

REASSERTING THE PLACE OF OBJECTIVE TESTS IN CRIMINAL RESPONSIBILITY: ENDING THE SUPREMACY OF SUBJECTIVE TESTS

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Abstract

This paper contends for a greater role for objective tests on public safety grounds, and building on the measure of objectivity contained in reckless murder at common law and constructive murder in all Australian States, seeks to redress the balance in favour of objective tests. The argument is made for an objective test for recklessness as the underlying fault element, based on the natural and probable consequences test adopted in *Director of Public Prosecutions v Smith* [1961] AC 290, which is similar to objective ‘*Caldwell*’ recklessness where the defendant does not foresee the relevant risk but a reasonable person would have, following *R v Caldwell* [1982] AC 341. The paper also advances the case for the adoption of purely objective tests for provocation and self-defence, because the current tests in Australia for both defences are confusing as they combine subjective and objective elements.

I INTRODUCTION

Australia has a very disparate mosaic of criminal laws within the nine criminal law jurisdictions. Unlike other countries, such as Canada, which has a single Criminal Code,¹ Australia’s criminal laws are State based and can broadly be grouped into either Code States and Territories² or common law States.³ Superimposed above State legislation is

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1 *Criminal Code 1892* (Canada).

2 The Code States and Territories are Queensland (1899), Western Australia (1913), Tasmania (1924), the Northern Territory (1983) and the Australian Capital Territory (2002).

3 The common law States are New South Wales, Victoria, and South Australia, although each of these States has significant statute law. See for example *Crimes Act 1900* (NSW); *Crimes Act 1958* (Vic); and *Criminal Law Consolidation Act 1935* (SA).

Commonwealth legislation,⁴ and the distinction relates to the powers given to the Commonwealth under s 51 of the Federal Constitution.⁵

Since Federation in 1901, this mosaic of criminal laws has been subjected to two countervailing forces. On the one hand, the trend of non-Code jurisdictions to place the criminal law in statutes, has, in some cases, 'brought some Code jurisdictions closer to some of their common law cousins than to their Code siblings and vice versa'.⁶ On the other hand, there 'is the modern tendency of the courts, and particularly the High Court of Australia, in interpreting the law of one jurisdiction, to do so in a way which will provide a uniform solution for as many as possible of the other jurisdictions'.⁷ However, the elements⁸ and available defences to murder, (particularly the partial defences of provocation⁹ and diminished responsibility),¹⁰ differ across Australian criminal jurisdictions.

Nevertheless, despite these differences between Australian jurisdictions, and recognising that the Code jurisdictions do not have the concept of *mens rea*, it can be fairly stated that subjective tests, whether they be the mental states of intention, knowledge or recklessness, constitute the required standard for the fault element of serious offences. However, how is the subjective question of what was in the accused's mind at the relevant time to be determined? As Kirby ACJ observed in *R v Winner*,¹¹ 'it is inescapable that the forensic process by which intent is judged (when it is denied), will address the objective facts from which an inference of

4 *Criminal Code 1995* (Cth).

5 *Commonwealth of Australia Constitution Act 1900*. Section 51 lists the legislative powers of the Federal Parliament. For example, the Commonwealth's capacity to deal with drug offences under the *Customs Act 1901* (Cth) is based on two heads of power under s 51: (i) trade and commerce and (xxix) external affairs. Other relevant heads of power for federal criminal offences include (ii) taxation; (v) postal, telegraphic, telephonic, and other like services; (ix) quarantine; (x) fisheries in Australian waters beyond territorial limits; (xii) currency, coinage, and legal tender; and (xviii) copyrights, patents of inventions and designs, and trade marks.

6 David Lanham et al, *Criminal Laws in Australia* (The Federation Press, 2006) 1. The learned authors give as an example the similarity of the law of theft between the Northern Territory and Victoria, as compared with the Northern Territory and other Code States.

7 *Ibid* 2. The learned authors cite at page 4, *Masciantonio v The Queen* (1995) 183 CLR 58, 66, 71 as authority that *Stingel v R* (1990) 171 CLR 312 'laid down the law not only for the Tasmanian Code but also for the common law and other statutory provisions on provocation'.

8 For example, reckless murder exists as a category of murder at common law but not in the Code jurisdictions.

9 The partial defence to murder of provocation has been abolished in Tasmania, Victoria and Western Australia.

10 The partial defence to murder of diminished responsibility is only available in Queensland, New South Wales, the Northern Territory and the Australian Capital Territory.

11 79 A Crim R 528.

intention may be derived'.¹² In *Stanton v The Queen*,¹³ which involved an appeal against a conviction for wilful murder under the now repealed s 278 of the *Criminal Code 1913* (WA), three judges of the High Court discussed how intention may be inferred from the actions of the accused:

In the circumstances of the present case, bearing in mind the nature of the weapon involved, and the range from which it was discharged, if the appellant intended to shoot the victim, then his intent was obviously to kill, rather than merely to cause grievous bodily harm. Furthermore, although defence counsel at trial put an argument to the effect that the shooting was accidental, in the sense that it was not a willed act, the argument had nothing to commend it. The appellant's best hope was that the jury might regard the case as one of manslaughter, based upon a view that he was menacing his wife with a loaded shotgun, but did not actually intend to shoot her.¹⁴

This paper contends that the above passage encapsulates all that is amiss with subjective tests and the artificiality involved in determining the appellant's actual state of mind when he shot his estranged wife at close range. The High Court was per force required to turn to objective circumstances to infer the appellant's intent. The argument being made here is that a greater degree of objectivity in the standard used to determine criminal liability will obviate the tortured reasoning of courts inserting objective circumstances into the narrow subjective test of intention. In addition, such objectivity can also be justified on public safety grounds. For example, in *Stanton v The Queen*,¹⁵ the appellant, who was in dispute with his wife in the Family Court, claimed he went to his wife's house armed with a shotgun to 'make her see some sense and negotiate'.¹⁶ Such behaviour is, at its very lowest, reckless, and it is the fault element of objective recklessness (where the defendant does not foresee the relevant risk but an ordinary person would have foreseen it), that underpins this paper's argument in favour of a greater role for objective tests for serious offences.

By contrast with objective recklessness, a recent example of appellate judges taking an exceptionally narrow view of intention in Western Australia for wilful murder¹⁷ occurred in 2004 in *Turner v The Queen*.¹⁸ The appellant had followed his estranged wife from Victoria to Western Australia. Upon locating his wife in Kalgoorlie, the appellant attacked her with a large pocket knife and inflicted a total of 65 wounds, a number

12 *R v Winner* (1995) 79 A Crim R 528, 542.

13 (2003) 77 ALJR 1151.

14 *Ibid* 1153 [5] (Gleeson CJ, McHugh and Hayne JJ).

15 (2003) 77 ALJR 1151.

16 *Ibid* 1152 [2] (Gleeson CJ, McHugh and Hayne JJ).

17 The now repealed s 278 of the *Criminal Code 1913* (WA) stated: 'Except as in hereafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder.'

18 [2004] WASCA 127.

of which were potentially fatal, and was only stopped from stabbing his wife when struck on the head by a milk crate wielded by the deceased's brother. Wheeler J (with whom Murray and Templeman JJ agreed), whilst finding it 'very difficult to accept the conclusion that a person who stabs another repeatedly in the chest with considerable force, can have intended anything other than the death which inevitably resulted',¹⁹ nevertheless could not exclude the possibility that the appellant's anger, intoxication and hypoglycaemia might have left the jury 'in some doubt as to the appellant's intention to cause death rather than some other outcome'.²⁰ The decision in *Turner v The Queen*²¹ illustrates the argument being made here, that respect for the criminal law would be better served if 'abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do'²² were avoided.

The rationale for adopting an objective test position is also a response to academic support for the notion of fair labelling in criminal law,²³ which this paper contends is skewed towards the offender rather than the victim or society.²⁴ Ashworth defines the concern for fair labelling as 'to see that widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law',²⁵ while Simester and Sullivan discuss fair labelling in the context of 'values to which the law should aspire'.²⁶ Another argument in support of fair labelling made by Clarkson, is that broad offences like manslaughter allow too much discretion at the sentencing stage.²⁷ By contrast, this paper supports a broader definition of murder by including the fault element of recklessness, thereby bringing the law of homicide 'more into line with public opinion'.²⁸ Horder acknowledges the duality of labelling in noting that,

19 *Turner v The Queen* [2004] WASCA 127 [22].

20 *Ibid* [23].

21 [2004] WASCA 127.

22 *Vallance v The Queen* (1961) 108 CLR 56, 58 (Dixon CJ).

23 For a good overview see J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.

24 Chalmers and Leverick point out that 'more important to victims than the name of the offence is whether the offender is convicted at all and the magnitude of the sentence passed': *ibid* 238.

25 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 5th ed, 2006) 88.

26 A P Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, 3rd ed, 2007) 21.

27 C M V Clarkson, 'Context and Culpability in Involuntary Manslaughter', in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 2000) 142. For an opposing argument that offences should be defined in the broadest terms leaving distinctions of blameworthiness to the sentencing stage, see P.H. Robinson, *Structure and Function in Criminal Law* (Clarendon, 1997) 183.

