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Provocation - Pushing the Reasonable Man too far?

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Almost every aspect of the partial defence of provocation has caused considerable debate over the years. Areas of difficulty range from the question of when the issue should be left to the jury, to the relevance of the defence to battered women who kill. The issue for consideration here will be the ‘reasonable’ or ‘ordinary man’ and the characteristics imputed to him in the light of the accused’s own character. *R. v. Smith*¹ reaffirms the Court of Appeal’s view that the accused’s characteristics should be included at all levels of the test. Attitudes to this differ considerably. On the one hand, some argue that the doctrine weakens the legal requirement of self-control and is therefore only acceptable where the accused has been pushed to extremes. This is ensured by maintaining a highly objective approach and narrow interpretation of the ‘reasonable man’. On the other hand, it is argued that, in the interests of attaining justice, characteristics of the accused should be imputed to the reasonable man in order to acknowledge that some people will find conduct more provoking than others, and that some individuals may have a lower threshold of self-restraint which should be taken into account. This article considers the merits of these two approaches by analysing recent English case law and contrasting this with Australian developments.

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¹ [1998] 4 All ER 387.

English Law

The reasonable man did not emerge here until the late nineteenth century, and for almost a hundred years judges directed juries on the characteristics attributable to him. The approach was to look at the provocative effect of the conduct on the ordinary person, even where the accused suffered from some condition which made him react differently². Thus the approach taken was objective - if the accused had killed his victim under provocation, he would only establish the defence if the reasonable man would have been so provoked. This reasonable man bore none of the personal characteristics of the accused.

However, this approach, exemplified in *Bedder v. D.P.P.*³, was reversed by the Homicide Act 1957 section 3, under which the judge was no longer entitled to dictate the characteristics of that reasonable man to the jury. The effect of this section is shown in *D.P.P. v. Camplin*⁴ where a 15 year old boy who had been raped and then taunted by the deceased, was judged by the effect such provocation would have had on a reasonable *boy*. In rejecting the trial judge's opinion, the Court of Appeal and House of Lords affirmed that section 3 overruled *Bedder* and accepted that the age of the accused was a characteristic which should be imputed to the reasonable man. Lord Diplock classified the reasonable man as someone of either sex "...not exceptionally excitable or pugnacious", which has remained the law, but went on to mitigate the test by allowing age to be included⁵. His age was not an individual peculiarity or abnormality, but merely a phase through which everyone passes. Thus the reasonable man would be endowed with the same age and sex as the accused, along with any

² J. Smith and B. Hogan, *Criminal Law*, 8th edn. London, Butterworths, 1996, p367

³ [1954] 2 All ER 801.

⁴ [1978] 2 All ER 168.

other *relevant* characteristics in order to assess more subjectively the gravity of the provocation offered to the accused. However, the degree of self-control expected of him would reflect only the accused's age and sex, thus remaining as objective as possible⁶.

This immediately raised the problem of which characteristics are classified as 'relevant' for the subjective arm of the test, and there has also been a steady increase in the attributes imputed to the reasonable man under the objective test. Indeed, in allowing age and sex to be used for the appropriate level of self-control, it appears that Lord Diplock opened the floodgates to further characteristics. In *R. v. Morhall*⁷ a drug addict was persistently taunted about his addiction to glue. In his trial for murder, he unsuccessfully raised the issue of provocation and appealed. It was held in the Court of Appeal that the reasonable man could not be given the accused's characteristic of addiction because the reasonable man was not an addict. However in the House of Lords this was rejected because Morhall's addiction should be taken into account if the provocation had been targeted at that addiction. Thus, if Morhall had been provoked by some other statement, the fact that he was also a glue-sniffer would have been discounted, but since he was provoked by being nagged about his addiction, his response was to be assessed by reference to a reasonable man with the same addiction. By extension this would presumably also apply to any other form of addiction.

