

# WORKSHOP A1: Fault Requirements for Criminal Culpability

## The Design of Objective Tests for Criminal Culpability

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### 1. Introduction

Objective tests = tests which make criminal liability depend on failure to live up to some standard of 'reasonable' or 'ordinary behaviour'.

Fault requirements too often conceived in terms which make objective tests a minor footnote to subjectivist principles.

Neglect wrong because objective tests are important – even re serious offences:

- Most jurisdictions recognise liability for injuries to person on basis of criminal negligence.
- Many jurisdictions (eg Canada, Queensland) use objective tests of fault (eg foreseeability of injury) for the aggravated element of compound offences.
- Objective elements are prominent in tests for exculpatory defences like self-defence, duress, necessity – and also for provocation.

Result of neglect that important issues re the design of such tests have not received attention. Codes and draft codes usually contain no more than a basic definition of negligence as conduct departing from standard of reasonable person + perhaps definition of criminal definition as conduct involving such a wide departure from standard as to merit criminal liability. Eg Criminal Code (Cth):

#### **5.5 Negligence**

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.

Codes and draft codes have generally failed to address the issue which has engaged the courts in various jurisdictions – how much flexibility should there be in objective tests? – flexibility to make allowance for persons whose age/intelligence/mental state may make it more difficult for them to meet standard than for most people – perhaps even impossible to meet standard.

Exception - 1995 Criminal Code (Qld) – never enacted – contained provision re 'ordinary person' test for provocation and emergency defence:

#### **Characteristics of the ordinary person**

**85.(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.

Issues are ripe for review in codification. Issues have been exercising courts in various jurisdictions but with messy results. General consensus via dicta that it would be wrong to judge a person against standard wholly beyond reach. However, confusion and disagreement re cases where issue is difficulty rather than impossibility of reaching standard.

## **2. Comparative analysis**

**Canada.** Issues explored more systematically than in other jurisdictions.

Disagreements with judiciary eventually resolved by compromise in SCC.

- Re negligence. Accused must have had capacity to conform to standard. Otherwise, uniform standards applicable to everyone. See 5-4 decision in *Creighton* [1993] 3 SCR 3.
- Re defences. Flexible standards with allowance for relevant human frailties for which person not responsible - *Hibbert* [1995] 2 SCR 973. Called ‘modified objective test’ or ‘objective-subjective standard’.
- Unexplained exception for provocation – variables confined to age and sex.

Rational per Lamer CJ: 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. 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.

**England.** Main area of disagreement has been re provocation. That issue now settled in terms of authority but not principle. Other areas of law unclear.

- Flexible standard adopted for provocation, primarily as matter of principle (with some distortion of precedents), by HL 3-2 in *Smith* [2001] 1 AC 146; rejected by PC 6-3 in *Holley* [2005] 2 AC 580, on the weight of precedent rather than by reference to principle.
- Re negligence, there have been notoriously rigid decisions such as *Elliot v C* [1983] 1 WLR 939 (CA). However, Simester and Sullivan (Criminal Law Theory and Doctrine, 3<sup>rd</sup> ed 2007) have detected pieces of dicta more favourable to flexibility and have concluded (p 149) that current position is unclear.
- Re law of duress (sober person of reasonable firmness), they cite obiter authority from *Emery* (1993) 14 Cr App R (S) 394 (CA) that a recognised psychiatric syndrome or mental illness can be attributed – although other decisions make it plain there will be no attribution of mental states not so recognised.
- BWS cases

**Australia.** Uniform tests appeared established following *Stingel* (1990) 171 CLR 312. However, recent decisions has made picture less clear.

- *Stingel* held that the ‘ordinary person’ test for provocation is adaptable only for the age of the accused; also dicta that test for criminal negligence is not adaptable for any variable, not even age.
- In practice, judicial approaches to criminal negligence have been more variable. In *Lavender* [2005] HCA 37, trial judge instructed jury by reference to a person of the same age of the accused. HCA did not comment on this when case was on appeal.
- HCA in *Osland* (1998) 197 CLR 316 seemingly endorsed *Lavallee* on BWS in self-defence cases.
- QCA and WACA have recently introduced highly flexible approaches to the defence of reasonable mistake of fact in sexual assault cases: *Mrzljak* [2004] QCA 420; *Aubertin* [2006] WASCA 229. The Qld and WA Codes provide: “A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to

*any greater extent than if the real state of things had been such as he believed to exist.” Mrzljak and Aubertin held that issue is not what reasonable person might have believed but what accused might reasonably have believed, in light where appropriate of characteristics beyond control of person, such as mental impairment and psychiatric disorder. Support sought in Canadian decisions on defences, without reference to the distinctions drawn in Canadian law.*

### **3. Arguments of principle.**

Main argument of principle for uniform standard is based on principle of equality before law – essentially that same behavioural standards should apply to everyone. See Wilson J of the SCC in *Hill* [1986] 1 SCR 313, 343-4, re provocation:

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.

This reasoning was endorsed by the High Court of Australia in *Stingel* (1990) 171 CLR 312, 324. In *Tutton* [1989] 1 SCR 1392, 1417-8, Wilson J made the same argument with respect to negligence.

EC has argued elsewhere that equality arguments are not conclusive because there are different forms of equality.

- *Principle of formal equality.* Requires same standard to apply to everyone regardless of differences in capacities to meet the standard. But generates substantive inequalities in liability to criminal conviction.
- *Principle of substantive equality.* Requires equal exposure to likelihood of criminal liability. Requires flexible standards where person is handicapped with respect to the attainment of a standard – providing equal opportunity to avoid conviction.

Issue: which form of equality should we adopt? Substantive equality should be preferred in light of the *principle of proportionality* which underlies the whole framework of fault and, in particular, the doctrine of criminal negligence. If objective tests are to be used for serious offences, liability 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 difficult standards. In order to ensure that a standard could have been attained with reasonable ease, objective tests must be adaptable for any special handicaps of the accused.

### **4. Codifying flexibility.**

#### **Objective standards**

1. Where the criminal culpability of a person depends on the reasonableness of any state of mind, reasonableness is to be judged by reference to what would be reasonable for the person given his or her mental capacities.
2. Where the criminal culpability of a person is decided by comparison with the conduct of an ordinary or reasonable person, an ordinary or reasonable person possesses any characteristics of the person that may have affected the person’s ability to meet standards of conduct and that the person cannot fairly be expected to have controlled or managed.