ETHNICITY AND THE OBJECTIVE TEST IN PROVOCATION

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[*Since the House of Lords' decision in* D.P.P v. Camplin, *the objective test in the defence of provocation has been whittled down by the ascription of peculiar characteristics of the accused to the 'ordinary person'. One notable restriction placed by* Camplin *was that, except for age and sex, all other characteristics, including ethnic derivation, were to be taken into account only for the purpose of determining the gravity of the provocation to the accused. Although* Camplin *is to be applauded in other respects, it is submitted by the author that the ethnicity of an accused person should also be relevant in assessing the power of self-control to be expected of him. This submission has the support of a number of Australian decisions, notably, the High Court case of* Moffa v. R., *thereby allowing for a departure from the* Camplin *ruling in this respect.*]

The defence of provocation will succeed only if the jury is satisfied *inter alia* that the provocation confronting the accused was 'such as would lead an ordinary man in the accused's circumstances to so lose his self-control as to do an act of the kind and degree as the act by which the accused killed the deceased'.[1] This objective element of the defence has, for various reasons, been regarded as being so unsatisfactory that judges, reform commissioners and academic commentators alike have called for its total abolition and replacement by a purely subjective test.[2] However, the objective test is too firmly entrenched in the common law for it to be removed by the courts themselves. The proposal for a purely subjective test, however attractive it might be, must therefore be left to legislative fiat. The policy argument relied on by the courts for maintaining the test is because 'the law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life'.[3] Hence, it is thought that one aspect of this compromise is the requirement, to some degree at least, of objectivity. Given the strong judicial recognition of the objective test for provocation in Australia, England and other common law jurisdictions, the criticisms against that test[4] and the consequent enthusiasm over a purely subjective assessment need not concern us here.

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1 *Johnson v. R.* (1976) 136 C.L.R. 619, *per* Barwick C.J. at 636.

2 The strongest judicial expression against the objective test has been by Murphy J. in *Johnson, ibid.* and *Moffa v. R.* (1977) 13 A.L.R. 225. For law reform commissions taking a similar view, see the Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law* (1977) and the Law Reform Commissioner, Victoria, Report No. 12, *Provocation and Diminished Responsibility as Defences to Murder* (1982). For academic commentators, see Brett, P., 'The Physiology of Provocation' [1970] *Criminal Law Review* 634; and Sharma, K. M., 'Provocation in New South Wales: From Parker to Johnson' (1980) 54 *Australian Law Journal* 330.

3 *Johnson v. R.* (1976) 136 C.L.R. 619, *per* Gibbs J. at 656.

4 Besides the references made in *supra* n. 2, see also Samuels, A., 'Excusable Loss of Self-Control in Homicide' (1971) 34 *Modern Law Review* 163; Smith, J. C. and Hogan, B., *Criminal Law* (4th ed. 1978) 304-306; Gordon, G. H., *The Criminal Law of Scotland* (2nd ed. 1978) 782-784. For the reasons in support of the objective test, see Ashworth, A. J., 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292; Williams, C. R., *Brett and Waller's Criminal Law: Text and Cases* (5th ed. 1983) 229-230.

The objective test as it now stands can, however, be the subject of detailed comment in another respect. This concerns the diminution of its role by the courts themselves. While maintaining the objective test, the courts have in recent years allowed its gradual erosion by attributing some of the characteristics of the particular accused to the 'ordinary person'. Such characteristics include age, sex, physical disability, religion and ethnic derivation.[5] How far the courts would be willing to go in this process of erosion remains uncertain. In particular, apart from age and sex,[6] it is questionable whether these characteristics will be attributed to the ordinary person only for the purpose of gauging the gravity of the provocation towards him or her or whether they are also to be considered in determining the degree of self-control expected of such a person. It is quite likely that in Australia, this issue will soon be resolved in respect of the characteristic of ethnic derivation due to the increasing number of cases where it has been both raised and discussed.

The ensuing discussion will advocate a generous application of ethnicity by suggesting that it be recognised not solely in determining the gravity of the provocation but also in deciding upon the degree of self-control to be expected of an ordinary person of the accused's ethnic origin. Should this proposal be accepted by the courts, it would result in a more realistic view of human behaviour than is currently allowed for by the law. The greatest obstacle to this submission is the decision of the House of Lords in *D.P.P. v. Camplin*.[7] In answer, it will be argued that there is nothing to prevent the High Court, or the Supreme Courts of the various Australian states for that matter, from disagreeing with *Camplin* in this respect. This argument hinges, to some extent, on an appreciation of the judicial development in Australia occurring prior to *Camplin* recognising ethnic derivation as a characteristic of the ordinary man in provocation. To this we now turn.

1. *RECOGNITION OF ETHNIC DERIVATION AS A CHARACTERISTIC OF THE ORDINARY PERSON*

The judicial acceptance of ethnic derivation as a characteristic of the ordinary person in provocation is a very recent development in Australia. The explanation for this late recognition was the close adherence of the Australian courts to English decisions which, until less than a decade ago, refused to attribute any characteristic peculiar to the accused to the 'reasonable Englishman'. There was

[5] All these characteristics were referred to by the House of Lords in *D.P.P. v. Camplin* [1978] A.C. 705. Although *Camplin* was a case interpreting an English statutory provision, it has been regarded by a number of Australian cases as representing the common law on provocation; *e.g. R. v. O'Neill* [1982] V.R. 150; *R. v. Croft* [1981] 1 N.S.W.L.R. 126; *R. v. Dutton* [1979] 21 S.A.S.R. 356. The common law expression of the defence is contained in statute in New South Wales: see Crimes Act 1900 (N.S.W.) s. 23. A recent 1982 amendment to that provision has not altered the objective test of the defence as evidenced by the phrase 'an ordinary person in the position of the accused'; see s. 23(2)(b).

[6] Lord Diplock's proposed direction to the jury in *Camplin*, *ibid.* 718 in respect of the objective test clearly allows for age and sex to be regarded for the purposes of assessing the accused's power of self-control. That same direction to the jury certainly also allows these characteristics to be considered in assessing the gravity of the provocation.