28 Law Commission of England and Wales, *A New Homicide Act for England and Wales?* Consultation Paper No 177 (2005) 29 [2.13]. A public opinion survey of 56

'if the offence in question gives too anaemic a conception of what that might be, it is fair neither to the defendant, nor to the victim'.²⁹ Significantly, it was the widely reported reaction of the victim's families that led directly to the abolition of the partial defence to murder of provocation in Victoria³⁰ and New Zealand,³¹ thereby widening murder and narrowing manslaughter in those jurisdictions.

This paper does not contend for a collapsing of murder and manslaughter into one offence,³² rather the inclusion of recklessness, in addition to intention, as a fault element for murder and either the repeal of partial defences to murder,³³ or the incorporation of greater objectivity into defences to homicide. Such a narrowing of the range of partial defences challenges the view that '[i]f the rationale for adding rungs to the homicide ladder is primarily fair labelling, then it is important that defendants are categorised according to the appropriate level of fault'.³⁴ The contrary argument being made here is that there should be fewer rungs (for example, no difference in blameworthiness between an intention to cause an injury likely to endanger life and an intention to cause a permanent injury to health)³⁵ and narrower defences. This has the virtue of consistency even if it comes at the cost of flexibility.³⁶

participants was carried out for the Commission by Professor Barry Mitchell which is contained in Appendix A. The survey was about mandatory sentencing in criminal homicides in the context of the Commission recommending that a new offence of first degree murder be created. For present purposes, the conclusion contained in A.16 (1) is significant: 'The survey appears to confirm the findings of previous studies that members of the public share the law's view that there are important variations in the seriousness of homicides - that any unlawful homicide is a serious matter, but some are worse than others - and that these variations should be reflected in the law.' One example given of a serious homicide was 'where the offender demonstrated a "total disregard for human life" ' (A.8), which encompasses recklessness where the consequence was probable, as in the example given of a Russian-roulette killer.

29 Jeremy Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 *Oxford Journal of Legal Studies* 335, 351.

30 *R v Ramage* [2004] VSC 508.

31 *R v Weatherston* [2009] NZCA 267.

32 For the contrary view, that murder and manslaughter should be merged into a single offence of criminal homicide (unlawful killing), see L Blom-Cooper and T Morris, *With Malice Aforethought: A Study of Crime and Punishment for Homicide* (Hart Publishing, 2004) 175, who argue fault is merely a factor to reflect sentence.

33 See Andrew Hemming, 'It's Time to Abolish Diminished Responsibility, the Coach and Horses' Defence through Criminal Responsibility for Murder' (2008) 10 *University of Notre Dame Australia Law Review* 1; Andrew Hemming, 'Provocation: A Totally Flawed Defence That Has No Place in Australian Criminal Law Irrespective of Sentencing Regime' (2010) 14 *University of Western Sydney Law Review* 1.

34 Victor Tadros, 'The Homicide Ladder' (2006) 69(4) *Modern Law Review* 601, 617.

35 Cf s 279(1)(b) *Criminal Code 1913* (WA).

36 Tadros, above n 34.

For jurisdictions where recklessness is not a separate mental element for murder, such as Queensland and Western Australia, there are three possible approaches. Firstly, intention includes recklessness; secondly, intention means purpose and awareness that consequences are virtually certain to occur; and thirdly, the meaning of intention is limited to purpose. This was the form of analysis adopted by the Law Reform Commission of Western Australia, which recommended the third approach.³⁷ This paper contends that none of the above three approaches are satisfactory, and that what is required is the specific importation of recklessness number one as articulated by Campbell, which the learned author identified as a separate, substantive head of malice at common law.³⁸ An example can be found in s 115.1(d) *Criminal Code 1995* (Cth) where the fault element for murder is either intention or recklessness as per ‘intends to cause, or is reckless as to causing, the death’.

II OVERLAP BETWEEN SUBJECTIVE AND OBJECTIVE TESTS

Where a subjective test³⁹ is applied, the Crown must prove that the accused had the requisite state of mind at the time he or she carried out the external element. However, this is ‘somewhat artificial as an accused, in many cases, will deny that he or she possessed the requisite state of mind necessary to commit the offence’.⁴⁰ Barwick CJ in *Pemble v R*,⁴¹ pointed out that the jury will normally have to infer the accused’s state of mind from what the accused has actually done and the surrounding circumstances:

The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused’s actual state of mind, a firm emphasis on the latter as the fact to be found

37 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report, Project No 97 (2007) 66-69.

38 I G Campbell, ‘Recklessness in Intentional Murder Under the Australian Codes’ (1986) 10 *Criminal Law Journal* 3, 12-13. Campbell defined recklessness number 2 as being no distinction in law between intention and recklessness; and recklessness number 3 where recklessness exists purely as a matter of evidence.

39 Colvin has described a subjective test of criminal responsibility as meaning that ‘liability is to be imposed only on a person who has freely chosen to engage in the relevant conduct, having appreciated the consequences or risks of that choice, and therefore having made a personal decision which can be condemned and treated as justification for the imposition of punishment’: Eric Colvin, ‘Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility’ (2001) *Monash University Law Review* 197, 197. Colvin identified the alternative objective approach as ‘measuring the conduct of an accused against that of some “ordinary” or “reasonable” person, placed in a similar situation [which] is “objective” because it does not depend on any finding that the accused’s state of mind was blameworthy in itself’: at 197.

40 Jonathan Clough and Carmel Mulhern, *Criminal Law* (LexisNexis, 2nd ed, 2004) 17.

41 (1971) 124 CLR 107.

by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind... that conclusion [as to the accused's state of mind] could only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen.⁴²

The above passage is illustrative of the difficulties faced by both judges and juries when the judge is explaining the law and the elements of the particular offence (or defence) to the jury. Barwick CJ points out that the jury, in coming to a verdict founded on inference as to the accused's state of mind, naturally take into consideration the reasonable person's foresight. This overlap between subjective (the accused's actual state of mind) and objective (the ordinary or reasonable person placed in a similar situation) tests, can be traced back to different meanings given to the terms 'subjective' and 'objective' in criminal law. A reference in a case to objective circumstances goes to the facts and the strength of the evidence, which is separate from the elements of an offence or a defence. Turning to the meaning of 'objective', within the substantive law as opposed to evidence, two different meanings of 'objective' are employed. The first meaning relates to the ordinary or reasonable person standard, while the second meaning refers to foresight of probable consequences which frames the law around objective circumstances and objective grounds for making inferences about the accused's subjective state of mind.

The nature of the overlap between the subjective test of intention and inference from the evidence was considered in *R v Glebow*,⁴³ where the appellant appealed his conviction for murder under s 302(1)(a) of the *Criminal Code 1899* (Qld). The leading judgment was given by Jerrard JA who found that '[t]he directions on proof of intent given by the learned trial judge were both common sense ones, and were supported by authority'.⁴⁴ Jerrard JA noted that the trial judge had directed the jury that 'where, (as was commonly the case), there was no direct evidence of the existence of the necessary intention, it may be able to be inferred from facts which had been proved beyond reasonable doubt'.⁴⁵ Furthermore, the Court of Appeal took no objection to the prosecution reminding the jury that 'intention was something which could be inferred from the degree of violence that was used',⁴⁶ and other matters relevant to the question of intention included whether any remorse was shown, whether

42 *Pemble v R* (1971) 124 CLR 107, 120-121 (Barwick CJ). See also *R v Clare* (1993) 72 A Crim R 357, 369 and *R v Cutter* (1997) 94 A Crim R 152, 156-157 and 164-166.

43 [2002] QCA 442.

44 *R v Glebow* [2002] QCA 442 [20], citing Connolly J in *R v Willmot (No 2)* [1985] 2 Qd R 413 as authority that the ordinary and natural meaning of the word 'intends' is, to have in mind, which involves the directing of the mind, having a purpose or design.

45 *Ibid* [12].

46 *Ibid* [15] (Jerrard JA).

any assistance was given to the victim and the continued aggressive conduct of the accused.⁴⁷ Thus, while the jury had to be satisfied that the necessary intent did exist, such that the appellant meant at least to cause grievous bodily harm to the victim, the critical objective circumstance was that the appellant had repeatedly kicked the inert victim in the head.

Another Queensland case on point is *R v Reid*,⁴⁸ which concerned the transmission of the HIV positive virus. Keane JA, while noting ‘that the complainant becoming infected with the HIV virus was a natural consequence of the appellant’s deception’,⁴⁹ went on to identify the key issue as ‘whether the jury, acting reasonably, could have rejected, as a rational inference, the possibility of the absence of an intent to infect the complainant with the HIV virus’.⁵⁰ As in *R v Glebow*,⁵¹ critical objective circumstances were determinative in rejecting the appellant’s ground of appeal that he was either ‘completely irresponsible’ or ‘stupid in the extreme’ rather than being motivated by a subjective desire to infect the complainant.⁵² Keane JA singled out first, ‘the complainant’s evidence of the appellant’s taunting after the complainant had been diagnosed as HIV positive’,⁵³ and secondly, ‘that the appellant knew that post-exposure prophylaxis might have prevented the complainant becoming infected’.⁵⁴

Cases involving guns allegedly going off by accident provide fertile ground to highlight the implicit intermingling of subjective and objective tests, of which the watershed case of *Woolmington v Director of Public Prosecutions*⁵⁵ is perhaps the best known example. Woolmington, who was estranged from his wife, stole a shotgun and cartridges from his employer, sawed off the barrel, threw it in a brook and then bicycled over to his mother-in-law’s house where he shot and killed his wife. Woolmington was charged with the wilful murder of his wife. Woolmington’s version of events was that he did not intend to kill his wife, but rather he wanted her to return to him; to show his wife he was serious he threatened to kill himself if she did not come back to the marital home. By accident, the gun went off, shooting his wife in the heart.

