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# Ordinary and reasonable people: The design of objective tests of criminal responsibility

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ORDINARY AND REASONABLE PEOPLE:  
THE DESIGN OF OBJECTIVE TESTS OF CRIMINAL RESPONSIBILITY

By Eric Colvin

Abstract

This paper reviews the design of objective tests of criminal responsibility for serious offences. It is argued that their design should reflect two fundamental principles. First, there is the principle that there should be no penal liability without fault. It follows from this principle that there should be no responsibility for failure to attain a standard that was beyond the capacities of the accused. Secondly, there is the principle of proportionality between culpability and penal liability. It follows from this principle that, if objective tests are to be used for serious offences, responsibility should be restricted to breaches of minimal standards of conduct that were attainable with reasonable ease. We should reject liability to major penal sanctions for failure to attain idealistic or difficult standards. Moreover, in order to ensure that a standard could have been attained with reasonable ease, objective tests should be adaptable for any special handicaps of the accused. The paper uses these ideas to review the formulations of criminal negligence and of the objective elements in the defences of self-defence, provocation, duress and necessity.

# ORDINARY AND REASONABLE PEOPLE: THE DESIGN OF OBJECTIVE TESTS OF CRIMINAL RESPONSIBILITY

Eric Colvin\*

## 1. INTRODUCTION

Criminal responsibility can be determined either subjectively or objectively. To describe a test of criminal responsibility as subjective means that liability is to be imposed only on a person who has freely chosen to engage in the relevant conduct, having appreciated the consequences or risks of that choice, and therefore having made a personal decision which can be condemned and treated as justification for the imposition of punishment. The alternative, objective approach to assessing criminal responsibility involves measuring the conduct of an accused against that of some hypothetical person, such as an 'ordinary' or 'reasonable' person, placed in a similar situation. A blameworthy failure of the accused to live up to a comparative standard is taken to justify conviction and punishment. This approach to assessing criminal responsibility is 'objective' because it does not depend on any finding that the accused's state of mind was blameworthy in itself. For example, the conduct elements of the offence might have been committed inadvertently or for reasons appearing acceptable on their face. Nevertheless, the accused is blamed on the basis of a comparison with what an ordinary or reasonable person might have done. The accused is culpable because of a failure to live up to some objective standard of behaviour.<sup>1</sup>

The objective approach to determining criminal responsibility is widely used for minor offences in schemes of governmental social and economic regulation, where relatively light penalties such as fines are typically in issue. Examples are vehicles offences and offences relating to the sale of goods. The accidental breach of a prohibition in these fields usually provides a defence only if there was a mistake of fact which was objectively reasonable.<sup>2</sup> It is, however, widely thought that the subjective approach is more appropriate for serious offences where the accused faces exposure to severe penal sanctions, such as substantial terms of imprisonment. The effect of such sanctions upon the course of a person's life can be devastating. Hence, the common law has generally insisted on the 'worse' culpability which is involved in choosing to commit or to risk committing the conduct elements of the offence.<sup>3</sup>

The ascendancy of subjective tests of criminal responsibility does not mean that objective tests are entirely excluded for serious offences. Objective tests are used in many contexts in Australian law, both in the 'common law' jurisdictions and, even more so, in those jurisdictions with criminal codes. For example, the common law permits manslaughter to be committed through an inadvertent homicide, as long as there is a high degree of negligence<sup>4</sup> or an unlawful act carrying an appreciable risk of serious injury.<sup>5</sup> There have also been some statutory versions of offences involving injury to the person which are based on negligence<sup>6</sup> and negligence is the

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<sup>1</sup> Some English judges have questioned the conventional distinction between subjective and objective tests of criminal responsibility. See eg *R v Caldwell* [1982] AC 341, 354 (HL) (Lord Diplock); *R v Reid* [1992] 3 All ER 673, 695 (HL) (Lord Browne-Wilkinson). Their argument seems to be that, because inadvertence is a personal state of mind, liability for inadvertent negligence is therefore a subjective form of liability. This oversimplifies the nature of inadvertent negligence. A person who is held liable for inadvertent negligence is blamed not just for the inadvertence but because a *comparison* with the state of mind of a hypothetical ordinary or reasonable person indicates that the inadvertence was culpable. It is the comparative element which makes the test objective rather than subjective.

<sup>2</sup> See *Proudman v Dayman* (1941) 67 CLR 536. See also the defence of due diligence in Canadian law: *R v City of Sault Ste. Marie* [1978] 2 SCR 1299.

<sup>3</sup> See eg *He Kaw Teh v The Queen* (1985) 157 CLR 523.

<sup>4</sup> See *Nydam v The Queen* [1977] VR 430 (Full Ct); *R v Adomako* [1994] 3 WLR 288 (HL).

<sup>5</sup> See *Wilson v The Queen* (1992) 174 CLR 313.

<sup>6</sup> See *Crimes Act 1900* (NSW) s 54 (causing grievous bodily harm by unlawful or negligent conduct);

underlying fault element in the various statutory offences concerning dangerous driving.<sup>7</sup> These incursions into liability for negligence have been episodic in those jurisdictions which draw upon the common law for general principles of criminal responsibility. However, under the *Criminal Codes* of Queensland, Western Australia, Tasmania and the Northern Territory, there are general tests for criminal responsibility which are objective in character. These general tests are contained in sections providing for the defence of mistake of fact in relation to circumstances and for the defence of accident or chance in relation to consequences. A mistake of fact must generally be reasonable if it is to provide a defence under these *Codes*, even for a serious offence.<sup>8</sup> In addition, the test for a defence of accident or chance is that the event must have been not only unforeseen but also objectively unforeseeable.<sup>9</sup> The general threshold of criminal responsibility is therefore negligence: unreasonable mistakes are negligent mistakes and unjustifiably risking foreseeable harms is negligent conduct. This threshold applies to the range of basic offences against the person. Subjective states of mind are in issue under the *Codes* only when they are put in issue by the definitions of particular offences, mainly property offences and certain aggravated offences against the person.<sup>10</sup>

In both the common law and the code jurisdictions, objective tests have a particularly prominent role to play in the realm of exculpatory defences. By 'exculpatory defences', I mean the special justifications and excuses which can sometimes negate liability, or at least reduce the level of liability, even though the standard elements of the offence are present. The examples to be discussed in this paper are self-defence, provocation, duress and necessity. Although the content of these defences varies between jurisdictions, objective tests must be satisfied in much of the common law world.<sup>11</sup>

This paper reviews the design of objective tests of criminal responsibility for serious offences.<sup>12</sup> It will be argued that their design needs to be rationalised in light of two fundamental principles. First, there is 'the fault principle', that is, the principle that there should be no penal liability without fault. It follows from this principle that, whatever the seriousness of an offence, we should reject liability for failure to attain a standard that was beyond the capacities of the accused. Secondly, there is 'the proportionality principle', that is, the principle of proportionality between culpability and punishment or penal liability. Proportionality is both a sentencing principle and a principle of responsibility.<sup>13</sup> As a principle of responsibility, it demands that the degree of culpability required for an offence should be commensurate with the level of penal liability. The more severe the sanctions that a person will face upon conviction, the worse should be the culpability required for conviction. That is why the common law has generally preferred subjective rather than objective tests of criminal responsibility for serious offences. It also follows that, if objective tests are to be used for serious offences, their design needs to be carefully attuned to the level of the sanctions. Liability should generally be restricted to breaches of minimal standards of conduct that could have been attained with reasonable ease. We should reject liability to major penal sanctions for failure to attain standards that are idealistic or difficult to attain. Moreover, in order to ensure that a standard could have been attained with reasonable ease, the objective standard should be adaptable for any special handicaps of the accused making it more difficult to attain the regular standard. Impairments can be ignored if the accused can be held responsible for them in a way which justifies the imposition

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*Crimes Act 1958* (Vic) s 24 (causing serious injury by negligent conduct).

<sup>7</sup> See eg *McBride v The Queen* (1966) 115 CLR 44; *Jimenez v The Queen* (1992) 173 CLR 572.

<sup>8</sup> See the wording of *Criminal Code 1899* (Qld) s 24; *Criminal Code 1913* (WA) s 24; *Criminal Code 1924* (Tas) s 14; *Criminal Code 1983* (NT) s 32.

<sup>9</sup> See *Kaporonovski v The Queen* (1975) 133 CLR 209, interpreting *Criminal Code 1899* (Qld) s 23; *Criminal Code 1913* (WA) s 23; *Criminal Code 1924* (Tas) s 13. Section 31 of the *Criminal Code 1983* (NT) adopts a defence of lack of intention or foresight instead of a defence of accident or chance.

<sup>10</sup> There is also a question about whether some form of awareness is an implied element of the offence of assault. See *Hall v Fonceca* [1983] WAR 309 (Full Ct).

<sup>11</sup> A genuine albeit unreasonable mistake of fact can ground an exculpatory defence in England and in jurisdictions which accept the authority of the Privy Council in matters of common law: see *Gladstone Williams* (1983) 78 Cr App R 276 (CA); *Beckford v The Queen* [1988] AC 130 (PC); *Cairns* [1999] 2 Cr App R 137; *Martin* [2000] 2 Cr App R 42. Even in England, however, objective tests govern the exculpatory effect of the response to the perceived facts.

<sup>12</sup> By 'serious offences', I mean roughly those offences for which the common law would import a requirement for mens rea. See eg *He Kaw Teh v The Queen* (1985) 157 CLR 523.

<sup>13</sup> On proportionality as a sentencing principle, see *Veen [No 2] v The Queen* (1988) 164 CLR 465. On proportionality as a principle of liability, see especially the decisions of the Supreme Court of Canada: eg *R v Vaillancourt* [1987] 2 SCR 636, *R v Martineau* [1990] 2 SCR 633; *R v Hundal* [1993] 1 SCR 867; *R v Creighton* [1993] 3 SCR 3.

of responsibility for the offence. Objective tests should, however, be sufficiently flexible to accommodate genuine handicaps.

Both the fault and the proportionality principles build on the initial proposition that criminal responsibility is in part an expression of culpability. We may, of course, sometimes feel compelled to take coercive measures to prevent the commission of harm by a person who is dangerous but not blameworthy. This kind of preventive action is a different matter from criminalising breach of a standard of behaviour and different principles apply. In a context of social protection outside criminal law, persons with poor cognitive or volitional powers may have weaker claims for favourable attention. Incapacity to meet standards of ordinary behaviour, or difficulty in doing so, becomes a reason for rather than against coercive action. Therefore, the arguments of this paper for flexible objective tests do not apply to the 'ordinary person' in tests for distinguishing insane and non-insane automatism.<sup>14</sup> The present argument is concerned only with the role of attributions of culpability in determining matters of criminal responsibility.

Much contemporary legislation and judicial doctrine is consistent with the principles advanced in this paper for the design of objective tests. The picture, however, is far from settled. Although there is now widespread recognition of the importance of protecting a person who lacks the capacity to meet an objective standard, the case-law provides few clear and firm articulations of this general principle. Moreover, there has been controversy over the merits of flexible standards that can be adapted for lesser handicaps and also over the propriety of idealistic or difficult standards. The next part of this paper examines general principles for the design of objective tests in more depth; later parts explore the formulations of the objective tests for criminal negligence, self-defence, provocation, duress and necessity. The focus of this paper is on Australian law. Many of the same issues, however, have attracted attention in other jurisdictions. References will therefore be made to developments elsewhere and the discussion is intended to be of general relevance.

## 2. OBJECTIVE TESTS IN CRIMINAL LAW

The primary problem for the design of objective tests of criminal responsibility is that ordinary behaviour encompasses a range of conduct. Ordinary behaviour varies within individuals, depending on how well they use their capacities. Ordinary behaviour also varies between individuals, depending on how factors such as age and mental health shape the capacities which they possess. The idea of 'ordinariness' sets limits to the range but does not itself provide a single point of comparison for the conduct of an accused. If an objective test is to be used, a point within the range must be selected as the standard against which the accused is measured. The higher the standard, the more difficult it will be to attain and therefore the lower will be the threshold of criminal responsibility.

