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# The law: Provocation...a provocative issue

# THE LAW:
# PROVOCATION.. A PROVOCATIVE ISSUE

There are implicitly cultural assumptions in our law which unintentionally act to disadvantage certain groups of Australians. The law on provocation is an example of this.

The law governing provocation, operates to reduce murder to manslaughter. In deciding a case the 'ordinary person' test is used which means the defendant's actions are considered in the light of what the ordinary person would have done under the same circumstances.

The High Court of Australia in *Stingel* (1990) 171 CLR 312 and more recently in *Masciantonio* (1995) 183 CLR 58 determined that what the jury had to consider in a case where provocation is raised as a defence, was whether the defendant killed in a state of loss of control in circumstances where an ordinary person, faced by the same degree of provocation, could have formed the intent to kill or do grievious bodily harm.

In other words, the test to be used is whether the ordinary person could have done what the defendant did, in terms of the nature and extent of the violence used by the defendant, in the same circumstances.

When the jury is considering the seriousness of the provocation they can look at characteristics of the defendant such as ethnicity. However, by applying the concept of the ordinary person, the measurement of self control is still an objective one.

## ARGUMENTS AGAINST THIS APPROACH

The appropriateness of using an objective standard in a multicultural society has been questioned. For example, Murphy J in *Moffa* (1977) 138 CLR 601 ( at 626), argued that:

"This objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of an ordinary [person] for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances".

In *Masciantonio*, McHugh J. rejected the majority's view that the ethnic or cultural characteristics of the defendant were irrelevant to the ordinary person test. He argued (at 73): "In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Its invocation in cases heard by juries of predominantly Anglo-Saxon origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon heritage, that being the stereotype of the ordinary person with which the jurors are most familiar."

He went on to say (at 74): "Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities".

## ARGUMENTS FOR THIS APPROACH

The High Court of Australia has expressed its concern that to attribute to the ordinary person characteristics of the defendant such as ethnicity would depart from the principle of equality. It stated in *Stingel* (at 329): "The principle of equality before the law requires that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary".

The Australian Law Reform Commission in its 'Multiculturalism and the Law' Report (No. 57 1992 at 187) expressed its concern that: "a proliferation of different standards against which to judge the reasonableness or otherwise of a person's behaviour in the criminal law context is undesirable. To apply different standards to different groups would lessen the protection to all afforded by the criminal law.

Such concerns are motivated by a number of factors. One of these is the perceived danger that the adoption of a different standard may result, for example, in the accommodation of cultural claims about the use of domestic violence to discipline women and children, providing a partial defence to murder in communities where violence is recognised as a culturally appropriate response to provocative acts of 'domestic disobedience'.

Another perceived danger is that by accommodating different cultural characteristics there will be problems with proof. The concern here is that when determining the reactions of an ordinary person of a particular ethnicity there is a risk that judges and juries may draw on discriminatory generalisations about the cultures of minority groups of which they have little or no understanding.

## DISCUSSION QUESTIONS

*1. In the Case of Dincer ([1983] 1 VR 460)*

*In this case, Dincer killed his daughter because he found out that she had been engaged in pre-marital sex. This was against Dincer's cultural and religious custom, he was Turkish by birth, a Muslim by religion and a traditionalist in nature.*

*He argued that he was justified in killing her because he was provoked by her actions.*

*If you were the judge in this case, do think it would be equitable at law to invoke the ordinary person test of provocation or do you think that the cultural/ethnic/religious characteristics of Dincer should be taken into account by the jury?*

*2 Are there any other perceived dangers you think might exist if the ordinary person test is changed to accommodate cultural and ethnic differences?*

*3. In what ways do you think the perceived dangers might be overcome?*

## ASSIGNMENT

*Evaluate the arguments for and against changing the ordinary person test for the defence of provocation to include the ethnic, cultural and religious characteristics of the defendant*

## DEBATING TOPICS

*1. "There is no such person as an 'ordinary person'.*

*2. Without an objective test for the defence of provocation, equality at law could not be maintained.*

## THE LAW:

## IGNORANCE IS NO DEFENCE

If we look at criminal law we see that criminal liabilty is based on the idea that a person not only needs to have committed an act that is against the law but that the person's mind is also guilty.

The guilty act is referred to as actus reus and the guilty mind is referred to as *mens rea*.

Originally, as seen in the case of *Sherras v De Rutzen* (1895) 1 QB 918 at 921, the courts construed the guilty mind as "an evil intention, or a knowledge of the wrongfulness of the act".

In modern law, *mens rea* is defined in terms of doing something unlawful due to intention, recklessness or knowledge.

In a multicultural society this test of criminal liability can pose some problems.

## ARGUMENT FOR AN 'IGNORANCE' DEFENCE

There is an argument that to apply this test of *mens rea* in a multicultural society is harsh because there are many people who, because they come from backgrounds where the law is different or because of the language barrier, may not know what the law is in Australia.

The argument goes on to say that to punish a person for acting without their knowledge of wrongfulness is unjust and therefore there should be available a defence of 'justifiable ignorance of the law'.

## ARGUMENTS AGAINST AN 'IGNORANCE' DEFENCE

On the other hand, there is the argument that if you allow a defence to exist of 'ignorance of the law', then the 'floodgates' would be open, everyone could try to use this as an excuse for illegal acts.

This argument goes on to say that it is not just people from a different cultural background or people whose first language is not English who may be unaware of the law in Australia. There is in fact, a general lack of knowledge of the law in our society.

As such then, it would be open to many in our society to claim that they were not aware of the law and therefore not guilty of breaching it with regard to *mens rea*.

Furthermore, it is argued, that given the above situation, to apply the law only to those people where it could be proved they knew the law would not only be inequitable but also an extremely difficult task in terms of proof.

## DISCUSSION QUESTIONS

*1 Should a defence of 'justifiable ignorance of law' be enacted for people who, due to knowledge, language or cultural barriers, do not know, and could not reasonably be expected to know, the law which they have infringed?*

*2. Should a defence of 'justifiable ignorance of the law' be enacted for people who due to any reason, including educational background, do not know and could not reasonably be expected to know the law they have infringed?*

*3. If a defence of 'justifiable ignorance of the law' is enacted, how could this be done in an equitable manner for all members of Australian society?*

*4. If a defence of 'justifiable ignorance of the law' is enacted, how could the problem of proof be overcome?*

## DEBATING TOPIC

*"The law should be applied equally to all people in Australia".*