47 Ibid [15] (Jerrard JA).

48 (2006) 162 A Crim R 377.

49 *R v Reid* (2006) 162 A Crim R 377, 390 [48].

50 Ibid.

51 [2002] QCA 442.

52 *R v Reid* (2006) 162 A Crim R 377, 389 [44]. In England, a similar offence would be prosecuted under s 20 of the *Offences Against the Person Act 1861* (UK), which only requires proof of recklessness.

53 Ibid 390 [53].

54 Ibid 391 [54].

55 [1935] AC 462.

The trial judge directed the jury that the onus was on Woolmington to show that the shooting was accidental, and the subsequent appeal was dismissed by the Court of Criminal Appeal, who cited *Foster's Crown Law* (1762) as authority:

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him. For the law presumeth the fact to have been founded in malice until the contrary appeareth.⁵⁶

The Attorney-General gave his fiat certifying that Woolmington's appeal involved a point of law of exceptional public importance, which brought the issue of the correctness of the above statement in *Foster's Crown Law* to the House of Lords. This was the background to Viscount Sankey's famous 'golden thread' speech:

Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused.⁵⁷

Thus, from 1935 onwards, it has been settled law that where an accused person raises the defence of accident, it is for the Crown to negative that possibility beyond reasonable doubt. However, there is a clear distinction between a reversal of the onus of proof and the adoption of an objective test. How is a jury to be instructed when the accused is claiming he feared the victim was about to commit suicide and in lunging for the rifle it discharged, killing the victim? This was the fact scenario in *Stevens v The Queen*,⁵⁸ where the High Court split three to two on whether a substantial miscarriage of justice occurred as a result of the trial judge's failure to give directions on accident under s 23(1)(b) of the *Criminal Code 1899* (Qld). In this context, it will be recalled that in *Widgee Shire Council v Bonney*⁵⁹ Griffith CJ famously observed that,

56 Sir Michael Foster, *Foster's Crown Law* (1762) 255.

57 *Woolmington v DPP* [1935] AC 462, 481.

58 (2005) 227 CLR 319.

59 (1907) 4 CLR 977.

under the criminal law of Queensland, as defined in the *Criminal Code*, it is never necessary to have recourse to the old doctrine of *mens rea* ... the test now to be applied is whether the prohibited act was, or was not, done accidentally or independently of the exercise of the will of the accused person (section 23).⁶⁰

In *Stevens v The Queen*,⁶¹ Gleeson CJ and Heydon J, who were in the minority, would have dismissed the appeal against conviction for murder. The main point of contention was the trial judge's decision not to direct the jury on accident under s 23(1)(b) of the *Criminal Code 1899* (Qld), which then read:

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for -
 - (a) an act or omission that occurs independently of the exercise of the person's will; or
 - (b) an event that occurs by accident.

Gleeson CJ and Heydon J were of the view that the jury would only need to consider the question of accident under s 23(1)(b) if the appellant had caused the death of the deceased, namely, the act of grabbing the gun, it being 'strongly arguable that it is foreseeable that death will result if another person attempts to seize the gun'.⁶² This led to consideration of the test of criminal responsibility under s 23:

In *R v Van Den Bemd*⁶³ this Court accepted the statement of the Queensland Court of Appeal⁶⁴ that "[t]he test of criminal responsibility under s 23 is not whether the death is an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person could not reasonably have foreseen it". The same proposition was more recently accepted in *Murray v The Queen*^{65, 66}

Hence, if, as the majority held, a direction under s 23 was necessary, then the test for accident was objective (as opposed to the subjective test for intention⁶⁷ to kill given the Crown's case that there was no mishap), in that an ordinary person could not reasonably have foreseen it. Gleeson

60 *Widgee Shire Council v Bonney* (1907) 4 CLR 977, 981-982.

61 (2005) 227 CLR 319.

62 *Stevens v The Queen* (2005) 227 CLR 319, 326 [17].

63 (1994) 179 CLR 137.

64 *R v Van Den Bemd* [1995] 1 Qd R 401, 405.

65 (2002) 211 CLR 193, 208 [43].

66 *Stevens v The Queen* (2005) 227 CLR 319, 326 [17].

67 In Queensland, under s 302(1)(a) *Criminal Code 1899* (Qld) a person is liable for murder where they unlawfully kill another with intent to kill or with intent to cause grievous bodily harm. The *Criminal Code 1899* (Qld) does not define the word 'intention'. In *R v Willmot (No 2)* (1985) 18 A Crim R 42, 46, Connolly J was of the view that there is 'no ambiguity about the expression ['intent'] as used in s 302(1) and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language'.

CJ and Heydon J cited *Murray v The Queen*⁶⁸ as framing the question for decision, whether s 23 was in play and whether there ‘was an issue separate from the issue about the intention with which the appellant acted’.⁶⁹ Gleeson CJ and Heydon J answered that question in the negative.

The majority gave three separate judgments. McHugh J, while recognising the case was fought on murder or nothing, considered that manslaughter should have been left to the jury.⁷⁰ McHugh J then continued with the following observation,⁷¹

with great respect to the majority judges in the Court of Appeal, much of their reasoning was based on the express or implied premise that the evidence had to establish a possible inference of accident before that issue could be left to the jury. *Barca*⁷² denies that proposition. Juries cannot take into account fantastic or far-fetched possibilities. But they ‘themselves set the standard of what is reasonable in the circumstances’.⁷³

In the above passage, McHugh J was leading up to the conclusion that ‘the jury might reasonably conclude that the Crown had not proved to the requisite standard that the death was not caused by accident’.⁷⁴ However, with respect, the above passage implies the trial judge is prescient. On the one hand, the trial judge is required to direct the jury to exclude the ‘far-fetched’, while on the other hand, the trial judge is to look into the minds of the jury and predict the jury’s own standard of reasonableness in determining what might be a fantastic possibility. Furthermore, the use of the phrase ‘standard of what is reasonable’ connotes an objective standard. Thus, under the test for s 23 in the context of a murder trial, the High Court appears to move seamlessly between subjective and objective tests.

Kirby J accepted the logical force of the argument that ‘[w]ith offences of specific intent such as murder ... the excuse of accident is not available to an accused if the jury is satisfied that the element of intention has been established’.⁷⁵ Nevertheless, Kirby J held that because the application of

68 (2002) 211 CLR 193, 207-208 [41] (Gummow and Hayne JJ).

69 *Stevens v The Queen* (2005) 227 CLR 319, 327 [18].

70 *Ibid* 331 [29].

71 *Ibid* 331 [30].

72 *Barca v The Queen* (1975) 133 CLR 82, 105 (Gibbs, Stephen and Mason JJ), citing *Peacock v The King* (1911) 13 CLR 619, 661 as authority for the proposition that ‘an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence’.

73 *Green v The Queen* (1971) 126 CLR 28, 33 (Barwick CJ, McTiernan and Owen JJ).

74 *Stevens v The Queen* (2005) 227 CLR 319, 331 [30].

75 *Ibid* 346 [80], citing R G Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*, (LexisNexis, 6th ed, 2004), 139.

s 23(1)(b) was not expressly excluded in a murder trial, in considering whether the Crown has established the necessary specific intention, ‘the jury’s attention must be directed (where accident is an available classification of the facts) to that category of exemption from criminal responsibility’.⁷⁶ So, again the subjective test for intention is merged into the objective test for accident.

Callinan J could not ‘be satisfied that the appellant has not missed a chance of an acquittal by reason of the absence of a direction of the kind that I have suggested’.⁷⁷ For present purposes, the relevant portion of Callinan J’s ‘model’ direction is as follows:

The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident, that is, not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseen by an ordinary person in his position.⁷⁸

With great respect to the three judges constituting the majority in *Stevens v The Queen*,⁷⁹ the running together of subjective and objective tests is unhelpful and confusing. This paper contends that the joint judgment of the minority is to be preferred: s 23 is only in play where there is ‘an issue separate from the issue about the intention with which the appellant acted’.⁸⁰ The minority’s approach in *Stevens v The Queen* does not muddy the waters between subjective and objective tests, albeit the minority did accept the objective test under *R v Van Den Bemd*⁸¹ when s 23 was relevant. The jurisprudence in *Stevens v The Queen* is important because it applies to three Australian jurisdictions: Queensland, Western Australia and Tasmania.⁸² Dixon CJ’s well known criticism in *Vallance v The Queen*⁸³ of s 13(1) of the *Criminal Code 1924* (Tas), which was derived from s 23 of the *Criminal Code 1899* (Qld), is pertinent here in ‘that it is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially’.⁸⁴

76 *Stevens v The Queen* (2005) 227 CLR 319, 346 [81].

77 *Ibid* 371 [162].

78 *Ibid* 370-371 [160].

79 (2005) 227 CLR 319.

80 *Ibid* 327 [18] (McHugh J), quoting *Murray v The Queen* (2002) 211 CLR 193, 207-208 [41] (Gummow and Hayne JJ).