Consider the range of behaviour which might be considered ordinary for an individual. Ordinary people have 'good days' and 'poor days'. Sometimes they utilise their capacities well, acting reasonably sensibly, decisively, courageously and altruistically. At other times they fail to realise these potentials, acting stupidly, indecisively, cravenly and selfishly. Individuals can sometimes excel to a degree which takes them out of the range of ordinary behaviour and merits descriptions such as 'brilliant' or 'wonderful'. Conversely, when performance falls below the minimum which is tolerable as ordinary behaviour, descriptions such as 'appalling' and 'disgraceful' become appropriate. Nevertheless, the range of ordinary behaviour is broad. Even when extraordinary levels of performance, however good or bad, have been eliminated, wide limits remain within which behaviour can fall and still be regarded as ordinary. The use of an objective test requires a standard to be selected from somewhere in this range: the minimum, the maximum, or some point in between such as the average or the standard of what is 'reasonable'.

Suppose that negligence or self-defence is at stake. The relevant capacities are cognitive: foresight of potentially harmful consequences of conduct or insight into the dangers of an attack and options for averting it. Is the accused to be measured against the standard of foresight and insight of an ordinary person performing well, at an average level, or poorly? A similar problem arises with the defence of provocation, where the relevant capacity is volitional. Ordinary people usually maintain their self-control, but sometimes they lose it. The likelihood of an ordinary person losing self-control can be increased by various debilitating pressures having nothing to do with the particular incident of provocation. Is the ordinary person to be assumed to be at the peak of 'ordinary' emotional strength or to be endowed with some lesser capacity for self-control? The problem arises again with the defences of duress and necessity. Is the ordinary person to be assumed to have the maximum capacity for fortitude in the face of danger that can still be regarded as 'ordinary', the average or the minimum?

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<sup>14</sup> See, especially, *R v Falconer* (1990) 171 CLR 30.

Such questions also arise in relation to liability for negligence in the civil law of torts. In that context, the standard which has been selected is a high one. The ordinary person becomes the *reasonable* person and the reasonable person always performs at the peak of her or his abilities. Fleming describes the idealistic component in the concept of the reasonable person in this way: 'The reasonable person is the embodiment of all the qualities we demand of a good citizen: and if not exactly a model of perfection, yet altogether a rather better person than probably any single one of us happens, or perhaps even aspires, to be.'<sup>15</sup> Similarly, Tony Honore has argued that the high standard of care in the law of torts cannot be *consistently* met by any person, no matter how intelligent or adroit.<sup>16</sup> Most people may have the capacity to meet this standard on occasion, but none can do so all the time. Everyone makes mistakes.

Although similar problems are raised by the use of objective tests in the law of torts and in criminal law, the solutions need not be the same. The choice of a high standard of care in civil negligence cases may be compelled by the role of the law of torts in allocating the burden of accident losses and by the primarily remedial nature of the sanctions for liability. If the question is 'Who should bear the loss?', it seems generally preferable to choose the actor who has performed poorly rather than the victim. Criminal law presents a very different context, structured by ideas of denunciation, punishment and stigma. The placement of objective standards in criminal law must be determined in light of their role in setting the threshold of liability for potentially devastating penalties.

Not only does the 'ordinary behaviour' of an individual vary from day to day and moment to moment, 'ordinary behaviour' also varies between individuals. Different people are endowed, whether by birth or development or some combination of the two, with different capacities. This gives rise to two problems for the design of objective tests of criminal responsibility. The first is that a relatively poor performance for one person on some scale of measurement may be a good performance for another person. Different 'ordinary' people have different personal ranges of behaviour, depending on factors such as age and mental health. If everyone is measured against the same point on the range of ordinary behaviour, it will be more difficult for some persons to reach that standard than for others. The second problem is that some persons may be incapable of attaining a common standard or may face such severe difficulties in attaining it that, even if it is conceivably within their reach, it would be unjust to blame them for having failed to grasp it. Indeed, persons with severely deficient capacities may face insuperable or severe difficulties in reaching even the lowest limits of what can be regarded as ordinary behaviour.

The principle that there should be no criminal liability without fault insists that an accused be measured only against a standard that was practically within reach. We should be appalled by any idea that a person should be held criminally liable for failure to meet a standard which was beyond the grasp of that person. Unless special standards are constructed for persons who are incapable of meeting uniform standards, no matter how hard they try, there will be criminal liability without fault. In order to preserve the requirement for fault, it is necessary to construct personalised standards under which comparisons are made with other people who have the relevant handicap possessed by the accused. The classic exposition of the need for this exemption from uniform standards was by H L A Hart, writing about liability for negligence:

It may well be that, even if the 'standard of care' is pitched very low so that individuals are held liable only if they fail to take elementary precautions against harm, there will still be some unfortunate individuals who, through lack of intelligence, powers of concentration or memory, or through clumsiness, could not attain even this low standard. If our conditions of liability are invariant and not flexible, i.e. if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard.<sup>17</sup>

Hart himself noted some of the more obvious qualifications to this general principle.<sup>18</sup> The practical difficulties of operating a law of criminal culpability may prevent any more than a few key variables being taken into account, such as age and intelligence. In addition, the incapacity must be one which the accused could not have

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<sup>15</sup> John Fleming, *The Law of Torts* (9th ed, 1998), 118.

<sup>16</sup> Tony Honore, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530, 549-50. Honore, 550, cites US Department of Transport, *Automobile and Compensation Study* (1970), 177-178: 'In Washington DC a "good" driver viz one without an accident within the preceding five years commits on average, in five minutes of driving, at least nine errors of different kinds.'

<sup>17</sup> H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968), 154.

<sup>18</sup> *Ibid*, 155.

been reasonably expected to detect and either to overcome or to neutralise by taking action to avoid situations in which harm might be caused.

The fault principle may require that capacity to reach a standard of conduct be conceived in a practical rather than a technical sense. It has sometimes been said that the attribution of fault requires not only the capacity to conform to the relevant standard but also a fair opportunity to exercise that capacity and reach the standard. It is in terms of fair opportunity to reach standards that George Fletcher presents the issue of accountability for wrongdoing:

[C]ould the actor have been fairly expected to avoid the act of wrongdoing? Did he or she have fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure, to counteract the effects of mental illness? This is the critical question that renders the assessment of liability just.<sup>19</sup>

Once the issue is presented in terms of fair or reasonable expectations, the limitations of a focus on incapacity in a narrow sense are exposed.<sup>20</sup> We cannot fairly and reasonably expect persons to consistently perform at their very best. The expectation would be unrealistic and, as a foundation for the law of criminal responsibility, unjust. The fault principle requires that the issue of capacity be determined in light of the practical difficulties in consistently making maximum use of cognitive and volitional powers.

Should it be required that an objective standard have been not only practically attainable but also attainable with particular ease? That depends on whether we embrace, as an underpinning for the law of criminal responsibility, a principle of proportionality, that is, a principle that the degree of culpability required for an offence should be commensurate with its penal liability.

Two somewhat different explanations can be given of why we should be concerned with issues of culpability in determining criminal liability, leading to different views on whether issues of proportionality need to be addressed.<sup>21</sup> First, we could ignore issues of penal liability and focus solely on the denunciatory aspect of a criminal conviction. We could view a criminal conviction as a discrete act of condemnation through which disapproval of the accused is conveyed without reference to the penal liability attaching to the offence. For condemnation to be justified, the accused must have been at fault for what occurred. The accused must therefore have been capable of attaining whatever standard of conduct has been set. There is, however, no requirement for the standard to be one which could be attained with particular ease. If the law sets a difficult standard, there is no injustice in blaming an accused who could have reached the standard but did not manage to do so. Thus, where negligence is in issue the civil standard can be adopted and an accused can be convicted for failing to meet a superior level of behaviour. This can be called the 'condemnation' or 'denunciation' theory of criminal culpability. Its key feature is that it views the exclusive role of the law of criminal culpability as being to ensure that criminal liability is imposed only on persons who can justly be blamed for their conduct. The justice of exposing an offender to a particular range of punishments is viewed as a separate issue for the law of sentencing.

Even from the limited perspective of this 'denunciation' theory of criminal culpability, objective tests need to be personalised to the extent necessary to ensure that all accused persons are judged against standards which they have a fair opportunity to meet. This means that there may have to be some modification of objective standards in cases where, for example, cognitive or volitional capacities are substantially underdeveloped because of age or severely impaired by mental disorder. Nevertheless, the argument respecting fair opportunity does not insist that everyone should have the same or even a roughly proximate opportunity to meet an objective standard. As long as a person is within the range of 'normal' capacities and can therefore be expected to meet a 'normal' standard, it is immaterial that there may have been relative difficulty in attaining it.<sup>22</sup>

The alternative, and preferable, approach to the problem of culpability can be called the 'proportion' theory. This involves viewing a criminal conviction not as a discrete act of condemnation, but as an integral step in a process leading to punishment. On this approach, questions about the justice of convicting someone and

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<sup>19</sup> George Fletcher, *Rethinking Criminal Law* (1978), 510. See also H L A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968), 152.

<sup>20</sup> See Roger Whiting, 'Negligence, Fault and Liability' (1991) 108 *South African Law Journal* 431 at 443-4.

<sup>21</sup> See Eric Colvin, 'Justice and Criminal Culpability' (1993) 5 *Canterbury Law Review* 321, 322-4.

<sup>22</sup> See George Fletcher, 'The Theory of Criminal Negligence' (1971) 119 *University of Pennsylvania Law Review* 401, 434. Fletcher relegates the problem of degrees of culpability to the law of sentencing. See also Roger Whiting, 'Negligence, Fault and Liability' (1991) 108 *South African Law Journal* 431 at 446-7.

punishing that person are so connected that they need to be addressed together. The issue then becomes not just whether the accused is blameworthy but rather whether the accused is sufficiently culpable to justify the penal liability which will follow upon conviction. An accused's degree of fault needs to be roughly commensurate with the measure of penal liability which attaches to the offence in issue. No mechanical formula can be constructed for measuring proportionality. Nevertheless, the theory does insist upon sensitivity to the issue. It requires that considerations of proportionality be at least taken into account when the threshold of responsibility for a particular offence is set.

The issue of proportion should be on the agenda when criminal liability is determined. For a criminal conviction it is surely not enough that there is *some* culpability. There must be a degree of culpability which is sufficient to justify the penal liability of the offence. Unless this happens, degrees of culpability will be handled entirely within the framework of the law of sentencing, with substantial disadvantages for the accused, such as the loss of the right to trial by jury on the issue. Moreover, the current development of sentencing law means that less attention is paid to consistency of outcomes in determining a sentence than in determining responsibility. The sentencing process can fine-tune penalties to fit degrees of culpability and to balance culpability against other considerations. Nevertheless, the accused is entitled to have the overall framework of culpability and penal liability established within the process of trial and conviction. It is presumably because of such considerations that judges have required different levels of culpability for different offences and that such differences have also sometimes been written into statutory formulations of offences. Although degrees of culpability are a central concern of sentencing, this concern is not exclusive to the sentencing process. It is manifested in such features of the law of criminal responsibility as the presumption of subjective mens rea.

The issue of proportionality bears on the competition between objective and subjective tests of criminal responsibility. It also bears on the question of the level at which objective tests should be set. For serious criminal offences where the penal liability encompasses substantial terms of imprisonment, there must be a high level of culpability and therefore a failure to meet a standard attainable with reasonable ease. As a matter of general principle, this means that an accused should not be measured against a higher standard than that of the bottom of the range of ordinary behaviour. A high level of culpability is present in failure to match minimum standards of ordinary behaviour which can be attained with reasonable ease. It is doubtful, however, whether it can be found in failing to match the best of ordinary behaviour and even questionable whether it can be found in failing to attain average levels of performance. Where severe penal sanctions are in issue, criminal law works best as an instrument for the enforcement of a minimalist ethics. Moreover, in order to ensure that a standard was attainable with reasonable ease, the range of 'ordinary behaviour' should be conceived in terms of what would be ordinary for a person with the particular capacities of the accused. If an accused is handicapped by a factor such as age or mental disorder, the standard of comparison should be a person with that handicap. This concession should not extend to an impairment for which an accused can be held responsible, such as self-induced intoxication. Nevertheless, justice demands that objective tests be sufficiently flexible to accommodate handicaps for which an accused cannot be held responsible.

