Power of Self-Control in Provocation and Automatism

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The High Court concluded its 1990 rulings with two significant decisions, within a month of each other, on a perplexing aspect of the criminal law. Generally speaking, that aspect concerns the power of self-control of an ordinary (or normal) person to withstand external pressure of a kind which tends to rouse intense rage. One of these decisions was *Stingel v The Queen*,[1] an appeal from Tasmania, in which the High Court had to consider the requirement under the defence of provocation that the wrongful act or insult be "of such a nature as to be sufficient to deprive an ordinary person of the power of self-control". The second case was *R v Falconer*,[2] an appeal from Western Australia, involving a person who had killed while allegedly in a state of dissociation caused by a psychological blow. The High Court resolved the question of whether the case was one of sane automatism or insane automatism by resorting to a test comprising the power of self-control of an ordinary person to protect the mind from malfunctioning. Hence, while the pleas relied upon by the accused persons in these two cases were different, they had in common the issue of the ordinary person's power of self-control to resist external pressure, namely, provocation in one case and a psychological blow in the other. The requirement of an ordinary person's power of self-control will be described as the objective test in this discussion.

The cases have several other features in common. Both stem from Code jurisdictions but the High Court declared that the objective test in provocation and psychological blow automatism was equally a part of the common law.[3] There is also the High Court's reliance in both cases on Canadian Supreme Court decisions.[4] This constitutes a refreshing move when compared with the usual references to English authorities.

As for the specific rulings on the objective test itself, the High Court strove to ensure that the test in automatism corresponded with the one in provocation. In both instances, the ordinary person was imbued with a normal temperament, unaffected by the personal characteristics of the particular accused pertaining to powers of self-control. The one exception conceded by the High Court was the

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1 (1990) 65 ALJR 141.

2 (1990) 65 ALJR 20.

3 For provocation, see *Stingel* [1990] 65 ALJR 141 at 146 despite the High Court's earlier comment (at 5) that it proposed to keep its focus firmly fixed upon s160 of the *Criminal Code Act* 1924 (Tas). For automatism, see *Falconer* [1990] 65 ALJR 20 at 28 per Mason CJ, Brennan and McHugh JJ; at 36 per Toohey J; at 42 per Gaudron J, reading s23 of the *Criminal Code Act* 1913 (WA) alongside common law case authorities.

4 For provocation, the case was *R v Hill* (1986) 25 CCC (3d) 322; for automatism, it was *Rabey v The Queen* (1980) 54 CCC (2d) 1.

age of the accused. Apart from age, personal characteristics of the accused were material only to the extent that they affected the gravity of the provocation or psychological blow towards her or him.

This article outlines the rulings of *Stingel* and *Falconer* on the issue of the power of self-control of an ordinary person. Somewhat surprisingly, *Stingel* contains no reference whatsoever to *Falconer* despite the latter being decided less than a month before. Accordingly, another objective of this discussion will be to draw up the important connections between the two cases. Various aspects of the High Court's rulings will be criticised and a proposal made for the accused's ethnic background to be placed alongside the characteristic of age when applying the objective test in provocation and psychological blow automatism.

A Preliminary Theoretical Discourse

Before proceeding to the cases, a significant proposition needs to be canvassed to facilitate a fuller understanding of the ensuing discussion. It is that the rationales for the defences of provocation and automatism stand apart from those for the objective tests contained in these defences. Thus, the defence of provocation may be seen as the law's concession to human frailty or alternatively as a recognition of the victim's contributory fault in provoking the defendant.[5] The objective test as an element of provocation is explained on a quite different premise. The test seeks to achieve equality by making the ordinary person's power of self-control the common denominator of all accused persons pleading the defence. Another rationale for the test is the perceived need "for society to maintain objective standards of behaviour for the protection of human life".[6] The test therefore functions to restrict the scope of provocation rather than to reflect the rationales underlying the defence.

In respect of automatism, the rationale for the defence comprises "a basic principle of criminal law that a person 'is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act'".[7] The objective test contained in the defence is not at all concerned with the issue of fault or no-fault expressed by this rationale. The test comes into operation after it has been determined that the accused was not criminally responsible because her or his act was unwilled. It assists the courts to decide whether the accused should be acquitted completely or receive the special verdict and be thereby subject to compulsory medical treatment. Having stated the function of the test, its rationale can be readily appreciated. The test measures the power of self-control of the particular accused against that of an ordinary (or normal) person. The suggestion here is that the criterion of normality should be used to assess whether the accused suffers from mental abnormality. A finding of normal self-control would accordingly render it safe to acquit entirely since the accused is "like everyone else" while a case manifesting abnormal self-control would attract compulsory treatment. More generally, we may observe that, as with its counterpart in the

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5 These alternative rationales of provocation have been frequently discussed in terms of whether the defence should be regarded as a justification or an excuse. For example, see Dressler, J, "Provocation: Partial Justification or Partial Excuse?" (1988) 51 *Modern LR* 467; McAuley, F, "Provocation: Partial Justification, Not Partial Excuse" in Yeo, S M H (ed) *Partial Excuses to Murder* (1991) p19.

6 *Johnson v The Queen* (1976) 136 CLR 619 at 656 per Gibbs J.

7 *R v Radford* (1985) 42 SASR 266 at 272 per King CJ, citing Barwick CJ in the High Court case of *Ryan v The Queen* (1967) 121 CLR 205 at 216.

defence of provocation, the objective test in automatism restricts the scope of the defence; it does so by channelling certain cases over to the defence of insanity.

These distinct rationales and functions of the objective tests in provocation and automatism will be elaborated further in the ensuing discussion. What is emphasised at this juncture is the need to appreciate that the tests are not to be analysed according to the rationales of the defences.

Power of Self-Control in Provocation

In *Stingel*, the accused was a nineteen-year-old male who had stabbed a young man to death. At the time of his death, the victim was in a parked car with A who had previously been the accused's girlfriend. The accused contended that he had lost his self-control on witnessing the victim engaging in sexual activity with his former girlfriend and upon being insultingly rebuffed by the victim. He pleaded the defence of provocation. The trial judge ruled that the defence should not be left to the jury as the matters relied upon by the accused as giving rise to provocation under s160 of the *Criminal Code Act* 1924 (Tas) were incapable of amounting to provocation under that section. The Tasmanian Court of Criminal Appeal upheld the trial judge's ruling. On appeal to the High Court, one of the questions for consideration was the content of the objective test embodied in s160, the relevant part of which reads:

> [Section 160(2)] Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, and which, in fact, deprives the offender of the power of self-control, is provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

The Full Bench of the High Court delivered an unanimous decision. It began by observing that the wording of s160 was similar to s215 of the Criminal Code RSC 1970 (Can), both provisions being traced to the provision of provocation contained in the Draft Code prepared by the Criminal Code Bill Commission of 1879 for submission to the British Parliament.[8] This appears to have prompted the High Court to examine *R v Hill*, the latest Canadian Supreme Court decision on provocation, resulting in a heavy reliance by the High Court on Wilson J's judgment in *Hill*.[9] The High Court adopted what Wilson J considered to be the rationale underlying the objective test in provocation:

> The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.[10]

Here then is a lucid judicial declaration of the rationale for the objective test in provocation. There is a noticeable absence of any reference to the rationales for

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8 *Stingel* [1990] 65 ALJR 141 at 143-144.

