combining with a factor that s 55(6)(c) states should be disregarded so that, as whole, s 55(4) may be satisfied. This is strange to say the least.

If the contextual approach is taken to its logical conclusion, it would merely require that the sexual infidelity be accompanied by any reason, however morally trivial, that may have played some part in the loss of self-control. Thus where a pattern of sexual infidelity was accompanied by some minor taunt about missing a party at the in-laws, the mere presence of the taunt would overcome the exclusion contained within s 55(6)(c). Given the multi-faceted nature of the breakdown of the vast majority of relationships, such that losses of self-control purely on the basis of sexual infidelity are likely to be rare, such an approach would amount to a cynical avoidance of the letter and spirit of s 55(6)(c).[25] Indeed it would undermine any purpose the

[23] See n 13 above.

[24] As also pointed out by Baker and Zhao: see n 2 above at 265 (where they describe the sexual infidelity in *Clinton* as the "dominant contributory trigger") and 266 (where they describe the sexual infidelity in *Clinton* as the "overriding trigger").

[25] Thus I largely agree with the following statement of Nicola Wake, also made in light of the complexity of the breakdown of relationships: "It is difficult to see when 'sexual infidelity' will be the *only* element to be relied on in support of a qualifying

Act could have in excluding sexual infidelity from consideration. Yet there is nothing in Lord Judge CJ's judgment to prevent this approach being adopted.

An alternative and perhaps more acceptable way of conceiving the contextual approach would be to require that the non-sexual elements play the predominant role in ascertaining the presence of a qualifying trigger, with sexual infidelity merely tipping the balance so to speak. Thus though the non-sexual elements might fall short of completely satisfying the normative benchmark established by s 55(4), the contextual approach so conceived would demand that they go some significant way in doing so in order to admit the sexual infidelity. Thus when the other reasons for losing self-control do not have such moral merit, the sexual infidelity would be caught by s 55(6)(c). However this approach would require judges (under s 54(6)) to exercise a further layer of normative judgment where the defence is concerned, introducing more discretion and complexity to a defence already requiring a subtle mix of normative judgment and psychological insight.

Given that the contextual approach thus involves either a somewhat cynical avoidance of s 55(6)(c) or, if not, adds even more complexity to an already highly complex defence, it is submitted that, for these reasons too, the contextual approach should be rejected.

Reason 3 for Rejecting the Contextual Approach: the Functions of Sections 55(4) and 54(1)(c)

In order to outline the third and final reason for rejecting the contextual approach, it is first necessary to explain the contrasting roles played by ss 55(4) and 54(1)(c) of the Act.

As we have seen, s 55(4), in defining a qualifying trigger, requires that the defendant has lost self-control for reasons that satisfy certain normative criteria ("circumstances of an extremely grave character"; "justifiable sense of being seriously wronged"). On the other hand, s 54(1)(c) focuses on the exercise of the psychological faculty of self-control, withholding the defence unless "a person of [the defendant's] sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of [the defendant], might have reacted in the same or in a similar way to [the defendant]". This latter provision is concerned with the defendant's management of his emotions and actions at the moment of killing, imposing a standard based on "normal" levels of tolerance and self-restraint, and withholding the defence if that standard is not met. Two examples are suggested to illustrate its function, both of these accepting an actual loss of self-control due to a qualifying trigger. First, the time between the final 'triggering' act and the act of killing may be

trigger." See Wake "Loss of Control beyond Infidelity" (2012) 76(3) *Journal of Criminal Law* 193 at 196.

of a length and nature such that the defendant can be expected to have exercised of self-control despite the moral gravity of the provocation. Second, the nature of the relationship between victim and defendant, say that of a mother and her son, may be such that self-restraint is to be expected however morally grave the 'trigger' leading to the loss of self-control.

Lord Judge CJ argues that s 54(1)(c), by omitting any reference to sexual infidelity, allows for the jury to take account of sexual infidelity in assessing whether self-control should have been lost, and considers this "counter intuitive" when, on one view, the jury are simultaneously forbidden from considering sexual infidelity when addressing the question of a qualifying trigger.[26] The contextual approach thereby (partially) avoids this odd possibility. However this counter intuitivism disappears when the different roles played by ss 55(4) and 54(1)(c) articulated above are focused on. An example given by Lord Judge CJ to demonstrate the need for the contextual approach can, ironically, be used to demonstrate this.