81 (1994) 179 CLR 137.

82 See s 23B(2) *Criminal Code 1913* (WA); s 13(1) *Criminal Code 1924* (Tas).

83 (1961) 108 CLR 56.

84 *Vallance v The Queen* (1961) 108 CLR 56,.61.

This two step process between the subjective test for murder and the objective test for accident would appear to be inevitable given that s 23 was drafted before the House of Lords decision in *Woolmington v DPP*.⁸⁵ When Sir Samuel Griffith designed s 23, the law was as stated in *Foster's Crown Law* (1762), which meant that the legal onus was on the defence to disprove accident. In addition, the underlying fault element of the *Criminal Code 1899* (Qld) is negligence,⁸⁶ with its attendant objective test of the standard of the ordinary person. After *Woolmington v DPP*⁸⁷ and coinciding with the supremacy of subjective tests, as Goode has aptly described 'the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood'.⁸⁸ It is therefore necessary in the next section of this paper to revisit the ascendancy of subjective tests post *Parker v The Queen*,⁸⁹ and to consider whether the opprobrium meted out to the House of Lords decision in *DPP v Smith*⁹⁰ was justified.

III THE ASCENDANCY OF SUBJECTIVE TESTS IN CRIMINAL RESPONSIBILITY

The appropriate starting point for a discussion of the supremacy of subjective tests for criminal responsibility in Australia is the 1952 case of *Stapleton v The Queen*.⁹¹ Stapleton, who had a family history of mental disability and abnormality, was convicted of murdering a policeman at Katherine, in the Northern Territory. His appeal to the High Court concerned the adequacy of Kriewaldt J's directions to the jury in a case involving both intoxication and a plea of insanity. The crucial passage of Kriewaldt J's direction to the jury was quoted by the High Court as follows:

The third view you might take is that the evidence regarding drink does not prove either one of the two things which I have just mentioned - neither incapacity to form an intent nor a decrease in the mental standard to make him irresponsible, but merely shows that his mind was so much affected by liquor that he more easily

85 [1935] AC 462.

86 Professor Fairall has pointed out, '[i]n Queensland and Western Australia, Courts have interpreted the Griffith Codes in such a way that negligence is the underlying fault standard', citing as authority *R v Tailors* (1996) 87 A Crim R 507, 512: 'The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.': Paul Fairall, *Review of Aspects of the Criminal Code of the Northern Territory*, March 2004, 41.

87 *Woolmington v DPP* [1935] AC 462.

88 M R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', (2002) 26 *Criminal Law Journal* 152, 160.

89 (1963) 111 CLR 610.

90 [1961] AC 290.

91 (1952) 86 CLR 358.

gave way to his passions. If that is the view you take, *the ordinary presumption prevails that a man intends the natural consequences of his acts*, and in that case, if you think the natural inference is that he intended to kill or inflict a serious injury the accused is guilty of murder.⁹²

The High Court was critical of both of the above sentences:

The first of the two sentences not only appears to place the burden of disproving intent on the accused but makes the test incapacity to form, rather than absence of, the intent. Upon the defence of insanity it might tend to lessen the probability of the jury grasping the part which the medical evidence assigned to alcohol in the production of an insane excitement and aggression in a person of inherited mental instability or deficiency. The second sentence tends still more to put the burden of proof on the accused with respect to the intent. *The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous*. For it either does no more than state a self evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation. Cf *R v Steane* (1947) KB 997, 1003-1004.⁹³

The stage was then set for a major disagreement with either the House of Lords or the Privy Council if the test for murder was to be explicitly framed around a presumption of intention for the natural and probable consequences of a person's actions. This occurred nine years after *Stapleton v The Queen* with the House of Lords unanimous decision in *DPP v Smith*,⁹⁴ where an objective test for criminal responsibility was adopted until replaced by statute.⁹⁵

Before turning to the facts in *DPP v Smith*,⁹⁶ the difference between the objective and subjective presumption of intent should be restated.

92 *Stapleton v The Queen* (1952) 86 CLR 358, 365 (emphasis added).

93 *Ibid* (Dixon CJ, Webb and Kitto JJ) (emphasis added). The reference to 'cf *R v Steane* (1947) KB 997, 1003-1004' refers to Lord Goddard CJ's statement: 'No doubt, if the prosecution prove an act the natural consequence of which would be a certain result and no evidence or explanation is given, then a jury may, on a proper direction, find that the prisoner is guilty of doing the act with the intent alleged.' Lord Goddard joined in the unanimous decision in *DPP v Smith* [1961] AC 290, fourteen years after *R v Steane*. Interestingly, the High Court in *Stapleton v The Queen* held that in applying the second limb of the M'Naghten Rules the question was whether the accused knew that his act was wrong according to the ordinary principles of reasonable men, not whether he knew it was wrong as being contrary to law, thereby choosing not to follow *R v Windle* (1952) 2 QB 826.

94 [1961] AC 290.

95 *Criminal Justice Act 1967* (UK), s 8 provides that: 'A court or jury, in determining whether a person has committed an offence - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.' The decision in *DPP v Smith* [1961] AC 290 was treated as wrongly decided by the Privy Council in *Frankland v R* [1987] AC 576.

96 [1961] AC 290.

The objective presumption is the presumption that a person intends the natural and probable consequences of his or her actions. The subjective presumption is 'the presumption of intent that may be drawn from proof that a person foresaw certain consequences as likely or probable'.⁹⁷

In *DPP v Smith*,⁹⁸ a policeman tried to prevent the defendant from driving off with stolen goods by jumping on the bonnet of the car. The defendant not only drove away at speed but also succeeded in dislodging the police officer by zigzagging. The policeman fell into the path of an oncoming vehicle and was killed. As Stannard points out, Smith's claim that he never intended to kill but only to shake the policeman off is 'a classic ruthless risk taker reaction'.⁹⁹ The ruthless risk taker has been described as having a 'wicked disregard of the consequences to life'.¹⁰⁰ Stannard suggests that ruthless risk takers highlight a tension in the law 'between the need to stigmatise as murderers those who are thought to deserve that label, and on the other to preserve the integrity of murder as crime of specific intent'.¹⁰¹ This paper contends that such a tension should be resolved objectively from the public policy perspective of protecting the community, rather than from the subjective complexities of labeling the ruthless risk taker as guilty of murder or manslaughter.¹⁰²

The trial judge in *DPP v Smith*¹⁰³ directed the jury on the basis of whether a reasonable man would have contemplated that grievous bodily harm was likely to result to the police officer. The Court of Criminal Appeal quashed the murder conviction and substituted a manslaughter conviction in applying a subjective test.¹⁰⁴ After the Attorney-General

97 John Stannard, 'A Tale of Two Presumptions' (1999) 21 *Liverpool Law Review* 275, 276-277.

98 [1961] AC 290.

99 Stannard, above n 97, 277.

100 J.H.A. MacDonald, *A Practical Treatise on the Criminal Law of Scotland* (W. Green & Son Ltd, 1869) 89.

101 Stannard, above n 97, 275, citing *inter alia* Grigg-Spall and Ireland, *The Critical Lawyer's Handbook* (Pluto Press, 1992) 76-83.

102 See, for example, *Winner v The Queen* (1995) 79 A Crim R 528, a case where the appellant drove a car as close as possible to a child cyclist in order to frighten him. The appellant, having consumed a large amount of alcohol, was driving in a stolen car when he veered suddenly across two lanes of traffic and struck and killed a cyclist riding near the kerb. He then drove away. The proceedings were heard by the primary judge sitting alone. The Court of Criminal Appeal held that the trial judge was entitled to infer the requisite intent for murder on the basis of the objective evidence alone, given the relevant portion of the definition of murder in s 18(1)(a) *Crimes Act 1900* (NSW) is 'where the act of the accused ... causing the death charged, was done or omitted with reckless indifference to human life'.

103 [1961] AC 290.

104 *Ibid* 300 (Byrne J). The test put forward by Byrne J stated: 'While that is an inference [a person intends the natural consequences of his or her acts] which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yea if on all the

gave his fiat that the appeal involved a point of law of exceptional public importance (Smith, like Woolmington 26 years earlier, was sentenced to death), the Director of Public Prosecutions appealed to the House of Lords who reinstated the murder conviction in holding that the trial judge had not misdirected the jury and that an objective test of foresight was applicable (as a rule of substantive law¹⁰⁵ and not an evidential guide). Viscount Kilmuir LC gave the sole speech:

The jury must, of course, in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone¹⁰⁶ in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.¹⁰⁷

Immediately following the above passage Viscount Kilmuir cited a string of authorities, the first of which was Holmes.¹⁰⁸ Lecture II of Holmes's book on *The Common Law* deals with the criminal law and the first crime considered is murder. Holmes commences his analysis by examining Sir James Stephen's definition of murder as 'unlawful homicide with malice aforethought'.¹⁰⁹ Holmes looks closely at Stephen's breakdown of malice aforethought into a number of states of mind, and concludes they can be 'reduced to a lower term ... that knowledge that the act will probably

facts of a particular case it is not the correct inference, then it should not be drawn.' Section 8 of the *Criminal Justice Act 1967* (UK) reflects the test identified by Byrne J in the Court of Criminal Appeal. See above n 95. It should be noted that s 8 did not abolish the objective presumption but rather s 8 assumed the continued existence of the objective presumption subject to Byrne J's qualification.