9 (1986) 25 CCC (3d) 322. Wilson J delivered a dissenting judgment, differing from the majority primarily on the issue of the trial judge's duty to direct the jury on characteristics attributable to the ordinary person. Another difference appears to have been that, while Wilson J clearly subscribed to the distinction between characteristics affecting the power of self-control and those affecting the gravity of the provocation, the majority judges were ambivalent about the distinction: see Quigley, T, "Deciphering the Defence of Provocation" (1989) 38 *Univ of New Brunswick LJ* 11 at 24-25.

10 Id at 345 and cited in *Stingel* [1990] 65 ALJR 141 at 145.

the defence itself.

The High Court then went on to note how s160(2) refers merely to the deprivation of "an ordinary person of the power of self-control" without proceeding to identify the extent of such loss of self-control.[11] The court clarified the issue by ruling that "the wrongful act or insult must have been capable of provoking an ordinary person not merely to some retaliation, but to retaliation 'to the degree and method and continuance of violence which produces death'".[12]

Reverting to the underlying rationale of the ordinary person test, the High Court declared that its practical effect was to distinguish those of the particular accused's characteristics affecting the power of self-control from those which affected the gravity of the provocation towards her or him.[13] The ordinary person's power of self-control must be held constant and unaffected by the accused's particular temperament or personality, save for immaturity as a result of her or his age. On the other hand, fairness and human reality dictated that all of the accused's personal characteristics could be attributed to the ordinary person in so far as assessing the gravity of the provocation towards her or him. The following passage of the High Court's judgment succintly bears out this distinction:

> The function of the ordinary person in s160 is the same as that of the ordinary person of the common law of provocation. It is to provide an objective and uniform standard of the minimum powers of self-control which must be observed before one enters the area in which provocation can reduce what would otherwise be murder to manslaughter. While personal characteristics or attributes of the particular accused may be taken into account for the purpose of understanding the implications and assessing the gravity of the wrongful act or insult, the ultimate question posed by the threshold objective test of s160(2) relates to the possible effect of the wrongful act or insult, so understood and assessed, upon the power of self-control of a truly hypothetical 'ordinary person'. Subject to a qualification in relation to age ... the extent of the power of self-control of that hypothetical ordinary person is unaffected by the personal characteristics or attributes of the particular accused.[14]

The High Court justified its stance of attributing personal characteristics of the accused to the ordinary person in relation to assessing the gravity of provocation by again referring to Wilson J in *Hill*. Wilson J had there stated that:

> the objective standard and its underlying principles of equality and individual responsibility are not...undermined when such factors are taken into account only for the purpose of putting the provocative insult into context.[15]

Criticisms of the distinction

Several criticisms can be made of the distinction adopted in *Stingel* and *Hill*. First, it runs counter to human reality. Let us take the case of a sexually impotent

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11 *Stingel*, ibid.

12 Ibid, citing *Holmes v DPP* [1946] AC 588 at 597 per Viscount Simon.

13 [1990] 65 ALJR 141 at 146-148.

14 Id at 146.

15 (1986) 25 CCC (3d) 322 at 347 and cited in *Stingel* [1990] 65 ALJR 141 at 146. Interestingly, the High Court made only slight references to the English landmark decision on provocation of *DPP v Camplin* [1978] AC 705 where the distinction was likewise applied (per Lord Diplock at 718). Several Australian State appellate decisions had already endorsed *Camplin* prior to *Stingel*. For example, see *R v Croft* (1981) 1 NSWLR 126; *R v O'Neill* [1982] VR 150; *R v Romano* (1984) 36 SASR 283; *R v Fricker* (1986) 42 SASR 436; *R v Voukelatos* [1990] VR 1.

male accused who kills a prostitute upon her taunting him about his impotency.[16] Under the current law, the ordinary person may be attributed with the accused's sexual impotence when assessing the gravity of the taunts on him. However, the jury will not be permitted to take into account any personality trait of the accused occasioned by his having grown up with the knowledge of such a physical disability. 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 or she would view some provocative conduct on the one hand and the way he or she would respond emotionally to that conduct on the other.[17]

One further example will suffice. Consider the case of a conservative Lebanese woman who is provoked into killing a male relative when he makes sexual advances towards her.[18] Applying the distinction, the trial judge would have to instruct the jury to attribute the accused's ethnic origin to the ordinary person when assessing the gravity of the provocation towards her. However, the jury is not permitted to consider the accused's ethnicity when deciding upon the power of self-control of an ordinary person. In line with our scientific understanding of human behaviour, this approach fails to appreciate that an accused's reaction to the provocation is not solely the result of its being an affront to her traditional or cultural values but is also the result of her emotional and psychological disposition moulded by those values. It is further submitted that the distinction is too subtle for the jury to appreciate and that there is a natural tendency for jurors to regard the particular characteristic as affecting the whole person of the accused both in relation to the gravity of the provocation and her or his power of self-control.[19]

Indeed, the subtlety of the distinction seems to have caught the High Court itself off-guard in one part of its judgment in *Stingel*. Having stated that the power of self-control of the ordinary person was unaffected by the personal characteristics of the accused, the High Court qualified this by saying:

> [The power of self-control] will, however, be affected by contemporary conditions and attitudes (see per Gibbs J in *Moffa* (1977) 138 CLR 601 at 616-617). Thus in *Parker* (1963) 111 CLR 610 at 654, Windeyer J pointed out that many reported rulings in provocation cases 'show how different in weight and character are the things that matter in one age from those which matter in another'.[20]

Yet, when we examine these passages in *Moffa* and *Parker*, we note that they are by no means concerned purely with the issue of power of self-control but also with the gravity of the provocation. Thus, Gibbs J in *Moffa* spoke of "what might be provocative in one age might be regarded with comparative equanimity in another" and Windeyer J in *Parker* was referring to various types of provocation which were recognised as sufficiently grave in one period but not in another.

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16 These were basically the facts in the English case of *Bedder v DPP* (1954) 38 *CrAppR* 133.

17 See Brett, P, "The Physiology of Provocation" [1970] *CrimLR* 634 at 636-639.

18 These were basically the facts in the NSW case of *R v Saliba* (1986) 10 *CrimLJ* 420.

19 This criticism was acknowledged by Lord Diplock himself in *Camplin* [1978] AC 705 at 718. See also King CJ in *Romano* (1984) 36 SASR 283 at 291. 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] VR 467 at 478 that the 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".

20 *Stingel* [1990] 65 ALJR 141 at 146.