Leaving aside those cases where an individual's characteristics are the subject

⁵ *ibid.*, p175

⁶ *idem.*

⁷ [1995] 3 All ER 659.

of the provocation, it follows from cases such as *Luc Thiet Thuan v. R*⁸ that English law looks at such characteristics for two purposes. The first is to accurately assess the gravity of the provocation. Here, the subjective characteristics of the accused will be given to the reasonable man so that they can be taken into account in determining the seriousness of the provocative conduct. Secondly, the accused must be shown to have exercised an appropriate level of self-control and for this test, those individual peculiarities are ignored, leading to an objective assessment. In *Luc Thiet Thuan*, the accused was suffering from brain damage which impaired control of his impulses. The Court of Appeal felt that such individual characteristics were not relevant to the reasonable person unless the provocation was directed at that characteristic (his mental abnormality). This reasoning was also upheld by the majority in the Privy Council, which result may well have been influenced by the mix of judges from different jurisdictions who heard the case, as some of them came from systems which adopt a fairly narrow approach to the level of self-control required.. It was felt that the appropriate plea was diminished responsibility, as a mental abnormality was not a relevant characteristic for the objective limb of the test. Thus the test for this aspect of provocation seemed at this stage to have moved from a highly objective, narrow formulation, to a two-fold test, the first part of which injects an element of subjectivity whilst the second retains a suitable degree of objectivity.

However, a recent English case casts some doubt on the exclusion of individual characteristics from the second limb. In *R. v. Smith*⁹ the question was whether the accused's severe depression was a relevant characteristic to impute to the reasonable man. It was held that it *was* relevant to an assessment of the gravity of the

⁸ [1996] 2 All ER 1033.

provocation aimed at the accused - someone who is severely depressed would probably view conduct as more provocative than someone not so afflicted. However, it was *also* relevant to the second limb - the level of self-control to be expected of Smith. For these purposes, the court held that his severe depression should be taken into account when assessing what the reasonable man's reaction would have been to that level of provocation. This involves including a mental abnormality within the objective limb of the test, contrary to *Luc Thiet Thuan* and moves the law in this area on to a much more subjective plane. There was no suggestion that the provocative conduct was aimed specifically at his depression. Indeed the prosecution argued that depression should be admitted as a relevant characteristic for the purposes of determining the gravity, but should be excluded from the assessment of the level of self-control required. This follows what had, until then, been accepted.

However, the court decided not to follow the approach from *Luc Thiet Thuan* and instead followed Lord Steyn's dissenting judgement in that case which relied heavily on Lord Simon in *Camplin*. The effect of the latter judgement was to query the nature of the reasonable man as used to set the required level of self-control. Lord Simon felt that the reasonable man was an appropriate measure, but not in the guise of "some hypothetical being from whom all mental and physical attributes (except perhaps sex) have been abstracted."¹⁰ Lord Steyn in *Luc Thiet Thuan* had interpreted this passage as meaning that age (as per *Camplin*) could not be the only relevant factor in determining the objective limb of the test, and indeed that *all the characteristics of the accused* should be considered. In *Smith*, Lord Steyn's speech in *Luc Thiet Thuan* is quoted in some detail. When referring to Lord Simon's statement

⁹ [1998] 4 All ER 387.

quoted above, Lord Steyn said that it was

...inconsistent with any intention to treat youthful immaturity as the only mental characteristic relevant to the objective requirement. Indeed later in his judgement Lord Simon made it clear that “the entire factual situation, which includes the characteristics of the accused, must be considered”.¹¹

Thus, applying this approach in *Smith*, the appellant’s submissions were accepted. Submissions by the prosecution were along *Camplin* lines (that his depression was relevant to the assessment of the gravity of the provocation, but not to the level of self-control required), but the Court of Appeal disregarded them for two reasons. Firstly, they felt that they were not bound *Luc Thiet Thuan* as it was a Privy Council decision. Instead they decided to adopt reasoning from Lord Steyn’s dissenting judgement in *Luc Thiet Thuan*, itself relying partly on Lord Simon’s judgement in *Camplin*. Lord Simon’s remarks in particular make it clear that he felt other characteristics of the accused, beyond age and sex, should be considered in determining the required level of self-control. Secondly, the court in *Smith* explicitly stated that they were bound by their previous decisions in this area. One of these cases is not strictly in point with *Smith*; *R. v. Humphreys*¹² involved the inclusion of attention seeking by wrist-slashing as a characteristic of the reasonable man. The provocation offered to Humphreys related directly to that characteristic – she was taunted with having not made a good job of it – and it is not disputed that, where the provocation is aimed precisely at that subjective characteristic of the accused, it should be included under both limbs of the test¹³. Another characteristic sought to be

¹⁰ *Camplin* [1978] 2 All ER 168 at 180-181.

