The Loss of Control Defence—Fit for Purpose?

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Abstract
This article examines the case law on the loss of control defence and considers whether the interpretation of the defence has been too conservative so that the defence is barely available as a defence to murder.

Keywords
Loss of control, anger trigger, sexual infidelity, normal capacity of self-restraint and tolerance

Under ss 54–56 of the Coroners and Justice Act 2009 (the Act), the defence of provocation was abolished (with effect from Monday 4 October 2010) and replaced by a new partial defence to murder involving loss of control. The loss of control defence is partial because if successful the defendant will be convicted of manslaughter, thus avoiding the mandatory life sentence for murder and giving the judge discretion as to sentence. The partial defence of loss of control has three essential elements. First, the killing must have been the consequence of a loss of self-control, but the killing must not have been the result of a considered desire for revenge. Secondly, the loss of self-control must be linked to a qualifying trigger, being attributable either to the defendant’s fear of serious violence (the fear trigger), or to things done or said which constituted circumstances of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged (the anger trigger), or to both. But the defendant’s fear of serious violence or sense of being wronged should be ignored to the extent that it was self-induced, and the fact that a thing done or said constituted sexual infidelity is also to be disregarded. Thirdly, there must be evidence that 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 (the objective standard). The judge must be satisfied that there is sufficient evidence to raise each of the three elements, the prosecution then having the burden to convince the jury beyond reasonable doubt that one or more is not present.

This article will examine judicial interpretation of these rather complex and, at times, badly drafted provisions. The reported cases concern loss of control, the anger trigger and the objective standard.

It will be shown that in most respects there has been a conservative interpretation of the loss of control provisions by the former Lord Chief Justice Lord Judge, thus restricting the availability of
the defence, except when it comes to the issue of sexual infidelity, where the interpretation has been very liberal.

**Loss of Control**

The Act was badly drafted in number of respects. First, there is no definition of the loss of control required by s. 54(1)(a) of the Act and the Court of Appeal has not been very forthcoming as to when the threshold is reached. For example, in the conjoined appeal of Dawes, Mark Dawes returned to his Brighton flat in the early hours in May 2012 to find Graeme Pethard asleep on the sofa with Dawes’ estranged wife, Kayleigh Chessell. Both were fully clothed. When Dawes saw her lying on the sofa with Pethard, their legs entwined, he was ‘gutted’. She awoke and said, ‘It ain’t what you think’. Pethard started to wake, so Dawes punched him in the face, told him to get out of the ‘fucking flat’, picked up a vodka bottle from the floor and threw it at him. Seconds later Pethard, holding the bottle by the neck, swung it at Dawes, who therefore punched him twice in the face. That appeared to have no effect, and Pethard came at him again. Dawes therefore went into the kitchen and picked up a knife to deter him. Mr Pethard backed off. Miss Chessell moved between them so Dawes pushed her to one side and the fire door began to fall onto her. Pethard again came at him with the bottle. On a previous occasion he had been hit by a bottle and now he was afraid. He moved out of the way and caught Pethard in neck with the knife so violently that the wound went down his body and punctured his lung, causing death. Dawes did not know that he had caught Pethard with the first stabbing action and he never intended to kill him or cause him serious harm. Dawes was convicted of murder. The defence at trial was self-defence. Nevertheless, although not advanced by Dawes in his evidence, if self-defence were rejected, the judge was invited to leave loss of control as an alternative. He decided that the evidence showed that Dawes had incited the violence offered to him by Pethard, and accordingly no qualifying trigger was available. Dawes’ appeal against conviction was dismissed with Lord Judge holding:

> In our judgment, however, the decision that the loss of control should not be left to the jury was fully justified. There was no sufficient evidence that Dawes ever lost his self-control. His own evidence was that he had not killed Mr Pethard in a rage. He was shocked rather than angry. He simply wanted him out of the flat. He had acted in self-defence. For what we may describe as obvious reasons the jury rejected this defence. However although for the purposes of self-defence the extent of his violence was wholly unreasonable, it did not follow that his actions were consequent on any loss of self-control. In our judgment there was no evidence sufficient to leave the first ingredient of this defence to the jury.