A second criticism of the distinction is that it bears no conceivable relationship with the underlying rationale of the defence of provocation (as opposed to the rationale of the objective test itself). As noted at the outset of this article, the defence has been variously regarded as premised upon the contributory fault of the victim and, alternatively, upon the fact that the accused was not fully in control of her or his behaviour when the homicide was committed.[21] Neither of these premises requires the distinction to be made between characteristics of the accused affecting the gravity of the provocation from those concerned with the power of self-control. Professor Fisse in the latest edition of *Howard's Criminal Law* illustrates this point with the case of D who has recently undergone brain surgery and is taunted mercilessly by V about the unsightly scarring which has resulted from the operation.[22] Furthermore, V is aware that the surgery has left D in an extremely irascible condition. Fisse contends that in such a case, it would not be "consistent with D's [blameworthiness] and V's contributory fault to deny the defence on the footing that D's extremely irascible condition cannot be attributed to the ordinary person; the fact that this condition affected D's self-control and not the gravity of the provocation offered is of little or no relevance to the merits of the matter".[23] Fisse concludes by saying that, short of abolishing the defence of provocation, the difficulty created by the distinction seems avoidable only by abrogating the ordinary person test.

Somewhat paradoxically, it is this very conclusion which comprises the strongest support for the distinction promulgated in *Stingel*. The above discussion suggests that the underlying rationales for the defence of provocation are different from those for the objective test. It is this feature which lends force to the call for completely subjectivising the defence of provocation. That is, since the underlying rationales of the defence do not require an objective test, such a test can be abolished. However, the objective test is too firmly entrenched in the common law to be dislodged except by legislative fiat and, in so far as *Stingel* itself was concerned (and likewise, in the case of *Hill*), the court was giving effect to a statutory provision which expressly made the objective test a requirement of the defence. The result was that the High Court had no choice but to pronounce upon the content of the objective test by examining the underlying rationale of the test, as opposed to the rationale supporting the defence generally. From there, it was a short step to holding that the rationale of equality underpinning the test[24] meant that the ordinary person's power of self-control had to be normal or ordinary. This was because, if an accused's unusual pugnacity or excitable temperament were permitted to be attributed to the objective test, whatever objective quality of the test would be demolished. In the words of the High Court in *Stingel*:

> No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one

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21 See note 5 above and accompanying main text.

22 Fisse, B (ed) *Howard's Criminal Law* (5th edn, 1990) at 88-89.

23 Id at 89. The word "blameworthiness" replaces "blamelessness" in the quotation which is clearly a typographical error. For another criticism of the distinction based on the underlying rationale of the defence, see Odgers, S, "Contemporary Provocation Law — Is Substantially Impaired Self-Control Enough?" in Yeo, S M H (ed) *Partial Excuses to Murder* (1991) at 104-105.

24 See the quotation from Wilson J's judgment in *Hill* cited in the main text accompanying note 10 above.

> sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between the different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary.[25]

All told then, the distinction drawn between the power of self-control and the gravity of the provocation appears to be a necessary corollary to the objective test in provocation.

Age affecting power of self-control

As we have already noted, the accused's age was the one characteristic which the High Court permitted to be considered when evaluating the ordinary person's power of self-control. By age, the High Court meant immaturity stemming from youth.[26] The High Court acknowledged the argument that if youth was relevant, so also might other human conditions like sex and senility.[27] The court sought to justify its recognition of youth alone in the following way:

> But the approach may be justified on grounds other than compassion, since the process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness.[28]

The court's reference to compassion alludes to the House of Lords decision in *DPP v Camplin* where youth was likewise regarded as a qualification to the objective test.[29] There, Lord Diplock asserted that "to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity".[30] Such a justification seems incontrovertible. However, the High Court's attempt at another justification based on the "ordinariness" of youth is, with respect, unconvincing. Surely, a person's sex is equally ordinary in that it is shared with around half the total number of members of the community. Arguably, so too is senility if that is taken to mean mental and physiological deterioration resulting from old age.[31] Senility and youth are at the opposite ends of the same continuum. Accordingly, just as it is "ordinary" for all of us to have been young at some stage of our lives, it is ordinary or the "common experience of all" to grow old. But whichever justification one chooses for maintaining youth as a qualification to the objective test, *Stingel* may be added to an already impressive list of case authorities supporting this position such that it has become virtually unassailable.[32]

A brief comment may be made here concerning the other human conditions of sex and senility. What is the likely explanation for not attributing these characteristics to the ordinary person for the purposes of assessing the power of self-

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25 [1990] 65 ALJR 141 at 147.
26 Id at 147-148.
27 Id at 147.
28 Ibid.
29 [1978] AC 705.
30 Id at 717 and cited with approval by Wilson J in *Hill* (1986) 25 CCC (3d) 322 at 348. As observed earlier, the law's compassion to human frailty is a rationale of the defence as opposed to the objective test. Lord Diplock's comment may be read as contending that the denial of youth as a characteristic of the ordinary person goes too much against the said rationale.
31 Of course, if by "senility" the High Court meant mental disorders experienced by a small handful of the aged, such a characteristic would be excluded. However, the court's discussion of senility alongside sex (an ordinary characteristic) suggests that it was considering cases of mental deterioration commonly experienced by the aged.
32 For example, *Camplin* [1978] AC 705; *Hill* (1986) 25 CCC (3d) 322; *Romano* (1984) 36 SASR 283.

control expected of her or him? Dealing first with sex, the answer seems to lie in the following comment in *Stingel*:

> The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterized as ordinary. The lowest level of self-control which falls within those limits or that range is required of all members of the community.[33]

In the same vein, in an earlier part of its judgment, the High Court spoke of the function of the ordinary person as providing "an objective and uniform standard of the minimum powers of self-control which must be observed" for the purposes of the defence.[34] The High Court's response contains two propositions, one general and the other specific. The general proposition is the principle of equality which makes it unacceptable to contend, say, that persons of different sex should be held to different standards of self-control. The specific proposition takes the general one further by saying that equality is achieved among persons having different levels of self-control when the minimum level expected of ordinary people is applied to everyone. Thus, assuming that it can be scientifically proven that women on average possess a higher power of self-control than men, a female accused will not receive unequal treatment because the law requires her to be assessed according to the lowest level of self-control regarded as "ordinary" by the community. This would be the average power of self-control of ordinary men in the community. It must be admitted that the High Court did not actually conduct such a detailed analysis of the propositions contained in the passages quoted above. However, such an analysis flows directly from those propositions and provides the best judicial explanation to date as to why such a characteristic as sex is not attributable to the ordinary person on the issue of power of self-control.

Turning next to senility, the High Court's explanation of youth being an aspect of ordinariness but not senility has already been challenged. Another attempt to explain why youth should be the sole qualification to the objective test appears in Wilson J's judgment in *Hill*:

> [t]he incorporation of the accused's age into the objective 'ordinary person' standard is an attempt to reflect the extent of the legal rights and responsibilities of children in the legal system. The law treats all persons as equal members of society and holds them responsible on an equal basis for their actions except to the extent that they are in a development stage en route to achieving full adulthood and full legal rights and duties.[35]

It is noteworthy that Wilson J was treating youth as an exception or qualification to the principle of equality which she had earlier on in her judgement regarded as the underlying rationale of the objective test. While it is true that a person's youth is given special preference in many areas of the law, this alone should not prevent senility from being recognised as a further qualification to the objective test. As mentioned earlier, senility is the opposite end of the same continuum from youth. If youth is regarded as a development stage en route to achieving full adulthood, senility can be seen as a development stage enroute to full degener-

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33 [1990] 65 ALJR 141 at 147.