Superior capacities are a different matter. It might be possible to mount an argument for holding superior persons to higher than normal standards. That would, however, be a different argument from the one which has been made here with respect to handicapped persons. The argument has been that it would be unjust to such persons to make them liable for serious offences if they could not have met the relevant standards with reasonable ease. In contrast, persons with superior capacities would benefit from making uniform standards applicable to them. Any disadvantage would be born by other accused persons, not by those who possess superior capacities. Arguments from equality under the law could perhaps be used to support personalising the standards which those with superior capacities must meet. Such an argument, however, would not involve the same charge of injustice as the argument which has been pursued here.

The remainder of this paper reviews the law pertaining to criminal negligence, self-defence, provocation, duress and necessity in light of the general principles which have been discussed. The next part of the paper is concerned with problems arising from the variations in behaviour which occur independently of differences between people. Differences between people are addressed in the final part.

### 3. LEVELS OF BEHAVIOUR

There are both direct and indirect ways in which objective tests can be designed to catch only those who fail to live up to minimal standards of ordinary behaviour. The direct ways involve specifying either egregious behaviour in the elements of an offence or a low threshold for the availability of a defence. For example, reference might be made to falling below the standard of 'ordinary' behaviour rather than 'reasonable' behaviour,



and to what an ordinary person 'could' or 'might' do rather than to what such a person 'would' or 'would be likely to' do. The indirect way is to give an accused the benefit of a significant margin of error or leeway in the application of a standard. Both these techniques can be seen in the existing case-law. There are, however, inconsistencies in the design of objective tests. Concern for considerations of proportionality is apparent but does not always prevail.

One way in which the courts have demonstrated some concern about proportionality is through the development of the concept of 'criminal negligence'. Criminal negligence is a higher degree of negligence, involving a wider departure from the standard of the reasonable person, than would suffice for liability for negligence in the civil law of torts. The concept of criminal negligence has been formulated in various terms. In Canada, it is simply expressed as a 'marked departure' from the standard of the reasonable person.<sup>23</sup> In England, the House of Lords has said that the question is whether there is 'gross negligence' to a degree 'that it should be judged criminal'.<sup>24</sup> The Australian practice has tended to follow English models. The Australian Model Criminal Code contains one of the more detailed formulations: 'A person is negligent with respect to a physical element when his or her conduct involves such a great falling short of the standard of care which a reasonable person would have exercised in the circumstances and such a high degree of risk that the element exists or will exist that the conduct merits criminal punishment for the offence in issue.'<sup>25</sup>

The concept of criminal negligence incorporates a distinction between the standard of reasonable care and the threshold of criminal liability. A reasonable person will exercise more than the minimum standard of care which falls within the range of ordinary behaviour. A person acting reasonably will at least be performing at an average level of foresight, insight and concern for the welfare of others. Arguably there should be a superior level of performance. Yet, even if reasonable care is conceived in terms of exercising an average or a superior level of foresight, insight and concern for others, criminal negligence demands much worse than a simple failure to meet this standard. There must be a wide departure from it. This will usually involve a failure to match even the minimum level of performance which can be expected of an ordinary person.

The concept of criminal negligence developed in the common law of manslaughter.<sup>26</sup> Its role has since expanded to cover a wider range of serious offences against the person. There are, however, some curious gaps. Moreover, some of its gains have been made because of the attractions of conceptual economy rather than an expressed commitment to proportionality in the law of criminal responsibility. The most notable instance of such a commitment within Commonwealth jurisdictions is provided by Canada. The Canadian *Criminal Code* contains offences of criminal negligence causing death or bodily harm and manslaughter by criminal negligence.<sup>27</sup> These have long been held to require proof of at least gross negligence,<sup>28</sup> by reference to the meaning of the concept of criminal negligence at common law. Since the entrenchment of the Canadian *Charter of Rights and Freedoms*, criminal negligence has been elevated to the status of a minimum constitutional requirement for many offences. Section 7 of the *Charter* guarantees the right not to be deprived of liberty 'except in accordance with the principles of fundamental justice'.<sup>29</sup> This provision has been interpreted to mean that any offence which carries liability to a term of imprisonment must have a fault element which is in accordance with the principles of fundamental justice. The civil standard of negligence has been accepted as the minimum fault element which is required constitutionally for any offence, and as a sufficient fault element for 'regulatory offences'.<sup>30</sup> For 'true crimes', however, the minimum fault element is ordinarily criminal

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<sup>23</sup> *R v Creighton* [1993] 3 SCR 3, 59.

<sup>24</sup> *R v Adomako* [1994] 3 WLR 288, 295 (HL).

<sup>25</sup> Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility* (1992) s 203.4. See also *Criminal Code Act 1995* (Cth) s 5.5.

<sup>26</sup> See eg *Andrews v DPP* [1937] AC 576.

<sup>27</sup> *Criminal Code*, RSC 1985, c C-46, ss 220-222, 234.

<sup>28</sup> There has even been a strong body of judicial opinion to the effect that subjective recklessness is required. In *R v Tutton* [1989] 1 SCR 1392, the Supreme Court of Canada split equally on the question whether the mens rea is subjective recklessness or gross negligence. Provincial courts of appeal generally held that it is gross negligence. See, for example, *R v Rogers* [1968] 4 CCC 278, 285-6, 299-300 (BCCA); *R v Nelson* (1990) 54 CCC (3d) 285, 289 (Ont CA).

<sup>29</sup> RSC 1985, App II, No. 44, Sched B, s 7: 'Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

<sup>30</sup> See *R v Wholesale Travel Group Inc* [1991] 3 SCR 154.

negligence.<sup>31</sup> The distinction between ‘true crimes’ and ‘regulatory offences’ is as elusive in Canadian law as it is in the law of other jurisdictions. It does seem, however, that indictable offences in the Canadian *Criminal Code* are generally subject to the higher standard of culpability. Criminal negligence has been held to be required for the Code offences of dangerous driving and even the careless handling or storing of firearms.<sup>32</sup>

At the other extreme from Canada is New Zealand. New Zealand courts have taken the view that, since criminal negligence is not expressly mentioned in the *Crimes Act*, it should not be read in.<sup>33</sup> The Australian position falls somewhere between the two extremes: there is not the Canadian commitment to proportionality, but there is greater recognition of its importance than in New Zealand.

In the common law jurisdictions of Australia, causing death by criminal negligence is one of the recognised forms of manslaughter.<sup>34</sup> State appellate courts have also held that a requirement for criminal negligence should be read into statutory offences of negligently causing grievous bodily harm and, seemingly, any other statutory offences involving the negligent causation of bodily harm.<sup>35</sup> The rulings, however, have been limited to offences which expressly used some form of the word ‘negligence’. Moreover, one of the reasons given for adopting this interpretation has been simply to avoid variable standards of negligence in the criminal law. In *Shields*, it was also doubted that the legislature would have intended to criminalise causing injury merely through breach of the basic standard of reasonable care.<sup>36</sup> Otherwise, the judgments do not display much concern for maintaining proportionality between culpability and penal liability.

Concern with proportionality has been more pronounced in the interpretation of the duty-imposing provisions of the Queensland and Western Australia *Criminal Codes*.<sup>37</sup> These provisions create duties relating to the avoidance of danger to life or health, breach of which may involve liability for various offences. For offences of negligence, the question has been whether the breach can involve any degree of negligence or whether criminal negligence is required. The answer from the High Court of Australia has been that criminal negligence must be implied as the threshold of criminal responsibility. In *Callaghan*, the High Court conceded that the words of the text itself ‘smack very much of the civil standard of negligence’.<sup>38</sup> It was, however, concluded that a different interpretation was needed when the words were used ‘in a description of fault so blameworthy as to be punishable as a crime’ and in ‘a criminal code dealing with major crimes involving grave moral guilt’.<sup>39</sup> On the other hand, there has been no suggestion of implying a criminal negligence requirement for offences for which culpability is determined by the *Code* provisions on accidents and reasonable mistakes of fact.<sup>40</sup> These provisions can apply to major as well as minor offences. Where the defence of accident is in issue, there is often an underlying intentional offence. An example would be manslaughter by unlawful act. The presence of this underlying offence may justify making simple negligence the threshold of liability for a consequential injury. Yet there are also instances of straightforward liability for negligence where very high penalties are at stake. Thus, in cases on rape<sup>41</sup> and possession of dangerous drugs,<sup>42</sup> it has been assumed that the defence of mistake of fact is excluded whenever the mistake was unreasonable. There has been no discussion of whether the unreasonableness must amount to gross negligence.<sup>43</sup>

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<sup>31</sup> See *R v Creighton* [1993] 3 SCR 3, 59. This minimum requirement applies to crimes of negligence but not to the aggravating component of compound offences which incorporate both a predicate offence and a consequence or circumstance constituting a more serious offence: For example, it applies to manslaughter by criminal negligence whereas it does not apply to manslaughter by unlawful act unless the predicate offence is an offence of negligence.

<sup>32</sup> *R v Hundal* [1993] 1 SCR 867; *R v Grosset* [1993] 3 SCR 76; *R v Finlay* [1993] 3 SCR 103.

<sup>33</sup> *Crimes Act 1961* (NZ). See *R v Dawe* (1911) 30 NZLR 673 (CA); *R v Storey* [1931] NZLR 417 (CA); *R v Yogaskaran* [1990] 1 NZLR 399 (CA). The South African courts have also refused to recognise any standard of criminal negligence which is different from that of civil negligence: see *Meiring* [1927] AD 41.

<sup>34</sup> See eg *Nydam v The Queen* [1977] VR 430 (Full Ct).

<sup>35</sup> See *R v Shields* [1981] VR 717 (Full Ct); *R v D* [1984] 3 NSWLR 29 (CCA).

<sup>36</sup> *R v Shields*, *ibid*, 718.

<sup>37</sup> *Criminal Code 1899* (Qld) ss 285-290; *Criminal Code 1913* (WA) ss 262-267.

<sup>38</sup> *Callaghan v The Queen* (1952) 87 CLR 115, 121.

<sup>39</sup> *Ibid*, 121, 124.

<sup>40</sup> *Criminal Code 1899* (Qld) ss 23-24; *Criminal Code 1913* (WA) ss 23-24.

<sup>41</sup> See *Attorney-General’s Reference No. 1 of 1977* [1979] 1 WAR 46 (CCA).

<sup>42</sup> See *Clare* (1994) 72 A Crim R 357 (Qld CA).

<sup>43</sup> It might be contended that a mistake about consent to sexual interaction is necessarily grossly

The law of self-defence in most Australian jurisdictions, like the law of negligence, demands that the accused act reasonably. Again, however, the practical threshold of criminal culpability is set at a higher level requiring a breach of minimum standards of ordinary behaviour. In this instance, it has been done indirectly. The current formulation of the common law of self-defence by the High Court of Australia is as follows: 'The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary to do what he did.'<sup>44</sup> The statutory versions of the defence in Queensland, Western Australia and the Northern Territory are more complex, but similar in substance.<sup>45</sup> This traditional form of the defence of self-defence has two basic components. One is the subjective belief of the accused that it was necessary to do what was done. The other is the objective reasonableness of the belief. This will depend on the reasonableness of the accused's assessment of both the danger which was faced and the options available for dealing with it. As with offences of negligence, matters of foresight or insight are in issue and the cognitive capacities of ordinary people must be drawn into the analysis.<sup>46</sup> In order to decide whether the accused's belief was reasonable, a comparison must be made with the belief which was likely to have been formed by an ordinary person in the position of the accused. What danger might have been foreseen? What options for dealing with this danger might have been identified?