105 Stannard, above n 97. The rule posited that for murder it was 'sufficient to prove an intent to do an unlawful and voluntary act to someone coupled with the objective probability of death or grievous bodily harm resulting from that act'. This rule of substantive law was later held by the Privy Council in *Frankland v R* [1987] AC 576 'to form no part of the common law' (Stannard, above n 97, 278-279).

106 S C Desch, 'Negligent Murder', *The Modern Law Review* (1963) 26(6) 660, 673, argues that the decision in *DPP v Smith* [1961] AC 290 'clearly establishes in English law a doctrine of negligent murder, subject to the proviso that the accused was "aiming an act at someone"'. Desch makes the suggestion that the act probably means an assault (670).

107 *DPP v Smith* [1961] AC 290, 327, concurred in by Lord Goddard, Lord Tucker, Lord Denning and Lord Parker of Waddington. The decision in *DPP v Smith* [1961] AC 290 harked back to *R v Meade* [1909] 1 KB 895.

108 Oliver Wendell Holmes, *The Common Law* (Little, Brown and Co, 1881) 54, 56.

109 *Ibid* 51, citing Stephen's *Digest of Criminal Law*, Art. 223.

cause death, that is foresight of the consequences of the act, is enough in murder'.¹¹⁰ Holmes gives the example of a newly born child who has been laid naked out of doors. The child must perish without intervention. Holmes classifies this as murder even though the guilty party would be happy for a stranger to find and save the child.¹¹¹

Holmes then seeks to define 'foresight of consequences'. Holmes grounds his definition in knowledge: knowledge that from the present state of things the act done will very certainly cause death. Thus, where the probability is a matter of common knowledge, the person doing the act is guilty of murder, 'and the law will not inquire whether he did actually foresee the consequences or not'.¹¹² In this way, Holmes arrives at the conclusion that the test of foresight is not subjective (the foresight of the accused) but objective (the foresight of a person of reasonable prudence).¹¹³ Holmes gives the example of throwing a heavy beam from a building site down into a busy street below which a person of ordinary prudence would foresee as likely to cause death or grievous bodily harm 'and he is dealt with as if he foresaw it, whether he does so in fact or not'.¹¹⁴

In *DPP v Smith*,¹¹⁵ Viscount Kilmuir stated that the 'unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence'. In the example above of throwing down a heavy beam, Holmes would appear not to have required the accused to have been aiming at anyone in particular. As the act was deliberate and not an accident, the likelihood of hitting someone and causing death or grievous bodily harm was sufficient to constitute murder. It may be objected that this represents a failure to distinguish between the notion of a willed act and the consequences of a willed act. This is where the degree of foresight necessary to convert a reckless act into a de facto intentional act, and whether the measuring rod is subjective or objective, emerges as the critical question. In the context of a deliberate assault, Lord Parker in *R v Grimwood*¹¹⁶ explained *Director of Public Prosecutions v Smith*¹¹⁷ in similar terms to Holmes's beam example, whereby if a reasonable

110 Ibid 53.

111 Ibid.

112 Ibid 54.

113 Ibid 54.

114 Ibid 56.

115 [1961] AC 290, 327.

116 [1962] 3 All ER 285, 286.

117 [1961] AC 290.

person would have realised (an awareness¹¹⁸ or knowledge¹¹⁹) in the circumstances of a deliberate assault that death or grievous bodily harm was a likely result, then, if death results, this is reckless murder and not negligence.

For Holmes, the selection of the standard of the prudent person, the yardstick of general experience, is based on the 'object of the law to prevent human life being endangered or taken ... to compel men to abstain from dangerous conduct ... at their peril to know the teachings of common experience'.¹²⁰ Writing in 1881, Holmes's test for murder 'is the degree of danger to life attending the act under the known circumstances of the case'.¹²¹

As will be discussed in the next section of this paper, the question of whether 'certainty' or 'likelihood' of causing death should constitute a touchstone for a definition of the mental state of murder, caused considerable difficulty to judges in the United Kingdom some 100 years after Holmes published his seminal work. Cases analogous to Holmes's heavy beam example, such as the dropping of concrete blocks from a bridge onto cars travelling below,¹²² the lighting of a fire through the letterbox in the front door of an occupied house,¹²³ and throwing a three-month-old baby onto a hard surface,¹²⁴ once more placed centre stage whether the probability of causing death should form part of the test for murder.¹²⁵

118 The subjective requirement of 'awareness' for recklessness is the sole distinction between recklessness and negligence in the *Criminal Code 1995* (Cth). The test for the latter is totally objective, negligence requiring such a great falling short of the standard of care that a reasonable person would exercise, and such a high risk that the physical element exists, that the conduct merits criminal punishment. Notwithstanding the fact that Part 2.2 treats the distinction between recklessness and negligence as fundamental (only recklessness contains a subjective component), it was demonstrated in *Simpson v The Queen* (1998) 103 A Crim R 19, that there is a thin line between recklessness and negligence - between the actual (subjective) awareness of a risk and the objective awareness of the risk based on the fact that the risk was obvious.

119 In *R v Ward* [1956] 1 QB 351, 356, Lord Goddard states: '[B]ut if the jury comes to the conclusion that any reasonable person, that is to say a person who cannot set up a plea of insanity, must have *known* that what he was doing would cause at least grievous bodily harm, and that death is the result of that grievous bodily harm, then that amounts to murder in law.' (Emphasis added.) Thus, there is a presumption of intent which is rebuttable only by proof of incapacity to form intent such as insanity or diminished responsibility. This rebuttable presumption was reversed by s 8 of the *Criminal Justice Act 1967* (UK).

120 Holmes, above n 108, 56-57.

121 *Ibid* 57.

122 *R v Hancock and Shankland* [1986] 1 AC 455.

123 *Hyam v DPP* [1975] AC 55.

124 *R v Woollin* [1999] AC 92.

125 Yeo points out that 'Australian courts have largely avoided the difficulties which their

In Australia, the test for reckless murder¹²⁶ at common law is whether the accused knew¹²⁷ that death was a probable, as opposed to a possible, consequence of his or her conduct.¹²⁸ Here, a subjective presumption of intent is drawn from proof of foresight of probable consequences, as opposed to the objective presumption of a person intending the natural and probable consequences of his or her actions. However, at common law in Australia, by contrast with England, intention and recklessness are alternative fault elements for murder, and proof of recklessness does not require an additional finding of intention before a person can be convicted, such that recklessness is not merely evidence from which intention can be inferred. Thus, in *La Fontaine v The Queen*,¹²⁹ Gibbs J said:

It must now be taken to be the law that a person who does an act knowing that it is probable that death or grievous bodily harm will result is guilty of murder if death does in fact result, even though he had no intention to cause death or grievous bodily harm.¹³⁰

This statement was unanimously approved by the High Court in *R v Crabbe*.¹³¹

A person who does an act causing death *knowing* that it is probable that the act will cause death or grievous bodily harm is, as Stephen's Digest states, guilty of murder although such *knowledge* is accompanied by indifference whether death or grievous bodily harm is caused or not or even by a wish that death or grievous bodily harm might not be caused. That does not mean that reckless indifference is an element of the mental state necessary to constitute the crime of murder. It is not the offender's indifference to the consequences of his act but his *knowledge* that those consequences will probably occur that is the relevant element.¹³²

English counterparts have had over the meaning of intention as a fault element for murder': Stanley Yeo, *Fault in Homicide* (Federation Press, 1997) 52. Given the authority of *R v Crabbe* (1985) 156 CLR 464 that the test for reckless murder is a defendant's awareness that his or her conduct will probably result in death and is sufficient to equate to intention for murder, Yeo opined that Australian jurisdictions 'have not felt the same need to define intention': at 55.

126 As Cato has observed: 'The rationale for murder is a person's reckless and callous indifference to life which renders him or her very closely compatible in moral terms with one who intends to kill or cause grievous bodily harm': Charles Cato, 'Foresight of Murder and Complicity in Unlawful Joint Enterprises Where Death Results' (1990) 2(2) *Bond Law Review* 182, 189.

127 Knowledge is defined in s 5.3 of the *Criminal Code 1995* (Cth) as follows: 'A person has knowledge of a result or circumstance if the person is aware that it exists or will exist in the ordinary course of events.' The overlap between subjective awareness and objective ordinary course of events in the definition of knowledge, is more marked in the definition of recklessness in s 5.4 which combines the subjective awareness of a substantial risk with the objective unjustifiable to take the risk in the circumstances.

128 *R v Crabbe* (1985) 156 CLR 464. In 1983, Crabbe drove his 25-tonne Mack truck into a crowded motel at the base of Uluru. Five people were killed and sixteen seriously injured.

129 (1976) 136 CLR 62.

130 *La Fontaine v The Queen* (1976) 136 CLR 62, 75.

131 (1985) 156 CLR 464.