34 Id at 146.

35 (1986) 25 CCC (3d) 322 at 351 and comparing this to a similar development in the law of negligence, citing the High Court case of *McHale v Watson* (1966) 115 CLR 199.

ation. Since both stages of youth and senility are commonly experienced by all, it is difficult to appreciate why the law should recognise the immaturity of one stage but not that of the other.[36] To modify Lord Diplock's assertion in *Camplin*, requiring senile heads on young adult shoulders is inconsistent with the law's compassion to human frailty. It is therefore submitted that "age" as a qualification to the objective test in provocation should cover both youth and senility.

Ethnicity affecting the power of self-control

After age and sex, the accused's ethnic or cultural background is the personal characteristic which has drawn the most judicial attention. The usual type of case envisaged here is of a migrant who has spent her or his formative years in a foreign culture and may perhaps continue to live in a cultural enclave in Australia. There are Australian decisions which permit ethnicity to be taken into consideration when assessing the gravity of the provocation but not when assessing the power of self-control of an ordinary person.[37] Another line of authority is prepared to recognise ethnicity without qualification.[38] The High Court's omission in *Stingel* to comment upon these conflicting authorities is therefore most unfortunate. Nevertheless, there can be no denying the pronouncement in *Stingel* that only age is to be attributable to the ordinary person when assessing her or his power of self-control and, by implication, ethnicity is relevant only in so far as it affects the gravity of the provocation.[39]

It is respectfully submitted that ethnicity has a strong claim to being recognised, alongside age, as a qualification to the objective test in provocation. The various justifications, canvassed earlier, for making age a qualification are equally supportive of ethnicity. First, as regards the justification based on "compassion to human infirmity", it could be argued that the law should account for the comparative lack of exposure on the part of the migrant to the various socialising institutions of the host country, such as the family and school, when compared to one who has been raised since early childhood in that country.

Secondly, in relation to the claim of "ordinariness" which age (in terms of youthfulness) is said to have, it could be asserted that ethnicity can similarly be regarded as being an ordinary characteristic.[40] The crux of the matter lies in what is meant by "ordinary". Thus, if the term involves the concept of universality, it may be conceded that the diverse spread of ethnic cultures lacks such a quality when these cultures are compared with one another. But if by "ordinary" is meant being normal, unexceptional and generally acceptable, it could be argued

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36 The assumption here is that senility brings about a lowering of the power of self-control. Whether senile persons have the physical strength to commit homicidal acts is a separate matter.

37 For example, see *R v Croft* [1981] 1 NSWLR 126 at 162 per O'Brien CJ; *Romano* (1984) 36 SASR 283 at 290-291 per King CJ. Wilson J in *Hill* (1986) 25 CCC (3d) 322 at 348 was of this view.

38 For example, see *Moffa* (1977) 138 CLR 601 at 606; *R v Webb* (1977) 16 SASR 309 at 314 per Bray CJ; *R v Dutton* (1979) 21 SASR 356 at 377 per Cox J. For a discussion of the two conflicting lines of authorities, see Yeo, S M H, "Ethnicity and the Objective Test in Provocation" (1987) 16 *MULR* 67.

39 *Stingel* was so interpreted by a majority of the NSW Court of Criminal Appeal in *R v Manu*, unreported, 21 June 1991. In his dissenting judgment, Enderby J took the view that ethnicity could be relevant for the purposes of assessing an ordinary person's self-control. Regrettably, Enderby J did not refer to *Stingel* and accordingly did not indicate how that decision could be circumvented.

40 This justification comes from *Stingel* and has been criticised earlier on page 8.

that each and every one of the cultures which make up our heterogeneous community satisfies this quality of ordinariness. This contention may be more clearly evidenced if we spoke in terms of the power of self-control influenced by one's ethnic background. To borrow the words of the High Court in *Stingel*, "no doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average".[41] The High Court did not then proceed to discount those groups with lower powers of self-control as failing the test of ordinariness. Instead, the court spoke of "limits" or a "range" within which the level of self-control could be regarded as ordinary.[42] Hence, while one ethnic group may have a lower threshold of self-control than another in the same community, that lower level would still be regarded as "ordinary" if it fell within the limits or range which was acceptable by the community as a whole. Under this scheme, there could be individuals whose pugnacious and excitable temperaments might be so pronounced as to be deemed extraordinary by each and every ethnic group in the community.[43] Such unusual and unacceptable levels of self-control would then certainly not be attributed to the ordinary person. In this way, the societal protection rationale underlying the objective test remains intact.[44]

The third justification for recognising age as a qualification is what Wilson J in *Hill* described as youthfulness being "in a development stage en route to achieving full adulthood and full rights and duties".[45] As a result Wilson J was prepared to withold the principle of equality normally required by the law. This justification can also be applied to ethnicity. An analogy may be drawn with a migrant who needs time to assimilate into her or his host community. When applying the objective test in provocation, the migrant should be viewed as being in a development stage en route to achieving full socialisation in the ways, values and expectations of her or his host community. The rider to this is that the level of self-control exercised by the migrant during this development stage must be within the limits or range regarded as "ordinary" by society.

For those who remain unpersuaded by the third justification and who insist on adherence to the principle of equality for ethnicity, there is a further argument. This argument challenges the traditional way in which equality is seen to be accomplished. In the Australian context, we have a host of residents originating from diverse cultural backgrounds who intermingle with one another both in work and recreational settings. Consequently, 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 group recognises the others' right to be different and when the majority does not penalise the minority groups for being different.[46]

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41 [1990] 65 ALJR 141 at 147.

42 Ibid. Consistent with this approach, the High Court later (at 148) stressed that the law was concerned with an ordinary person with powers of self-control within the range or limits of what is "ordinary" rather than the precisely identifiable powers of self-control found in the "average" person.

43 Case examples would include the accused in *R v Lesbini* [1914] 3 KB 1116; and in *R v Alexander* (1913) 9 CrAppR 139.

44 See the main text accompanying note 6 above.

45 (1986) 25 CCC (3d) 322 at 351.

