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*Law and Public Policy: Taming the Unruly Horse?*

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**THE NOT SO ORDINARY, REASONABLE PERSON OR THE MAN FROM  
CLAPHAM JUST GOT OFF THE BUS**

IAN DOBINSON AND LESLEY TOWNSLEY\*

In *Crime, Reason and History* Alan Norrie argues 'that criminal law is neither rational nor principled, so that the 'extraordinary' is as much the norm as the ordinary.'<sup>1</sup>

In a subsequent article, Norrie seeks to use the objective test in provocation to demonstrate his point. As Norrie states,<sup>2</sup> this has led, in England, to the apparent but somewhat irrational recognition in law of a 'reasonable glue sniffer',<sup>3</sup> 'reasonable immature person'<sup>4</sup> and a 'reasonable obsessive'.<sup>5</sup> It is possible to add others such as the 'reasonable battered woman'<sup>6</sup> and 'reasonable depressive'.<sup>7</sup> In referring to the Australian High Court case of *Stingel v R*,<sup>8</sup> Norrie further suggests that this case recognizes the existence of the 'reasonable erotomaniac'.<sup>9</sup> While we do not necessarily agree with Norrie's specific assertions regarding provocation we do agree that role of the reasonable or ordinary person in criminal law is both contentious and problematic.

From a law reform perspective, Eric Colvin argues that liability for serious offences should not be determined by reference to standards of conduct attributed to some mythical reasonable or ordinary person, particularly in circumstances beyond the capacities of the accused. If objective tests are to be imposed they should be restricted

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<sup>1</sup> Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (2<sup>nd</sup> ed, 2001) 7.

<sup>2</sup> Alan Norrie, 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) 65 *The Modern Law Review* 538.

<sup>3</sup> *R v Morhall* [1995] 3 All ER 658.

<sup>4</sup> *R v Humphreys* [1995] 4 All ER 1008.

<sup>5</sup> *R v Dryden* [1995] 4 All ER 987.

<sup>6</sup> *R v Ahluwalia* [1992] 4 All ER 889.

<sup>7</sup> *R v Smith* [2000] 4 All ER 289.

<sup>8</sup> (1990) 171 CLR 312. ('*Stingel*')

<sup>9</sup> Norrie, above n 2, 539.

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‘to breaches of minimal standards of conduct that were attainable with reasonable ease...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.’<sup>10</sup>

In her seminal work, *Rethinking the Reasonable Person*,<sup>11</sup> Mayo Moran also calls for reform because ‘[o]n her account, the reasonable person standard is an impediment to the pursuit of justice.’<sup>12</sup> While her focus is on the tort of negligence much of what she concludes is also relevant to the criminal law. In this regard, Moran calls for the abandonment of the reasonable person standard in negligence. Judges, she states, ‘should focus their attention on the morality of the salient core of the present inquiry into reasonableness.’<sup>13</sup> Further, in referring to Moran’s work, Mullender notes:

According to Moran, this is the question of whether the defendant’s conduct betrays the ‘normative shortcoming’ of indifference to the interests of the person he or she has harmed. By concentrating on this question, judges should, other things being equal, be able to detect genuine blameworthy failings.<sup>14</sup>

The objective of our research is to make sense of, or rationalize the various approaches taken by the criminal law, where the conduct and mind of the objective person serves as the benchmark to measure the mind or conduct of those actually involved in the offence. We begin with an initial descriptive analysis of the role of the reasonable or ordinary person in criminal law.<sup>15</sup> The criminal law will be that which applies in New South

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<sup>10</sup> Eric Colvin, ‘Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility’ (2001) 27 *Monash University Law Review* 197, 197.

<sup>11</sup> Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (2003).

<sup>12</sup> Richard Mullender, ‘The Reasonable Person, The Pursuit of Justice, and Negligence Law’ (2005) 68(4) *Modern Law Review* 681, 682.

<sup>13</sup> *Ibid* 685.

<sup>14</sup> *Ibid*.

<sup>15</sup> This will be Part 1 and the basis for this paper. Part 1 does not attempt to be an exhaustive identification of where the reasonable or ordinary person arises in the criminal law. This would be a daunting task given the large number of statutory offences that are determined objectively. The focus will be on the so-called

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Wales, noting, however, that much of this law will be relevant to other Australian jurisdictions.

**I WHO IS THE ORDINARY OR REASONABLE PERSON?**

As previously mentioned, Colvin contends that objective liability for certain offences should not be determined by reference to a hypothetical ordinary / reasonable person whose capacities may be beyond the capacities of the accused. In relation to the formulation of objective tests of criminal responsibility, Colvin identifies three capacities being, cognition, fortitude and volition.<sup>16</sup>

The table below sets out the general principles and defences where reliance is placed on an objective test, either fully or partially, of the accused's liability. We have also adopted Colvin's notions of capacity.

**Table 1**

<b>General Principle</b>	<b>Capacity</b>	<b>Reasonable, ordinary or other</b>
Causation / Victim	Cognition	Reasonable person
Assault / Victim	Fortitude	Reasonable person
Unlawful & Dangerous Act Manslaughter	Cognition	Reasonable person
Negligent Manslaughter	Cognition	Reasonable person
Reckless Inadvertence in sexual assault	Cognition	Reasonable/ordinary person <sup>17</sup>
Fraud /Dishonesty	Cognition	Ordinary community standards
<b>Defence</b>		
Provocation	Volition	Ordinary person
Substantial Impairment	Cognition	Reasonable person

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general category of offences, that is, those which require proof of a fault/mens rea element. Part 2, a planned forthcoming article, will consequently seek to rationalize the use of objective tests in criminal law. In this regard two principle themes will be addressed, being rationality and justice. While this will necessarily involve a critique of the work by the likes of Norrie, (see also Antony Duff (ed), *Philosophy and the Criminal Law* (1990)) we will attempt our own theoretical rationalization concluding whether on this basis change and/or reform is necessary.