132 *R v Crabbe* (1985) 156 CLR 464, 470 (Gibbs CJ, Wilson, Brennan, Deane and Dawson

On the above authority, it would appear that in Australia it is arguable that the test of common law reckless murder approximates Holmes's definition of murder. Holmes clearly stated his test was objective because 'the danger which in fact exists under the known circumstances ought to be of a class which a man of reasonable prudence could foresee'.¹³³ This paper contends that it is open to conclude that the 'probable consequence' test for common law reckless murder resembles an objective test, notwithstanding Barwick CJ's remarks in *Pemble v R*¹³⁴ above, the jury does stand in the shoes of the defendant adopting the reasonable person's foresight. The jury in *R v Crabbe*¹³⁵ would have asked themselves what else could the defendant have intended when he drove his truck into the crowded hotel but to cause grievous bodily harm? Whilst in *R v Crabbe*,¹³⁶ criminal liability was based on recklessness as to the causing of death or grievous bodily harm, the High Court equated recklessness, where the consequence was probable, with intention sufficient to sustain a conviction for murder rather than manslaughter. Ironically, if Crabbe was to be tried today in the Northern Territory, rather than under the common law that pertained in 1983, Crabbe would likely only be convicted of manslaughter given the definition of intention under s 156 of the *Criminal Code 1983* (NT) and the absence of reckless murder in Northern Territory.

So how do *R v Fontaine*¹³⁷ and *R v Crabbe*¹³⁸ fit into the Australian denunciation of *DPP v Smith*?¹³⁹ In answering this question, it is necessary to turn to *Parker v The Queen*,¹⁴⁰ in which Dixon CJ reasserted the High Court's attack on the natural and probable consequences test, which was first raised eleven years earlier in *Stapleton v The Queen*.¹⁴¹ *Parker v The Queen*¹⁴² was a provocation case and unrelated to the issue of an objective test for murder. Nevertheless, Dixon CJ at the end of his judgment took clear aim at the House of Lords decision in *DPP v Smith*¹⁴³ which had been handed down just two years earlier:¹⁴⁴

JJ) (emphasis added).

133 Holmes, above n 108, 56.

134 (1971) 124 CLR 107, 120-121.

135 (1985) 156 CLR 464.

136 Ibid.

137 *La Fontaine v The Queen* (1976) 136 CLR 62.

138 *R v Crabbe* (1985) 156 CLR 464.

139 *DPP v Smith* [1961] AC 290.

140 (1963) 111 CLR 610.

141 (1952) 86 CLR 358.

142 (1963) 111 CLR 610.

143 *DPP v Smith* [1961] AC 290.

144 Dixon CJ was but one of many distinguished jurists to attack *DPP v Smith* [1961] AC 290. Professor H.L.A. Hart in a letter to *The Times*, November 12, 1960, cited by Desch, above n 106, 672, was deeply critical of the decision: '[T]he House of Lords has shown that it is true, even if in the mid-twentieth century it is almost unbelievable,

In *Stapleton v The Queen*¹⁴⁵ we said: 'The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous'.¹⁴⁶ That was some years before the decision in *Director of Public Prosecutions v. Smith*,¹⁴⁷ which seems only too unfortunately to confirm the observation. I say too unfortunately for I think it forces a critical situation in our (Dominion) relation to the judicial authority as precedents of decisions in England. Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I shall not discuss the case. There has been enough discussion and, perhaps I may add, explanation, to make it unnecessary to go over the ground once more. I do not think that this present case really involves any of the so-called presumptions but I do think that the summing-up drew the topic into the matter even if somewhat unnecessarily and therefore if I left it on one side some misunderstanding might arise. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we had long since laid it down in this Court and I think *Smith's Case* should not be used as authority in Australia at all. I am authorized by all the other members of the High Court to say that they share the views expressed in the foregoing paragraph.¹⁴⁸

Dixon CJ appears to imply that without some clear statement from the High Court that *DPP v Smith*¹⁴⁹ would not be followed in Australia, there might be some 'misunderstanding on the subject', and there would be no departure from the law of murder 'long since laid down in this Court'. Two points can be made at this juncture. The first is that Australia, with its federal system, has multiple criminal jurisdictions, as discussed earlier. It is therefore no more possible in 1963 than it is today, with respect to Dixon CJ, to suggest that the law of murder has been clearly laid down by the High Court.

The second point to make in relation to the extract from Dixon CJ's judgment above in *Parker v The Queen*,¹⁵⁰ is that there were already differences between the law of murder in England and Australia prior to *DPP v Smith*.¹⁵¹ For example, constructive murder¹⁵² was and remains on

that English law recognises no distinction between the man who intends to kill and one who, without intending either to kill or seriously harm, does something to another which a reasonable man would realise would probably cause serious harm.'

145 (1952) 86 CLR 358.

146 *Stapleton v The Queen* (1952) 86 CLR 358, 365.

147 [1961] AC 290.

148 *Parker v The Queen* (1963) 111 CLR 610, 632-633 (Dixon CJ).

149 [1961] AC 290, 327 (Viscount Kilmuir LC).

150 (1963) 111 CLR 610.

151 *DPP v Smith* [1961] AC 290.

152 For constructive murder, it is not necessary for the prosecution to prove the subjective fault element of intention or recklessness to kill or to cause serious harm. Rather, the fault element is imputed to the accused where the victim has been killed during the course of a crime that endangers human life or whilst resisting lawful arrest. For the

the statute books of all six Australian States.¹⁵³ Yet, constructive murder has been extensively criticised¹⁵⁴ as it lacked the essential fault element of 'intentional recklessness' by the accused.¹⁵⁵ In 1957, four years prior to *DPP v Smith*,¹⁵⁶ common law felony murder was repealed in England. This paper contends that there is already a *de facto* objectivity in the Australian law of murder by virtue of the test of knowledge of a probable consequence for common law reckless murder, combined with all Australian State jurisdictions including constructive murder under which a fault element is 'constructed' from the circumstances.

Given Dixon CJ's emphatic criticism of the objective test adopted in *DPP v Smith*,¹⁵⁷ there is a certain irony that fifty years after *DPP v Smith* was decided, it is Australia that has come closer to adopting a *de facto* objective test for murder, rather than England. Australia has set the foresight bar for reckless murder at 'probable' in the common law jurisdictions, whereas England has raised the foresight bar to 'a virtual certainty'. In Australia, in the *Criminal Code 1995* (Cth), recklessness has a dual subjective and objective component,¹⁵⁸ while in England the jury must find intent rather than merely inferring intent. To appreciate how this situation has occurred, it is necessary to turn to the development of the law of murder in England since 1961 by way of a series of House of Lords rulings, as seen through the prism of s 8 of the *Criminal Justice Act 1967* (UK), which modified *DPP v Smith* by incorporating the test of Byrne J in the Court of Criminal Appeal.¹⁵⁹

IV THE DEVELOPMENT OF THE LAW OF MURDER IN ENGLAND POST *DPP V SMITH*

Writing in 1999, Stannard observed that the House of Lords has pronounced on the subject of the ruthless risk taker and the use of presumptions for murder 'no less than five times in the last forty years,

physical elements, the accused must have caused the death of the victim and the death must be connected to the commission of a specified offence.

153 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 524 [9.105] and Table 3 530 [9.125].

154 Common law felony murder was repealed in England by s 1(2) *Homicide Act 1957* (UK), and the constructive murder provisions in the *Criminal Code 1892* (Canada) were held to be unconstitutional by the Supreme Court of Canada in *Vaillancourt v The Queen* [1987] 2 SCR 636.

155 For example, Law Reform Commission of Western Australia, above n 37, 59 quoting B. Fisse, *Howard's Criminal Law*, 2005, 70-71. 'The main objection to the felony-murder rule is that it does not require proof of a subjective blameworthy state of mind.'

156 [1961] AC 290.

157 [1961] AC 290, 327.

158 See, for example, s 5.4 *Criminal Code 1995* (Cth); s 43AK *Criminal Code 1983* (NT).

159 See *DPP v Smith* [1961] AC 290, 300 for Byrne J's test.

and three times in the last twenty, yet the law is still neither clear nor satisfactory'.¹⁶⁰ The first of those pronouncements was in *Hyam v Director of Public Prosecutions*,¹⁶¹ where the appellant had been convicted of murder as a result of her pouring petrol in the letter box of the front door of a house occupied by her rival in love (Mrs Booth) and igniting it by means of a lighted newspaper. Two of Mrs Booth's young children died in the ensuing house fire. Hyam's defence was that she only intended to frighten Mrs Booth. Ackner J had directed the jury that the necessary intention was established if the prosecution could prove that when Hyam started the fire she knew it was highly probable that the fire would cause death or grievous bodily harm.¹⁶²

The House of Lords divided three-two in dismissing the appeal and holding that foresight on the part of Hyam meant that her actions were likely, or highly likely, to cause death or grievous bodily harm was sufficient *mens rea* for murder. Viscount Dilhorne opined that if a person does an act,

knowing when he does it that it is highly probable that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm.¹⁶³

Three observations on the result in *Hyam v DPP*¹⁶⁴ can be made. First, the majority approved the statement made in 1839 by the Commissioners on Criminal Law that,

it appears to us that it ought to make no difference in point of legal distinction whether death results from a direct intention to kill or from wilfully doing an act of which death is the probable consequence.¹⁶⁵

Second, that at this point in time the law on murder in England (*Hyam v DPP*)¹⁶⁶ and the law in Australia (*R v Crabbe*)¹⁶⁷ were similar. Third, that the same result of a murder conviction in *Hyam v DPP*¹⁶⁸ is achieved in England whether the route taken is via the qualified objective

160 Stannard, above n 97, 287-288. Stannard notes in footnote 71 (288) that the then Lord Chief Justice, Lord Bingham, has said, 'even the most breathless admirer of the common law must regard it as a reproach that after seven hundred years of judicial decision-making our highest tribunal should have been called upon time and time again in recent years to consider the mental ingredients of murder, the oldest and most serious of crimes (*New Law Journal* (1998) 1134)'.