46 See the commentary entitled "The Cultural Defense in the Criminal Law" (1986) 99 *HarvLR* 1293.

A fourth justification concerns the inter-relatedness of human perception and reaction. Behavioural science would regard an individual's assessment of the gravity of provocative conduct as being integrally tied together with her or his personal make-up.[47] Taking age again as an example, it is readily conceivable that an adolescent person might, as a result of her or his immature personality, be much more greatly affronted by some provocative conduct than would a mature adult. The law currently takes cognizance of this scientific fact by attributing an accused's age to the ordinary person both as to the gravity issue and the power of self-control. If age is so recognised, it is difficult to appreciate why the law does not extend the same recognition to an accused's ethnicity. Surely, one's personality can often be powerfully influenced by culture as is well illustrated by the case, mentioned earlier,[48] of the conservative Lebanese woman who kills a male relative making sexual advances towards her. The deceased's conduct was undeniably highly provocative to the accused in view of her cultural background and the law does presently take cognizance of this. But what of her emotional and psychological make-up which were likewise strongly moulded by her culture and which led to her being so deprived of her power of self-control as to kill?[49]

For the above reasons it is hoped that the High Court will, at the next opportunity, relent from its ruling in *Stingel* and recognise ethnicity alongside age as a qualification to the objective test in provocation.[50] Should that eventuate, the following direction from a NSW Supreme Court judge could provide a useful model direction incorporating both the age and ethnicity of the accused into the objective test:

> So far as...the examination of the conduct of an ordinary [person] in the circumstances is concerned, you must take an ordinary [person] 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...as the reaction, in the circumstances, of an ordinary person of [her or his] age, background and culture.[51]

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47 Brett, above n17.

48 *R v Saliba* (1986) 10 *CrimLJ* 420 and discussed in the main text accompanying note 18 above.

49 See Yeo, above n38 at 79-81. The influence of culture on a person's behaviour was recognised by the Australian Law Reform Commission in its Discussion Paper No48 on *Multiculturalism: Criminal Law* (May 1991), pars2.28 and 2.33. Regrettably, the Commission did not clearly delineate cultural influences affecting the gravity of the provocation from those affecting power of self-control.

50 In the recent NSW Court of Criminal Appeal case of *Hamdi Baraghith v R*, unreported, 14 June 1991, the majority cited *Stingel* as authority for refusing to recognise ethnicity for the purposes of self-control. However, like the High Court, they failed to present any reasons for this ruling nor did they consider the case authorities to the contrary. For a discussion of those authorities, see Yeo, above n38.

51 *Saliba* (1986) 10 *CrimLJ* 420 at 421 per Finlay J. References in the direction to the sex of the accused have been omitted to bring it into line with the ruling on sex in *Stingel* and other authorities.

Power of Self-Control in Psychological Blow Automatism

In *Falconer*, the accused had killed her estranged husband with a shotgun blast. She had separated from her husband on account of his violence towards her and her discovery that he had sexually abused their daughters. The accused was also aware of charges of sexual assault brought against her husband. On the day of the shooting, the deceased had entered the accused's house unexpectedly, sexually assaulted her and reached out at her apparently to grab her hair. From that point on, the accused claimed she could not recall anything until she found herself on the floor with her shotgun beside her and her husband lying close by.

At the trial, the accused's counsel sought to have psychiatric evidence admitted which was consistent with sane automatism recognised under s23 of the *Criminal Code Act Compilation Act* 1913 (WA). The relevant part of the provision reads:

> a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will...

The trial judge rejected the evidence and the accused was convicted of murder. On appeal, the Court of Criminal Appeal of Western Australia held that the evidence was admissible and ordered a retrial. The Crown then sought special leave to appeal before the High Court against the order.

The High Court granted special leave and dismissed the appeal on the ground that the Court of Criminal Appeal was correct in ruling that the psychiatric evidence was admissible as relevant to the issue of sane automatism arising under s23.

The High Court was divided on the issue of onus of proof in respect of sane automatism.[52] However, all seven judges were agreed that sane automatism could be caused by extraordinary mental stress or what might be described as a "psychological blow". It is this latter aspect of the case with which we are here concerned, focusing primarily on the High Court's pronouncements on the power of self-control of an ordinary (or normal) person as the yardstick to distinguish sane automatism from insane automatism. The judgments which dealt with this matter in detail were the joint judgment of Mason CJ, Brennan and McHugh JJ, that of Gaudron J and, to a lesser extent, of Toohey J.[53]

The High Court was first prepared to recognise a state of dissociation as constituting automatism. Such a state was described by one judge as "the segmentation of personality so that a person in that state acts independently of his or her will".[54] Hence, the concept of automatism is not confined to fully unconscious states, but extends to conduct which is performed semi-consciously and involuntarily, with involuntariness depending on the extent to which the actor has been overtaken by unconscious forces.[55] The High Court did not break new ground in doing this, there being already several preceding case authorities on the matter.

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52 The minority comprising of Mason CJ, Brennan and McHugh JJ held that the persuasive burden rested with the defence to prove automatism. The majority comprising Deane, Dawson, Toohey and Gaudron JJ ruled that the persuasive burden lay with the Crown to disprove automatism beyond a reasonable doubt.

53 The remaining judges, Deane and Dawson JJ, expressed their general agreement with the reasoning of Gaudron and Toohey JJ.

54 *Falconer* [1990] 65 ALJR 20 at 43 per Gaudron J.

55 See Elliott, I D, "Regina v Jekyll, sub nom. Hyde: Metaphors of the Divided Self in Criminal Responsibility" (1984) 14 *MULR* 368 at 394-396.

In particular, there was the South Australian case of *R v Radford* which was heavily relied upon by the High Court.[56] Scattered throughout the judgments in *Falconer* are references to many other common law authorities despite the fact that *Falconer* was an appeal from a Code jurisdiction. The High Court felt able to make these references because, although there were some differences in the language used in the Code provisions on insanity[57] when compared to the common law McNaghten Rules, the concepts were basically the same.[58]

Since dissociation could indicate either sane automatism or insane automatism,[59] the next task of the High Court was to devise a way of differentiating the two. In this exercise, it was again greatly assisted by preceding case authorities. The court both recognised and applied the two tests gleaned from these authorities, namely, a propensity to recur and the external factor test. Devised by Lord Denning in *Bratty v AG for Northern Ireland*, the first test states that "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind".[60] This test has been the subject of widespread criticism, one of them being that it confuses the concept of insanity with that of dangerousness.[61] None of the High Court judges in *Falconer* seems to have dealt with these criticisms, preferring simply to apply the test to the case at hand. The explanation for this might be that the accused's mental condition in *Falconer* was of a particularly difficult kind to categorise legally as it constituted a state of dissociation brought upon by a psychological blow. In the words of Matthew Goode, commenting on *Radford* which similarly involved dissociation from psychological blow:

> [t]here is underlying the continued emphasis on this issue in the unclear cases a feeling that, if there is a possibility of recurrence, the ultimate decision ought to be that the accused should be compelled to undergo treatment for the condition, whatever it is.[62]

The external factor test stipulates that a mental disorder brought about by internal causes amounts to insanity whereas sane automatism results from external influences. This test was formulated by the English Court of Appeal in *R v Quick*[63] and has been applied to render insane persons suffering from a mental disorder caused by internal factors such as a cerebral tumour, epilepsy and arteriosclerosis. Conversely, persons who have manifested a mental disorder as a result of external factors such as a physical blow, the effect of drugs or hypnosis, have been held not to be insane. Much dissatisfaction has been expressed with the external factor test, a primary criticism being that somnambulism and hypoglycaemia are conditions which are internal in nature and yet have traditionally

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56 (1985) 42 SASR 266. See also *Rabey v The Queen* (1980) 54 CCC (2d) 1. For a recent English case, see *R v T* [1990] *CrimLR* 256.