[7] *Ibid.*

notably the House of Lords decision in *Bedder v. D.P.P.*[8] which held that sexual impotence or any other physical disability suffered by the accused could not be taken into account when applying the objective test in provocation. If such characteristics were to be disregarded, so too would the ethnic origin of the accused.

There was, however, one Australian jurisdiction where the courts were willing to modify the strictness of the pure objective test as pronounced in cases like *Bedder*. This occurred in the Northern Territory where a sizeable Australian aboriginal community lives.[9] In *R. v. Muddarubba*,[10] a case involving a member of the Pitjintjara tribe who, upon being provoked, had speared another member of the tribe to death, Kriewaldt J. said that 'until put right by a higher court I shall continue to tell juries that the members of the Pitjintjara tribe are to be considered as a separate community for the purposes of the rules relating to provocation'.[11] He went further to add that he would not apply to these tribesmen the standard applied to the white citizens of the Northern Territory.

Kriewaldt J.'s approach was confined to cases occurring within an aboriginal community and did not extend to cases where, say, a foreigner such as an Italian or Greek came to live in Australia. One commentator has justified this position by suggesting that, whereas aborigines and whites could be easily differentiated because they generally live apart from one another, the same could not be said of a migrant who joins a community having a strange and altogether different background from his own.[12] In the case of the migrant, the law would be over-complicated if the jury had to enquire whether, at the time of killing, the migrant was more under the influence of his original homeland than of his new host country. Another commentator preferred to view the position in terms of a concession to the aborigine because he was a political nonentity while migrants who were usually persons of enterprise and pertinacity were not.[13] As such, the most that the host country could afford to do was to confer upon these new migrants equal (but not more) social rights and opportunities with those who were already enjoying full rights of citizenship.

Either of the above comments could explain why the Australian courts, apart from cases involving aborigines, continued to follow the House of Lords' decision in *Bedder* to refuse recognition of an accused's ethnicity when applying the objective test in provocation. Another explanation would have been that our courts found themselves bound by that decision. However, the foundation for change was laid in the landmark High Court case of *Parker v. R.*[14] in 1963. That decision made it possible thereafter for the Australian courts, had they so desired, to break away from the constraints of *Bedder*.[15] The change, when it did

8 (1954) 38 Cr. App. R. 133.
9 See Howard, C., 'What Colour is the "Reasonable Man"?' [1961] *Criminal Law Review* 41.
10 [1951-1976] N.T.J. 317.
11 *Ibid.* 322.
12 Howard, *op. cit.* 47.
13 Brown, B., 'The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and "Unreasonable Non-Englishmen"' (1964) 13 *International and Comparative Law Quarterly* 203, 226-7.
14 (1963) 111 C.L.R. 610.
15 The High Court in *Parker* departed from earlier rulings that decisions of the House of Lords should be followed in case of conflict in preference to decisions of the Australian courts themselves, including the High Court.

eventually occur, was not surprising in the light of the sizeable influx of migrants into Australia from the 1950s onwards, making its population more heterogeneous with each passing year. It was therefore only a matter of time before the Australian courts had to face up to the reality that there was no single type of ordinary Australian.

The departure of the Australian courts from the strict objective test seems to have first appeared in a Victorian case decided in 1976.[16] Soon after this came a High Court decision in 1977[17] which was followed by a South Australian decision a few months later.[18] As we shall see in the next Part when these cases are examined, they all contained *dicta* allowing ethnic derivation to be taken into account when considering the objective test in provocation. What is pertinent to note at this juncture is that the House of Lords handed down its ruling in *Camplin* in 1978, barely a year or two after these cases were decided. The upshot of *Camplin* being decided at this point in time was that the Supreme Courts in Australia viewed that decision as presenting a golden opportunity to depart from the strictures of the purely objective test as exemplified in *Bedder*. Regrettably, in their enthusiasm over *Camplin*, our courts failed to appreciate that there existed Australian precedents which contained the beginnings of a separate legal development concerning ethnic derivation in the law of provocation. As we shall observe below, this separate development would enable ethnicity to be recognised to a far greater extent than that allowed for under *Camplin*.

2. *THE EXTENT OF RECOGNITION OF ETHNIC DERIVATION*

For the defence of provocation, the ethnicity of an accused person could be relevant when determining how the ordinary person of the accused's ethnic background would have viewed a particular type of provocative conduct. Thus, to refer to a Vietnamese political refugee residing in Australia as a 'Vietcong' would clearly invoke a far greater indignant response from him than if that term had been addressed to say, an Australian of British origin or, possibly, even an Australian-born Chinese. The ethnic derivation of the accused might also be relevant in another respect, namely, the power of self-control to be expected of an ordinary person of the same ethnic origin as the accused. Hence, in the face of the same type of provocative conduct, a Latin such as an Italian who is by popular tradition impulsive by nature might more readily lose his self-control than, say, the theoretically phlegmatic Anglo-Saxon. In both England and Australia, the law clearly recognises that in assessing the gravity of the provocation towards the accused, his ethnic background is a relevant consideration. The law in England, as stated in *Camplin*, is equally clear that ethnicity is not relevant when determining the power of self-control to be expected of the ordinary person. It is submitted, however, that the law in Australia is far from certain on this point. If *Camplin* were to be unreservedly applied by the Australian courts, then

[16] Unreported (1976) but an extract of which appears in Baxt, R., (ed.) *Annual Survey of Law 1977* (1978) 180-181.

[17] *Moffa v. R.* (1977) 13 A.L.R. 225. It is noteworthy that *Bedder* was given only a passing reference by one of the judges in *Moffa*, *i.e.* Murphy J., 243.

[18] *R. v. Webb* (1977) 16 S.A.S.R. 309.

ethnicity would likewise be irrelevant to the issue of self-control in Australia as in England. But it is contended that our courts are not bound to take this course.

We shall now critically examine the case authorities against the proposition that ethnic derivation should be considered when deciding on the power of self-control to be expected of the ordinary person in the law of provocation. This will be followed by an evaluation of those authorities which support that proposition.