161 [1975] AC 55.

162 *Hyam v DPP* [1975] AC 55, 65.

163 *Ibid* 82.

164 *Ibid* 55.

165 Commissioners on the Criminal Law, Fourth Report (1839), referred to by Lord Hailsham in *Hyam v DPP* [1975] AC 55, 77 and cited by Charles Cato, above n 126, 184.

166 *Hyam v DPP* [1975] AC 55.

167 *R v Crabbe* (1985) 156 CLR 464.

168 *Hyam v DPP* [1975] AC 55.

presumption of s 8 of the *Criminal Justice Act 1967* (UK) or the subjective presumption of foresight of probable consequences. On the tragic facts in *Hyam v DPP*,¹⁶⁹ under s 8 the jury could have properly inferred in the circumstances that she intended or foresaw the natural and probable consequence of her actions.

The issue of whether there is a distinction between foresight and intention returned before the House of Lords ten years after *Hyam v DPP*,¹⁷⁰ in the case of *Moloney v R*.¹⁷¹ In *Moloney v R*,¹⁷² the appellant had been convicted of murder after shooting his stepfather during a drunken game. The appellant had claimed at trial that he did not aim the shotgun and had not realised it was pointing at the victim. The trial judge had directed the jury on intention (based on *Hyam v DPP*¹⁷³) as follows:

a man intends the consequence of his voluntary act (a) when he desires it to happen, whether or not he foresees that it probably will happen, or (b) when he foresees that it will probably happen, whether he desires it or not.¹⁷⁴

This time the House of Lords was unanimous in holding that foresight of the probability of death or grievous bodily harm was not the same as an intention for either to occur.

Lord Hailsham, who had been in the minority in *Hyam v DPP*,¹⁷⁵ repeated his view that at best foresight was evidence from which intent could be inferred, stating that

foresight [subjective actual foresight of consequences] and foreseeability [objective foreseeability of consequences] are not the same thing as intention although either may give rise to an irresistible inference of such'.¹⁷⁶

Lord Hailsham was of the view that matters of inference for a jury as to the subjective state of mind of the defendant should not 'be erected into a legal presumption'¹⁷⁷ but remain part of the law of evidence and not the substantive law.

Lord Bridge gave the leading judgment in *Moloney v R*¹⁷⁸ and his Lordship's speech is particularly relevant to the topic of this paper. Lord Bridge aligned himself with Lord Hailsham in treating foresight of consequences

169 *Ibid.*

170 *Ibid.*

171 [1985] AC 905.

172 *Moloney v R* [1985] AC 905.

173 *Hyam v DPP* [1975] AC 55.

174 *Moloney v R* [1985] AC 905, 917.

175 [1975] AC 55.

176 *Moloney v R* [1985] AC 905, 913.

177 *Ibid.*

178 *Moloney v R* [1985] AC 905.

as belonging to the law of evidence. Lord Bridge took aim at the decision in *DPP v Smith*¹⁷⁹ by observing that the elevation of the maxim ‘a man is presumed to intend the natural¹⁸⁰ and probable consequences of his act,’ into an irrebuttable presumption, ‘predictably provoked the intervention of Parliament by section 8 of the *Criminal Justice Act 1967* (UK) to put the issue of intention back where it belonged, viz., in the hands of the jury’.¹⁸¹

Lord Bridge concluded that only in rare cases would it be necessary to direct a jury by reference to foresight of consequences, and in cases of this kind the jury should be invited to answer two questions:

First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant’s voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence.¹⁸²

Stannard has neatly summed up the effect of this approach as ‘*Moloney* did for foresight what section 8 of the *Criminal Justice Act 1967* (UK) did for foreseeability: both might be compelling evidence of intent, but neither was equivalent to intent’.¹⁸³ In effect, all that *Moloney v R*¹⁸⁴ achieved was to overrule *Hyam v DPP*¹⁸⁵ and send the law back to s 8 which assumed the continued existence of the objective presumption subject to the qualification of the jury ‘drawing such inferences from [the evidence] as appeared proper’ in the circumstances.¹⁸⁶ One obvious issue left unresolved by Lord Bridge’s two questions above, namely, the relationship between probability and foresight, emerged centre stage just one year later in *R v Hancock*.¹⁸⁷

In *R v Hancock*,¹⁸⁸ striking miners pushed a block of concrete from a bridge onto a roadway below killing the driver of a taxi taking another miner to work. The defendants, who were prepared to plead guilty to manslaughter, claimed their intention was only to block the road or to frighten. The Crown pressed for a murder conviction. The trial judge

179 [1961] AC 290.

180 Lord Bridge suggested that ‘if a consequence is natural, it is really otiose to speak of it as also being probable’: *Moloney v R* [1985] AC 905, 929.

181 *Moloney v R* [1985] AC 905, 929.

182 *Ibid* 907.

183 Stannard, above n 97, 280-281.

184 *Moloney v R* [1985] AC 905.

185 *Hyam v DPP* [1975] AC 55.

186 Stannard, above n 97, 284.

187 [1986] AC 455.

188 *R v Hancock* [1986] AC 455.

summed up on the basis of Lord Bridge's guidelines in *Moloney v R*¹⁸⁹ above, compressing the prosecution's case into the residual question of what else could someone have intended by throwing such an object but to cause serious bodily harm. The defendants were convicted of murder. The Court of Appeal quashed the murder convictions and substituted verdicts of manslaughter on the grounds that the *Moloney v R*¹⁹⁰ guidelines,

offered the jury no assistance as to the relevance or weight of the probability factor in determining whether they should, or could properly, infer from foresight of a consequence (in this case, of course, death or serious bodily harm) the intent to bring about that consequence.¹⁹¹

The Director of Public Prosecutions appealed to the House of Lords.

The House of Lords unanimously dismissed the appeal. Lord Scarman gave the sole speech. Lord Scarman agreed with the Court of Appeal that the probability of a consequence must be drawn specifically to the attention of the jury:

In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences, the probability of death or serious injury resulting from the act done may be critically important.¹⁹²

Essentially, *R v Hancock*¹⁹³ did little more than to find the *Moloney*¹⁹⁴ guidelines defective, and to draw attention to s 8 of the *Criminal Justice Act 1967* (UK) pointing to even the high probability of a consequence as being only a factor in determining the necessary intention.¹⁹⁵ In 1988, Lord Goff was able to conclude that

after the journey through *Smith, Hyam, Moloney* and *Hancock*, the law is really back where it was ... Foresight of consequences is not the same as intent, but is material from which the jury may, having regard to the circumstances of the case, infer that the defendant really had the relevant intent.¹⁹⁶

Lord Scarman had conceded in *R v Hancock* that

the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended.¹⁹⁷

189 *Moloney v R* [1985] AC 905.

190 *Ibid.*

191 *R v Hancock* [1986] AC 455, 471 (Lord Scarman).

192 *Ibid* 473 (Lord Scarman).

193 *R v Hancock* [1986] AC 455.

194 *Moloney v R* [1985] AC 905.

195 *R v Hancock* [1986] AC 455, 474 (Lord Scarman).

196 Lord Goff, 'The Mental Element in the Crime of Murder' (1988) 104 *The Law Quarterly Review* 30, 41.

197 *R v Hancock* [1986] AC 455, 474 (Lord Scarman).

However, the ink was hardly dry in *R v Hancock*,¹⁹⁸ when, as Stannard has observed, the Court of Appeal in *R v Nedrick*¹⁹⁹ applied ‘an even tighter test, declaring that the inference of intent was not to be drawn, at least in murder cases, unless the defendant was proved to have realised that death or serious injury was a virtual certainty’.²⁰⁰ Lord Lane’s test of a ‘virtual certainty’ in *Nedrick*²⁰¹ was approved by the House of Lords in *R v Woollin*.²⁰² In *R v Woollin*,²⁰³ as in *R v Hancock*,²⁰⁴ the House of Lords quashed the murder conviction and substituted a manslaughter verdict on the grounds that by using the phrase ‘substantial risk’, the trial judge had blurred the line between intention and recklessness and hence between murder and manslaughter. The House of Lords in *R v Woollin*²⁰⁵ accepted the appellant’s argument that ‘substantial risk’ unacceptably enlarged the scope of the mental element required for murder, and approved Lord Lane’s formula in *R v Nedrick*²⁰⁶ of ‘a virtual certainty’.

The situation in England post *R v Woollin*²⁰⁷ would appear to be that the subjective presumption only operates where the jury is satisfied beyond reasonable doubt that the accused foresaw death or grievous bodily harm as ‘a virtual certainty’. From a practical perspective, in dealing with the ruthless risk taker, such an approach is ‘virtually useless, for surely few such killers can be shown to have foreseen the relevant harmful

198 *R v Hancock* [1986] AC 455.