57 *Criminal Code Act Compilation Act*, ss26, 27 and 28. The High Court had to consider these provisions alongside s23 given that it had to decide whether the accused's dissociation amounted to insane or sane automatism.

58 See *Falconer* [1990] 65 ALJR 20 at 28 per Mason CJ, Brennan and McHugh JJ; at 42 per Gaudron J.

59 Campbell, K, "Psychological Blow Automatism: A Narrow Defence" (1980) 23 *CrimLQ* 342.

60 [1963] AC 386 at 412.

61 See *Howard's Criminal Law*, above n22 at 431; Colvin, E, *Principles of Criminal Law* (1986) at 246-247; *R v Rabey* (1977) 37 CCC (2d) 461 at 475-476 per Martin JA.

62 Goode, M, "On Subjectivity and Objectivity in Denial of Criminal Responsibility: Reflections on Reading Radford" (1987) 11 *CrimLJ* 131 at 144-145.

63 [1973] QB 910.

been regarded as instances of sane automatism.[64] In *Falconer*, only one judge, Toohey J, was prepared to voice discontent with the test, describing it as "artificial and [paying] insufficient regard to the subtleties surrounding the notion of mental disease".[65] Yet, his Honour eventually appears to have endorsed the test, albeit downplaying it by adopting the following statement by King CJ in *Radford*: "The significant distinction is between the reaction of an unsound mind to its own delusion or to external stimuli on the one hand and the reaction of a sound mind to external stimuli ... on the other hand".[66] While the emphasis in this pronouncement is on an unsound mind versus a sound one, the matter still remains that only a sound mind which has been exposed to an external influence can be the subject of sane automatism.

Having presented the tests to distinguish sane automatism from insane automatism, the High Court in *Falconer* set out to apply them to the specific case of psychological blow automatism.

Determining whether psychological blow automatism is insanity

The following application of the tests to psychological blow automatism contains some extrapolations from the various judgments in *Falconer*. This is justified for the reason that the judgments do not clearly set down the interplay between the tests and psychological blow automatism. It will be useful to express the rulings of the High Court in point form and then to expand on them:

1. a state of dissociation caused by a psychological blow can constitute automatism. For sane automatism, such a blow must be extraordinary so that the ordinary stresses encountered in daily life are insufficient;
2. an accused suffering psychological blow automatism is not insane if he or she had the power of self-control of an ordinary (or normal) person;
3. when assessing the power of self-control of an ordinary person, the particular temperament of the accused is to be disregarded. Save for the accused's age, the ordinary person is assumed to possess normal temperament and self-control;
4. an accused suffering psychological blow automatism may be insane if he or she had the power of self-control which was below that of an ordinary person. Whether such an accused is insane will depend further on the existence of an underlying pathological condition and the proneness of the state of automatism to recur.

On the first ruling, the High Court could find no distinction between a physical blow and a psychological blow. Hence a state of dissociation brought about by psychological trauma was equally capable of amounting to automatism. Such trauma had, however, to be extraordinary in nature for it to support a case of sane automatism. The High Court derived this proposition from King CJ's description of sane automatism in *Radford* as "the reaction of a healthy mind to extraordinary external stimuli".[67] The High Court also cited with apparent approval the comment by the English Court of Appeal in *R v Hennessy*

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64 See *Howard's Criminal Law*, above n22 at 431; Goode, above n62 at 141-142.

65 *Falconer* [1990] 65 ALJR 20 at 39.

66 (1985) 42 SASR 266 at 276 and cited in *Falconer*, ibid.

67 (1985) 42 SASR 266 at 275. Emphasis added. Cited with approval in *Falconer*, id at 29 per Mason CJ, Brennan and McHugh JJ, and at 43 per Gaudron J.

that "stress, anxiety and depression ... are not ... external factors of the kind capable in law of causing or contributing to a state of [sane] automatism ...They lack the feature of novelty or accident".[68] The court was thereby implying that only psychological pressures which were "novel", that is, extraordinary, could contribute to a state of sane automatism. Although not referred to by the High Court, the following statement by Martin JA in *Rabey v The Queen*, the leading Canadian authority on psychological blow automatism, is along the same lines:

> In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for the malfunctiong of the mind which takes it out of the category of a 'disease of the mind.'[69]

It follows that an accused who enters into a dissociative state from ordinary stresses will most likely be suffering from a disease of the mind, that is, insanity.

A careful analysis of the requirement of extraordinariness of the psychological blow for sane automatism reveals that it is but a reflection of the two tests of proneness of recurrence and externality. A recurring dissociative state brought upon by the stresses of everyday life clearly indicates a need for treatment. On the other hand, an automatonic condition which occurs only in the rare instance of an extraordinary psychological shock suggests that treatment is unnecessary. As Mason CJ, Brennan and McHugh JJ in *Falconer* put it:

> [w]e would think it necessary that a temporary mental disorder or disturbance must not be prone to recur if it is to avoid classification as a disease of the mind. That is because a malfunction of the mind which is prone to recur reveals an underlying pathological infirmity.[70]

With regard to the external factor test, where the accused has been subjected to ordinary stresses, her or his dissociation is most likely due to an underlying or internal disorder which requires treatment. Conversely, if an extraordinary psychological shock was involved, this would suggest that the person was not suffering from an underlying disorder and that the cause of the automatonic state was entirely external. Accordingly, there would not be any need for treatment and the accused could be safely allowed an unconditional return to society.

The second ruling takes the first a step further. To ensure that it is the extraordinary psychological shock alone and not some underlying pathological infirmity which has brought upon the dissociation, the High Court in *Falconer* stipulated that the accused had to manifest ordinary powers of self-control. The rationale for this was that if the accused had the same powers of self-control as an ordinary person, it could be safely concluded that the psychological blow was the sole cause. Mason CJ, Brennan and McHugh JJ expressed the position as thus:

> The problem of classification in a case of a transient malfunction of the mind precipitated by psychological trauma lies in the difficulty in choosing between the reciprocal factors — the trauma and the natural susceptibility of the mind to affection by psychological trauma — as the cause of the malfunction. Is one factor or the other the cause or are both to be treated as causes? To answer this problem, the law must postulate a standard of mental strength which, in the face

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68 [1989] 1 WLR 287 at 294 per Lord Lane CJ.

69 (1977) 37 CCC (2d) 461 at 482 and subsequently approved of by the majority of the Canadian Supreme Court (1980) 54 CCC (2d) 1 per Ritchie J at 7.

70 *Falconer* [1990] 65 ALJR 20 at 30.