<sup>16</sup> Colvin above n 10, 201.

<sup>17</sup> This assumes that the notion of reckless inadvertence in sexual assault reflects, at least partially, the objective concept in *Caldwell* recklessness.

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Self-defence	Cognition	Reasonable response in the circumstances
Duress	Fortitude	Average person
Necessity	Fortitude	Reasonable person

What is initially evident from the above table is that not only are so-called objective tests interpreted and applied differently across the criminal law, but that even the name of the objective person differs. Further confusion arises when the terms are used interchangeably. For example, in his judgment criticizing the objective test in provocation, Murphy J in *Moffa v The Queen* repeatedly uses ordinary and reasonable interchangeably or in conjunction.<sup>18</sup>

One of Murphy J's criticisms of the objective test in provocation is that in applying the tests rigidly, that is 'for a superficially homogenous society'<sup>19</sup> – 'the ordinary or reasonable man simply does not kill if he is provoked.'<sup>20</sup> This implies that there is no distinction between the standards of 'ordinary' and 'reasonable'. However, in the same case Barwick CJ explicitly differentiates between the standards:

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

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<sup>18</sup> *Moffa v The Queen* (1977) 138 CLR 601, 627 ('*Moffa*') – 'Even if the objective test were applied, the accused's statement could be regarded by the jury as amounting to: "I am an ordinary reasonable man. I killed my wife only because she provoked me so much that I lost self-control."... If the judge decided that no ordinary or reasonable man could (or would) have so acted, she would be in effect forming an opinion that the accused is not an ordinary or reasonable man...' See also *R v Smith* [2000] 4 All ER 289, 311 where the House of Lords discuss the objective test of the 'reasonable man' and do not make the distinction between 'reasonable' and 'ordinary'. They quote English authority, which while recognizing that reasonable and rational are synonymous, commingle the terms reasonable and ordinary. Although, Lord Hoffman alludes to the distinction when discussing the judicial and academic commentary on the applicable subjective attributes of the reasonable man stating – 'Nor does it elucidate matters to substitute "ordinary" for "reasonable"'.  
<sup>19</sup> *Moffa* (1977) 138 CLR 601, 626.  
<sup>20</sup> *Ibid*, 627.

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provocation, would exclude from consideration such emotional reactions, I have greater reason for preferring the description “ordinary man” in the formulation of that test.<sup>21</sup>

The difference in standard between ‘ordinary’ and ‘reasonable’ was further considered by the High Court in *Stingel*.<sup>22</sup> The court clearly states that “[t]he function of the “ordinary person”... should not be confused with the role of the “reasonable man” in the law of negligence.’<sup>23</sup> The reason for the distinction is that the defence (provocation) would be abolished ‘since it is impossible to envisage circumstances in which a wrongful act or insult would so provoke the circumspect and careful reasonable man’.<sup>24</sup> More importantly the court stated that the assumption underlying the objective tests was not that the act was ‘an ordinary or reasonable reaction to a wrongful act or insult.’<sup>25</sup> Rather, the wrongful act or insult ‘may be of such a nature as to be sufficient to provoke an ordinary person to lose his or her self-control to an extent that he or she does the unreasonable and extraordinary’,<sup>26</sup> thereby recognising the range of emotional experience in humans that could make an ordinary person lose sight of rational thought and action.

It is apparent from these judicial statements that ‘ordinary’ encompasses an agent who is vulnerable to their emotions and acts on them. This is demonstrated in the partial defence of provocation where the justification for reducing culpability is an accused’s emotion(s).<sup>27</sup> Conversely, ‘reasonable’ encompasses the rational agent who has the ability to set emotion aside or assess emotion rationally and act accordingly. This is demonstrated in criminal negligence where the justification for finding culpability is through an assessment of an accused’s ‘network of deliberation – both what it includes

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<sup>21</sup> Ibid 606.

<sup>22</sup> *Stingel* (1990) 171 CLR 312 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>23</sup> Ibid 328.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid 329.

<sup>26</sup> Ibid.

<sup>27</sup> Brian Rosebury, ‘On Punishing Emotions’ (2003) 16 (1) *Ratio Juris*, 37. See also Peter Rush, *Criminal Law (Butterworths Casebook Companions)* (1997), 357, where the author states: ‘Another way of reading the doctrine of provocation is to note the irony involved in the judicial construction of the defence – namely, in acceding to the emotions of the defendant, the judiciary accords to the emotions a power greater than the power of legal rules.’

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and excludes, as exhibited in the pattern of [my] deliberative conduct.’<sup>28</sup> Thus, the ‘reasonable’ benchmark in one sense makes the agent accountable to a higher normative standard and ‘ordinary’ makes the agent accountable to a lower normative standard because of the inclusion of emotion.

Colvin states that ‘ordinary behaviour encompasses a range of conduct’ and ‘ordinary behaviour varies within individuals, depending on how well they use their capacities.’<sup>29</sup> In relation to this, Colvin questions whether the objective tests require ‘a standard to be selected from somewhere in this range: the minimum, the maximum, or some point in between, such as the average or standard of what is “reasonable”.’<sup>30</sup> In other words, what exactly are the cognitive, volitional and fortitudinous capacities of the ordinary or reasonable person?