Requiring that the assessment of the situation be based on reasonable grounds might suggest that an accused who made a careless mistake about the existence or nature of an attack, or about the options for dealing with it, would be criminally responsible. The standard of reasonable grounds, however, is an odd one to use in judging a person who has to make a quick decision under stress. The courts have recognised this by according a substantial margin of error or leeway in the assessment of what needs to be done. It has been repeatedly stressed that a person apparently under attack cannot be expected to measure the dimensions of the situation to a nicety. For example, in *Zecevic*, it was said: 'No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.'<sup>47</sup> Thus, the issue is not whether someone observing the situation from the side-lines would have formed the same belief as the accused about what it was necessary to do. It is whether this belief was a reasonable one for a person in the situation of the accused, subject to the pressures of the moment and required to make a quick decision. This doctrine will effectively raise the threshold of criminal responsibility, so that a conviction is likely only when the response falls below the range of 'ordinary' reactions to an apparent attack. The test might be more accurately expressed by asking whether the assessment of the situation was one which an ordinary person could have made, rather than by asking whether there were reasonable grounds for it.

The defence of provocation, in its form as a partial excuse for murder, provides the clearest example of an objective test being geared to a minimal standard of ordinary behaviour. The central conditions for the defence at both common law and in most legislated versions are twofold. First, there must be actual loss of self-control by the accused. Secondly, the provocation must be sufficiently grave that it could cause an ordinary person to lose self-control to the extent of doing what the accused did. Australian statutory formulations of the defence use the expression 'ordinary' person rather than 'reasonable' person.<sup>48</sup> The High Court of Australia has indicated

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negligent because the activity focuses the participant's mind and because any uncertainty is easy to resolve. This argument, however, would not apply to possession offences. See the discussion of the differences between these two types of offence in Toni Pickard, 'Culpable Mistakes and Rape' (1980) 30 *University of Toronto Law Journal* 75 at 80-3, 88-9.

<sup>44</sup> *Zecevic v DPP* (1987) 162 CLR 645, 661.

<sup>45</sup> *Criminal Code 1899* (Qld) ss 271-272; *Criminal Code 1913* (WA) ss 248-249; *Criminal Code 1983* (NT) s 27(g). See also *Criminal Code Act 1995* (Cth) s 10.4. See, however, the subjective test under *Criminal Law Consolidation Act 1991* (SA) s 15 and the partly subjective test under *Criminal Code 1924* (Tas) s 46.

<sup>46</sup> The High Court has also indicated that necessity has a normative dimension in the sense that, not only must the response be the only way of averting the danger, but it must be necessary to make this response rather than suffering the attack: see *Zecevic v DPP* (1987) 162 CLR 645, 662-3. This aspect of the law of self-defence raises issues about the volitional rather than the cognitive capacities of ordinary people.

<sup>47</sup> *Ibid.*, 662-3 (Wilson, Dawson and Toohey JJ). See also *Palmer v The Queen* [1971] AC 814, 832 (PC).

<sup>48</sup> See *Crimes Act 1900* (NSW) s 23(2)(b); *Criminal Code 1924* (Tas) s 160(2); *Criminal Code 1983* (NT) s 34(2). See also *Criminal Code* (Can) RSC 1985, c C-46, s 232(2). The expression 'ordinary person' is also used in the definitions of provocation for the purposes of the defence to assault in *Criminal Code 1899* (Qld) s 268; *Criminal Code 1913* (WA) s 245. In England, the statutory formulation of the defence refers to a 'reasonable'

that this is correct as a matter of general principle<sup>49</sup> and has adopted the same position for the common law.<sup>50</sup> In *Stingel*, the High Court observed that a person acting reasonably would never be provoked to kill, so that tying the defence to the idea of loss of self-control by the reasonable person would be to abolish the defence altogether.<sup>51</sup> Whereas, linking it to loss of self-control by an 'ordinary' person makes the defence potentially available for conduct which was 'unreasonable and extraordinary'.<sup>52</sup>

In *Stingel*, the High Court of Australia was faced with the interpretation of s 160(2) of the Tasmanian *Criminal Code*, which requires that the provocation be 'of such a nature as to be sufficient to deprive an ordinary person of the power of self-control'. Not only did the Court stress that the concept of ordinariness includes badly flawed behaviour, it also insisted that the issue was whether the ordinary person *could* have lost self-control; it was not whether the ordinary person would or would be likely to have done so: 'In its context in s 160(2), the phrase "to be sufficient to" should not be construed as meaning "would". It should be construed as meaning "to have the capacity to", "to be capable of" or "could" or "might"'.<sup>53</sup> The statutory defence of provocation in New South Wales refers expressly to conduct which 'could' induce an ordinary person to lose self-control.<sup>54</sup> Similarly, the High Court in *Masciantonio* formulated the common law test in terms of whether the provocation 'could have caused an ordinary person' to intend to kill or cause bodily harm.<sup>55</sup> In Queensland, where the common law provides the objective test for provocation as a defence to murder, it has been held that it is a misdirection to ask what an ordinary person 'might be likely' to have done.<sup>56</sup> Australian law in this respect parallels the law in other jurisdictions.<sup>57</sup>

In its analysis in *Stingel* of the general principles underlying the objective component of the provocation defence, the High Court made it plain that the concern is with no more than the lowest level of self-control which can still be regarded as ordinary.<sup>58</sup> Thus, if an ordinary person could have lost self-control when exercising the power of self-control poorly, it is immaterial that the mass of ordinary people would be likely to have exercised greater self-restraint.

The objective test for provocation is framed differently in some statutory definitions. In the Queensland and Western Australia *Codes*, where the defence is made available for any offence involving assault, the definition requires a 'wrongful act or insult of such a nature as to be *likely*' to deprive an ordinary person of the power of self-control.<sup>59</sup> 'Likely' has been interpreted by the High Court, albeit in another context, to be synonymous with 'probably' and ordinarily to mean that there is 'a substantial - a "real and not remote" - chance regardless of whether it is less or more than fifty per cent'.<sup>60</sup> Ordinary language may even suggest that the outcome should be more likely than not. Substituting 'likely' for 'sufficient' therefore appears to suggest that loss of self-control should at least be expected as a common response to particular provocation. This formulation of the defence invokes the idea of loss of self-control in the context of an average rather than a minimum level of emotional

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person: see *Homicide Act 1957* (Eng) s 3. Nevertheless, the House of Lords has said that 'ordinary' is more appropriate and can be used in jury directions: *R v Morhall* [1996] AC 90, 98.

<sup>49</sup> *Stingel v The Queen* (1990) 171 CLR 312, 327-8.

<sup>50</sup> *Masciantonio v The Queen* (1995) 183 CLR 58, 66.

<sup>51</sup> *Stingel v The Queen* (1990) 171 CLR 312, 327-8.

<sup>52</sup> *Ibid*, 328.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Crimes Act 1900* (NSW) s 23(2)(b).

<sup>55</sup> *Masciantonio v The Queen* (1995) 183 CLR 58, 66, 69.

<sup>56</sup> *Buttigieg* (1993) 69 A Crim R 21, 34 (Qld CA). See also *Romano* (1984) 14 A Crim R 168, 171-2, 178 (SA CCA); *Fricke* (1986) 23 A Crim R 147, 153 (SA CCA). Even after *Stingel*, however, Australian practice has not always been consistent. For example, the report of the jury directions in *Masciantonio* (1993) 69 A Crim R 258, 274 (Vic CCA) indicates that, although the judge several times used the word 'could', 'would' was adopted in one passage: 'Here an objective case is posed for you. Would any ordinary man react in the same way as the accused reacted to the provocation you find was offered him by the deceased?' This formulation of the issue was not one of the grounds of appeal in the case and neither the Victoria Court of Criminal Appeal nor the High Court of Australia made a comment about it. There would, however, be a misdirection on the general principles laid down by *Stingel*.

<sup>57</sup> See eg *Homicide Act 1957* (Eng) s 3, referring to whether the provocation was 'enough'; *Criminal Code*, RSC 1985, c C-46, s 232(2), referring to whether the provocation was 'sufficient'.

<sup>58</sup> *Stingel v The Queen* (1990) 171 CLR 312, 328.

<sup>59</sup> *Criminal Code 1899* (Qld) s 268; *Criminal Code 1913* (WA) s 245. Emphasis added.

<sup>60</sup> *Bouhey v The Queen* (1986) 161 CLR 10, 21.

control. In Queensland, the statutory definition of provocation has been held to apply only for the purposes of the defence to assault and its compounds. When provocation is raised as a defence to murder, the common law supplies the objective test.<sup>61</sup> In Western Australia, however, the statutory definition is held to govern murder as well as assault.<sup>62</sup> Moreover, in the Northern Territory *Code*, it is an express requirement for provocation to be a defence to murder or any other offence that ‘an ordinary person similarly circumstanced *would* have acted in the same or a similar way’.<sup>63</sup>

The appropriateness of these more restrictive formulations of the objective test is bound up with the question of whether provocation should ever be a defence to anything other than murder. One of the reasons why provocation is a particularly problematic defence is that the capacity for emotional control is widely regarded as being more amenable to personal development than are the cognitive capacities. The result is that loss of self-control is usually considered highly culpable, even where self-control could have been lost by an ordinary person. Most jurisdictions have therefore rejected the idea that provocation should be a complete defence to any offence. Moreover, in those jurisdictions which do allow provocation to operate as a defence to assault, very restrictive conditions have been imposed. If the ordinary person could have lost self-control but would not have been ‘likely’ to have done so, then loss of self-control on the part of the accused is taken to be sufficiently culpable to justify a conviction. This is a step back from denying the defence altogether, but only a small one.

Different issues arise where provocation operates as a defence to murder and results in a conviction of manslaughter. In this context, where provocation is functioning only as a partial excuse, the argument for tying the objective test to the minimum level of ordinary self-control is stronger. Where the offence of murder is in issue, the highest levels of penal liability must be justified. There must therefore be the worst culpability. It is not enough that the excused failed to match the standard of self-control which the ordinary person would have been ‘likely’ to have exercised. The accused must have fallen below the minimum self-control which would be conceivable for the ordinary person. This dimension of proportionality is ignored in the position adopted for murder by the Western Australian courts and in the Northern Territory *Code*.

There are also inconsistencies in the formulations of the objective tests for duress (or, under some codes, ‘compulsion’) and necessity (or, under some codes, ‘emergency’). These defences are raised in cases where the elements of an offence are committed in order to avoid some danger. Under the defence of duress, the danger arises from a threat that violence will be inflicted unless the offence is committed whereas, under the defence of necessity, the danger can have any form or source other than a threat. An objective test is usually invoked on the question of whether it was appropriate to avert the danger, at the cost of committing the conduct elements of the offence, rather than submit to it. At issue is the ordinary person’s volitional capacity for fortitude in the face of danger.

There have been wide variations in the standard against which the accused has been measured for these defences by different courts. The standard has ranged from the lowest level of fortitude in ordinary behaviour, through the average, all the way to the very highest. The picture is complicated by different opinions about not only the level of fault appropriate for criminal culpability but also the role to be played by the conditions for the defences. It is sometimes thought that these conditions should specify a standard of fortitude which the ordinary person should strive to achieve rather than accepting the ordinary person’s moral frailties. The objective tests are therefore sometimes expressed normatively, in terms of what could be expected of the ordinary person, rather than predictively, in terms of what the ordinary person would or could do. When the issue is put normatively, it tends to drive up the standard against which the accused is measured. Instead of the debate being over whether the accused is to be judged by reference to a minimum or an average level of ordinary fortitude, it becomes whether the average or the top of the range should be adopted.