> of a given level of psychological trauma, is capable of protecting the mind from malfunction to the extent prescribed in the respective definitions of insanity. That standard must be the standard of the ordinary person: if the mind's strength is below that standard, the mind is infirm; if it is above that standard, the mind is sound or sane. This is an objective standard which corresponds with the objective standard imported for the purpose of determining provocation.[71]

More will be said later about the comparison with the objective test in provocation. Gaudron J's contribution, while somewhat equivocal, expresses a similar view:

> the thrust of the evidence was that such a state [of dissociation] is or may be experienced by normal persons, albeit only in situations involving intense psychological crisis or conflict. That feature gives that evidence the same quality as...evidence that the person was overcome by passion, lack of self-control, or impulsiveness. Such evidence, because it deals with or is premised on the experience of normal persons, raises no question of mental disease.[72]

Here again, the High Court was not breaking new ground but merely adhering to Martin JA's ruling in the Canadian case of *Rabey*. Martin JA had this to say:

> Any malfunctioning of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a 'disease of the mind' if it prevents the accused from knowing what he is doing.[73]

And further on in his judgment, Martin JA made the following remark concerning dissociation caused by a psychological blow such as being the victim of a murderous attack notwithstanding that the victim escaped physical injury, or witnessing a loved one murdered or seriously assaulted:

> Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective make-up of the person exposed to such experience.[74]

It is noteworthy that the above statements of Martin JA's were cited by the High Court in *Falconer*, albeit as a general description of Canadian law rather than in express support of the second ruling.[75]

The third ruling overlaps with the second and is reflected in Martin JA's remarks quoted above. When considering the powers of self-control of an ordinary person, the peculiar temperaments of the accused are to be discounted. However, the High Court was quick to state that other characteristics of the accused which bore upon the impact of the psychological blow on her or him were material. The similarity between this approach and the objective test in provocation is unmistakeable — as in the law of provocation (as pronounced by

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71 Ibid.

72 *Falconer*, id at 43. Earlier on (at 43), Gaudron J said that "the fundamental distinction [between a sound mind and a diseased mind] is necessarily between those mental states which, although resulting in abnormal behaviour, are or may be experienced by normal persons...and those which are never experienced by or encountered in normal persons". That point was made, although in a quite different context, by Dixon J in *Porter* (1933) 55 CLR 182 at 188, where he observed that the diseased mind is to be distinguished from the "[m]ere excitablity of a normal man, passion, even stupidity, obtuseness, lack of self-control, and impulsiveness".

73 (1977) 37 CCC (2d) 461 at 478 and approved by the majority if the Canadian Supreme Court in (1980) 54 CCC (2d) 1 at 7.

74 Id at 482-483 and endorsed by the Canadian Supreme Court in (1980) 54 CCC (2d) 1 at 7.

75 *Falconer* [1990] 65 ALJR 20 at 28-29 per Mason CJ, Brennan and McHugh JJ.

the High Court in *Stingel* a few weeks later), the High Court was here drawing a distinction between the accused's characteristics which affect the power of self-control expected of an ordinary person and those characteristics affecting the gravity of the psychological blow towards her or him. Also in line with the law of provocation, the High Court held that only the age of the accused could be attributed to the ordinary person when considering the issue of power of self-control. The part of Mason CJ, Brennan and McHugh JJ's judgment which advances these propositions is worth quoting in full:

> In determining whether the mind of an ordinary person would have malfunctioned in the face of the physical or psychological trauma to which the accused was subjected, the psychotic, neurotic or emotional state of the accused at the time is immaterial. The ordinary person is assumed to be a person of normal temperament and self-control. Consequently, evidence that, in the week preceding the shooting, Mrs Falconer had demonstrated fear, depression, emotional disturbance and an apparently changed personality would not have been relevant in determining the reaction of an ordinary person. Likewise, evidence of the stress that she suffered on discovering that her husband had sexually assaulted their two daughters would not have been relevant in determining the reaction of the ordinary person to the incidents which took place on the day of the shooting.[76]

Pausing here for a moment, it is observed that the judges were so far dealing with the power of self-control of an ordinary person and were holding that the accused's subjective temperament was irrelevant. The judges then continued:

> But evidence of the objective circumstances of the relationship between the parties would have been relevant to that issue, for only by considering the pertinent circumstances of that relationship could the jury determine whether an ordinary person would have succumbed to a state of dissociation similar to that which Mrs Falconer claims overtook her on that day.[77]

In the above passage we observe how the judges were prepared to recognise those characteristics of the accused which had a bearing on the degree of shock created by the psychological blow. Mason CJ, Brennan and McHugh JJ then concluded this part of their judgment in the following way:

> Speaking generally, the issue for the jury on this aspect of the case would be whether an ordinary woman of Mrs Falconer's age and circumstances, who had been subjected to the history of violence which she alleged, who had recently discovered that her husband had sexually assaulted their daughters, who knew that criminal charges had been laid against her husband in respect of these matters and who was separated from her husband as the result of his relationship with another woman, would have entered a state of dissociation as the result of the incidents which occurred on the day of the shooting.[78]

The mention of the accused's age is in conformity with the law of provocation pronounced in *Stingel*. However, the reference to an "ordinary woman" without further comment is apt to mislead. In line with the discussion of *Stingel* on this subject, the sex of the accused is material only for the purposes of gauging the gravity of the psychological blow and should be irrelevant to the issue of power of self-control of an ordinary person.[79]

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76 Id at 31-32.
77 Id at 32.
78 Ibid.
79 See above at page 8.

The fourth ruling concerns the conditions required for a finding of insanity in respect of an accused suffering psychological blow automatism. As stated under our discussion of the first ruling, if the psychological blow comprised the ordinary stresses of daily living there would be a strong implication that the accused had an underlying pathological condition which was prone to recur. Consequently, he or she would require treatment and the insanity verdict would be proper. Where the psychological blow comprised extraordinary shock, the second ruling would utilise the yardstick of the ordinary person's self-control to assist in determining whether the case was one of sane or insane automatism. Should the particular accused's level of self-control be lower than the ordinary person's, the case would lean towards a finding of insanity. However, before such a finding is reached, the external factor test and proneness of recurrence must be applied. The accused will be held to have suffered insane automatism provided some underlying pathological infirmity can be diagnosed and provided the dissociative condition is prone to recur. Only then will such an accused be said to be in need of treatment.[80]

Readily observable throughout the course of all these rulings is the role of the objective test, namely, to determine whether a person suffering psychological blow automatism is to be acquitted entirely or acquitted but subjected to compulsory medical treatment. The rationale of the test is that the criterion of normality properly assesses whether a person was suffering from mental abnormality. The test has therefore, both in its role and its rationale, nothing to do with the rationale of the defence of sane automatism itself, which is that a person cannot be criminally responsible for the consequences of an unwilled act.