Theoretically the capacities of cognition, volition and fortitude encompass and require consideration of the role of emotion. On this basis, *cognition* - the mental process of knowing and perceiving, *volition* - the act of willing and making a conscious choice or decision, and *fortitude* - the capacity for mental and emotional strength and courage, all involve consideration of the influence of emotion on judgement.<sup>31</sup> However, traditionally, emotion ‘has almost always played an inferior role in philosophy, often as antagonist to logic and reason.’<sup>32</sup> Further, a ‘core presumption underlying modern legality is that reason and emotion are different beasts entirely’ despite ample examples of how the law accounts for emotion.<sup>33</sup> For our purposes, the implication in this conventional view is that that there is a dichotomy between emotion and reason, that emotion affects reasoning irrationally.<sup>34</sup>

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<sup>28</sup> Rosebury, above n 29, 46.

<sup>29</sup> Colvin, above n 10, 200.

<sup>30</sup> Ibid, 201.

<sup>31</sup> Colvin does not explicitly define the terms as such.

<sup>32</sup> Robert C Solomon, ‘The Logic of Emotion’ (1977) 11(1) *Nous* 41,41.

<sup>33</sup> Terry A. Maroney, ‘Law and Emotion: A Proposed Taxonomy of an Emerging Field’ (2006) 30(2) *Law and Human Behaviour* 119, 220.

<sup>34</sup> Again, it will be the purpose of the second article to more fully explore the relationship between the capacities of the ordinary or reasonable person and the regulation of actions arising from emotional

It must be noted that most objective tests identified in Table 1 refer to the reasonable person. As such, the moral culpability of the offender or reaction by a victim is assessed by reference to a rational agent whose judgement is not influenced by emotion. This, however, is not without variation whereby the objective person (see for example duress), or the reasonableness of response of the defendant (note self defence here) is considered with reference to specific characteristics of the accused compared to others (see for example the test for dangerous) where the reasonable person is in effect neutral. If we were to suggest any trend here, it would be towards the inclusion of characteristics of the accused as a component of the objective test.<sup>35</sup>

The analysis that follows looks at the objective tests in more detail, highlighting the various cases which have provided the constructs for the general principles and defences outlined in Table 1. In this regard, the analysis mirrors the conceptions of a “general part” of criminal law, that is, conduct, fault and defence. To deal with all the principles and defences specified in Table 1, however, would produce a paper of significant length. Accordingly, we have selected three areas to analyse in more detail. These are negligent manslaughter, reckless inadvertence in sexual assault, and provocation. They have been selected because they not only reflect the complexities of the objective test but are also the subject of recent law reform proposals and changes.

## **II CONDUCT, FAULT AND THE REASONABLE/ORDINARY PERSON**

### *(a) Negligent Manslaughter*

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motivators. Our purpose so far in this regard, has been to demonstrate the different meanings of ‘ordinary’ and ‘reasonable’ in light of various capacities and emotional motivators.

<sup>35</sup> As previously mentioned, this will be more fully explored in the second paper.

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Negligent manslaughter in NSW is a common law crime and a leading authority is *Nydam v R*.<sup>36</sup> Here the Victorian Supreme Court stated that negligent manslaughter occurred where death was caused

in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.<sup>37</sup>

This test of criminal or gross negligence is said to apply to negligent acts<sup>38</sup> and negligent omissions,<sup>39</sup> the difference between the two being the requirement in negligent omission manslaughter of establishing a legally recognizable duty.<sup>40</sup> It is also clear that the determination of whether the accused was criminally negligent is purely objective.

In 2004 however, the NSW Court of Criminal Appeal (by majority) in *R v Lavender*<sup>41</sup> overturned the defendant's conviction for negligent manslaughter on the basis that the determination of negligence required a subjective element of malice based on the reference to malice in the *Crimes Act 1900* (NSW) s 18(2) and the definition of malice under section 5. This decision was in turn, however, overturned by the High Court<sup>42</sup> which held that the common law applied to the crime of negligent manslaughter (not s18 *Crimes Act*) and that the definition of negligence sufficient for manslaughter was to be understood in accordance with *Nydam*.

Parts of Kirby J's judgment are of some significance here.

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<sup>36</sup> [1977] VR 430 ('*Nydam*').

<sup>37</sup> *Ibid* 445.

<sup>38</sup> See *Nydam* [1977] VR 430, 445.

<sup>39</sup> See *R v Stone and Dobinson* [1977] 2 All ER 341, 345-346 ('*Stone and Dobinson*'); *R v Taktak* (1988) 14 NSWLR 226,239 (Yeldham J), 250 (Carruthers J) ('*Taktak*').

<sup>40</sup> *Taktak* (1988) 14 NSWLR 226, 240, 250.

<sup>41</sup> [2004] NSWCCA 120.

<sup>42</sup> *R v Lavender* (2005) 222 CLR 67 ('*Lavender*').

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Even in today's society, where death has resulted from aggravated negligence (variously called "'culpable,' 'criminal,' 'gross,' 'wicked,' 'clear,' 'complete'") holding the individual criminally liable has been justified. Subjective intention does not enjoy a monopoly on moral culpability. Professor H L A Hart concluded that people of ordinary capacity who negligently cause an undesirable outcome may be open to blame notwithstanding the absence of a subjective intention to produce that outcome. The claim of a person who causes harm that he or she did not mean to do it or did not stop to think as excusing them of wrongdoing is commonly treated as unpersuasive, especially where death or serious injury ensue.<sup>43</sup>

Kirby J continued:

It is true that, in extreme situations, a person may be exposed to criminal liability for being objectively at fault in circumstances where no one would regard that person as culpable. For instance, it would not be rational to impute blame to a person who is physically or mentally incapable of achieving the standard of care expected by the criminal law. However, this, and related objections to justifying objective criminal liability on the basis of moral blameworthiness, are largely grounded in theoretical arguments.<sup>44</sup>

As a result of the High Court's decision it is now confirmed that the objective test for negligent manslaughter is satisfied where the defendant does not exercise a standard of care that a reasonable person would have exercised in circumstances which, objectively, involved a high risk of death or grievous bodily harm. In addition, such negligence must be so gross, or wicked as to warrant criminal punishment.<sup>45</sup> A question arises, however, as to the extent to which any personal characteristics of the accused are relevant to a reasonable person's awareness of such risk, noting the intrinsic link between this and the notion of gross or wicked negligence. As Kirby notes above, 'it would not be rational to impute blame to a person who is physically or mentally incapable of achieving the standard of care expected by the criminal law.'