The example concerns a wife who has been physically abused by her husband over a long period; during the course of another beating at his hands, he taunts her for the first time about various acts of sexual infidelity, as a result of which she snaps and reacts with fatal force.[27] On the basis that the abuse by itself is insufficient to constitute a qualifying trigger, Lord Judge CJ argues that, in this case, the taunts of sexual infidelity should enable the finding that a qualifying trigger is in place, stating: "Yet in the real world the husband's conduct over the years, and the impact of what he said on the particular occasion when he was killed, should surely be considered as a whole".[28] But what Lord Judge CJ has lost sight of is that s 55(4) is a purely normative test not necessarily concerned with the exact moment self-control was lost: what it asks for is *a reason* for the loss of self-control that survives certain normative filters, with s 55(6)(c) forbidding the use of sexual infidelity in this regard. In his example, the acts of physical abuse satisfy those filters; indeed, it is hard to see what additional normative impact the taunt would have *relative to* that physical abuse.[29] However, the fact that the loss of self-

[26] [32]. Baker and Zhao have argued that Lord Judge CJ's concern with regard to this point is misplaced since the jury will not be considering s 54(1)(c) unless they are satisfied a qualifying trigger is in place, and, if the only 'trigger' is that of sexual infidelity, then the absence of a qualifying trigger means there is no need to consider s 54(1)(c): see n 2 above at 270. However this is not strictly correct as there may be a qualifying trigger not linked to sexual infidelity, and yet the question of sexual infidelity can still arise under s 54(1)(c) because it played a role in the loss of self-control.

[27] [24].

[28] Ibid.

[29] Lord Judge CJ acknowledges, ibid, that such abuse in a different case to his example could constitute a qualifying trigger, but says it would not do so in his

control in his example would not make sense without the sexual taunt can be addressed under s 54(1)(c), by (perhaps) helping to explain why "a person of [the defendant's] sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of [the defendant]", would have lost self-control at the moment of killing. Thus the psychological impact of sexual infidelity is admissible under s 54(1)(c) in assessing the defendant's exercise of self-control, but should not be considered when assessing the presence of a qualifying trigger.

What the above example reveals is that a loss of self-control will occur at a particular moment in time but the reasons for that loss of self-control can occur over a period of time and operate cumulatively. When presented with such a situation, the judge under s 54(6) will not only have to decide whether any of those reasons might reasonably satisfy s 55(4), but will also have to decide whether the reasons so identified played a sufficient role in explaining the loss of self-control. However, unlike the normative judgment articulated above as part of *Reason 2* for rejecting the contextual approach, this exercise of judgment is unavoidable given there will often be many reasons for a loss of self-control. However, after at least one reason has been found that both plays a sufficient role in explaining the loss of self-control and satisfies s 55(4), s 54(1)(c) becomes relevant, at which point sexual infidelity can play a role in assessing the exercise of self-control. This is a perfectly workable arrangement and not in the slightest bit counter intuitive. Thus, under this arrangement, the defence would certainly fail in *Clinton* but perhaps succeed in Lord Judge CJ's example. As such one of Lord Judge CJ's reasons for the contextual approach disappears, again favouring the compartmentalisation and exclusion of sexual infidelity where the question of a qualifying trigger is concerned.

The three reasons articulated above against the contextual approach are not concerned with the more fundamental question of whether the defence would be improved if s 55(6)(c)'s prohibition of sexual infidelity was repealed *tout court*. It is to this question that attention will now turn in the final part of this case commentary.

THE MERIT OF EXCLUDING SEXUAL INFIDELITY

Section 55(6)(c) is concerned with a complex moral problem, which is the moral significance of sexual infidelity and violent reactions to it. Given this complexity, the language of s 55(6)(c), which, when interpreted literally, creates a rule removing sexual infidelity from the equation without exception,

example because the wife would have continued to endure it but for the sexual taunts. However, the fact that she personally would have endured the abuse has no bearing on its normative significance and ability to satisfy the language of s 55(4).

perhaps does risk injustice. However, ascertaining whether injustice is indeed risked requires an exploration of the moral significance of violent reactions to sexual infidelity. Two schools of thought can be identified where that moral significance is concerned.

For some, violence as a result of sexual infidelity is a moral evil and a manifestation of a wider problem concerning the male use of violence against female partners. This violence is seen as an exercise in control that denies the identity of the woman and reduces her autonomy in the name of her male partner's interests; to use the phrase of Leila Tov-Ruach, it is designed to secure a woman's "unconditional, unjudgmental attentive acceptance".[30] Thus, according to this school of thought, violence triggered by real and/or imagined sexual infidelity is rooted in a deeply problematic attitude to women. For this reason, the legal system has sought, at the substantive, procedural and enforcement level, to take the problem of male violence against female partners seriously.[31] Section 55(6)(c) is therefore part of an ongoing project of ensuring that such violence is in no way condoned or excused by the legal system, but rather condemned.