A. *Restricting ethnicity to the gravity of provocation*

The basis for presenting the English position in the above manner is contained in the following passage by Lord Diplock in *Camplin*:

> In my opinion a proper direction to a jury on the question left to their exclusive determination by s. 3 of the [Homicide] Act of 1957[19] would be on the following lines. The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him . . .[20]

This passage has been cited with approval in a number of Australian cases.[21] The distinction embodied therein between characteristics affecting the accused's power of self-control and those going to the gravity of the provocation was foreshadowed by Andrew Ashworth, an English commentator, two years earlier when he wrote: 'The proper distinction . . . is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not.'[22] It is likely that Ashworth drew inspiration for this proposal from the New Zealand case of *R. v. McGregor*.[23] In pronouncing on the types of characteristics which could be attributed to the ordinary person in provocation, the New Zealand Court of Appeal emphasized that:

> [T]here must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic.[24]

The Court then went on to illustrate the practical effect of this requirement in cases where ethnic derivation was advanced by the accused as a characteristic of the ordinary man:

[19] The section leaves the jury to decide on the question whether the provocation was enough to make a reasonable man do as the accused did. In Australia, this question is regarded as a matter of law and is therefore left to the trial judge.

[20] [1978] A.C. 705, 718. The passage was expressly approved of by all the other Law Lords. For a recent application of this passage in England, see *R. v. Newell* (1980) 71 Cr.App.R. 331 where the Court of Appeal held that even if alcoholism was capable of amounting to a characteristic which might be taken into account under the law as stated in *Camplin*, there had to be some real connection between the provocation and the characteristic relied upon. *Cf.* Smith, A. T. H., 'The Provok'd Drunk' (1981) 44 *Modern Law Review* 567.

[21] *E.g. R. v. Romano* (1984) 36 S.A.S.R. 283, *per* King C.J. at 288; *R. v. Dincer* [1983] 1 V.R. 460, *per* Lush J. at 462; *R. v. Croft* [1981] 1 N.S.W.L.R. 126, *per* O'Brien C.J. of Cr. D. at 155; *R. v. Dutton* (1979) 21 S.A.S.R. 356, *per* King C.J. at 357.

[22] Ashworth, *op. cit.* 300.

[23] *Ibid.* 301, n. 47 where he cites *McGregor* [1962] N.Z.L.R. 1069 in support of his proposed distinction.

[24] *McGregor* [1962] N.Z.L.R. 1069 *per* North J. at 1081-1082. His Honour was interpreting a new provision, s. 169 of the Crimes Act 1961, which the New Zealand legislature had introduced to enable the courts to avoid having to follow the House of Lords decision in *Bedder*.

> [I]t is to be repeated that the provocative words or conduct must be related to the particular characteristic relied upon. Thus, it would not be sufficient, for instance, for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon. Here again, the provocative act or words require to be directed at the particular characteristic before it can be relied upon.[25]

In his judgment in *Camplin*, Lord Simon of Glaisdale opined that the law in England was substantially the same as that pronounced in *McGregor*.[26]

Returning now to Lord Diplock's proposed direction to the jury, we note that he was willing to recognise the characteristics of sex and age as possibly affecting the accused's power of self-control. As to the accused's sex, it is difficult to appreciate why this characteristic should be relevant at all. Lord Diplock spoke as if there might be a difference in the power of self-control between the sexes. That proposition cannot be seriously advanced because the gentle sex would otherwise be unfairly disadvantaged.[27] Age as a characteristic affecting the power of self-control is on firmer ground, the underlying rationale being that it is a good measure of a person's emotional maturity or stability. It is also consistent with the law's compassion towards human frailty to recognise that a youth might be more easily provoked to violence than an adult.[28] Having stated this, it is difficult to see why an accused's ethnic derivation should not likewise be relevant in assessing his level of self-control. A migrant to England or Australia would, in most cases, have already been deeply conditioned by the customs and traditions of his native land. These customs and traditions would have moulded his emotions and personality to such a degree that altering them in any significant manner would be extremely difficult.[29] If the law of provocation recognises the emotional instability of youth, it is hard to understand why it should not likewise recognise ethnic derivation when determining an accused's power of self-control.

Despite the number of Australian decisions which have expressly approved of Lord Diplock's direction in *Camplin*,[30] it appears that in only two judgments was the question directly addressed in respect of the characteristic of ethnicity. The first of these was the New South Wales Court of Criminal Appeal case of *R. v. Croft* where O'Brien C.J., after an extensive review of the major cases on the law of provocation, came to the following tentative conclusion:

> Just how far the 'ethnic derivation' of the accused . . . in so far as it affects his standard of excitability or pugnacity as distinct from his reaction to an insult to such derivation is to be taken into account, is not so clear. The present law would not seem to support a proposition that extraordinary excitability or pugnacity or ill-temper due to such a derivation should be taken into account in assessing the reaction of 'a man of ordinary self-control'.[31]

25 *Ibid.* 1082.

26 [1978] A.C. 705, 727. The same view was more recently expressed in *Newell* (1980) 71 Cr. App. R. 331 *per* Lawton L.J. at 340. See also *R. v. Raven* [1982] *Criminal Law Review* 51 and commentary.

27 See Williams, G., *Textbook of Criminal Law* (2nd ed. 1983), 539. With due respect, it is submitted that this criticism is not answered by King C.J.'s attempt in *Romano* (1984) 36 S.A.S.R. 283, 289, to explain this characteristic in terms of the differences in maturity between an adolescent male and an adolescent female.

28 *Camplin* [1978] A.C. 705, *per* Lord Diplock at 717-718.

29 See *Brett*, *op. cit.* 638. Allowing for the possibility that the immigrant's personality could be modified so as to enable him to conform better to the social norms of his new homeland, such modification is possible only through the slow process of time.

30 *Supra* n. 21.

31 [1981] 1 N.S.W.L.R. 126, 162.