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<sup>43</sup> *Lavender* (2005) 222 CLR 67, 107-108.

<sup>44</sup> *Ibid* 108.

<sup>45</sup> *Taktak* (1988) 14 NSWLR 226, 247 (Yeldham J).

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In the English case of *Stone and Dobinson*,<sup>46</sup> Stone was described as being partially deaf, almost totally blind, no sense of smell and of low average intelligence. Dobinson was described as ineffectual and somewhat inadequate. This description of the intellectual and physical capacities of Stone and Dobinson is stated in the facts of the case and appears to be relevant for three reasons. Firstly, the issue as to their intellectual capacities must have arisen at trial. The appeal court in reviewing the trial judge's directions on the nature of negligence and recklessness quotes passages in which the trial judge differentiates between a person 'who is not very bright' and one who is reckless. In other words, the trial judge is making a distinction between a person who is incompetent and a person who is indifferent as to their responsibility. Secondly, Stone's physical capacities were relevant because his invalid sister (who died) was found lying in a pool of excrement, her body ingrained with dirt and her bedclothes filthy and soiled. This would have been obvious to a person with ordinary senses of smell and sight. Thirdly, and consequently, the court held that while the capacity of Stone was not relevant to the assessment of negligence, though however, 'that we are now able to extend some mercy to this man who is greatly handicapped' and reduced his sentence from three years to twelve months.<sup>47</sup>

The Court of Appeal, in *Stone and Dobinson*, rejected the defence argument that the prosecution must prove that the defendants appreciated the risk of death or serious injury. The Court went on to say that:

The duty which a defendant has undertaken is a duty of caring for the health and welfare of the infirm person. What the prosecution have to prove is a breach of that duty in such circumstances that the jury feel convinced that the defendant's conduct can properly be described as reckless, that is to say a reckless disregard of danger to the health and welfare of the infirm person. Mere inadvertence is not enough.<sup>48</sup>

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<sup>46</sup> [1977] 2 All ER 341.

<sup>47</sup> Ibid 348.

<sup>48</sup> Ibid 347.

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We see in *Stone and Dobinson* that the appellant's lack of capacity led to a lack of knowledge as to the urgent nature of the victim's need for medical assistance, and this lack of knowledge was considered as irrelevant in determining the question of negligence. Conversely, in the NSW case of *Taktak*, Yeldham J indicated that certain personal characteristics of the accused may well affect an appreciation of the danger or risk created and as such this was relevant to an assessment of his gross or wicked negligence.<sup>49</sup> Yeldham J indicates in the passage below, that the factors leading to Taktak's reduced capacity and consequent lack of knowledge in relation to seeking medical assistance, were relevant, and thus his omission to obtain medical assistance could not in the circumstances be characterized as criminal negligence.

The appellant himself was a heroin addict. He had no medical knowledge. The time involved, on any view, was short. Plainly he did make some ineffectual attempts to bring her out of her apparent state of unconsciousness. Reasonable care and common prudence demanded that he should have called medical help, notwithstanding the hour of the morning. But to hold that he was criminally negligent, and that such negligence caused or accelerated death, was in my opinion a verdict which was dangerous and unsatisfactory. There was no evidence that the appellant knew the extent of the ingestion by the deceased of any drug or that, if medical help was not obtained for her, she would be likely to die. Nor is there any evidence that he was aware that death, if likely, might have been prevented by the administration of Narcan or any other preparation. Any finding against him on these issues involved at least some guesswork.<sup>50</sup>

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<sup>49</sup> Taktak (T) had procured two prostitutes for a man named Rabih who had taken them to a party, subsequently one of the prostitutes died of a heroin overdose. T was not present at the party or when the girl took the drugs but thought she had been using tablets or heroin. In the early hours of the morning Rabih called T to pick the girl up from outside the building where the party had been held. When T arrived she was semi-conscious, he put her in a cab and took her back to Rabih's shop where he made some ineffectual efforts to revive her. She lost consciousness and T did not call for medical assistance, they were the only people at the shop. At around 10am the following morning Rabih arrived and tried to wake the girl up, she could not be roused and T called a doctor who on arrival pronounced her dead. Yeldham J reluctantly found that T had a duty of care on the basis that he had voluntarily assumed the care of a helpless person and so secluded that person as to prevent others rendering aid.

<sup>50</sup> *Taktak* (1988) 14 NSWLR 226, 248.

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As noted in Brown, the Victorian Law Reform Commission in its report on Homicide recommended 'where the accused presented evidence which raised the issue of his or her capacity to meet reasonable standards because of physical or mental deficiency, the prosecution should have to prove beyond reasonable doubt that the accused was able to meet those standards.'<sup>51</sup>

This appears to reflect Yeldham's position in *Taktak* but such a position is apparently at odds with *Stone and Dobinson*.<sup>52</sup> In negligence the capacity of the reasonable person is cognitive, and the recognition that Stone and Dobinson did not have the required acumen was accounted for at the sentencing stage. Given the perceived harshness of that decision, there appears to be now a move to consider the capacities of the accused when applying the substantive law, as in *Taktak*. However, a question remains as to the parameters of the objective test and which, if any, capacities of the accused will be relevant and attributed to the reasonable person in any given situation.