From this the meaning of ‘loss of control’ remains somewhat obscure. It seem juries must use their common sense. Surely Dawes was acting because he was angry not shocked, anger that fuelled his loss of control but that was not so overwhelming that he did not know what he was doing. What can be said is that the first ingredient of the loss of control defence—that the defendant’s act or omissions in doing, or being part of, the killing resulted from his loss of self-control—has a higher threshold than that of the previous law on provocation, where the loss of control had to be fuelled by anger but did not have to be overwhelming. It seems that the law now requires something overwhelming for there to be loss of control as a result of anger, anger that is so extreme that defendants can claim lack of mens rea. Contrast Jewell, where it was held that loss of control means a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning. This seems to set the threshold for loss of control much lower than in Dawes and suggests that Dawes had lost self-control.

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1. [2013] EWCA Crim 322.
2. Ibid. at [64].
3. Lord Judge makes it clear that loss of control is a subjective question relating to the defendant’s state of mind and that the loss of control need not be sudden but can be cumulative. Ibid. at [54].
4. Ibid. at [50].
5. [2014] EWCA Crim 414 at [23].
The Anger Trigger

Secondly, with the anger trigger it must be established that the loss of 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. The defendant must have a sense of being seriously wronged, but the question is: what amounts to circumstances of an extremely grave nature giving a justifiable sense of being seriously wronged? In Dawes it is made clear that this question is not for the defendant to decide ‘[t]he presence, or otherwise, of a qualifying trigger is not defined or decided by the defendant’, so the defendant cannot say, ‘the circumstances were extremely grave to me and caused me to have what I thought to be a justifiable sense that I was seriously wronged’ as ‘[i]n our judgment these matters require objective assessment by the judge at the end of the evidence and, if the defence is left, by the jury considering their verdict’. So in Hatter, which was heard at the same time as Dawes, the Court of Appeal held that ‘the break-up of a relationship, of itself, will not normally constitute circumstances of an extremely grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged’. In Bowyer, also heard with Dawes, the court held that a burglar, who was known to the householder, when discovered could not rely on the anger trigger when the householder reacted violently to the presence of the burglar and made insulting remarks about the burglar’s girlfriend. These examples establish what is not the anger trigger, and it must be said the bar is much higher than under the former provocation defence, where even a baby crying could constitute provocation. What the cases do not say is what does amount to circumstances of an extremely grave nature giving a justifiable sense of being seriously wronged. The explanatory notes issued with the Act give an example of what amounts to the anger trigger:

Where a person discovers their partner sexually abusing their young child (an act that amounts to sexual infidelity) and loses self-control and kills. The fact that the partner’s act amounted to sexual infidelity must be discounted but that act may still potentially be claimed to amount to the qualifying trigger in section 55(4) on the basis of the other aspects of the case (namely the child abuse).

The child abuse would constitute circumstances of an extremely grave character and a jury would no doubt conclude that such a defendant would have a justifiable sense of being seriously wronged. What is clear is the requirement of a justified reaction sets the bar for the defence of loss of control higher than for the defence of provocation, as it restricts the circumstances in which the defence is left to juries. Unmeritorious cases will not get past the judge and cases that do will be subject to a jury’s notion that a justified response has to be morally acceptable.

Sexual Infidelity

Thirdly, ‘sexual infidelity’ is not defined by the Act and it has been left to the Court of Appeal in Clifton to give meaning to the term, and that judgment has in turn been analysed in leading textbooks with differing conclusions. In Clinton Jon-Jacques Clinton (the appellant) and Dawn Clinton (the victim) were married in 2001 (they had two school-age children) but by 2010 the relationship was breaking down and the victim went to live with her parents. The appellant was desperate for his marriage to work,