Overall, *Falconer* is a satisfactory decision on a very difficult area of the criminal law. The High Court adhered to the doctrine of precedence by applying the existing tests to distinguish sane from insane automatism; achieved consistency in the law by invoking an objective test corresponding with the one contained in the law of provocation; and presented the law in a way which provides intuition with a major role to play. As to this last aspect, the following comment is instructive:

> When dealing in grey areas such as psychological blow automatism, intuition is relied on to a great extent because there is little other evidence on which to rely. The value of these intuitive abilities ought not to be underestimated...The ultimate decision [whether] the accused should be forced to undergo medical treatment, thus precluding the possibility of another person falling victim to a violent dissociative state, is perhaps an application of the old adage, 'better safe than sorry'; not altogether inconsistent with the philosophy of what has been called a 'conservative' court.[81]

Bases for a Common Objective Test for Provocation and Automatism

The ruling in *Falconer*, that the objective test contained in automatism corresponds with the one in provocation, is supportable on several counts. Although

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80 This seems to be an improvement of the majority judgment of the Canadian Supreme Court in *Rabey* (1980) 54 CCC (2d) 1. It would appear that the Canadian court would make a finding of insanity based solely on the accused's lower level of self-control. For criticisms against the Canadian position, see Archibald, T, "The Interrelationship Between Provocation and Mens Rea: A Defence of Loss of Self-Control" (1986) 28 *CrimLQ* 454 at 468-469; Mackay, R, "Non-Organic Automatism — Some Recent Developments" [1980] *Crim LR* 350 at 359.

81 Campbell, above n59 at 349-350.

there are fundamental differences between the two defences, they do have certain features in common and it makes good sense for the law governing these similarities to be comparable. One such similarity is the power of self-control which has a subjective and an objective dimension. Dealing with the subjective dimension, in a case of provocation the accused claims to have killed while under a partial loss of self-control. Since the killing was intentional and voluntarily performed, and as there remained some measure of self-control, he or she is partially to blame for the killing. Accordingly, the proper verdict is manslaughter.[82] In a case of automatism, the accused claims to have killed while under a complete loss of self-control. As such, the killing was unintentional and involuntary with the result that any criminal liability is negated entirely and an acquittal is appropriate.[83] Hence, while the end results might be different for the two defences, they are both reached through an evaluation of the degree of loss of self-control suffered by the accused.[84]

The objective dimension of self-control is cast in terms of the ordinary person test for both defences.[85] For provocation, the question is whether a person of ordinary self-control could have been so provoked as to retaliate "to the degree and method and continuance of violence which produces the death".[86] Similarly for automatism, the issue is whether a person of ordinary self-control could have been so affected by the psychological blow as to react violently and cause death.[87] Since both defences use the measure of the ordinary person's reaction to extraordinary external pressure, it stands to reason that the components of the ordinary person test should be identical. The only rider I would suggest to the law as presented in *Stingel* and *Falconer* is that the accused's ethnicity should be recognised, alongside age, as affecting the power of self-control of an ordinary person.[88]

The fact that the objective test in provocation is not rooted to the rationale of the defence, but has a quite separate rationale of its own, would also have encouraged its inclusion under the defence of sane automatism. Had the test been so rooted, the High Court in *Falconer* may then have been at a loss to discover similarities between the rationales of provocation and automatism. Instead, the court must have noted how the test sought to protect society against provoked killings by

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82 See Odgers, above n23 at 102-103. Cf *Howard's Criminal Law*, above n22 at 434 where the argument is made for a complete acquittal.

83 Whether the special verdict of insanity is given will depend on which side of the divide, as drawn by *Falconer*, the accused's mental condition falls.

84 See Archibald, above n80 at 470-471.

85 Some differences in formulations of the test for the two defences are highlighted in the case-comment on *Falconer* (1991) 15 *CrimLJ* 205 at 212. For example, for provocation the jury is to consider whether an ordinary person could have reacted in the same way as the accused did while for automatism the question is whether he or she would have done so. Whether the High Court in *Falconer* deliberately specified these differences and, if so, for what reasons, is unclear.

86 *Holmes v DPP* [1946] AC 588 at 597 per Viscount Simon and discussed in this article in the main text accompanying note 12 above.

87 Admittedly, *Falconer* does not appear to have expressly described the extent of the reaction of the ordinary power to a psychological blow: see case-comment on *Falconer* (1991) 15 *CrimLJ* 205 at 212. For a similar criticism made against the Canadian case of *Rabey*, see Holland, W H, "Automatism and Criminal Responsibility" (1982) 25 *CrimLQ* 95 at 104.

88 For a fact situation which would have leant itself ideally to such an innovation, see the Canadian case of *R v Parnekar* (1972) 5 CCC (2d) 11. The accused was an Indian who had been born and bred in India for 28 years before recently migrating to Canada. He submitted both provocation and automatism as alternative pleas to murder.

unusually bad-tempered persons. The court found that a similar protection could be achieved by adopting the test to distinguish persons suffering automatonic states who were harmless from those who continued to pose a danger to society.

Falconer's invocation of the ordinary person test serves a material advantage. The test imposes a rather formidable obstacle to a successful plea of sane automatism since the accused is measured against a person of ordinary self-control or temperament. As such, any subjective mental conditions of the accused are discounted and indeed, if present, could be evidence of insanity. This is not to say that a case of sane automatism can never be made out; when such a case occurs the law should have no hesitation in ensuring the unconditional return of the accused to society. However, the test does prevent a spate of claims of sane automatism and maintains the defence of provocation as a viable and proper alternative in many cases of killings while deprived of the power of self-control.[89]

Lastly, in relation to the objective test in provocation and automatism, mention should be made of the use of medical experts to assess the power of self-control of ordinary people. At least in cases of provocation, the courts are very reluctant to admit expert opinion on whether a particular provocative conduct could have been sufficient to deprive an ordinary person of her or his power of self-control.[90] Whether the same restriction will be placed in cases involving psychological blow automatism is less clear. Perhaps an argument may be made for sidestepping the rule in such cases. It may be that the question of whether an ordinary person could enter into a dissociative state as a result of a psychological trauma is too technical and complex for juries to answer without the assistance of medical opinion.[91]

Conclusion

The recent High Court pronouncements in *Stingel* and *Falconer* are by no means radical, erring on the side of conservatism by going along paths previously trodden by earlier authorities. This approach is understandable, even welcome, given the complexity of the subject-matter under consideration. Many great judicial minds of State and foreign courts had already striven to achieve the most just result. Consequently, it was only prudent for the High Court to have adopted such learned thinking on the matter.

The way is now open for the same objective test to be applied to other defences, such as duress and necessity, which contain an objective element of self-control.[92] In the application of the test to these defences, as with provocation and automatism, the hope remains that serious consideration be given by our judges to the recognition of ethnicity as a qualification, along-side age, to the objective quality of the ordinary person's power of self-control.

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89 See Campbell, "Psychological Blow Automatism", above n59 at 350 and 356.

90 This arises from a common law rule of evidence that "neither experts nor ordinary witnesses may give their opinions upon matters of legal and moral obligation, or general human nature, or the manner in which other persons would probably act or be influenced": *Phipson on Evidence* (14th edn, 1990), pars32-52. The Australian Law Reform Commission in its Report No38 on Evidence (1987) has recommended the abolition of this rule. See also the Evidence Bill 1991 (NSW), cl68.

91 See Archibald, above n80 at 472.

92 Some headway in this direction has already been made. For duress, see *R v Palazoff* (1986) 43 SASR 99 at 109; *R v Lawrence* [1980] 1 NSWLR 122 at 143. For necessity, see *R v Conway* [1988] 3 WLR 1238 at 1244-1245.