*(b) Reckless Inadvertence in Sexual Assault*

Recently, in *R v G*,<sup>53</sup> the House of Lords overturned its own decision in *Caldwell*.<sup>54</sup> While the HL stated that it was only dealing with the meaning of reckless as it related to

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<sup>51</sup> David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (4<sup>th</sup> ed, 2006) 488 referring to Victorian Law Reform Commission, *Homicide*, Repot No 40 (1991) [270].

<sup>52</sup> Regarding the position in the UK, it is significant to note the 2006 Law Commission Report on Homicide (<http://www.lawcom.gov.uk/docs/lc304.pdf>):

3.60 We recommend the adoption of the definition of causing death by gross negligence given in our earlier report on manslaughter:

(1) a person by his or her conduct causes the death of another;  
(2) a risk that his or her conduct will cause death...would be obvious to a reasonable person in his or her position;  
(3) he or she is capable of appreciating that risk at the material time;  
and  
(4) ... his or her conduct falls far below what can reasonably be expected of him or her in the circumstances ... .

<sup>53</sup> [2003] 4 All ER 765.

<sup>54</sup> *R v Caldwell* [1982] AC 510.

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criminal damage, others contend that the decision will be applied elsewhere. In this regard, Ashworth notes for

acts taking place before May 1, 2004, the law of sexual offences will continue with the "couldn't care less" test of recklessness deriving from decisions such as *Kimber* (1983) 77 Cr.App.R. 225, ...<sup>55</sup>

In *R v Kitchener*,<sup>56</sup> the NSW Court of Criminal Appeal considered the meaning of recklessness in the then existing 61D 1A(2) of Crimes Act NSW.<sup>57</sup> Carruthers J, who gave the judgement for the Court, began by dealing with the case of *Morgan*.<sup>58</sup>

where Lord Cross of Chelsea stated: 'Rape, to my mind, imports at least indifference as to the woman's consent.' Lord Edmund-Davies stated (at 225) 'the man would have the necessary *mens rea* if he set about having intercourse *either* against the woman's will *or* recklessly, without caring whether or not she was a consenting party.' Lord Hailsham of St Marylebone stated (at 215) 'the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no'; and (at 209) 'if the intention ... is to have intercourse *volens*, that is

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<sup>55</sup> Ibid at 371. Ashworth notes that acts taking place after this date are now governed by the *Sexual Offences Act 2003*. This Act abolishes the notion of recklessness for rape, the new offence being specified as follows:

"1. Rape

(1) A person (A) commits an offence if-

- (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."

In this sense, a person who does not take any steps to ascertain whether the victim consents, cannot claim that they reasonably believe that the victim was consenting.

<sup>56</sup> (1993) 29 NSWLR 696 ('*Kitchener*').

<sup>57</sup> Now 61R(1).

<sup>58</sup> *Director of Public Prosecutions v Morgan* [1976] AC 182.

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recklessly and not caring whether the victim be a consenting party or not' then the requisite criminal intention is found...<sup>59</sup>

Since *Kitchener*, the NSWCCA has confirmed this concept of reckless inadvertence in *Tolmie v R* and *R v Mueller*.<sup>60</sup> In *Banditt v R*, the High Court further considered the meaning of reckless inadvertence in accordance with s61R(1).<sup>61</sup> On appeal from the NSWCCA, the appellant argued that s61R(1) 'should be construed as imposing the same mental element as is required for a conviction for rape under the common law..., that is, as requiring of an offender that he be indifferent about the risk, or determined to engage, in intercourse whether the complainant consented or not. Awareness of a risk would not suffice...'<sup>62</sup>

Counsel for the appellant further sought to argue that an accused might be aware of a possibility (or a 'real' possibility) that consent is absent, but should not be regarded as reckless unless it could be concluded that he was indifferent to whether consent was not being given.<sup>63</sup>

It was further submitted that:

the approach of the Court of Criminal Appeal in this case requires the drawing of very fine distinctions between levels of possibility or probability in the mind of an accused. Recklessness would not be established if the accused were aware that there was "a slight possibility" of absence of consent but would be, if there were awareness of "a real possibility" of absence of consent.<sup>64</sup>

Counsel for the appellant argued:

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<sup>59</sup> *Kitchener* (1993) 29 NSWLR 696, 702.

<sup>60</sup> See (1995) 37 NSWLR 660; [2005] NSWCCA 47 respectively.

<sup>61</sup> *Banditt v R* (2005) 224 CLR 262 ('*Banditt*').

<sup>62</sup> *Ibid* 263.

<sup>63</sup> *Ibid* 264.

<sup>64</sup> *Ibid* 296.

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that a man would be unlikely to engage in such fine levels of analysis in a sexual context. In contrast, it was contended, directions based on the judgment of the House of Lords in *Morgan* need not make any reference at all to awareness of possibilities or probabilities. A direction that the prosecution must prove that the accused did not believe that consent had been given, and simply did not care whether the complainant consented or not, would be sufficient. That test avoids, it was urged, a problematic distinction between 'advertent' and 'inadvertent' or 'non-advertent' recklessness.<sup>65</sup>

Callinan, J. rejected these submissions and further disagreed with the appellant's argument that:

the trial judge's direction that recklessness would be established if the appellant were aware there was a possibility that the complainant was not consenting to sexual intercourse with him, was wrong: there should have been an additional direction that the appellant had to be shown to be "indifferent" about the risk, or determined to have sexual intercourse whether consent was present or not.<sup>66</sup>

In dismissing the appeal he concluded that:

In this case, the trial judge's formulation of 'recklessness' reasonably approximated what had been said in a number of the cases. It was a reasonable approximation, although an unnecessary one, of the dictionary meaning, and the common understanding of recklessness.<sup>67</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid 297.