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7. Above n. 1 at [61].
8. Ibid. at [61].
9. Ibid. at [65].
10. Ibid. at [66].
and eventually became ‘obsessional’ about it. He contemplated suicide and looked at suicide websites. The appellant mentioned to a mutual friend in an e-mail his suspicions that his wife was having an affair. Eventually the appellant confronted her about the affair, saying he had seen her Facebook page, which indicated she was separated and open to offers. The victim responded that she had had sex with five different men, which followed her Facebook status of wanting to have sex, which was posted on their daughter’s birthday. The victim sniggered and looked at the suicide site that the appellant had minimised on his computer and said ‘you haven’t got the fucking bollocks’. And then she became very angry, saying that she’d done her bit with the children. She said, ‘I didn’t fucking sign up for this. You have them. You look after them’. The appellant lost control and killed his wife. At a plea and case management hearing the appellant pleaded guilty to manslaughter, but not guilty to murder. Although responsible for his wife’s death, either on the basis of ‘loss of control’ or ‘diminished responsibility’, he was not guilty of murder. The prosecution would not accept that plea and the case proceeded to a trial for murder.

The defence of loss of control can only have been raised at a trial if the trial judge is of the view that the evidence relied upon could satisfy a ‘properly directed’ jury that the defence might reasonably apply. In Clinton the trial judge ruled that there was no evidence that the loss of self-control necessary for the defence was due to the anger trigger. She was required ‘specifically’ to disregard anything said or done that constituted sexual infidelity. The remarks allegedly made by the wife, when challenged about her infidelity, to the effect that she had intercourse with five men were to be ignored. Removing that element of that evidence, what was left was the evidence that when the victim saw that the appellant had visited a suicide site on the internet, she commented that he had ‘not the balls to commit suicide’ and that she also said, so far as the future was concerned, that he could have the children, who were then currently living with him at their home. The judge observed that she could not see that those circumstances were of an extremely grave character or that they would cause the appellant to have a justifiable sense of being seriously wronged. On this issue no sufficient evidence had been adduced. She could not find that a jury properly directed could reasonably conclude that the defence might apply as there was no anger trigger. In due course she proceeded to her summing up, leaving diminished responsibility for the consideration of the jury. The jury convicted the appellant of murder and he appealed against his conviction.

The Court of Appeal allowed the appeal and quashed Clinton’s murder conviction and ordered a retrial so that the loss of control defence should be put to the jury. The then Lord Chief Justice Lord Judge interpreted the 2009 Act, in particular s. 55(6)(c). Lord Judge points out that s. 55(6)(c) is unequivocal that loss of control caused by sexual infidelity cannot, on its own, qualify as the anger trigger. This means that the classic case of a loss of control killing caused by finding a partner engaging in sexual activity cannot be a qualifying trigger for the purposes of the loss of control defence. This is the clear effect of the legislation. This seems harsh in comparison to the previous law of provocation, which did allow for sexual infidelity in itself to be the basis of the defence, but that is the will of Parliament. However, Lord Judge goes on to state: ‘[i]n 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 subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it’.

14. Section 54(6).
15. The irony is that the retrial did not take place because Clinton pleaded guilty to murder. The assumption is that he considered the anger trigger would not have been established at the retrial, even though a jury could have considered the remarks allegedly made by the wife, when challenged about her sexual infidelity, to the effect that she had intercourse with five men together with the comments about suicide and leaving the children with the appellant. The jury would not have accepted that Clinton had experienced a justifiable sense of feeling seriously wronged. In addition, it would be unlikely that the third element of the defence would have been satisfied. http://www.bbc.co.uk/news/uk-england-berkshire-19480076 (accessed 23 November 2014).
16. Above n. 13 at [39].
Lord Judge gives an example of what he means by context:

A defendant returns home unexpectedly and finds her spouse or partner having consensual sexual intercourse with her sister (or indeed with anyone else), and entirely reasonably, but vehemently, complains about what has suddenly confronted her. The response by the unfaithful spouse or partner, and/or his or her new sexual companion, is to justify what he had been doing, by shouting and screaming, mercilessly taunting and deliberately using hurtful language which implies that she, not he, is responsible for his infidelity. The taunts and distressing words, which do not themselves constitute sexual infidelity, would fall to be considered as a possible qualifying trigger. The idea that, in the search for a qualifying trigger, the context in which such words are used should be ignored represents an artificiality which the administration of criminal justice should do without.17

