Contemporary Comments

Comment on Papathanasiou & Easteal, 'The "Ordinary Person" in Provocation Law'

In their well-crafted article Papthanasiou and Easteal submit, for consideration, a new test for juries in determining the guilt or innocence of persons accused of acting as a result of provocation. No longer should juries be asked to consider whether defendants acted simply as 'reasonable' persons, but rather juries should be asked by the judge: 'Is it reasonable for a person, possessing all the defendant's characteristics and having had all the defendant's experiences, to have done what the defendant did in the circumstances?' The authors are endeavouring, with sound reasons, to affirm the value of having an alternative test to the standard (purportedly objective) test; one that combines rather than dichotomises subjectivity and objectivity.

This is all well and good, but I am not sure that their alternative is workable, for four reasons. Firstly, the empirical data confirm my suspicions that people (including, of course, jurors) carry around with them all sorts of prejudices which are, like it or not, unlikely to be abandoned on the strength of a direction from a judge. Patricia Easteal's 1995 article drew readers' attentions to the fact that even with the many years of public campaigning to heighten Australians' awareness of the horror of violence against women, there is little understanding still. Even given the high regard I have for jurors' abilities to apply commonsense in the consideration of their verdicts, I am not sure that jurors are capable of doing what this proposed new judicial direction is asking them to do; namely, to consider 'what it is like to be that particular person'. Dominocentrism will prevail unless there is, for example, a radical departure from the current method of juror selection. For example, what if selection were to include only certain persons (based upon age, gender, sexuality, ethnicity and so forth) capable of putting themselves in the accused's shoes, so to speak? Any reform in that direction would certainly have to involve the problematic American system of juror candidates being cross-examined for hours on end, and would lose the support of those who value the 'cross-section of community views' represented in arguments for the retention of the jury system.

Secondly, I am a little sceptical about the possibilities of bringing about reform by the creation of a new legislative formula, having observed the introduction and aftermath of a (purportedly) subjective element in South Australian law in relation to self-defence. In 1990 a South Australian parliamentary select committee examined self-defence generally, and its final report recommended changes to the *Criminal Law Consolidation Act* in 1991. In attempting to do too much, it actually made matters worse. The new section (s 15 CLCA) is 300 words long. It allows people to form their own genuine belief about the reasonableness of the force they may use to defend themselves or others, or to prevent their unlawful imprisonment. People can also use whatever force they think appropriate to protect property (it doesn't have to be their property) to prevent a 'criminal trespass to any land' (again, not necessarily their land) or to assist in the lawful arrest of an alleged offender. But they cannot have intended to cause death. Nor can they have been recklessly

indifferent about a fatal outcome. If they did, they run the risk of being convicted of murder or manslaughter. But if they did cause death and acted, in their eyes, reasonably, but their belief was subjectively 'grossly unreasonable' (one concludes that they may need to admit to that), and they didn't intend death and are not reckless, then it is open to a jury to find them guilty of manslaughter, but only if they find there was criminal negligence (a term that is undefined in the Act). One can understand why Supreme Court judges raised concerns thereafter that the law was very difficult to apply. Remember that the High Court had abolished, in *Viro*, the old common law doctrine of 'excessive self-defence', essentially because it had become impossible to explain it to juries. Remember also that many such criminal actions involve the exacerbating factor of alcohol. Anyone who considers that there are simple formulae that could be applied to allow this factor a place in judicial directions on self-defence need only read the excellent report of the Victorian Law Reform Committee (1999) to see how convoluted this issue is.

Thirdly, the authors suggest that their proposal would need the admission of expert testimony in order for judges and juries to learn how reasonable behaviour can vary depending upon gender, ethnicity, social class, and sexuality. Having observed for two decades the ambivalent way in which judges react to this sort of testimony and its ability to extend trial length and include irrelevancies, it may be a very long time before this type of evidence finds its way into court. I admire the sentiments, but doubt the feasibility in practice.

Finally, the authors imply some reservations about the majority High Court decision in *Green* which allowed the defendant Green, under the doctrine of provocation, to defeat a murder conviction in circumstances where the deceased purportedly had made an unwanted sexual advance upon him. Green panicked and killed the victim. His appeal against conviction for murder was upheld by virtue of an argument that has come to be described colloquially as the Homosexual Advance Defence (HAD). As Howe (1998:466-490) points out, in condemning the High Court decision as 'deplorable' and 'chilling', the objective test failed 'to save the provocation defence from the charge that it is a profoundly sexed excuse for murder' (485). Now consider how the authors' new test might work in a case such as *Green*. They ask: 'Is it reasonable for a person, possessing all the defendant's characteristics and having had all the defendant's experiences, to have done what the defendant did in the circumstances?' Is it not the case that adding a subjective element may simply compound the problem in provocation cases? In other words, in attempting to fix one problem they create another one. Could an avowed homophobic, violent man simply ask the jury to consider his homophobia and temper in determining whether he, on that occasion, had been provoked? In cases such as these it is the defence of provocation, of course, that should be under attack. And while provocation remains, an objective standard might indeed provide a safeguard against absurd and unjust results.

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List of Cases

Green v R (1997) 191 CLR 334.

Viro v R (1978) 141 CLR 88.

REFERENCES

Easteal, P (1995) 'Reconstructing Reality', *Alternative Law Journal*, vol 20, pp 108-112.

Howe, A (1998) 'Case Notes', *Melbourne University Law Review*, vol 22, pp 466-490.

Victorian Law Reform Committee (1999) *Criminal Liability for Self-Induced Intoxication*, Government Printer, Melbourne.