The second judgment was by King C.J. in the South Australian Full Court case of *R. v. Romano*.[32] His Honour dealt at length with the cases of *Camplin* and *McGregor* as well as the submission of Ashworth, referred to earlier, and came down firmly in favour of restricting all the characteristics of an accused, except age,[33] to the issue relating to the gravity of the provocation. He then went on to say:

> Unusual excitability and pugnacity, whether due to a temporary factor such as intoxication . . . or to the normal temperament of the accused (*R. v. Lesbini*)[34] are therefore to be excluded from consideration . . .[35]

Still later, we find his reasoning for the above holding:

> To speak of the power of self-control of an ordinary person save in so far as his power of self-control is weakened by his own characteristics, is to deprive the [objective] test of its objective content except to the extent that transient states are to be disregarded. Unusual excitability and pugnacity would be relevant if they resulted from the individual's permanent temperament, or mental condition, as distinct from a transient condition. This would be contrary to long established authority . . .[36]

The criticisms of these two judgments can be dealt with together. First, the remarks pertaining to ethnic derivation in both judgments are clearly *obiter*.[37] Secondly, both rely heavily on *Camplin* and *McGregor* which, it will be contended below, should not be followed in Australia in so far as these cases have held that ethnic derivation is irrelevant for the purpose of assessing the accused's power of self-control. Thirdly, and most cogently, both judges equate 'extraordinary' or 'unusual' excitability and pugnacity with the emotional state that may traditionally be ascribed to a particular ethnic group. Thus, in their view, every member of an ethnic community whose indigenous temperamental dispositions prompt them into reacting more quickly than the 'ordinary person' (who is, in Australia, presumably still the phlegmatic Anglo-Saxon) is to be described as unusually excitable or pugnacious. This view, it is submitted, extends the characteristic of unusual excitability or pugnacity well beyond what was contemplated in cases such as *Lesbini*.[38] That case, as well as the earlier English case of *R. v. Alexander*,[39] involved accused persons who were afflicted with some recognisable mental defect. Furthermore, these cases were pronouncing on the mental deficiencies of individuals and not whole communities. It is

32 (1984) 36 S.A.S.R. 283.

33 In expressly excluding sex as a characteristic affecting the level of self-control, King C.J. suggested that Lord Diplock's reference to sex in *Camplin* was linked with age so as to account for the possible differences in the degrees of maturity to be found in the adolescent male and adolescent female of similar age.

34 [1914] 3 K.B. 1116.

35 (1984) 36 S.A.S.R. 283, 289.

36 *Ibid.* 290-291. His Honour's references to the characteristic as being permanent or transient were based on the decision in *McGregor* [1962] N.Z.L.R. 1069, where it was stated, at 1081, that for a characteristic to be attributed to the ordinary man, it had *inter alia* to have 'a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality'.

37 *Croft* involved the characteristic of intoxication while in *Romano*, there was no evidence before the court to indicate that the accused's mental condition was such as to have impaired his power of self-control. It is also noteworthy that in *Romano* neither of the two other judges, Legoe and Cox JJ., lent their support to King C.J.'s submission that characteristics affecting self-control should be distinguished from those affecting the gravity of the provocation.

38 [1914] 3 K.B. 1116. This case was relied on by both O'Brien C.J. in Cr. D. and King C.J. for their views on this issue.

39 (1913) 9 Cr.App.R.139.

contended that had persons such as Lesbini or Alexander been measured by the standards of ethnic communities with traditionally more volatile temperaments than the Anglo-Saxons, they would still have been regarded as exceptionally excitable or pugnacious. In a heterogeneous society like the one in Australia, the description of a person as being unusually excitable or pugnacious should be measured not by what a segment of that society regards as acceptable behaviour but by what that mixed society as a whole would commonly expect as acceptable behaviour.[40]

B. *Extending ethnicity to the power of self-control*

Reference has already been made to how the objective test in provocation has been modified in the Northern Territory to take account of the ethnic derivation of the aboriginal accused. It should, however, be stressed here that the characteristic of ethnicity is not confined in that jurisdiction to its effect on the gravity of the provocation but that it also extends to the accused's power of self-control. Thus, the Supreme Court of the Northern Territory has allowed for the fact that aborigines may take longer to regain their self-control than white people.[41]

The same approach has been taken by the courts of many other jurisdictions which have modified the objective test to account for an accused's ethnicity. For instance, in Papua and New Guinea, the courts have recognised that it is a characteristic of many Papua-New Guineans to react more quickly to an insult than persons of European origin.[42] So too, in both Western Samoa[43] and New Zealand,[44] the courts have been prepared to assume that, unlike the case of Europeans, there is a tendency among Samoans 'towards a slow build-up of passion'. Of particular relevance to our discussion is the New Zealand Court of Appeal case of *R. v. Tai*[45] where it was held that *McGregor* was wrongly decided in not taking this characteristic of Samoans into consideration.[46] It is noteworthy that none of the English and Australian cases which have approved of the New Zealand Court of Appeal decision in *McGregor* have ever commented on this subsequent holding by the same court in *Tai*.

Reverting to the Australian position, a brief reference has previously been made to three Australian cases decided prior to *Camplin* in which our courts had recognised ethnic derivation as a characteristic of the ordinary person in provoca-

40 This was basically the approach taken by the New Zealand Court of Appeal in *R. v. Tai* [1976] 1 N.Z.L.R. 102, *per* McCarthy P. at 106. This approach was similarly advanced in *R. v. Saliba* (1986) 10 *Crim. L.J.* 420, a recent decision of the New South Wales Supreme Court which will be examined in the latter part of this article.

41 *E.g. R. v. Nelson* [1951-1976] N.T.J. 327.

42 See O'Regan, R. S., 'Ordinary Men and Provocation in Papua and New Guinea' (1972) *International and Comparative Law Quarterly* 551.

43 See Marsack, C. C., 'Provocation in Trials of Murder' [1959] *Criminal Law Review* 697.

44 *R. v. Tai* [1976] 1 N.Z.L.R. 102.

45 *Ibid.* This case involved a Samoan who had killed another while residing in New Zealand. The court was prepared to attribute the accused's ethnic derivation to the ordinary person after noting (at 106) that the population of New Zealand was 'of markedly mixed racial origins with, especially a substantial Polynesian minority'.