<sup>67</sup> Ibid 298. See also, 296-297 'The appellant helpfully drew attention to the position in other Australian jurisdictions. Western Australia, Queensland and Tasmania impose objective tests, so that an honest belief in consent will not negate criminal responsibility unless it be reasonably held. Victoria adopts a statutory test of awareness that the other person "is not consenting or might not be consenting". South Australia has enacted a statutory formulation as to the mental element of rape similar to s 61R(1). Section 48 of the *Criminal Law Consolidation Act 1935* (SA) as amended by Act No 83 of 1976, provides that the offence is made out by establishing knowledge of absence of consent, or reckless indifference as to whether the other person consents to sexual intercourse with him. In *Egan*, White J (with whom Zelling and Mohr JJ agreed) said:

"Once it is clearly proved that she might not be consenting, then the man is recklessly indifferent if he presses on with intercourse without clearing up that difficulty of possible non-consent. ...

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In NSW therefore, an accused would be reckless in accordance with s61R(1) where they fail to advert to the possibility that the victim is not consenting in circumstances where they should have adverted to such possibility.<sup>68</sup> As noted by Bronitt and McSherry '[t]he fault element for rape in New South Wales has adopted a modified standard of recklessness based on the culpable inadvertence standard used in *Caldwell*...'<sup>69</sup>

While it is arguable that *Kitchener* and *Banditt* are restricted to the meaning of s61R(1), both cases imply an element of objectivity in this determination of recklessness on the basis that the accused is reckless where they unreasonably fail to advert to the possibility of non-consent. This, as Bronitt and McSherry note, is very similar to *Caldwell* and as such, a defendant is reckless as to the consent of the victim where he/she creates a risk of non-consent which would have been obvious to an ordinary person and then fails to consider this risk. It is accepted that the courts in both *Kitchener* and *Banditt* do not define recklessness under s61R(1) precisely in these terms but the implication is certainly present. This conclusion however, is not highlighted here as a criticism of these two cases. The purpose is to acknowledge that if recklessness is defined in this way, then it imports a comparative consideration whether a reasonable or ordinary person would have perceived the risk. In *Caldwell*, this hypothetical person was without age and gender, let alone any other personal characteristics of the accused. This approach has now been overturned in the UK by *R v G*.<sup>70</sup>

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Upon receiving notice of the possibility of her non-consent, he is put upon inquiry before he proceeds to intercourse."

<sup>68</sup> The NSW Bench Book contains the following entry:

The accused's state of mind was such that he or she simply failed to consider whether or not the complainant was consenting at all, and just went ahead with the act of sexual intercourse, notwithstanding the risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned his or her mind to it: *R v Kitchener* (1993) 29 NSWLR 696 at 697; *R v Tolmie* (1995) 37 NSWLR 660; *R v Mitton* [2002] NSWCCA 124. This is a wholly subjective test and is often referred to as 'non-advertent recklessness'. In Criminal Law Review Division Attorney General's Department (NSW), *The Law of Consent and Sexual Assault*, Discussion Paper (May 2007), 20-21.

The extent to which this is a wholly subjective test is certainly questionable given the way in which it is framed.

<sup>69</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005)183.

<sup>70</sup> [2003] 4 All ER 765.

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Accordingly, one is left pondering whether under the common law, a defendant's awareness of the risk of non-consent should be considered in light of someone in the defendant's position or circumstances. The extent to which this will be resolved by the recent changes to the legislation is unclear.<sup>71</sup> What is clear however is that the new provisions introduce an objective fault element in sexual assault. It is therefore arguable that a person who does not seek to ascertain whether a victim is consenting or not in circumstances where they should (reckless inadvertence) 'has no reasonable grounds for believing that the other person consents to the sexual intercourse'.<sup>72</sup> In addition to this any accused who claims that they honestly but mistakenly believed that the victim was consenting may have to demonstrate that they took steps to ascertain whether the victim was consenting and this would have to be objectively reasonable.<sup>73</sup>

How will this test of objective reasonableness in sexual assault be determined? Will it be referable to the reasonable person without the personal characteristics of the accused as it is in New Zealand?<sup>74</sup> Will it focus on the reasonableness of the accused's belief and allow certain characteristics of the accused to be taken into account as in the United Kingdom?<sup>75</sup> Or will it focus on the reasonableness of the steps taken by the accused that led to the formation of a belief in consent, as in Canada?<sup>76</sup>

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<sup>71</sup> Section 61HA(3) *Crimes Act 1900* (NSW) states:

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

- (a) the other person knows that the other person does not consent to sexual intercourse, or
- (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
- (c) the other person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.

<sup>72</sup> See s 61HA(3)(c) above n 73..

<sup>73</sup> See s 61HA(3)(d) above n 73.

<sup>74</sup> *Crimes Act 1961* (NZ), s 128(2); *R v Mustafa Can* [2007] NZCA 291.

<sup>75</sup> *Sexual Offences Act 2003* (UK), s 1(1).

<sup>76</sup> *Criminal Code* (Can), s 273.2; *R v Ewanchuk* [1999] 1 SCR 330.

The above examples of jurisdictions with similar sexual assault provisions containing an objective fault component, demonstrate that interpretation and application of the objective standard can vary significantly. This highlights the difficulties in formulating an objective test that will be both concordant with the underlying principles and policies of the criminal law in relation to fault and fairness to an accused person. Apparently the same tension as encountered by the courts in formulating the test for reckless indifference in sexual assault.

### **III DEFENCES - PROVOCATION**

It is in the area of criminal defences that the role of the reasonable or ordinary person is at its most complex and confusing. Such complexity is easily demonstrated through a consideration of the defence of provocation. This could be an article in its own right but the objective here is just to highlight the elements of the defence which are determined from an objective perspective.