¹¹ *Smith* [1998] 4 All ER 387 at 394.

¹² [1995] 4 All ER 1008.

¹³ per *R. v. Morhall* [1995] 3 All ER 659.

included was immaturity which is admissible as it follows directly from *Camplin*. The final characteristic raised was her explosive nature which was correctly rejected following the *Camplin* exclusion¹⁴. Reference was also made to *R. v. Ahluwalia*¹⁵ and *R. v. Thornton (No. 2)*¹⁶, both relating to battered women. It is arguable that to allow the partial defence in these cases requires sufficient derogation from the usual principles governing provocation that they should not be relied upon outside their particular sphere. However, regardless of the status of these previous cases, it is clear that the Court of Appeal feels bound by precedent to allow other factors beyond age and sex to be imputed to the reasonable man for the purposes of self-control. It was acknowledged in *R. v. Campbell*¹⁷ that unless and until such decisions were overruled, the Court of Appeal had no choice but to follow them.

In summary, English law now requires that the reasonable man should have all the mental and physical characteristics of the accused in relation to the *gravity* of the provocation. Furthermore, all such characteristics are relevant to the level of self-control required, with the time-honoured exception of irascibility. The latter substantially weakens the self-control element and thereby the objectivity of the partial defence of provocation. Critics would say that this allows the accused to escape conviction for murder all the more easily since, having measured the gravity of the provocation through his eyes, the self-control required of him would only be that of the reasonable man who had all the accused's peculiar characteristics except irascibility.

¹⁴ *supra*, p2.

¹⁵ [1992] 4 All ER 889.

¹⁶ [1996] 2 All ER 1023.

Australian law

Australian courts have been characteristically thorough in their consideration of this issue, and it is interesting to note that their approach is less liberal than that suggested by *Smith*. In *Stingel v. The Queen*¹⁸, what was required was conduct of a nature that would deprive the ordinary person of self-control. It was felt necessary in all cases of provocation to determine first the gravity of the provoking conduct and that this could only be achieved by a subjective assessment which took into account all relevant characteristics of the accused. Further it was stated that, potentially, all the accused's characteristics could be included if relevant to the issue¹⁹. Examples given included the age, sex, race, physical features, personal relationships and attributes, and past history of the accused. However, the next stage identified by the court was to determine whether that level of provocation would have made the ordinary person lose self-control. At this stage, personal characteristics of the accused should be ignored, except his age as a concession to immaturity. It seems well-established that it is unfair to expect a young person to exercise the self-control of an adult, and, further, that age cannot be characterised as something personal to the accused as it is common to everyone.

Several years later, the same questions were discussed in *Masciantonio v. The Queen*²⁰ following the reasoning in *Stingel*. Again it was felt that the first step was to assess the gravity of the provocation by reference to all relevant characteristics of the

¹⁷ [1997] 1 Cr. App. R. 199.

¹⁸ (1990) 171 CLR 312. Also at

http://www.austlii.edu.au/au/cases/cth/high_ct/171clr312.html

All page references to this case refer to pages of the internet edition.

¹⁹ *ibid.*, p7.

²⁰ (1995) 183 CLR 58. Also at

http://www.austlii.edu.au/au/cases/cth/high_ct/183clr58.html

All page references to this case refer to pages of the internet edition.

accused²¹. This acknowledges that factors such as age, race, physical features and past history can make an otherwise relatively innocuous statement highly inflammatory and also emphasises the need to contextualise such enquiries in order to give them meaning. To assess the gravity of the conduct, any list given of relevant characteristics was not felt to be exhaustive as any circumstance which explained the accused's conduct should be taken into account.