46 *Ibid. per* McCarthy P. at 107. For a critical comment of *McGregor* generally, see Milligan, J. R., 'Provocation and the Subjective Test' (1967) *New Zealand Law Journal* 19. See also Brookbanks, W. J., 'Provocation — Defining the Limits of Characteristics' (1986) 10 *Criminal Law Journal* 411 for a discussion of New Zealand cases decided after *Tai* which have likewise departed from *McGregor* but in other respects.

tion. These same cases strongly indicate that our courts were prepared to follow the course taken by the Papua-New Guinean, Samoan and New Zealand courts in modifying the objective test to account for the fact that members of the community could have differing levels of self-control from one another. In the first of these cases, *R. v. La Cava*,[47] the accused was an Italian who had lived in Australia for a number of years prior to the offence. He shot and killed his victim after the latter had allegedly provoked him. Newton J. of the Victorian Supreme Court instructed the jury that when assessing the susceptibilities of the ordinary man, 'the accused must be taken as the ordinary man who happens to be born abroad'. He then proceeded to make the following comment:

> The law says that in a case where provocative conduct causes a man of a foreign race to lose his self-control and kill another, then his crime will be manslaughter not murder provided that another man of the same race *whose susceptibility to passion and loss of self-control did not fall outside the common range of temperaments of persons of that race*, could in the same situation also have been provoked to kill.[48]

Quite clearly, the learned judge was willing to accept the accused's ethnic derivation for the purposes of assessing his power of self-control. It might be added here that the unusual excitability or pugnacity of accused persons such as those in *Lesbini*[49] and *Alexander*[50] would have fallen 'outside the common range of temperaments of persons' belonging to the same ethnic background as themselves.

The High Court case of *Moffa v. R.*[51] was another decision to the same effect. The accused, an Italian, had killed his Australian wife with an iron pipe after she had, amongst other provocative words, referred to him as a 'black bastard'. The following passage from Barwick C.J.'s judgment clearly shows that he was prepared to attribute the accused's ethnic origin to the ordinary person in provocation. Furthermore, the words which have been highlighted in the passage clearly indicate that his Honour was discussing ethnicity in terms of self-control:

> There is nothing suggested about the applicant, *his disposition or mental balance*, which could be called in human terms extraordinary. That he was *emotionally disturbed* by his wife's disclosed attitude to him did not make him, in my view, other than an ordinary man: and, in particular, other than an ordinary man of his ethnic derivation. If the use of the word 'reasonable', in the statement of what is called the objective test in relation to provocation, would exclude from consideration such *emotional reactions*, I have even greater reason for preferring the description 'ordinary man' in the formulation of that test.[52]

It is submitted that the learned Chief Justice's frequent reference to the emotions of the accused could not mean anything other than his power of self-control.

The third decision of like effect is Bray C.J.'s judgment in the South Australian Full Court case of *R. v. Webb*.[53] His Honour initially stated that he felt himself 'restrained by judicial decorum' to follow the decision in *Bedder*. He then went on to state that if he were not so constrained, there was much merit in

[47] Baxt, *loc. cit.*
[48] *Ibid.* 181. Emphasis added.
[49] [1914] 3 K.B. 1116.
[50] (1913) 9 Cr.App.R. 139.
[51] (1977) 13 A.L.R. 225.
[52] *Ibid.* 227. Emphasis added. The other majority judges did not regard the accused's ethnic origin in the same way as did the Chief Justice. However, in his dissenting judgment, Murphy J., at 243, included ethnicity as one of the factors which so influenced human behaviour that he regarded it to be practically impossible to construct a model of an ordinary person.
[53] (1977) 16 S.A.S.R. 309.

Andrew Ashworth's proposition concerning the distinction between characteristics affecting the power of self-control and those affecting the gravity of the provocation to the accused.[54] But immediately after citing that proposition, his Honour makes the following comment: '*However*, I add that the ordinary man is apparently an ordinary man of the accused's "ethnic derivation"',[55] citing as authorities for that submission Barwick C.J.'s passage in *Moffa* as well as the Privy Council case of *Kwaku Mensah v. R.*[56] The first point to note is that Bray C.J. was by that last comment stating what he considered to be the current law and not what the law might be if Ashworth's proposition were to be applied.[57] Secondly, his references to *Moffa* and *Kwaku Mensah* meant that he regarded ethnic derivation as being relevant not only to the gravity of the provocation but also to the issue of the accused's power of self-control. The relevant part of Barwick C.J.'s judgment in *Moffa* has already been referred to and discussed. As for *Kwaku Mensah*, which was a case concerning the interpretation of the particular section on provocation in the Gold Coast Criminal Code, the following passage appears in Lord Goddard's judgment:

> Then again, it can be said that as there had been a chase, and the dead man had fled to a house and was killed while he was escaping from the house, and was shot from behind, there must have been time for an ordinary person to have regained control of his passion. In their Lordships' opinion, however, the question whether in the circumstances the provocation was such as to deprive an ordinary person of self-control, and whether sufficient time had elapsed to enable control to be regained, are questions for the jury . . . . The tests have to be applied to the ordinary West African villager . . .[58]

This passage clearly indicates that the Privy Council was prepared, as far as the law of provocation in the Gold Coast was concerned, to endow the ordinary person with the power of self-control to be expected of an ordinary West African villager. Consequently, in citing this authority with approval, Bray C.J. indicated his willingness to make the same ruling in South Australia.

The above decisions seem to have been largely ignored by Australian judges like O'Brien C.J. and King C.J. who have concentrated on *Camplin* to decide on the extent to which they would recognise the characteristic of ethnic derivation under the objective test in provocation. However, one judge, namely, Cox J. of the South Australian Supreme Court, appears to have been less enthusiastic over *Camplin*, and while not entirely rejecting that decision as such, preferred to base his judgments as far as possible on the earlier Australian High Court cases of *Johnson*[59] and *Moffa*.[60] One effect of this approach was to lead Cox J. to disagree with Bray C.J.'s reliance on *Bedder* in the South Australian case of *Webb*.[61] Cox

54 Ashworth, *op. cit.* 300.

55 *Supra* n. 53, 314. Emphasis added.

56 [1946] A.C. 83. This same decision has been frequently relied on by the courts of Papua and New Guinea to justify a liberal interpretation of the objective test; see O'Regan, *op. cit.* 552.