On the other hand there is another view of sexual infidelity and violence, set out by Lord Judge CJ himself; he states:

> "Nevertheless daily experience in both criminal and family courts demonstrates that the breakdown of relationships, whenever they occur, and for whatever reason, is always fraught with tension and difficulty, with the possibility of misunderstanding and the potential for apparently irrational fury. Meanwhile experience over many generations has shown that, however it may become apparent, when it does, sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response. This may have nothing to do with any notional 'rights' that the one may believe

[30] "Jealousy, Attention, and Loss" in Amelie O Rorty (ed) *Explaining Emotions* (Berkeley: University of California Press, 1980) p 483. In much the same vein, Margo Wilson and Martin Daly state: "...violence against wives is a product of self-interested male motives directed at constraining wives' autonomy by 'encouraging' them to prioritize their husband's wants rather than their own"; see Wilson and Daly "Lethal and Nonlethal Violence Against Wives and the Evolutionary Psychology of Male Sexual Proprietariness" in R E Dobash and R P Dobash (eds) *Rethinking Violence Against Women* (Thousand Oaks, CA: Sage, 1998) p 199.

[31] See, for example, Chapter 4 "Domestic Violence" in S Harris-Short and J Miles *Family Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2nd edn, 2011) p 203.

> that he or she has over the other, and often stems from a sense of betrayal and heartbreak, and crushed dreams."[32]

This second school of thought acknowledges that a man or woman can be driven to morally legitimate anger and despair by a campaign of sexual betrayal, taunting and humiliation. On such occasions, sexual infidelity is a morally significant betrayal of trust with traumatic psychological effects that can, on occasion, partially excuse even fatal violence.[33]

Though the first school of thought will almost always be the correct assessment of violence in response to sexual infidelity, there will remain some situations where the second is true. In light of this, the problem with s 55(6)(c) is that, interpreted in its most far reaching form, it will prevent the court from considering sexual infidelity even in situations reflecting the second school of thought.[34] Thus it would be arguably just to repeal the sub-section so that cases involving sexual infidelity became eligible for consideration under s 55(4). It would then be hoped that, given the very high moral standards articulated by s 55(4) ("extremely grave character'; 'justifiable sense of being seriously wronged"), judges (under s 54(6)) would only let juries consider the defence, and juries will only let the defence succeed, when the sexual infidelity under consideration reflected the second school of thought.

However, once the door to sexual infidelity is opened, there is the danger of drift towards the acceptance of unmeritorious cases.[35] Arguably *Clinton* is an example of such drift, as it is not clear how Mrs Clinton's sexual infidelity, when added to her contempt for Mr Clinton's lack of courage to commit

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[32] [16].

[33] For an articulation of this argument see Reed and Wake "Sexual Infidelity Killings...." above n 2, p 128: "...a loss of self-control in response to the actions of a faithless lover, in some cases, has much more to do with the breach of trust involved, and serious relationship violation, rather than proprietorial instinct."

[34] Jeremy Horder comments on the dangers of a blanket prohibition where sexual infidelity is concerned in a discussion of clause 46(6)(c), the identical provision from the Coroners and Justice Bill: see his Memorandum to the House of Commons (Coroners and Justice Bill, Committee Stage, 3 February 2009, CJ 01). Horder states: "One of the difficulties about being 'absolutist' in this area is that one prevents the jury hearing rare meritorious cases."

[35] An example of such drift can be found in the behaviour of the judge at first instance in *Davies* (1975) QB 691, who left the common law defence of provocation to the jury in an instance of a killing motivated by the victim's infidelity to her husband, the defendant. The jury nevertheless correctly convicted of murder. On appeal, Lord Widgery CJ's described leaving the defence to the jury as being "too generous" (see 702). In *Ibrams* (1982) 74 Crim App R 154 the decision to leave the defence to the jury at first instance in *Davies* was endorsed as "over-lenient" by Lawton LJ (see 159). See also the discussion at n 39 below.

suicide and her indifference to the children, could, as a whole, satisfy the normatively exceptional language of s 55(4). After all, there was nothing exceptional about the Clintons' breakup, sexual infidelity or otherwise.