The divergences of approach have been particularly glaring in the common law of duress. In Australia, the tests have generally been framed predictively and the debate has been focused on whether a jury should be directed to consider whether an ordinary person *would* have yielded to the threat or *could* have done so. Some decisions have formulated the objective test in terms similar to those used for the defence of provocation, asking whether the ordinary person could or might have done what the accused did. The analogy with provocation was drawn in *Palazoff*, where Cox J of the South Australia Court of Criminal Appeal distinguished between ‘would’, ‘would be likely’ and ‘might’, with a preference for the latter:

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<sup>61</sup> See *R v Johnson* [1964] Qd R 1 (CCA).

<sup>62</sup> See *Roche* (1987) 29 A Crim R 168, 174 (WA CCA).

<sup>63</sup> *Criminal Code 1983* (NT) s 34(1)(d), (2)(d). Emphasis added.

First, as has been pointed out more than once in the analogous situation of provocation and the ordinary man, an ordinary man or reasonable man may well respond in any one of a number of ways in a particular situation. There is often more than one course reasonably open to him. The use of the expression 'would have yielded', without qualification, takes no account of this necessary refinement. Secondly, the use ... of the word 'likely' is unduly restrictive. It seems better to follow in this respect the language of the usual provocation direction. Hence, I conclude, the reference by King CJ in *Brown* (1986) 21 A Crim R 288 at 293 to the question whether 'a person of ordinary firmness of mind and will might have yielded to the threat in the way the accused did'.<sup>64</sup>

The *Palazoff* formulation of duress could permit a defence where a person showing a relatively low level of fortitude chose to yield to a threat. There are, however, other decisions in which the question posed has been whether the ordinary person would have or would be likely to have taken this course of action. This formulation suggests that yielding should be predictable behaviour for the mass of ordinary people functioning at an average level of fortitude. An example is *Abusafiah*, where the New South Wales Court of Criminal Appeal approved a jury direction which had used the word 'would'.<sup>65</sup> The court rejected the analogy with provocation in part because duress is a complete defence, leading to an acquittal.<sup>66</sup> There have been similar variations in terminology in England, although without the courts engaging in debate over the better form.<sup>67</sup>

In defending the use of the word 'would', the court in *Abusafiah* insisted that the objective test for duress has traditionally been conceived as a normative rather than a predictive test: '... what is involved is an evaluation of the behaviour, not a prediction as to the way particular individuals may behave'.<sup>68</sup> This is presumably a reference to the way in which the defence has sometimes been formulated with reference to how an ordinary person could reasonably be expected to behave. For example, in the decision of the English Court of Appeal in *Graham*, Lane LCJ said that the law of duress requires an accused 'to show the steadfastness reasonably to be expected of the ordinary citizen in his situation'.<sup>69</sup> Similarly, the defence of emergency under the Queensland and Western Australia *Codes* incorporates as its objective test: '... such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise'.<sup>70</sup> Framed in this normative way, the objective test communicates a standard towards which the ordinary person should strive rather than reflecting a particular pattern of predictable behaviour.

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<sup>64</sup> *Palazoff* (1986) 23 A Crim R 86, 90-1 (SA CCA).

<sup>65</sup> *R v Abusafiah* (1991) 24 NSWLR 531 (CCA). See also *Runjanjic and Kontinnen* (1991) 53 A Crim R 362, 367 (SA CCA).

<sup>66</sup> *R v Abusafiah*, *ibid*, 541. Another reason given was that duress unlike provocation does not involve loss of emotional self-control. The court did not explain why this is relevant. Presumably, it was assumed that the impairment to volitional capacity is less in situations of duress than in situations of provocation. See below, n 77 and accompanying text.

<sup>67</sup> In the leading English case of *Graham* (1982) 74 Cr App R 235, 241, the test for duress was presented in negative terms: the defence is excluded where a person of reasonable firmness 'would not' have succumbed to the threat. Presumably this means that the defence would be available if such a person could or might have succumbed. This was how the test for necessity was framed in *Cairns* [1999] 2 Cr App R 137, 141: it was said the test was whether a person of reasonable firmness 'may' have done what the accused did. However, the test for duress was formulated differently in *Baker and Ward* [1999] 2 Cr App R 335, 345, and *Martin* [2000] 2 Cr App R 42, 49. In these cases, the test was said to be whether a person of reasonable firmness 'would' have done what the accused did.

<sup>68</sup> *R v Abusafiah* (1991) 24 NSWLR 531, 542 (CCA). Curiously, it was also argued that the distinction between 'would' and 'could' was immaterial because the Crown carries the persuasive burden to eliminate the defence beyond reasonable doubt: *ibid*, 541-2. On this line of reasoning, a large part of the substantive law of criminal responsibility would be redundant.

<sup>69</sup> *Graham* (1982) 74 Cr App R 235, 241. See also *R v Conway* [1989] QB 290, 298 (CA), where the same approach was endorsed for the defence of necessity in the form of 'duress of circumstances'.

<sup>70</sup> *Criminal Code 1899* (Qld) s 25, *Criminal Code 1913* (WA) s 25. In the Northern Territory, the statutory defences of both duress and emergency require that 'an ordinary person similarly circumstanced would have acted in the same or a similar way': *Criminal Code 1983* (NT) ss 33,40. The statutory defences of compulsion or duress in Queensland, Tasmania and Western Australia use detailed prescriptions for the defence rather than a general objective test. The Tasmanian Criminal Code does not include a provision on necessity or emergency, leaving the matter to the common law. The statutory defences of duress and emergency in the Commonwealth Criminal Code require that the conduct be a 'reasonable response': *Criminal Code Act 1995* (Cth). The scope of this provision depends on whether a margin for error will be accepted, in the same way that it has for self-defence: see above, n 47 and

The differences between predictively and normatively phrased defences would diminish if the latter were to be based on the belief that we can only reasonably expect average levels of behaviour. This moderate version of ethics was accepted for South African law in *Goliath*, where Rumpff JA justified allowing duress as a defence to murder in this way: 'In the application of our criminal law, in the cases where the acts of an accused are judged by objective standards, the principle applies that one could never demand more from an accused than that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary average person in the particular circumstances.'<sup>71</sup> An adherent of this view of ethics might well be satisfied with a predictively phrased test which refers to what an ordinary person would do. The difference between the two approaches would, however, widen if it is believed that we can reasonably expect people to rise to the occasion and heed a moral call for heroic behaviour.

The most controversial exposition of an idealistic standard in modern times occurred in *Howe*,<sup>72</sup> where the House of Lords ruled that duress could never be a defence to murder. Lord Hailsham was explicit that the highest standards of behaviour attributable to the 'ordinary person' should dictate the scope of the defence:

I do not at all accept in relation to the defence of duress that it is either good morals, good policy or good law to suggest ... that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in *R v Dudley and Stephens*. But many will not, and I do not believe that as a 'concession to human frailty' (see Smith and Hogan *Criminal Law* (5th edn, 1983) p 215) the former should be exempted from liability to criminal sanctions if they do. I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either 'just or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection on the coward and the poltroon in the name of a 'concession to human frailty'.<sup>73</sup>

Thus, the defence is denied if the ordinary person, functioning at a high level of fortitude, could have *resisted* the threat. It is immaterial that the ordinary person functioning at a lower level of fortitude could have yielded to it or even that the mass of ordinary people would have yielded to it.

The defence of necessity received similar treatment in *Dudley and Stephens*,<sup>74</sup> where the survivors of a shipwreck were adrift in an open boat and two of them killed and ate a third in order to avoid starvation. In denying the defence to the charges of murder, Coleridge LCJ frankly acknowledged that he was imposing an idealistic standard: 'To preserve one's life is generally speaking a duty but it may be the plainest and highest duty to sacrifice it ... We are often compelled to set up standards that we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.'<sup>75</sup> Historical research has shown that homicide for the purposes of 'survival cannibalism' was a not uncommon phenomenon in the eras of sail and exploration.<sup>76</sup> Therefore, the accused persons in *Dudley and Stephens* might have succeeded in their defence if the objective test had referred to the middle or the lower end of the range of ordinary behaviour. The defence disappeared when the accused were measured against the highest standard of ordinary human fortitude.

Running through the law of duress and necessity appears to be a greater readiness to criminalise the lower levels of ordinary performance than is found in most other uses of objective tests. The explanation is unclear. In *Abusafiah*, it appeared to be assumed that no significant impairment of volitional capacity occurs in situations of duress and other emergencies.<sup>77</sup> This is surely wrong. A contrary view is that expressed in a series of decisions of the Supreme Court of Canada which have sought the rationale for the defences of duress and necessity in the idea of 'moral involuntariness'. This is said to refer to a state in which there is no effective freedom of choice because

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accompanying text.

<sup>71</sup> *Goliath* 1972 (3) SA 1 (A), trans. John Milton and Jonathon Burchell, *Cases and Materials on Criminal Law* (1992), 110.

<sup>72</sup> *R v Howe* [1987] AC 417 (HL).

<sup>73</sup> *Ibid*, 432.

<sup>74</sup> *R v Dudley and Stephens* (1884) 14 QBD 273.

<sup>75</sup> *Ibid*, 287-8.

<sup>76</sup> See Brian Simpson, *Cannibalism and the Common Law* (1984).

<sup>77</sup> *R v Abusafiah* (1991) 24 NSWLR 531, 541 (CCA): 'His act can be said to be induced by the threat ... only in the most general sense; there is no loss of self-control.'

a particular course of conduct is 'remorselessly compelled by normal human instincts'.<sup>78</sup> Another explanation for criminalising poor performance might be an assumption that volitional powers are generally easier to develop and use fully than are cognitive powers, so that greater culpability attaches to failure to exercise them well. Provocation as a defence to murder would then be an exceptional case in which a concession for human frailty is made only because there will still be a conviction for manslaughter. There would be no concession to frailty in cases of duress or necessity where a complete acquittal is sought; nor for provocation where it operates as a complete defence to assault. Yet, even if we have high expectations for the development and use of volitional powers, there must be considerable sympathy for the predicament of persons caught in extraordinary situations of duress or necessity.

In the absence of compelling arguments to the contrary, it would surely be better to adopt the same general level of performance whichever capacities and defences are in issue. The model of criminal negligence should be adopted as a general framework for objective criminal culpability, with the threshold of criminal liability being failure to match the minimum of ordinary behaviour or a wide departure from any higher standard. Even if this view is rejected, the standard should be that of an average rather than an idealistic level of fortitude. As it was observed in a recent decision of the Supreme Court of Canada respecting duress: 'The law is designed for the common man, not a community of saints or heroes.'<sup>79</sup>

#### 4. DIFFERENCES BETWEEN PEOPLE

Criminal law has traditionally ignored the differences between people in favour of a uniform standard of comparison, against which all accused persons are measured. Under the uniform model, no attention is paid to what might be regarded as ordinary or reasonable behaviour for the particular accused, given her or his own capacities, or even to what might be regarded as ordinary or reasonable for persons like the accused, sharing characteristics such as age, sex, education and mental health. Admittedly, there has been ready acceptance in modern times of the need to contextualise objective tests, so that the ordinary person is not an external observer of the situation but is in the position of the accused, exposed to the same information and subject to the same pressures.<sup>80</sup> For the purposes of the criminal law, however, the ordinary person has traditionally responded to this situation with a uniform set of capacities. Thus, although *contextualisation* of the accused's predicament has been accepted, there has been reluctance to embrace *personalisation* or *individualisation* of the capacities against which the accused is judged. There are some indications of movement away from the uniform model towards more flexible objective tests which take account of the characteristics of the accused, particularly in relation to exculpatory defences.<sup>81</sup> As yet, however, the uniform model has not been wholly supplanted.

A notorious example of the rigidity of objective tests is the English case of *Elliot v C*.<sup>82</sup> The charge was arson of a shed. The accused had set fire to some material within the shed and the shed had burned as a result. Under English law, the offence of arson of the shed could be committed through an objective form of 'recklessness', if the risk of the fire spreading would have been obvious if any thought had been given to the matter.<sup>83</sup> The

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<sup>78</sup> *R v Perka* [1984] 2 SCR 232, 249. See also *R v Hibbert* [1995] 2 SCR 973, 1017-8; *R v Ruzic* [2001] SCC 24, paras 27-47. The analysis and terminology are taken from George Fletcher, *Rethinking Criminal Law* (1978), 802-5.