57 That this was Bray C.J.'s view is clear when the comment is read in the light of the whole paragraph in which it appears. In so reading, it becomes evident that his Honour was adding his comment, not to Ashworth's proposition, but to his earlier description of the objective test in provocation.

58 [1946] A.C. 83, 93. The page of the case report in which this passage appears was expressly referred to by Bray C.J. in *Webb*.

59 (1976) 136 C.L.R. 619.

60 (1977) 13 A.L.R. 225. The cases where Cox J. took this approach were *Dutton* (1979) 21 S.A.S.R. 356; *R. v. Griffin* (1980) 23 S.A.S.R. 264; and *Romano* (1984) 36 S.A.S.R. 283.

61 *Dutton*, *ibid.* 376.

J. opined that *Bedder* need not have been followed in the light of the two High Court decisions mentioned earlier. Another effect of Cox J.'s approach was to treat a characteristic such as the accused's ethnic derivation in very broad terms. This is borne out in the following statement which appears in his judgment in *R. v. Dutton*:

> At any rate, if racial characteristics may be relevantly causal, it is difficult to see any logical stopping place short of investing the ordinary man with all of the characteristics of the accused himself, other than the two — temper and intoxication — that the law has consistently excluded upon what may fairly be recognised as policy grounds.[62]

That his Honour was equating the term 'temper' with exceptional excitability or pugnacity is evidenced in the paragraph immediately following the above statement:

> It follows, in my opinion, that the ordinary man against whom the actions of the accused are to be judged is one possessing all of the characteristics and idiosyncrasies of the accused himself — age, sex, race, colour, physical defects and so on — that would have affected his conduct in the circumstances in which the accused found himself, with the exception of any extraordinary excitability or pugnacity that the accused happened to possess.[63]

It may be gleaned from these passages that Cox J. meant to regard the characteristics he mentions as affecting both the gravity of the provocation as well as the accused's power of self-control. For instance, he places the characteristics of age and sex alongside those of race, colour and physical defects despite Lord Diplock's ruling in *Camplin* that only the first two characteristics were relevant to the issue of the accused's level of self-control. Furthermore, in expressing that intoxication, extraordinary excitability and unusual pugnacity formed the only exceptions to the list of characteristics which could be attributed to the ordinary man, Cox J. was thereby impliedly stating that he would be willing to recognise the indigenous temperamental dispositions of accused persons. Although these dispositions might be more volatile than those traditionally ascribed to some other group in the community, they nevertheless fell short of being described as exceptionally excitable or pugnacious.[64]

There is much to be said for Cox J.'s proposition to permit characteristics like some physical defect or, we might add, religion[65] to be recognised for the purposes of determining both the gravity of the provocation to the accused as well as the level of self-control to be expected of him. However, recognising these characteristics to this extent does not have the same support of previous case authorities as does the characteristic of ethnic derivation. Nevertheless, it is still open to the Australian courts to recognise these other characteristics as affecting the accused's power of self-control. The obvious obstacles to this legal development occurring in Australia are the decisions in *Camplin* and *McGregor*. But as Cox J. has recently argued in *Romano*, these cases were 'decided in

62 *Ibid.* 377.
63 *Ibid.*
64 That Cox J. was confining the description of extraordinary excitability or pugnacity to persons suffering from some recognisable mental condition is borne out in his subsequent judgment in *Griffin* (1980) 23 S.A.S.R. 264, 265-7.
65 The accused's religion has been mentioned in a number of cases including *McGregor* [1962] N.Z.L.R. 1069; *Camplin* [1978] A.C. 705; and *Dincer* [1983] 1V.R. 460.

England and New Zealand under special statutory provisions [and] will therefore be of very limited assistance here'.[66]

There is one other case, decided as recently as July 1986, which strongly indicates willingness on the part of another Supreme Court judge to recognise an accused's ethnic derivation in relation to the issue of self-control. This was the case of *R. v. Saliba* which came before Finlay J. of the Supreme Court of New South Wales.[67] The accused, a woman belonging to the Christian Lebanese community in Sydney, was charged with the murder of her brother-in-law after he had allegedly invited her to engage in sexual intercourse with him. In his summing up, his Honour instructed the jury to consider the conduct to be expected of the ordinary person in the following terms:

> . . . you must take an ordinary woman who has the same social and ethnic background as the accused. Ordinary people, of course, come in all shapes and sizes and temperaments, and what is required is that you take into account the whole mass of various kinds of people who go to make up the community. Somewhere there is a line to be drawn between people who can be classed as ordinary people and those who are abnormal. You are required to look at the whole class of ordinary people and the question you have to answer is whether the Crown has proved that what was done by the accused was beyond the range of activities as you could expect — not 'would expect'[68] — as the reaction, in the circumstances, of an ordinary person of her age, background and culture.

It is clear from this passage that Finlay J. was of the view that the accused's ethnic derivation should be attributed to the ordinary person for the purpose of gauging the level of self-control that was to be expected of her. His opinion that what constitutes socially acceptable behaviour depends on the views of the whole mass of ordinary people residing in the community finds common expression in the New Zealand Court of Appeal case of *Tai*.[69] In that case, the Court, after observing that New Zealand had a population of 'markedly mixed origins' went on to state that '[w]hat has to be contemplated by the trial Judge (and later [by] the jury) . . . is an ordinary person in terms of that mixed society, one who could be expected to react in the way people who commonly accept current New Zealand standards react'.[70]

Finlay J.'s statements concerning ordinary as opposed to abnormal people also parallels the judicial comment in *La Cava*, noted earlier, that a man of a foreign race would successfully invoke the defence of provocation 'provided that another man of the same race whose susceptibility to passion and loss of self-control did not fall outside the common range of temperaments of persons of that race'.[71] While it is unfortunate that Finlay J. did not support his views by reference to case authorities, his approach is one which is consistent with a number of preceding decisions favouring the recognition of ethnicity in assessing both the gravity of the provocation as well as the issue of self-control.

66 (1984) 36 S.A.S.R. 283, 293. Cox J. thereby made his decision a strong dissent on this matter from King C.J.'s judgment in the same case.