As noted in the Introduction, Norrie identifies the defence of provocation as a classic example of the irrationality in criminal law. What is the basis for this?

The leading Australian authority on the objective test in provocation is *Stingel v R*.<sup>77</sup> While this is a Tasmanian case and was concerned with provisions in the *Criminal Code* (Tas), the High Court held that there was no good reason why the ordinary person provisions of the Code should not apply to s23 *Crimes Act 1900* (NSW) and to that extent broadly across Australia. In *Stingel* the High Court set out a two stage test for a jury's determination of whether an ordinary person would, like the accused, have lost his/her self control. The first stage required a contextualization of the gravity of the provocation. In a unanimous decision, the HC stated that:

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<sup>77</sup> (1990) 171 CLR 312.

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Even more important, the content and extent of the provocative conduct must be assessed from the viewpoint of the particular accused. Were it otherwise, it would be quite impossible to identify the gravity of the particular provocation. In that regard, none of the attributes or characteristics of a particular accused will be necessarily irrelevant to an assessment of the content and extent of the provocation involved in the relevant conduct. For example, any one or more of the accused's age, sex, race, physical features, personal attributes, personal relationships and past history may be relevant to an objective assessment of the gravity of a particular wrongful act or insult. Indeed, even mental instability or weakness of an accused could, in some circumstances, itself be a relevant consideration to be taken into account in the determination of the content and implications of particular conduct. For example, it may be of critical importance to an assessment of the gravity of the last of a series of repeated insults suggesting that the person to whom they are addressed is 'mad' to know that that person has, and understands that he has, a history of mental illness.<sup>78</sup>

This does not mean that every characteristic of an offender is relevant to the gravity of the provocation. In *R v Baraghith*, for example, Samuels JA stated that:

I do not think it was necessary to tell the jury that the appellant was a stranger in Australia; and there was nothing to justify a direction that the deceased's conduct was generated by any cultural or religious differences between her and the appellant. There was in short, no evidence from the appellant or anyone else, that what he asserted his wife had done had particular gravity for him as an Egyptian or as a Muslim, or on account of any other specific attribute or characteristic.<sup>79</sup>

What is consistent throughout these judgments is that there must be a sufficient link between the provocative conduct and the effect this has had on the accused resulting in their loss of self control, thereby establishing the gravity of the provocation. Establishing this link requires the court to consider the relevance of the characteristics of the accused,

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<sup>78</sup> Ibid 326.

<sup>79</sup> (1991) 54 A Crim R 240, 245.

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but a determination of their relevance, such that they are included or excluded, is very much at the discretion of the trial court judge. As we will elaborate on further below, it is in exercising that discretion that much of what Norrie contends is irrational in this area of law arises.

Having contextualized the gravity of the provocation, the jury should then determine whether an ordinary person would have lost their self control when faced with provocation of that gravity. Here however, the characterization or description of the ordinary person did not include any specific characteristics of the accused. Such an ordinary person had only one characteristic, that being a minimum level of self control. The High Court went on to say however, that the age of the accused might be included but only in circumstances where maturity was an issue.

The 1994 South Australian case of *R v Georgatsoulis* is a useful example of how the two stages are applied.<sup>80</sup> Here the accused was a 50 year old Greek male. He worked with the female victim who he apparently loved and to whom he gave many gifts. While the victim encouraged the attention and accepted the gifts, she rejected G's affections. Following a fight in a restaurant which continued at the café where the two worked, G stabbed the victim to death. Part of G's provocation defence was that he had been humiliated in the eyes of other Greeks dining at the restaurant. He was convicted of murder and appealed.

In applying *Stingel*, King CJ noted that an assessment of the gravity of the provocation in this case should include G's cultural attitudes to relations between men and women and the history of unrequited affection. As far as the second stage was concerned, the jury should have been directed to consider the self control of the ordinary person of 'featureless anonymity' with a capacity for self-constraint within the normal limits for men and women in Australia. The age of the accused was irrelevant.

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<sup>80</sup> (1994) 62 SASR 351 – note provocation is a common laws defense in SA. See also *Masciantonio v R* (1995) 129 ALR 575.

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The problems with the objective test in provocation are further demonstrated by the High Court decision in *Green v R*.<sup>81</sup> Green was convicted of the stabbing murder of the victim, a male friend. Green raised the defence of provocation based on the victim's sexual advance made to Green when the accused slept over at the victim's residence. While the trial court judge allowed the provocation defence to be put, he directed the jury that evidence of Green's special sensitivity to sexual assault because of his father's sexual assault of Green's sisters, was irrelevant to the defence. On appeal to the NSWCCA, the majority agreed with the defence submission that the trial judge was wrong not to direct the jury on this evidence. They dismissed Green's appeal, however, on the basis that there had been no substantial miscarriage of justice. Green then appealed to the High Court.

By a majority of 3 to 2, the High Court allowed the appeal. The majority of Brennan CJ, Toohey J and McHugh J held that Green's special sensitivity was relevant to s23(2)(a) and (b) and should have been allowed. Had it been allowed, the jury may have acquitted. As such the NSWCCA's decision re the proviso could not stand. The minority comprised Gummow J and Kirby J. In dismissing the appeal, Gummow stated that:

The accused's evidence as to the deep impression made upon him by episodes in his family history, so that, in the appellant's words, he had hated his father and wanted to kill him, were insufficiently related to the provocation presented by the conduct of the deceased...

The ultimate question presented by s23(2)(b) in this case relates to the possible effect of the offered provocation, understood and assessed with respect to its gravity, by reference to the position of the deceased, upon the power of self-control of a truly hypothetical 'ordinary person'. Such an ordinary person with the personal beliefs and attitudes asserted by the accused with respect to the conduct of his father during his childhood would still be expected to have retained, in the circumstances of this case, the necessary

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<sup>81</sup> (1996) 191 CLR 334 ('*Green*').