<sup>79</sup> *R v Ruzic* [2001] SCC 24, para 40 (Lebel J).

<sup>80</sup> See eg *R v Camplin* [1978] AC 705, 717 (HL); *Viro v The Queen* (1978) 141 CLR 88, 146; *R v Lavallee* [1990] 1 SCR 852, 883; *Stingel v The Queen* (1990) 171 CLR 312, 325-6; *R v Creighton* [1993] 3 SCR 3, 71.

<sup>81</sup> A complete contrast to the uniform model is found in *Criminal Code 1995* (Qld), which has not been proclaimed and now appears to have been abandoned. Section 85 provides:

'(1) This section applies for-

(a) this division; and

(b) any other provision of the Code under which the criminal responsibility of a person for doing an act in particular circumstances is decided by comparison with the conduct of an ordinary person in those circumstances.

(2) The characteristics of the person that are included in the characteristics of the ordinary person are not limited to the person's age.

(3) The characteristics of the person included in the characteristics of the ordinary person include, for example, a person's race, ethnic background and gender.'

<sup>82</sup> *Elliot v C* (1983) 77 Cr App R 103 (Div Ct).

<sup>83</sup> See *R v Caldwell* [1982] AC 341 (HL).



accused was a 14 year-old girl, of low intelligence and exhausted after a night without sleep. The magistrate acquitted her on the ground that, given her age, experience and condition, the risk of the fire spreading to the shed would not have been obvious to her even if she had given thought to the potential consequences of her conduct. The Divisional Court, however, allowed an appeal and entered a conviction. The court ruled that the risk of the fire spreading would have been obvious to a 'reasonably prudent person' and that it was immaterial that the appellant was not such a person. *Elliot v C* is often read as insisting upon the application of a uniform objective standard even in cases where the accused was incapable of achieving it and not just in cases where the standard was a difficult one.<sup>84</sup> Against this reading, some commentators have objected that the issue before the court was whether the risk *would* have been obvious to a person who gave any thought to the matter; it was not whether it *could* have been foreseen.<sup>85</sup> Thus, the original acquittal did not rest upon a finding that foreseeing the risk was beyond the capacity of the girl. Nevertheless, no reservation was expressed in the judgments overturning the acquittal about the position of an accused who was incapable of meeting a standard.

In the law of torts, objective standards of care are adjusted to allow for the youth of a person.<sup>86</sup> It might be expected that criminal law, untrammelled by concerns about the distribution of accident losses, would allow greater flexibility in the use of objective tests for negligence or recklessness. Yet, the trend has been in the opposite direction. There have been several modern statements by judges of appellate tribunals denying that objective standards of care in criminal law are to be set by reference to age or any other personal characteristics of the accused which could make it difficult to comply with the standard. In *Stephen Malcolm R*, the English Court of Appeal confirmed that the test for objective recklessness, that is, whether a risk would be obvious to a reasonably prudent person, is not to be qualified for the age of a young accused.<sup>87</sup> In *Tutton*, Wilson J spoke with the concurrence of half of the Supreme Court of Canada when she insisted that criminal negligence should be based on a uniform standard of care, regardless of a person's age, intelligence or education:

For example, an instruction to the trier of fact that they are to hold a young accused with moderate intelligence and little education to a standard of conduct that one would expect from the reasonable person of tender years, modest intelligence and little education sets out a fluctuating standard which in my view undermines the principles of equality and individual responsibility which should pervade the criminal law.<sup>88</sup>

Similarly, the High Court of Australia has observed: 'The test of criminal negligence giving rise to involuntary manslaughter is ... entirely objective, taking no account of the age of the accused.'<sup>89</sup> In South Africa, the rigidity of the objective test for negligence has been given as a reason why subjective mens rea should be implied for certain offences.<sup>90</sup>

There have been some recent signs of a limited shift in judicial thinking in order to accommodate the special position of persons who are wholly incapable of meeting uniform standards of care, no matter how hard they try. There have been some comments from judges of the House of Lords signaling that objective tests might need to be modified in cases where incapacity is in issue.<sup>91</sup> It was, however, in the Canadian case of *Creighton* that the

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<sup>84</sup> See J C Smith and Brian Hogan, *Criminal Law* (9th ed, 1999, Sir John Smith), 64-5.

<sup>85</sup> See Stewart Field and Mervyn Lynn, 'The Capacity for Recklessness' (1992) 12 *Legal Studies* 74, 79-85.

<sup>86</sup> See eg *McHale v Watson* (1966) 115 CLR 199. See also John Fleming, *The Law of Torts* (9th ed, 1998), 126: '... there is no doubt that a child, whether as plaintiff or defendant, is at most expected to conform to the standard appropriate for normal children of similar age, intelligence and experience'. Fleming notes an exception for children who engage in 'dangerous adult activities' such as driving a car. In his view, such exceptions are justified because of the opportunities for loss distribution through insurance: *ibid*, 127.

<sup>87</sup> *Stephen Malcolm R* (1984) 79 Cr App R 334 (CA).

<sup>88</sup> *R v Tutton* [1989] 1 SCR 1392, 1417-8. See also *R v Naglik* [1993] 3 SCR 122, where a mother had been charged with failing to provide her child with the necessities of life and it was held that, in determining whether there was a marked departure from the standard of care of the reasonable parent, the mother's youth, inexperience and lack of education were immaterial.

<sup>89</sup> *Stingel v The Queen* (1990) 171 CLR 312, 330.

<sup>90</sup> See *AG Natal v Ndlovu* 1988 (1) SA 905 (A). See also the argument of Wilson J in *R v Tutton* [1989] 1 SCR 1392, 1417-9, as to why the mens rea for criminal negligence causing death or bodily harm should be subjective rather than objective.

<sup>91</sup> See *R v Reid* [1992] 3 All ER 673, 675, 691. The case endorsed the established view that the mens rea for the English offence of reckless driving is objective rather than subjective. In the body of the

most extensive examination of the issue occurred.<sup>92</sup> In *Creighton*, the Supreme Court of Canada accepted that, in order to protect 'the morally innocent', the objective test for criminal negligence must be adapted to fit the personal characteristics of an accused who was incapable of meeting the uniform standard. This was seen as a requirement of fundamental justice, and therefore as an entrenched constitutional requirement within the guarantee of fundamental justice in s 7 of the Canadian Charter of Rights and Freedoms.<sup>93</sup> Nevertheless, a narrow majority of the Court rejected the idea of any more extensive personalisation. Incapacity was ruled to be the only condition for drawing personal characteristics into objective tests. Speaking for the majority, McLachlin J said:

In my view, considerations of principle and policy dictate the maintenance of a single, uniform legal standard of care for such offences, subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails.

This principle that criminal law will not convict the morally innocent does not, in my view, require consideration of personal factors short of incapacity ...

In summary, I can find no support in criminal theory for the conclusion that the protection of the morally innocent requires a general consideration of individual excusing conditions. The principle comes into play only at the point where the person is shown to lack the capacity to appreciate the nature and quality or the consequences of his or her acts. Apart from this, we are all, rich and poor, wise and naive, held to the minimum standards of conduct prescribed by the criminal law.<sup>94</sup>

Experience, education and mental disability were expressly rejected as factors which could modify the objective test for criminal negligence.<sup>95</sup>

Little sympathy was exhibited by the majority in *Creighton* for the position of persons merely facing difficulties in, rather than being incapable of, meeting uniform standards. The view of McLachlin J was that persons with deficiencies should stay away from situations in which they could put others at risk.<sup>96</sup> Presumably, if this were not possible, they would just be expected to try especially hard in order to ensure that they met the standard. Neither of these responses to the problem is necessarily objectionable from a moral standpoint. Even where criminal liability is at stake, the responses have some attraction for cases where persons with impaired capacities can be held responsible for their own condition. Yet, they constitute weak justifications for holding persons generally liable for failing to meet standards which were difficult for them to attain.

For exculpatory defences, the courts have become more accommodating towards differences between the capacities of individuals, although the field is still in a state of flux. The leading authorities have concerned the defence of provocation. The standard formulations of the objective test for provocation have referred to an ordinary person of the age, or the age and sex, of the accused but have made no allowance for other personal characteristics. English authority to this effect has been followed in Australia, Canada and New Zealand.<sup>97</sup> It is at least well established everywhere that, in a case involving a

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judgments, brief comments were made acknowledging that the objective test might need to be modified for cases in which the capacity of the accused to appreciate the rules of conduct had been impaired. Subsequently, the English Court of Appeal has insisted that modification will not be contemplated in the absence of 'abnormality', and that it is immaterial that an accused has 'low average intelligence': *Coles* [1994] *Crim Law Review* 820.

<sup>92</sup> *R v Creighton* [1993] 3 SCR 3.

<sup>93</sup> Above, n 29. The provision has been held to require that any offence carrying liability to deprivation of liberty have a fault element which is in accordance with the principles of fundamental justice. See *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

<sup>94</sup> *R v Creighton* [1993] 3 SCR 3, 61-3.

<sup>95</sup> *Ibid*, 68-70. Superior abilities were also said to be immaterial: *ibid*, 73. The person who has special advantages is required only to meet the standards set for everyone else.

<sup>96</sup> *Ibid*, 66.

<sup>97</sup> See *R v Camplin* [1978] AC 705 (HL); *R v Hill* [1986] 1 SCR 313; *Stingel v The Queen* (1990) 171 CLR 312; *R v Thibert* (1996) 104 CCC (3d) 1 (SCC). There is no limit to the characteristics which can be taken into account when the gravity of provocation is assessed rather than the expected power of self-control. The distinction has not always been clearly maintained: see e.g. *R v Hill*, *ibid*, 331-2. The distinction was more clearly maintained in *Stingel* and in *Luc Thiet Thuan v The Queen* [1997] AC 131 (PC). In England, the significance of the distinction has diminished since the law on the expected power

young person, the relevant ordinary person has the power of self-control of an ordinary person of the chronological age of the accused.<sup>98</sup> This exception to the uniform standard has been justified on the grounds of either compassion towards the disabilities of youth or the 'ordinariness' of the prolonged development from childhood to maturity.<sup>99</sup> The House of Lords and the Supreme Court of Canada have also said that objective powers of self-control may be particularised for the sex of the accused<sup>100</sup> but the High Court of Australia has expressly disagreed.<sup>101</sup>

Although the High Court of Australia has insisted on a uniform test for provocation (except for the variable of age), it has advocated taking account of the differences between people through the way the uniform test is formulated. In *Stingel*, the High Court said that, for the purposes of the provocation defence, variations in the powers of self-control of different people should be reflected in the limits of what is characterised as ordinary: 'The lowest level of self-control which falls within those limits or that range is required of all members of the community.'<sup>102</sup> It was earlier noted that the objective test for provocation at common law and under some statutes requires only that the provocation *could* cause an ordinary person to lose self-control.<sup>103</sup> Thus, although the provocation rules in Australia impose a uniform standard of self-control, that standard expresses no more than the poorest self-control of the person with the weakest capacity for self-control, within the limits of what can still be regarded as 'ordinary'. It would be a rare occasion in which anyone would have such great difficulties in meeting this standard that it would be unjust to impose criminal liability for failing to do so. The position taken by the High Court therefore goes some way to assist those with below average capacities. It does not, however, eliminate the problem. First, a special standard may still need to be adopted for a person who was wholly incapable of meeting the uniform standard. Secondly, some persons who could conceivably achieve the standard may still experience such difficulty in doing so that it would be unjust to respond to their failures with convictions entailing heavy measures of penal liability. There has been some debate in Australia about the significance of ethnicity in this respect.<sup>104</sup> In *Masciantonio*, McHugh J of the High Court made a plea for the ordinary person to have the ethnicity or race as well as the gender of the accused.<sup>105</sup> This position, however, found no support among the rest of the High Court. Even if a flexible objective test for provocation were to be adopted, caution might be appropriate in responding to claims for ethnic differences in powers of self-control.