67 (1986) 10 *Criminal Law Journal* 420.

68 The distinction sought to be drawn here between 'could' and 'would' is that the former word couches the objective test in terms of a possible response while the latter connotes an inevitable response. For other instances where the 'could or might' formula has been preferred, see *R. v. Jeffrey* [1967] V.R. 467, *per* Smith J. at 482-483; *Moffa* (1977) 13 A.L.R. 225, *per* Stephen J. at 238; and *Romano* (1984) 36 S.A.S.R. 283 *per* King C.J. at 286. See also Fairall, P. A., 'The Objective Test in Provocation' (1983) 7 *Criminal Law Journal* 142.

69 [1976] 1 N.Z.L.R. 102.

70 *Ibid.* 106.

71 Baxt, *loc. cit.* and see the main text accompanying n. 48.

3. *JUSTIFICATIONS FOR EXTENDING ETHNICITY TO THE POWER OF SELF-CONTROL*

Having reviewed the case authorities for and against the proposition that ethnic derivation should be relevant in assessing both the gravity of the provocation and the power of self-control, it may be concluded that, on a balance, there is stronger authority in Australia for accepting that proposition. This position is preferable to the one taken in the cases of *Camplin* and *McGregor* and by King C.J. in *Romano* because it is more in accord with both social and human reality.

In the context of present-day Australia, the social reality is that we have a host of residents originating from diverse cultural backgrounds who intermingle with one another both in work and recreational settings. Accordingly, to insist that all these different ethnic groups conform to the one standard of behaviour set by the group having the greatest numbers (or holding the political reins of power) would create gross inequality. Equality among the various ethnic groups is achieved only when each of these groups recognises the others' right to be different and when the majority does not penalise the minority groups for being different.[72] It is furthermore submitted that it is not an act of favouritism to recognise that people who are raised in foreign cultures may have different levels of self-control. Rather, such recognition conforms to the principles of fairness and equality, for while it might be fair to expect a certain level of composure and temperament to one who has been raised since early childhood in this country, the recent adult immigrant has not been given the same opportunity of exposure to the various socializing institutions, such as the family and school, and the principle of equality demands that the law should take this factor into consideration.[73]

In relation to human reality, the *Camplin* approach dictates that we take into account an accused's ethnic derivation only for the purposes of evaluating the seriousness of the affront that the provocation had on him as a result of his culture. However, that is as far as recognition of ethnicity is permitted to go and, in particular, the accused's cultural background cannot be considered when it comes to assessing the degree of self-control which is expected of him. This is inconsistent with the opinion of behavioural scientists that the accused's personality must be taken as a whole and cannot be dissected into the way he would view some provocative conduct on the one hand and the way he would respond emotionally to that conduct on the other.[74]

This point concerning human behaviour and how it should be viewed takes on considerable practical significance in the context of jury deliberations. By way of illustration, let us consider the case of an accused, a conservative Turk, who is provoked into killing his daughter when she elopes with her boyfriend.[75] If Lord

[72] An excellent discussion of this point, but in a slightly different context, appears in a commentary entitled 'The Cultural Defense in the Criminal Law' (1986) 99 *Harvard Law Review* 1293.

[73] This statement is consistent with Professor Hart's general principle of criminal law which argues that liability should be imposed only if the accused had a 'fair opportunity' to conform his conduct to the law. See Hart, H. L. A., *Punishment and Responsibility* (1968), 180-183.

[74] Brett, *op. cit.* 636-9.

[75] These were basically the facts in the recent Victorian case of *Dincer* [1983] 1 V.R. 460. The Court, in addition, took account of the fact that the accused was a Muslim.

Diplock's direction to the jury in *Camplin* is applied, the trial judge would have to instruct the jury that they must attribute the accused's ethnic background to the ordinary man in provocation when assessing the gravity of the deceased's provocative conduct towards him. However, the jury must then be instructed to assume that, as far as the accused's power of self-control is concerned, he is to be regarded as having the same power of self-control as that of an ordinary man, who is in Australia presumably still a person of British origin. It is submitted that this is too subtle a distinction for the jury.[76] In line with our scientific understanding of human behaviour, this approach also fails to appreciate that an accused's reaction to the provocation is not solely the result of its being an affront to his traditional or cultural values but is also the result of his particular emotional and psychological disposition.

At this juncture, some might argue that taking an accused's ethnicity into account when determining the issue of self-control could have a counter-deterrent effect, namely, that members of some ethnic groups might be less deterred by the law if their culturally-influenced personalities could be relied upon as a defence. In answer, it is strongly contended that the threat of punishment has only a marginal effect on the types of persons we are concerned with here. A great majority of them have killed or are likely to kill on impulse; they are not murderers for profit but perpetrators of the crime of passion.[77] Additionally, these killings, when they do occur, would have frequently arisen out of extraordinary circumstances such that further physical violence on the part of the offender is unlikely to recur.[78] Moreover, the argument concerning counter-deterrence could just as readily be directed against other well-established defences involving the power of self-control such as insanity or diminished responsibility. Societal protection and the maintenance of social order have not been undermined by the operation of these defences and, doubtless, the same would hold true if the law of provocation was to recognise that some cultures develop lesser degrees of self-control in their members than other cultures.

Finally, even if it is correct to assume that such an extended recognition of an accused's ethnic derivation would lead to an increase in the number of successful pleas of the defence of provocation, this result may simply be regarded as being 'consonant with a greater awareness and tolerance of "human frailty" which is a characteristic of the age and society in which we live'.[79] Lest it be thought that this extension goes too far, it should be recalled that the defence will succeed

[76] This criticism was acknowledged by Lord Diplock himself in *Camplin* [1978] A.C. 705, 718. See also King C.J. in *Romano* (1984) 36 S.A.S.R. 283, 291; and a similar comment on the application of *McGregor* by the New Zealand Criminal Law Reform Committee's *Report on Culpable Homicide* (1976) at para. 15. For a more general criticism of the difficulties confronting juries when applying the objective test, there is Barry J.'s comment in *R. v. Jeffrey* [1967] V.R. 467, 478: '[This test] is unlikely to be applied by a jury, who are more likely to have regard to the limitations of the accused on trial than to the capacity for self-control of a mythical ordinary person.'