Indeed, when a more global approach to the evidence in *Clinton* is taken, it emerges that there was evidence that Mr Clinton's attitude to his wife was coloured by the defects of the first school of thought outlined above. The attack on Mrs Clinton's Land Rover was a vengeful and vindictive attack in light of the discovery of her association with Mr Montgomery; after a visit to Relate on the 13th of November, Mr Clinton showed her a note that he had written on his computer that lists, amongst the difficulties between them, "my bullying";[36] when her interest in him began to wane from March 2010, he suggested she had become "tarty" and "slutty".[37] At this point, the following observations of Samuel H Pillsbury on the moral nature of reactions to sexual infidelity are pertinent:

> "The challenge in modern provocation law is to distinguish between at least two different kinds of provocation-for-infidelity claims—those based on betrayal of a particular, personal trust, and those based on patriarchal rage-at-dispossession. ...Imagine a case in which the married partners have made a particularly strong commitment to sexual fidelity. Perhaps one partner has suffered in the past from a lover's infidelity and made fidelity a special requirement of the current relationship. In this case discovery of adultery may support great rage. But in other cases we may read rage at infidelity less as an expression of moral betrayal and more as an assertion of a man's (or in some instances a woman's) need to posses and control a partner. We need to look at the whole context of the relationship and especially the state of the relationship prior to the infidelity. Did the relationship violate a fundamental norm of the partners at the time, or was it just one in a series of mutually hurtful actions in a troubled relationship? Did it occur during a separation period or when the bonds of loyalty and partnership were still in force? These are the questions that should predominate..."[38]

When these questions are directed at the facts of *Clinton*, it emerges that the moral foundations of Mr Clinton's claim were very weak: as Mrs Clinton was no longer living with her husband, the bonds of partnership, if not entirely of loyalty, were no longer in force; the emotional difficulties between the

[36] [65].
[37] [63].
[38] *Judging Evil: Rethinking the Law of Murder and Manslaughter* (New York and London: New York University Press, 1998) p 150.

partners were tangible, not hidden by either partner; a pattern of mutually hurtful actions was in place, not least the vandalising of Mrs Clinton's Land Rover by Mr Clinton. When these factors are combined with Mr Clinton's intense focus on making the marriage work in spite of all the evidence, a picture emerges of a man not with a justifiable sense of being seriously wronged, but simply having extreme difficulty with his wife losing interest in, and then leaving, him, all too common occurrences. His was "rage-at-dispossession", to use Pillsbury's phrase. Thus, when the facts are considered as a whole, it becomes very difficult to see how the language of s 55(4) could be satisfied.

Given that *Clinton* was the first time the Court of Appeal was addressing the nature of s 55(6)(c) and given that its conclusions were always going to draw attention, the fact that Mr Clinton's case had so little merit does not bode well for the future behaviour of judges under s 54(6). As for juries, perhaps they will be more discerning when considering the presence of a qualifying trigger, but there is evidence that they cannot always be trusted not to accept unmeritorious cases.[39]

In light of this danger of drift towards the acceptance of unmeritorious cases, it is submitted that it is best if s 55(6)(c) is left in place.

CONCLUSION

To conclude, if the contextual approach to s 55(6)(c) is maintained, let us hope judges and juries display the necessary critical thinking so that, once and for all, this partial defence is freed from its association with a sexist vision of the relationship between men and women. The danger is that they will not

[39] For an account of the potential of judges and juries to accept unmeritorious cases in instances of male violence against women following infidelity, see Horder *Provocation and Responsibility* (Oxford: Clarendon Press, 1992) pp 192-194. In this regard the case of *Mellentin* [1985] 7 Cr App R (s) 9, cited by Horder, is of particular interest. A conviction of manslaughter had been returned for a man who had killed his wife after she had taunted him with regard to his lack of sexual prowess compared to her extra-marital lovers. He appealed against his 5 year sentence, which was reduced to 4 years by the Court of Appeal. The following observation of Russell J, who gave the judgment of the Court, is noteworthy: "But later, perhaps inflamed by the drink they had consumed, the couple began to argue and in particular Mrs Mellentin began to boast about her associations with other men. This of course all comes from the appellant and in the nature of things cannot be corroborated, but we have no reason to suspect that what he ultimately told the police was other than an accurate account of what transpired." The danger within this last sentence is that the killer's account will almost always be the only one available, as was the case in *Clinton*. The possibility for distortion and bias in such accounts is clear.

display the necessary critical thinking, resulting in a drift towards the acceptance of unmeritorious cases. If this occurs, one can see the day coming when s 55(6)(c) will find itself interpreted in the manner of Judge Smith at first instance in *Clinton*.