‘Sexual infidelity’ is not defined by the Act, but the mention of ‘spouse or partner’ must mean that Lord Judge is not limiting sexual infidelity to adultery (an act of sexual intercourse by penetration of the vagina by the penis between a male and female not married to each other, when at least one of them is married to someone else) but includes other sexual activity such as sodomy and oral sex. Thus sexual infidelity can be taken into consideration as part of the exercise of considering whether other non-sexual provoking factors, which resulted in the defendant losing control, amounted to circumstances of an extremely grave character which caused the defendant to have a justifiable sense of being seriously wronged, but sexual infidelity by itself cannot amount to the anger trigger.18 This interpretation also means that ‘words’ alone without ‘acts’ cannot amount to sexual infidelity.

If that was the end of the matter then the question would be whether Clinton is a just decision which alleviates the harshness of s. 55(6)(c) or whether it provides partial excuse for fatal male violence being a retort to female sexual infidelity. But there has been academic disagreement as to whether the effect of sexual infidelity (such as sexual jealousy, possessiveness or envy) is to be disregarded or not. Wilson maintains that:

In effect Clinton interprets section 55(6) to mean that sexual infidelity which prompts a loss of self-control due to sexual jealousy, possessiveness, or family honour is not a qualifying trigger. However, if the sexual infidelity provides the context within which another trigger (that is, which is not jealousy, possessiveness or family honour) operates it must be considered.19

Contrast Simester and Sullivan, who in summary say that words and acts alone count as sexual infidelity but ‘the effect of infidelity would not, such as envy, jealousy or possessiveness’.20 Wilson must be right, as if the will of Parliament is that words and acts that amount to sexual infidelity are to be excluded then surely so are their effects, otherwise the exclusion in s. 55(6)(c) is meaningless.

However, Lord Judge in Clinton makes it clear that in respect of the objective standard ‘[t]he exclusion in section 55(6) (c) is limited to the assessment of the qualifying trigger. In relation to the third component, that is the way in which the defendant has reacted and lost control, ‘the circumstances’ are not constrained or limited. Indeed, section 54(3) expressly provides that reference to the defendant’s circumstances extends to ‘all of the circumstances except those bearing on his general capacity for tolerance and self-restraint. When the third component of the defence is examined it emerges that, notwithstanding section 55(6)(c), account may, and in an appropriate case, should be taken of sexual infidelity’.21 This

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17. Above n. 13 at [23].
18. Radlett and Foulstone argue that this is going too far and that a jury should (with judicial guidance) be able to disregard completely the effect of sexual infidelity on the defendant, as it is not within s. 55(4); instead they should only consider whether the combined effect of the other matters, which do fall within the section, constituted the anger trigger: D. Radlett and L. Foulstone, ‘“Judges on Trial”—a critique of R v Clinton’ (2012) Nov Cilex Journal 22 at 40–41.
21. Above n. 13 at [31].
will make the jury’s task extremely difficult, because sexual infidelity itself and its effects will have to be ignored when considering the anger trigger. However, assuming there are other provoking circumstances (in respect of which the sexual infidelity may give context) that amount to circumstances of an extremely grave character that caused the defendant to have a justifiable sense of being seriously wronged, sexual infidelity can be taken into account when applying the objective standard as all the circumstances are relevant except those bearing on his general capacity for tolerance and self-restraint, which is the objective yardstick or standard against which the defendant’s conduct is judged. If an ordinary person might have reacted in the same or similar way to the defendant then (assuming the other two elements are present) he is excused of murder and convicted of manslaughter. If there are cases in which this happens then judges will have a very difficult task explaining the law to juries, as in fact it will be almost impossible to ignore sexual infidelity when considering anger trigger and then take it into account when considering the objective standard. Juries may not be capable of compartmentalising evidence of sexual infidelity in that way.