[77] For example, see Wolfgang, M. E., *Studies in Homicide* (1967); South Australian Office of Crime Statistics, *Homicide and Serious Assault in South Australia* Series II(1), (1981); N.S.W. Bureau of Crime Statistics and Research, *Homicide: The Social Reality* (1986).

[78] In particular, homicide studies reveal that most murder victims stood in a familial relationship with their killers or were at least known to one another.

[79] Law Reform Commissioner of Victoria, Working Paper No. 6, *Provocation as a Defence to Murder* (1979) at para. 70, when defending his stance that the objective test in provocation should be abolished.

only if there was sufficient evidence of provocation recognizable by law; it was shown that the accused did in fact lose his self-control as a result of the provocation and killed while in such a state of loss of self-control; and the result of successfully pleading the defence is not an outright acquittal but a conviction of manslaughter.[80]

4. *CONCLUSION*

The proposition recognizing ethnic derivation both in respect of the gravity of the provocation and the power of self-control has been adopted, apparently without any grave difficulties, in various jurisdictions outside Australia. It has also been observed that there are a number of Australian decisions, notably the High Court case of *Moffa*, which have done the same. This proposition takes proper account of human behaviour and the fact that we have a multi-cultural society. It is also consistent with the rationale underlying the defence of provocation which is to have compassion for human frailty.[81] Moreover, it is one which takes into account public sympathy calling for both a reduction in the charge and mitigation in sentence given that the accused's loss of self-control was the direct result of his particular ethnic background.

Those who might be prepared to accept this proposition might nevertheless still have one nagging reservation. How, they might ask, is the jury to determine the power of self-control attributable to an ordinary man of the accused's ethnic background? There is, unfortunately, no ready answer to this question. However, this weakness is not confined to the proposal for ethnic derivation to be recognised when assessing an accused's power of self-control; rather it will persist so long as the courts continue to require some objectivity in the law of provocation. For instance, how is a female juror to appreciate the level of self-control to be expected of an ordinary male in a case where the accused person is a male? Or how is a middle-aged juror to realistically assess the level of self-control to be expected of an adolescent given that the social, cultural and economic influences on the youth of today are all dramatically different from those experienced by that juror thirty years ago? In the same vein, it might be asked how a jury is to appreciate the effect of taunts of a lack of sexual prowess on an accused person who is sexually impotent when the jurors do not themselves suffer from that physical defect. All that can be done in these cases is for the matter to be left to the jury. As one commentator has argued, the most realistic course that the trial judge might take is as follows:

[80] This offence carries the maximum sentence of life imprisonment in New South Wales and South Australia: Crimes Act 1900 (N.S.W.) s. 24 and Criminal Law Consolidation Act 1935-1975 (S.A.) s. 13. It attracts a maximum sentence of fifteen years imprisonment in Victoria: see Crimes Act 1958 (Vic.) s. 5.

[81] See Brown, *op. cit.* 230: 'There is every reason for a doctrine which was first conceived of as a shelter for human frailty, closing its doors on the super-strong: but there is no justification for its exclusion of those whom it was originally established to accommodate.'

> There is a lot to be said for the judge not attempting to describe the reasonable man but simply leaving the issue to the jury, provided that there is some evidence of loss of self-control. The jury might then take account of the virility or size or colour or psychological make-up of the accused and ask themselves what would be the effect of this provocation upon a person having these physical or mental characteristics but having that degree of self-control that can properly be expected from that person.[82] The inscrutability of the jury verdict would then remove the matter from the ambit of the law.[83]

We might add that the current ability of juries to cope with the difficult evidentiary inquiries involved in trials where the defence of insanity or diminished responsibility are raised strongly suggests that they will be equally capable of deciding upon the degree of self-control to be expected of particular accused persons.

The major thrust of this article has been that the House of Lords' decision in *Camplin*, welcome as it was in other respects, should not be followed in Australia on the issue of ethnic derivation. It is still entirely open to the Australian courts to carry on the legal development which had begun in cases like *La Cava*, *Moffa* and *Webb*. Indeed, this is already being done in a number of post-*Camplin* cases by Cox J. of the South Australian Supreme Court and most recently by Finlay J. in New South Wales. Perhaps there is scope for refining the recognition of ethnicity further by taking into account the extent to which a foreign-born accused has assimilated into his new environment.[84] This refinement, if introduced, would mean that the extent to which an accused's power of self-control will be ascribed to his country of origin as opposed to his new homeland would depend on the time he has spent in each of these two countries.[85]

The precise manner in which the characteristic of ethnic derivation will ultimately be recognised in the defence of provocation will, of course, be a matter for our courts. In this regard, it is noted that the High Court has not ruled on this defence for nearly a decade and, in particular, since the decision in *Camplin*. Accordingly, it is reasonable to anticipate such a case arising in the near future. It is hoped that when this occurs, the High Court will not miss the opportunity to expressly depart from *Camplin* and instead will develop further upon the statements of Barwick C.J. in *Moffa* concerning the characteristic of ethnic derivation and its effect on the objective test in provocation.

[82] Lest there be confusion created by the last part of this sentence, it may be stressed that what is contemplated here is that the jury will evaluate the power of self-control to be expected of the particular accused, bearing in mind his peculiar physical and mental characteristics.

[83] Samuels, *op. cit.* 166. See also Brett, *op. cit.* 637, who submits that the jury, as triers of fact, should decide each case having regard to 'a number of factors, some genetic, others environmental, [which] combine to produce the differences of susceptibility and response'.

[84] This is the approach taken by the courts in Papua and New Guinea; for example, see *R. v. Manga Kitai* [1967-68] P. & N.G.L.R. 1 and *R. v. Moses Robert* [1965-66] P. & N.G.L.R. 180.

[85] This involves the extent of integration into the host community which could be evaluated by reference to such factors as the accused's exposure to the Australian educational system, his involvement with employment and other activities outside his ethnic community and ascription to a traditional Western religion.