McHugh J.'s judgement points to the strange juxtaposition whereby all relevant characteristics are included for the first part of the test, but substantially excluded for the second. He states that the 'ordinary person' test would be meaningless if all characteristics were included in this second limb as well as in the first, since the idea of an objective test is to provide one standard which everyone has to meet²². Whilst he accepted the need to include personal characteristics in the assessment of the gravity of provocation, he refused to include these characteristics in the second limb relating to the required level of self-control, as to do so would be to undermine the objectivity of the test completely. McHugh felt that the objective standard was too well-entrenched in the common law for a judge to be able to remove it. However, he did go on to say that some characteristics could be included in the objective 'ordinary person' test without compromising that objectivity, instancing ethnicity and cultural background, and age.

These clearly form a group of general characteristics, as opposed to those peculiarly attributable to the accused. Thus, whereas to assess gravity, all characteristics are admissible, to assess the required level of self-control, only the

²¹ *ibid.*, p6.

above limited group are used. McHugh felt that, given the multi-cultural state of Australian society, it would be unjust and discriminatory to assess minority groups under criteria referable only to the majority²³. He recognises that this could be said to establish a different standard for each social group, but feels that this is an inevitable consequence of equal treatment before the law. Thus, this case adds to the doctrine established in *Stingel*, where ethnicity was not an issue, in that ethnic and cultural background should now be added to age as relevant characteristics for the ordinary person when determining the level of self-control required of the accused.

The future of the reasonable man test

It seems sensible to identify two separate aspects to the rule that the provocation must be such as would make the reasonable man lose self-control. The first step in any decision must be to measure the level or gravity of that provocation. It further seems sensible to assess the gravity subjectively. The overall tenor of the test is objective – the law requires a certain degree of self-control from everyone – but this should not be followed too slavishly so as to exclude all subjective assessments. To measure the seriousness of the provoking conduct requires acknowledgement of characteristics peculiar to the accused, as these will have an effect on the measure of that provocation. If the accused has certain characteristics which render the conduct more provoking than would be expected, there seems little point in artificially ignoring this. It is better to acknowledge it, measure the level of provocation accordingly, and then ask whether, objectively, the reasonable man faced with *that* increased level of provocation would have responded in the same manner as the accused. This approach acknowledges the reality of the accused's situation (that he

²² *ibid.*, p9.

felt the sting of the provocation more keenly) but still requires him to respond to that in a way deemed to be socially acceptable (in a way which mirrors the reasonable man's response). Admittedly, the accused is not required to meet an unmodified form of the reasonable man test, since some of his characteristics are imputed when assessing the acceptable level of response, but these are, broadly speaking, limited to age and sex, with the addition of culture and ethnicity in Australia. It is widely accepted that factors such as age are not peculiar to the accused and should be relevant to the level of self-control required of him. However, if the test is to remain fairly objective, cultural and ethnic factors should perhaps be acknowledged as relatively indeterminate and therefore unsuitable for inclusion. Although they are not peculiar to the individual, they are also not, unlike being of *a* particular age and gender, universal.

Whatever the status of these cultural and ethnic factors, it seems clear that *all* characteristics of the accused should *not* be included when assessing whether the reasonable man would have responded in such a way to a given level of provocation. While all relevant characteristics should be taken into account to determine the gravity of the provocation, to allow them in the second limb of the test removes any real requirement of self-control. The accused would simply show that he had reacted immediately to conduct which he saw as extremely provoking for some personal reason. He would then have no real difficulty in showing that a reasonable man with that very personal characteristic would have responded in the same way. In essence then, the doctrine had reached a mature and developed position in England with cases such as *Luc Thiet Thuan*, and likewise in Australia. The inclusion of cultural and

²³ *ibid.*, p10.

ethnic factors in that jurisdiction seems perhaps unwarranted if the aim is to retain objectivity, but this appears to reflect their particular situation and political concern to acknowledge their level of multi-culturalism.

However, England appears to have taken a step too far in *R. v. Smith* where they impute all the accused's personal characteristics, except irascibility, to the reasonable man for both limbs of the test. It is worth noting, however, that the Court of Appeal granted leave for the case to proceed to the House of Lords, and it will be interesting to see what line they take. It is submitted that objectivity should be preserved in this limb of the test, along the lines used previously in England, and consistently in Australia. The dual test allows subjective factors to determine the gravity of the provocation, but still insists that certain standards of self-control are met, with very limited concessions to universal characteristics which affect ability to achieve such a standard. Any extension to this test subjectivises the concept of the reasonable man too much.