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of self-control was revised in *R v Smith* [2000] 4 All ER 289 (HL). See the discussion accompanying n 107.

<sup>98</sup> In *Curzon* (2000) 114 A Crim R 472 (Vic CA), where the accused was mentally impaired, the prosecution had acquiesced in the substitution of psychological maturity for chronological age. In the course of an appeal on another matter, Chernov JA observed, 480: 'It may be a humane and practical concession in the circumstances of the case but the principle of equality before the law, as explained by the High Court in the cases on provocation, casts doubt on whether it is technically correct.'

<sup>99</sup> See eg *R v Camplin* [1978] AC 705, 717-8; *Stingel v The Queen* (1990) 171 CLR 312, 329-30.

<sup>100</sup> *R v Camplin* [1978] AC 705, 718; *R v Thibert* (1996) 104 CCC (3d) 1, 10.

<sup>101</sup> *Stingel v The Queen* (1990) 171 CLR 312, 331.

<sup>102</sup> *Ibid*, 329.

<sup>103</sup> Above, text accompanying n 53.

<sup>104</sup> Apart from the general debate about ethnicity, there has also been some debate in Australia over whether the relatively rigid position adopted by the High Court for the provocation defence is compatible with cases from the Northern Territory involving accused persons from remote Aboriginal communities. There is a well-established tradition in such cases of referring to the power of self-control of an ordinary person from such communities, possessing their distinctive cultural characteristics: see, for example, *Mungatopi* (1991) 57 A Crim R 341 (NT CCA). If these cases can be reconciled, it may be on the basis that the ordinary person must be conceived with respect to a particular community and that, in the case of remote Aboriginal communities, the relevant community is the Aboriginal one rather than the wider Australian community. The differentiating factor would then be the geographical and cultural isolation of the communities inhabited by some accused persons, rather than race itself. Read in this way, the cases on remote Aboriginal communities present little challenge to the uniform model for objective tests.

<sup>105</sup> *Masciantonio v The Queen* (1995) 183 CLR 58, 73-4. McHugh J drew his inspiration from the arguments presented in Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 11-13. Part of these arguments were subsequently renounced in Stanley Yeo, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304. See also Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Crim Law Journal* 65; Michael Detmold, 'Provocation to Murder: Sovereignty to Multiculture' (1997) 19 *Sydney Law Review* 5.

There is a danger of negative stereotypes intruding. Provocation cases in which a uniform standard might cause injustice are perhaps more likely to involve mental disorder.

The relevance of mental disorder for the defence of provocation was rejected by the Privy Council in *Luc Thiet Thuan*. In that case, it was said to be immaterial that mental disorder had reduced powers of self-control below what could be expected of the ordinary person.<sup>106</sup> That position has, however, now been repudiated by a majority of the House of Lords in *Smith*,<sup>107</sup> in a decision which has wider significance for the design of objective tests.

*Smith* was a case of mental disorder in which it was alleged that serious clinical depression had reduced the accused's capacity to refrain from acting violently. The issue was whether the jury could take this into account in measuring the accused's loss of self-control against an objective standard. A majority of the House of Lords said that it could be taken into account. Their reasoning presented a broad challenge to the uniform model for objective tests in light of principles of justice. They argued that the point of the objective test for provocation is simply to demand that the accused exercise reasonable self-control, given any characteristics of the particular accused which might affect the power of self-control to be expected of that accused. Some characteristics are not to be taken into account because they should be controlled or because they were self-induced. However, justice requires taking account of mental disorder and also of other characteristics for which the accused cannot be blamed. Lord Hoffman said:

The general principle is that the same standards of behaviour are expected of everyone, regardless of their individual psychological make-up. In most cases, nothing more will need to be said. But the jury should in an appropriate case be told, in whatever language will best convey the distinction, that this is a principle and not a rigid rule. It may sometimes have to yield to a more important principle, which is to do justice in the particular case. So the jury may think that there was some characteristic of the accused, whether permanent or temporary, which affected the degree of control which society could reasonably have expected of him and which it would be unjust not to take into account. If the jury take this view, they are at liberty to give effect to it.<sup>108</sup>

No distinction was drawn in *Smith* between difficulties in meeting the regular standard of self-control and incapacity to meet this standard.<sup>109</sup> Presumably it would be a matter for the jury to decide whether a handicap less than incapacity was sufficiently great to merit an adjustment to the standard.

The approach taken by the House of Lords in *Smith* marks a change of direction from earlier authorities on the objective test for provocation.<sup>110</sup> Its reasoning would presumably apply to the objective tests for all exculpatory defences, including self-defence, duress and necessity. The English Court of Appeal had previously adopted a similar flexible model for duress. The objective question for duress was said to be whether 'a person of reasonable firmness, sharing the characteristics of the defendant' could or would have succumbed to the threat.<sup>111</sup> More colloquially, reference has been made to a person of reasonable firmness 'of a sort similar to the defendant'.<sup>112</sup> The governing principles were reviewed in *Bowen*.<sup>113</sup> It was stressed there that the objective

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<sup>106</sup> *Luc Thiet Thuan v The Queen* [1997] AC 131, 144-6 (PC).

<sup>107</sup> *R v Smith* [2000] 4 All ER 289 (HL).

<sup>108</sup> *Ibid*, 313. See also Lord Clyde, 318: 'It seems to me that the standard of reasonableness in this context should refer to a person exercising the ordinary power of self-control over his passions which someone in his position is able to exercise and is expected by society to exercise. By position I mean to include all the characteristics which the particular individual possesses and which may in the circumstances bear on his power of control other than those influences which have been self-induced.'

<sup>109</sup> Lord Clyde commented, 316, that it would be unjust to measure people against standards they are incapable of attaining. There was no indication, however, that the reasoning in the case was intended to be limited to the problem of incapacity. Elsewhere, 318, he referred to reduction of the capacity for self-control rather than to elimination of this capacity.

<sup>110</sup> See the cases cited above, n 97. Commonwealth courts have generally followed the authority of the House of Lords in *R v Camplin* [1978] AC 705. The majority in *Smith* claimed that *Camplin* had been misunderstood, but this seems doubtful.

<sup>111</sup> See especially *Graham* (1982) 74 Cr App R 235, 241. On the usage of 'could' and 'would' in the test, see above, text accompanying n 64.

<sup>112</sup> *Baker and Ward* [1999] 2 Cr App R 335, 345.

standard should be varied only for an accused falling within 'a category of persons who the jury may think less able to resist pressure than people not within that category'.<sup>114</sup> Examples of characteristics which might affect the standard were said to be young age, possibly sex, pregnancy and mental disorder. The particular characteristic in issue in *Bowen* itself was low intelligence. The Court of Appeal summarily dismissed the argument that this should have been incorporated in the instructions to the jury, on the ground that low intelligence does not ordinarily affect fortitude.<sup>115</sup> More generally, it was observed that characteristics arising from 'self-induced abuse', such as the consumption of intoxicating substances, should be excluded. It was also stressed that mere personal timidity or susceptibility would not justify any variation in the standard. Presumably, these are deficiencies which, it is believed, can and should be overcome. The point of a flexible standard is to make allowance for handicaps for which the person cannot be held responsible. This qualification was reiterated in *Smith*.<sup>116</sup>

Flexible objective tests for self-defence, duress and necessity have also become well established in Canada, although neither for provocation nor for criminal negligence. The breakthrough in Canada occurred in *Hibbert*, where it was decided that the 'reasonableness' requirements in self-defence, duress and necessity should all operate on the same flexible basis.<sup>117</sup> It was said: 'the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused'.<sup>118</sup>

For self-defence, duress and necessity, the Supreme Court of Canada now speaks of a 'modified objective test' or an 'objective-subjective standard'. In *Latimer*, where the issue was necessity, the Court described how a modified objective test differs from, on the one hand a fully objective test and, on the other, a subjective test: 'A modified objective test falls somewhere between the two. It involves an objective evaluation, but one that takes into account the situation and characteristics of the particular accused person.'<sup>119</sup> In *Ruzic*, where the issue was duress, the Court preferred to speak of an 'objective-subjective standard':

The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics.<sup>120</sup>

The various statements in *Hibbert*, *Latimer* and *Ruzic* make it clear that the modified objective test does not just put the ordinary or reasonable person in the context of the accused. The objective test is personalized: the cognitive and volitional powers of the accused are incorporated in the standard against which the accused is measured.

In *Hibbert*, Lamer CJ sought support for more flexible objective tests from the previous decision of the Supreme Court of Canada in *Lavallee*.<sup>121</sup> *Lavallee* has been the leading Commonwealth authority on the relevance of the psychological effects of prolonged abuse in domestic relationships (sometimes called 'the battered woman syndrome') to exculpatory defences. The issue in the case was the admissibility of psychiatric evidence about the battered woman syndrome in relation to a defence of self-defence for killing the abuser. The relevant objective test was that the accused was required to have had a reasonable apprehension of death or grievous bodily harm and a reasonable belief that the only way of preserving herself was by causing death or grievous bodily harm to her attacker.<sup>122</sup> The case was problematic because, although the deceased had threatened to kill the accused

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<sup>113</sup> *Bowen* [1996] 2 Cr App R 157, 166-7.

<sup>114</sup> *Ibid*, 166.

<sup>115</sup> The decision in *Bowen* has been criticised by Smith on the ground that low intelligence might affect the ability to take evasive action, such as seeking the protection of the police: J C Smith and Brian Hogan, *Criminal Law* (9th ed, 1999, Sir John Smith), 240. The Court of Appeal seems to have focused exclusively upon the issue of volitional capacity. While this may be the paramount concern in cases of duress, Smith's criticism draws attention to how the exercise of volitional capacity may depend upon what options are perceived, so that cognitive handicaps may become relevant to the analysis.

<sup>116</sup> *R v Smith* [2000] 4 All ER 289, 312, 318.

<sup>117</sup> *R v Hibbert* [1995] 2 SCR 973, 1021 (Lamer CJ).

<sup>118</sup> *Ibid*.

<sup>119</sup> *R v Latimer* [2001] SCC 1, para 32.

<sup>120</sup> *R v Ruzic* [2001] SCC 24, para 61 (LeBel J).

<sup>121</sup> *R v Lavallee* [1990] 1 SCR 852.

<sup>122</sup> *Criminal Code* (Can), RSC 1985, c C-46, s 34(2).

later, she shot him in the back of the head as he walked out of their bedroom. Psychiatric evidence about the battered woman syndrome was admitted at trial and the accused was acquitted.

In upholding the acquittal, Wilson J of the Supreme Court of Canada treated the psychiatric evidence as being relevant for assessing the reasonableness of both the apprehension of danger and the belief about how it could be averted. With respect with the apprehension of danger, *Lavallee* is a case on the contextualisation of objective tests rather than on their personalisation. The issue was simply whether the accused's apprehension was reasonable in the context of the relationship. It was an example of the well established principle that the ordinary person in an objective test is not an external observer of the situation but is in the position of the accused, exposed to the same background information.<sup>123</sup> This kind of contextualisation of objective tests does not involve varying the cognitive or volitional capacities of the ordinary person with whom the accused is compared.

Personalisation of objective tests came into play in *Lavallee* when Wilson J was explaining why the psychiatric testimony was relevant to the issue of whether it was reasonable for the accused to believe that she could only preserve herself by killing her abuser. The psychiatric evidence in the case agreed with some literature on abusive relationships in describing how victims can become dependent on their abusers and have difficulty fending for themselves. Wilson J adopted the term 'learned helplessness' from the literature.<sup>124</sup> Wilson J treated this information as being relevant not only to the question of whether the accused honestly believed that there was no alternative to homicide but also on the question of whether the belief was reasonable:

If, after hearing the evidence (including the expert testimony), the jury is satisfied that the accused had a reasonable apprehension of death or grievous bodily harm and felt incapable of escape, it must ask itself what the 'reasonable person' would do in such situation .... I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust that night except by killing him first was reasonable.<sup>125</sup>

What the jury is being asked to consider here is how a person whose cognitive capacities have been affected by prolonged abuse might respond to the apprehension of danger. The question of what it would be reasonable for an accused to believe about the available options is determined by reference to what it might be reasonable for a person who has suffered prolonged abuse to believe. No distinction was drawn between destruction and impairment of cognitive capacities.<sup>126</sup> There was no signal that the psychological effects of prolonged abuse would be taken into account only when the result was total incapacity to reach a normal appreciation of what options were available.