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degree of self-control as not to have formed an intent to kill or to inflict grievous bodily harm upon the deceased.<sup>82</sup>

Kirby J, who was scathing in his dismissal of the appeal, stated:

In my view, the "ordinary person" in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill or to inflict grievous bodily harm.<sup>83</sup>

Then further down:

If every woman who was the subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence rising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended.<sup>84</sup>

According to Norrie a problem arises because there is a tension between establishing 'a general standard for judging provocation while attending to individual particularity of the accused' and that this tension arises because of the 'unsatisfactory intellectual split between orthodox subjectivists and the moral contextualists...'<sup>85</sup> A further problem as highlighted in *Green*; is the variance and disparity between the majority and minority judgments in relation to the moral contextualization of Green's conduct. Thus, taking a similar line to that of Norrie in his assessment of UK law on provocation, it is arguable, in accordance with *Green*, that the law of provocation in Australia recognizes the existence of an 'ordinary' homophobic male. The purpose here, however, is not to critically analyse the defence of provocation. This has been done by others<sup>86</sup> and has led to serious consideration being given to the abolition of this defence.<sup>87</sup>

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<sup>82</sup> Ibid 385-386.

<sup>83</sup> Ibid 408-409.

<sup>84</sup> Ibid 415.

<sup>85</sup> Norrie, above n 2, 539.

<sup>86</sup> See generally Warren J Brookbanks, 'I Lost it': Rethinking Loss of Self-control in Provocation' (2006) 3 (4) *Alternative Law Journal* 186; Graeme Coss, 'The Defence of Provocation: An Acrimonious divorce

#### IV CONCLUSION

As noted, the above three legal principles were chosen largely because they are recent subjects of Australian criminal law reform proposals and changes. In addition, we believe they exemplify certain themes and trends in the law as represented by the principles and defences specified in Table 1 above.

In terms of capacity, it is important to note that the most common factor is cognition. In this sense, the objective person is attributed with reasonable or ordinary powers of perception or knowledge. The accused's liability is accordingly assessed on the basis of what the objective person would have perceived or known. Where this involves a notion of a risk as to certain consequences (note negligent and unlawful and dangerous act manslaughter) or circumstances (note reckless inadvertence as to consent in sexual assault) then a failure by the accused to perceive such risk where an objective person would have perceived will ground liability.

While there is a lack of common ground on the element of fraud/dishonesty in property offences and the extent to which this is an objective or subjective consideration, the objective argument states that an accused's fraudulent/dishonest intention is to be, at least partially, considered by reference to ordinary community standards,<sup>88</sup> in other words, what members of that community would perceive as being fraudulent/dishonest.

Where cognition is relevant to a defence, the approach is somewhat different. An accused who seeks to rely on the defence of substantial impairment<sup>89</sup> will be determined to be suffering from an abnormality of the mind where a reasonable person would perceive the state of the accused's mind to be objectively abnormal.

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From Reality' (2006) 18(1) *Current Issues in Criminal Justice* 51; Bernadette McSherry, 'It's a Man's World: Claims of Provocation and Automatism in 'Intimate' Homicides' (2005) 12(2) *Psychiatry, Psychology and Law* 388; Jane Maree Maher, 'Honouring White Masculinity: Culture, Terror, Provocation and the Law' (2005) 23 *Australian Feminist Law Journal* 147.

<sup>87</sup> In 2003 and 2006, respectively, Tasmania and Victoria abolished provocation.

<sup>88</sup> See *R v Feely* [1973] QB 530.

<sup>89</sup> Section 23A *Crimes Act 1900* (NSW) previously known as diminished responsibility.

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Somewhat differently, the response of the accused in a case of self defence must be objectively reasonable in the circumstances. This, however, is not a consideration of what a reasonable person would have perceived or known in such circumstances, but rather a perception of the reasonableness of the response.<sup>90</sup>

Similar observations can be made about the remainder of Table 1 but the overriding observation is that the law has developed somewhat disparately. This could well be explained by fundamental differences in the particular law and the capacity of the objective person, but in other circumstances this does not provide a satisfactory explanation. In this regard, the distinction between the objective elements in provocation and substantial impairment are understandable whereas those between provocation and duress are not.

Why has the law developed differently? At this stage it is important to acknowledge that the objective tests in criminal law were historically quite consistent. In this regard, the accused's liability was assessed partially by reference to what a reasonable person would have known and/or done in the circumstances. This reasonable person was purely objective, a mythical person as exemplified by the now famous reference to the man on the Clapham omnibus.<sup>91</sup> Apart from the obvious gender specificity, this person was not only devoid of emotion but equipped with the powers of reasonable assessment and objective determination. Characteristics of the accused which were contrary to such objective standards were irrelevant.

A number of principles and defences listed in Table 1 continue to reflect this position and have changed little over the years. These principles include unlawful and dangerous act manslaughter and negligent manslaughter.<sup>92</sup> Similarly, the defences of duress and necessity have changed little since their inception.

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<sup>90</sup> *R v Katarzynski* [2002] NSWSC 613, [25] (Howie J).

<sup>91</sup> *Hall v Brooklands Club* [1933] 1 KB 205, 224 (Greer LJ).

<sup>92</sup> It is important to note, however, the recent recommended changes to negligent manslaughter.

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Others, such as provocation and self defence have changed considerably by way of both case law and legislation. Why the criminal law has developed in this disparate fashion and the extent to which such developments have actually improved both the understanding and application of the criminal law will form the basis of our next paper. As noted in the Introduction, this will also include an assessment of the need for further law reform.