**The Objective Standard**

When the Homicide Act 1957 was enacted it was assumed that diminished responsibility was a defence which enabled those with a mental disability to be partially excused of murder on account of their disability. In contrast, the defence of provocation was for those who had full capacity but who would be partially excused because they had met the standard of self-control to be expected of them. The law got into a mess because of the disagreement as to whether there should be a constant standard of self-control in the provocation defence applied against all defendants or whether the standard expected should be reduced to take into account particular characteristics of defendants including mental disabilities. For example, consider the case where a defendant suffers from schizophrenia (a condition which substantially impairs his powers of self-control) and is provoked about that characteristic so that he loses his self-control and ends up killing his tormentor. It was unclear whether the objective question in the provocation defence was either: (i) ‘would an ordinary person (who does not have schizophrenia) upon being provoked in those circumstances have lost his self-control and killed as the defendant did?’ or (ii) ‘would an ordinary person (who does have schizophrenia) upon being provoked in those circumstances have lost his self-control and killed as the defendant did?’ In (i) a constant standard of self-control was being applied i.e. that of ‘an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today’. In (ii) the standard of self-control is reduced to take into account the particular characteristic of the defendant so that the question became: was his loss of self-control a reasonable response for someone with his condition? In *Smith (Morgan James)* the House of Lords held by majority of 3 to 2 that (ii) applied. The effect of the decision was an overlap between diminished responsibility and provocation because the latter became a defence of mental incapacity, as mental disability (which affected the defendant’s ability to control himself) could be taken into account when setting the standard of self-control, thus reducing the standard expected. In other words, the standard expected became variable. The result that followed was that a defendant who had failed to establish diminished responsibility might still be able to succeed on the defence of provocation on exactly the same evidence because the prosecution was unable to prove beyond reasonable doubt that the defendant was not suffering from a mental disability that affected his self-control. The decision in *Smith (Morgan James)* was criticised as breaking the rationale for the defence of provocation: that if most of us as ordinary persons would have lost self-control under that provocation then the loss of self-control itself would be justified, thus giving a strong basis for excusing the defendant of murder.

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In contrast, however, there was the high authority of *Att-Gen for Jersey v Holley*,\(^{25}\) a Privy Council decision where the majority of nine Law Lords (6 to 3) held that (i) represented the correct law relating to provocation and *Smith (Morgan James)* was not followed.\(^{26}\) This meant there were eight Law Lords who had decided that (i) applied, and six Law Lords who had decided that (ii) applied. A trial judge may have wondered how he was supposed to direct a jury on provocation! Strictly speaking, *Smith (Morgan James)* should have been applied in England and Wales as *Holley* concerned a separate jurisdiction, that of Jersey. Guidance came from the Court of Appeal. In *James*\(^{27}\) the Court of Appeal decided that *Holley* represented English law. That meant that the standard of self-control in provocation was raised to the constant standard of the ordinary person and those suffering from mental disability had to rely on diminished responsibility. The overlap between the two defences and the liberalisation of the defence of provocation were reversed.

The objective standard in the loss of control defence follows the decision in *Holley*, although the reference to the ‘reasonable man’ is dropped and instead of referring to characteristics the reference is to circumstances. This means that the distinction between the gravity of the ‘provocation’ and the standard of self-control is maintained. The gravity of the provocation relates to ‘the circumstances of D’ and the standard of self-control is that of ‘a person of D’s sex and age, with a normal degree of tolerance and self-restraint’. This means (i) above still represents the law, thus loss of control and diminished responsibility are separate defences. So in *Asmelash*\(^{28}\) Asmelash (A) was convicted of murder. It was alleged that during a violent quarrel with the victim A stabbed him twice, killing him. A at first denied killing the victim, but later said that he lost his self-control when the victim insulted A’s mother and danced round pushing his penis towards A’s face and hitting him with a beer can. Both men were drunk. A picked up a knife because he did not want to die. He grabbed the victim and stabbed him in the back. The victim exposed himself, and went on hitting him. A could not cope any longer. He tried to get away, but the victim followed him. They grappled together; A felt he had no exit route. He was frightened; he swung the knife and it went into the victim’s body. The second wound was fatal. A told the police he could not control himself, but was not so drunk that he did not know what he was doing.\(^{29}\) Addressing the loss of control defence the judge directed the jury as follows:

> Are you sure that a person of [A]’s sex and age with a normal degree of tolerance and self-restraint and in the same circumstances, but unaffected by alcohol, would not have reacted in the same or similar way?\(^{30}\)

The judge commented that if voluntary intoxication were permitted as a defence every violent drunk could say ‘I must be judged against the standards of other violently disposed drunken people even though I may be like a lamb when I am sober’.\(^{31}\) It was submitted that the judge misdirected the jury and that A’s voluntary intoxication should have been taken into account in the objective standard. The appeal was dismissed as Lord Judge held that voluntary intoxication cannot be taken into account when applying the test in section 54(1)(c) because it was evidence ‘whose only relevance’ is to the capacity for tolerance and self-restraint and section 54(3) makes it clear such evidence is to be excluded because of that.\(^{32}\) In other words, to take into account the voluntary intoxication would have lowered the standard of self-control from that of a person of A’s sex and age, with a normal degree of tolerance and self-restraint (the constant standard) to that of a person lacking tolerance and self-restraint due to voluntary


\(^{26}\) Thus applying *Camplin* [1978] AC 705 HL and *Luc Thiet Thuan v R* [1997] AC 131 PC.

\(^{27}\) [2006] EWCA Crim 1728.


\(^{29}\) So there was a *prima facie* murder required for the loss of control defence.

\(^{30}\) Above n. 28 at [15].

\(^{31}\) Ibid.

\(^{32}\) The ‘circumstances of D’ refers to ‘all of D’s circumstances other than those whose only relevance to D’s conduct is that they bear on D’s general capacity for tolerance or self-restraint’: s. 54(3).
intoxication. However, had A been an alcoholic and had he been provoked on that characteristic, it
would have been a relevant circumstance for the defence as it would relate to the gravity of the provoca-
tion, i.e. taking that circumstance into account would enable a jury to ascertain how serious the provoca-
tion was to the defendant. This interpretation of the objective standard sets the threshold high for
defendants because a sober individual, with normal capacity of self-restraint and tolerance, does not
often cross the threshold into loss of control.

Conclusion

It should be noted the former Lord Chief Justice Lord Judge presided in these appeal cases, and he com-
ments: ‘[b]y contrast with the former law of provocation, these provisions . . . have raised the bar. We
have been used to a much less prescriptive approach to the provocation defence’. 33

But Lord Judge’s interpretation of the loss of control requirement, the anger trigger and the objective
standard has been conservative, as the appeals were dismissed. The exception is the interpretation of sex-
ual infidelity which was liberal, with the appeal being allowed. There is the danger that if the liberal-
isation of the defence goes too far then only psychopaths will be guilty of murder. The way to bring
sexual infidelity into line with conservative interpretation of the other provisions is for Parliament to
change ‘constituted’ in s. 55(6)(c) to ‘concerned’, as that would prevent what Clinton’s wife said to him
about being available for sex and having sex being taken into account when considering the anger trig-
ger. 34 But if the interpretation is too conservative then no one will be able take advantage of the loss of
control defence, so there will be more murder convictions. The Court of Appeal has the right to interpret
the loss of control provisions, but the result of the case law is that loss of control is barely available as a
defence to murder except, it seems, where sexual infidelity gives context to other provoking causes. This
may achieve justice in such cases but it is almost the opposite of what Parliament intended. The problem
behind all this is the mandatory life sentence for murder, 35 as the purpose of the loss of control defence is
to avoid that sentence, just as the defence of provocation was originally introduced to avoid the death
sentence for murder. If the mandatory life sentence were abolished, then the loss of control defence
could be repealed and evidence of loss of control would be relevant only at the sentencing stage for mur-
der, at which point the judge would have discretion as to sentence.

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Declaration of Conflicting Interest

The author declares that there are no conflicts of interest.

34. Above n. 18 at [41].
35. The sentence will include a minimum term (or tariff) to satisfy the public interest in punishment and deterrence. This is set by
the trial judge and sets the time the prisoner has to serve before he can apply to the Parole Board to be released on life licence.
Some prisoners receive full-life tariffs and will never be released.