*Lavallee* has been a widely influential decision on how objective tests should take account of the psychological effects of abusive relationships. Its analysis has been followed in other jurisdictions and applied to duress and provocation as well as to self-defence.<sup>127</sup> The cases on abusive relationships have generally ignored the wider debate about the personalisation of objective tests. The link was made, however, in *Hibbert*. In that case, Lamer CJ presented his flexible approach to formulating objective tests as a logical progression from the decision in *Lavallee*.<sup>128</sup> Curiously, the Supreme Court of Canada has not extended the same flexibility to provocation.<sup>129</sup> It is, however, difficult to see why that particular defence should be subject to more rigid requirements. The reasoning of the House of Lords in *Smith* presents a compelling argument for personalising the objective test for

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<sup>123</sup> See above, n 80 and accompanying text. The psychiatric evidence was relevant because the words spoken by the deceased might not be sufficient by themselves to raise a reasonable apprehension of death or grievous bodily harm being inflicted. Whereas, the words might appear far more serious if viewed in the context of a relationship involving cycles of escalating violence. Although the abused person would have personal knowledge of that context, a trier of fact might not. The innovation in this part of *Lavallee* was the recognition that expert testimony may help the trier of fact to appreciate how cycles of violence operate in abusive relationships. Otherwise, there is nothing radical in this part of the reasoning.

<sup>124</sup> *R v Lavallee* [1990] 1 SCR 852, 886.

<sup>125</sup> *Ibid*, 889.

<sup>126</sup> In closely proximate passages, Wilson J referred at one point to impairment of a woman's ability to leave a battering relationship and at another point to inability to leave: *ibid*, 887,888.

<sup>127</sup> See eg *Runjanjic and Kontinnen* (1991) 53 A Crim R 362, 373 (SA CCA); *R v Oakes* [1995] 2 NZLR 673; *Osland v The Queen* (1998) 197 CLR 316, 335-8, 370-8.

<sup>128</sup> *R v Hibbert* [1995] 2 SCR 973, 1021.

<sup>129</sup> Six months after *Hibbert*, the traditional, relatively restrictive formulation of the objective test for provocation was reaffirmed by the Supreme Court of Canada in *R v Thibert* (1996) 104 CCC (3d) 1.

provocation in the same way that the Supreme Court of Canada has accepted for self-defence, duress and necessity.

Is there any good reason for moving to a flexible model for exculpatory defences but retaining the uniform model for criminal negligence? Prior to *Hibbert*, Lamer CJ had led a minority of the Supreme Court of Canada in arguing that the flexible model should be adopted for criminal negligence. In *Tutton*, he called for ‘“a generous” allowance for factors which are particular to the accused, such as youth, mental development, education’, although the generosity was to stop at factors like intoxication for which accused could be held responsible.<sup>130</sup> The merits of this approach were reaffirmed by a minority of the Supreme Court in *Creighton*.<sup>131</sup> Flexibility was rejected by the majority in *Creighton*. In *Hibbert*, however, Lamer CJ had the backing of the whole Supreme Court when he endorsed the flexible model for exculpatory defences. The price of unanimous concurrence was an explanation of why the flexible model was better suited to exculpatory defences than to criminal negligence. Lamer CJ argued that negligence-based offences are concerned with the consequences of choosing to engage in inherently hazardous activities whereas excuse-based defences are concerned with situations where there was realistically no alternative course of action.<sup>132</sup> Presumably the claim is that the handicapped accused should have stayed away from the activity which led to the charge of criminal negligence whereas the handicapped person who claims an exculpatory defence can be absolved of all responsibility for the predicament which was faced. Yet, although some cases may fit this picture, others do not. Persons who claim self-defence, duress or necessity could often have avoided the situations in which a need for drastic action became apparent. Conversely, charges of criminal negligence sometimes arise from problematic responses to emergencies arising in the context of everyday activities. Even in the absence of an emergency, it is surely simplistic to assume that it would always be easy to avoid hazardous activities. For example, while foregoing driving vehicles may be easy for an urban dweller in a city with good public transport, it may present major problems for an inhabitant of a rural area. If flexible objective tests are appropriate for exculpatory defences, they are also appropriate for criminal negligence. And if they are rejected for criminal negligence, they should also be rejected for exculpatory defences.

The reason most commonly given for opposing personalisation of objective tests is that it would undermine the principle of equality under the law. It would lower the standard of conduct expected of some people in comparison with others. This rationale has been most forcefully articulated by Wilson J of the Supreme Court of Canada. In *Hill*, she said:

The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard ... It is evident that any deviation from this objective standard against which an accused’s level of self-control is measured necessarily introduces an element of inequality in the way in which actions of different persons are evaluated and must therefore be avoided if the underlying principle that all persons are equally responsible for their actions is to be maintained.<sup>133</sup>

This reasoning was endorsed by the High Court of Australia in *Stingel*.<sup>134</sup> Both *Hill* and *Stingel* were cases on provocation. In *Tutton*, Wilson J made the same argument with respect to negligence, insisting that one standard should be applied regardless of a person’s intelligence, education and even age.<sup>135</sup>

There are, however, different forms of equality. In the conception developed in *Hill*, *Stingel* and *Tutton*, equality is taken to require that the same standard of conduct applies to everyone and that there is equal responsibility for failure to meet this standard. This is, however, a principle of formal equality which, because it ignores differences in capacities to meet the standard, generates substantive inequalities in liability to criminal conviction.<sup>136</sup> Substantive equality under the criminal law requires that the pattern of convictions corresponds to

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<sup>130</sup> *R v Tutton* [1989] 1 SCR 1392, 1434.

<sup>131</sup> *R v Creighton* [1993] 3 SCR 1, 25-33. See also *R v Gosset* [1993] 3 SCR 76, 93-8.

<sup>132</sup> *R v Hibbert* [1995] 2 SCR 973, 1022.

<sup>133</sup> *R v Hill* [1986] 1 SCR 313, 343-4.

<sup>134</sup> *Stingel v The Queen* (1990) 171 CLR 312, 324.

<sup>135</sup> See above, n 88 and accompanying text.

<sup>136</sup> The point that equality has different meanings was acknowledged but not explored in Ian Leader-Elliott, ‘Sex, Race and Provocation: In Defence of Stingel’ (1996) 20 *Crim Law Journal* 65, 88. Leader-Elliott’s defence of *Stingel* appears to rest upon the principle of formal equality.

patterns of culpability as well as conduct. This correspondence is violated if a person's likelihood of conviction increases simply because that person is handicapped with respect to the attainment of a standard.<sup>137</sup>

Another possible line of defence for uniform objective tests would be to stress the demands of protecting the community over those of making appropriate determinations of culpability. It might be argued that concerns about appropriate levels of protection are just as important an underpinning for the law of criminal responsibility as are concerns about appropriate determinations of culpability, and that sometimes the former should take priority over the latter. From this perspective, fears might be raised about the dangers presented by persons with poor cognitive or volitional powers. It might be contended that, as long as the capacity to meet uniform standards is present, everyone should be held criminally responsible for failure to attain them, regardless of any handicaps making them difficult standards. The minimum requirement of some fault would be present because the standards were within reach. Concerns about preventing dangerous behaviour should then take priority over concerns about the finer gradations of culpability.

Concerns about social protection are more likely to be raised with respect to provocation than with respect to negligence, self-defence, duress or necessity. Situations of duress and necessity are so rare that we can discount any dangers for the future presented by accused persons with abnormally low capacities for fortitude. Cases of negligence and self-defence, where the capacities for foresight or insight are in issue, arise more frequently. Yet, it is only in very extreme cases that a person who is cognitively impaired is considered dangerous. The insanity rules will cover some of these cases, where a relevant form of mental incapacity can be established. In contrast, a person who is prone to lose self-control when provoked is widely considered to be dangerous. It may therefore seem that a uniform standard should be adopted for the provocation defence in order to protect the community.

This conclusion should be resisted. The fear of abnormally short-tempered persons being acquitted is largely unfounded. A cognitive or volitional deficiency is immaterial if the accused was responsible for it. It is widely believed that short temper is an indulgence and that deficiencies in the capacity for self-control can be removed or reduced by the person affected. In most cases, therefore, a claim for an abnormally short temper will be easily discounted. Such a claim will have substance only when it can be linked to a mental disorder, as in *Smith*.<sup>138</sup> Furthermore, in most jurisdictions, a provocation defence operates as no more than a partial excuse reducing the offence from murder to manslaughter. Someone who managed to escape a murder conviction because allowance was made for a short temper would still be subject to the coercive power of the state. Indeed, any case in which a manslaughter conviction did not suffice would be so far removed from the focal concerns of the criminal law that a conviction of any traditional offence would be misleading. The issues raised by such a case would concern, not the design of objective tests of criminal responsibility, but rather the scope for a special verdict under the insanity rules.

## 5. CONCLUSIONS

The starting point of this review of the design of objective tests of criminal responsibility has been the importance of the fault and proportionality principles. It has been argued from the fault principle that, since criminal responsibility is an expression of culpability, it is unjust to measure accused persons against objective standards which they cannot meet. Furthermore, it has been contended that the principle of proportionality requires that criminal liability for serious offences, where there is exposure to substantial terms of imprisonment, should be imposed on the basis of objective tests only for failure to match standards which could have been attained with reasonable ease. Two conclusions have been drawn from this. The first is that the standard which a person must meet in order to avoid criminal liability should be set at the lowest level of the relevant scale of ordinary behaviour. The second is that the differences between people should be recognised by taking an ordinary person with any relevant special characteristics of the accused as the standard of comparison. Allowance should be made for relevant cognitive or volitional handicaps for which an accused cannot be held responsible. Justice demands this flexibility.

Some parts of the law of objective tests are already consistent with these principles. In particular, the objective component of the defence of provocation is usually, although not all always, framed in terms which clearly accept

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<sup>137</sup> This was recognised by the Appellate Division of South Africa in *AG Natal v Ndlovu* 1988 (1) SA 905 (A), trans. John Milton and Jonathon Burchell, *Cases and Materials on Criminal Law* (1992), 302: 'In South Africa, in view of its heterogeneous population and the existence of ethnic groups with widely varying standards of development and education, the application of such a criterion to all citizens of the country would have an inequitable result which could not have been within the Legislature's contemplation.'

<sup>138</sup> See above, n 107 and accompanying text.



the weaknesses in human self-control. Moreover, the concept of criminal negligence involves a wide departure from the standard of reasonable care. A similar result has been achieved for self-defence through the doctrine that a margin of error or leeway is permitted in responding to an attack. There are, however, other parts of the law of objective tests which have developed along different lines. Although the picture respecting duress and necessity is confused, the design of these defences has sometimes been aimed at presenting standards which the ordinary person should strive towards rather than standards which the ordinary person can be blamed for failing to attain. There are also some troubling aspects of the law relating to the personalisation of objective tests. There is widespread, if not yet universal, acceptance of the need to adapt objective tests to fit the characteristics of persons who are incapable of meeting uniform standards. There has also been growing attraction for flexible tests which can take account of relative difficulties in meeting uniform standards. The major developments in this respect, however, have occurred in England and Canada and have been confined to exculpatory defences. The uniform model still holds sway for criminal negligence. Moreover, in Australia, the uniform model has not yet been seriously threatened for any objective tests. Overall, the law of objective criminal responsibility needs further rationalisation in light of the distinctive character of criminal sanctions.