199 [1986] 1 WLR 1025. *R v Nedrick* had a similar fact scenario to *Hyam v DPP* being another petrol (paraffin) through the letter box case, where a child died after the paraffin was set alight. The trial judge in *R v Nedrick* framed his direction in terms of foresight of a high probability that the act would result in serious bodily injury.

200 Stannard, above n 97, 282. Stannard cited Lord Lane CJ in *R v Nedrick* at 1028: ‘Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.’

201 *R v Nedrick* [1986] 1 WLR 1025, 1028.

202 [1999] AC 82. The appellant lost his temper and threw his three-month-old son on to a hard surface. His son sustained a fractured skull and died. The appellant was charged with murder. The issue was whether the appellant had the necessary intention to cause serious harm which the appellant denied. The trial judge had directed the jury on the basis that if they were satisfied that the appellant had appreciated there was a substantial risk that he would cause serious injury then it was open to the jury to find the necessary intention for murder. The Court of Appeal upheld the murder conviction in rejecting the defence’s contention that ‘substantial risk’ unacceptably enlarged the mental element of murder.

203 *R v Woollin* [1999] AC 82

204 *R v Hancock* [1986] AC 455.

205 *R v Woollin* [1999] AC 82.

206 *R v Nedrick* [1986] 1 WLR 1025, 1028.

207 *R v Woollin* [1999] AC 82.

consequences of their act to the requisite degree of probability'.²⁰⁸ Effectively, the subjective presumption has no work to do because 'a virtual certainty' is equated to intent.

This then leads to the corollary question of the effect of *R v Woollin*²⁰⁹ on s 8 of the *Criminal Justice Act 1967* (UK), the first part of which provides that a jury is not bound to infer that the defendant intended the natural and probable consequences, and the second part of which requires the jury to decide on intent or foresight by reference to all the evidence drawing such inferences as appear proper in the circumstances.²¹⁰ Lord Steyn, who gave the leading speech in *R v Woollin*,²¹¹ considered that the formula in *R v Nedrick*²¹² left section 8 unaffected:

Nedrick does not prevent a jury from considering all the evidence: it merely stated what state of mind (in the absence of a purpose to kill or to cause serious harm) is sufficient for murder.²¹³

Such an argument is unconvincing as it overlooks the language of section 8 which allows the jury to draw the objective inference where proper in the circumstances. Lord Steyn appears to mean that the objective inference in section 8 can only be drawn in the case of 'a virtual certainty' and that a jury should be instructed to that effect, thereby ignoring any inconsistency between section 8 and the formula in *R v Nedrick*.²¹⁴ The outcome is to subsume the objective presumption under the subjective presumption.

So the wheel has come back full circle to Viscount Sankey's famous golden thread speech in *Woolmington v DPP*.²¹⁵ The case of *DPP v Smith*²¹⁶ is to be treated as an aberration and section 8 of the *Criminal Justice Act 1967* (UK) read down. After a circuitous route from *Hyam v DPP*²¹⁷ to *R v Woollin*,²¹⁸ the House of Lords has settled on 'a virtual certainty' (or, put another way, the probability of the consequence being foreseen must be little short of overwhelming), as constituting a finding of intent rather

208 Stannard, above n 97, 282. Stannard cites two Northern Ireland bombing cases, *McFeely* [1977] NI 149 and *Bateson* [1980] 9 NIJB, where the defendant escaped a murder conviction because he did not foresee the consequences to a sufficiently high degree of probability.

209 *R v Woollin* [1999] AC 82.

210 See s 8 of *Criminal Justice Act 1967* (UK).

211 *R v Woollin* [1999] AC 82.

212 *R v Nedrick* [1986] 1 WLR. 1025.

213 *R v Woollin* [1999] AC 82, 93-94 (Lord Steyn).

214 [1986] 1 WLR. 1025.

215 [1935] AC 462, 481.

216 [1961] AC 290.

217 [1975] AC 55.

218 [1999] AC 82.

than merely inferring intent. Dixon CJ, given his strong criticism of *DPP v Smith*²¹⁹ in *Parker v The Queen*,²²⁰ would have been well pleased with the rejection of the natural and probable consequences test.

V THE EXPANSION OF OBJECTIVE TESTS FOR CRIMINAL RESPONSIBILITY IN AUSTRALIA

Any discussion of an expansion of objective tests for criminal responsibility needs to commence with the appropriate underlying fault element of criminal responsibility in Australia. Writing in 2001 of the *Criminal Codes* of Queensland, Western Australia, Tasmania and the Northern Territory, Colvin identified the general threshold of criminal responsibility as negligence, stating that ‘subjective states of mind are in issue under the *Codes* only when they are put in issue by the definitions of particular offences, mainly property offences and certain aggravated offences against the person’.²²¹ However, this is not to suggest that most serious offences, which require proof of intention, should encompass a fault element of negligence. Rather, that the higher fault element of recklessness on the staircase of criminal liability is unknown to the above *Codes*.

However, under the *Model Criminal Code*, which has essentially been translated into Part 2 of the *Criminal Code 1995* (Cth), the underlying fault element is recklessness. Essentially, the basic structure of the *Criminal Code 1995* (Cth) is that the conduct (act) must be intentional, coupled with recklessness as the threshold for liability for the result of conduct or a circumstance in which conduct happens. Leader-Elliott has rightly described recklessness as the ‘ubiquitous fault element’²²² which requires an awareness of a substantial risk which is unjustifiable to take. The subjective requirement of ‘awareness’ is the sole distinction between recklessness and negligence,²²³ and there is clearly a thin line between recklessness and negligence in terms of actual awareness of a

219 [1961] AC 290.

220 (1963) 111 CLR 610, 632-633 (Dixon CJ).

221 Colvin, above n 39, 198-199. See also Fairall, above n 86.

222 Ian Leader-Elliott, ‘Elements of Liability in the Commonwealth Criminal Code’ (2002) 26(1) *Criminal Law Journal* 28, 39.

223 The test for negligence is totally objective, requiring such a great falling short of the standard of care that a reasonable person would exercise, and such a high risk that the physical element exists, that the conduct merits criminal punishment. Notwithstanding the fact that Part 2.2 treats the distinction between recklessness and negligence as fundamental (only recklessness contains a subjective component), it was demonstrated in *Simpson v The Queen* (1998) 103 A Crim R 19, that there is a thin line between recklessness and negligence - between the actual (subjective) awareness of a risk and the objective awareness of the risk based on the fact that the risk was obvious.

risk (subjective) and objective awareness, because the risk was obvious, as demonstrated in *Simpson v The Queen*.²²⁴

Selecting a general threshold of criminal responsibility is further complicated by the use of strict liability (no fault element) for serious driving offences. For example, in the Northern Territory, the Crown would likely prosecute a *DPP v Smith*²²⁵ case under s 174F of the *Criminal Code 1983* (NT), driving motor vehicle causing death or serious harm which under s 174F(4) is an offence of strict liability²²⁶ and carries a maximum term of imprisonment of 10 years under s 174F(1). The two physical elements of the offence are causing death or serious harm and driving dangerously, with the latter in turn having three alternative definitions being, under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle, or driving at a speed that is dangerous to another person, or in a manner that is dangerous to another person. Thus, not only is this serious offence one of strict liability but also intoxication per se is sufficient to trigger a physical element.

So where does a potential term of imprisonment of 10 years for a strict liability offence leave critics of objective tests who contend that for serious offences ‘there should be no penal liability without fault’?²²⁷ Colvin would apply the test that ‘whatever the seriousness of an offence, we should reject liability for failure to attain a standard that was beyond the capacities of the accused’.²²⁸ For Colvin, the

primary problem for the design of objective tests of criminal responsibility is that ordinary behaviour encompasses a range of conduct ... if an objective test is to be used, a point within the range must be selected as the standard against which the accused is measured.²²⁹

224 (1998) 103 A Crim R 19. In *Simpson v The Queen*, the High Court was construing s 157(1)(c) *Criminal Code 1924* (Tas) which deals with murder and in particular whether the offender knew or ought to have known whether the unlawful act was likely to cause death in the circumstances. The High Court held that if a fact or circumstance is so well known that no reasonable person in the community would dispute it (here stabbing the deceased in the general area of the upper body), a jury may safely infer that the offender (appellant) knew it unless denial by him raises a reasonable doubt about his knowledge.

225 [1961] AC 290.

226 Under s 43AN *Criminal Code 1983* (NT) strict liability is defined as where there are no fault elements for any of the physical elements and the defence of mistake of fact under s 43AX is available. Section 43 AX requires the person to be under a mistaken but reasonable belief about the facts and had those facts existed the conduct would not have constituted an offence.

227 Colvin, above n 39, 199.

228 Ibid.

229 Ibid 200.

It is instructive to compare Colvin's criteria above with the widely accepted test²³⁰ for criminal negligence manslaughter in *Nydam v The Queen*.²³¹ Clearly, the twin objective quantum of a great falling short of a reasonable standard of care and a high risk sufficient to merit criminal punishment, are neither beyond the capacity of a normal person nor set at an unrealistically high standard of human behavior. In fact, the strength of the objective test is here amply demonstrated, as the jury is not confused by mixed judicial messages about foresight and intention, and can objectively stand in the shoes of the accused. Arguably, given 'a great falling short' is open ended, the objective standard is set at the most favourable to the accused.

In any event, manslaughter carries a potential term of life imprisonment.²³² This begs the question if a person can face life imprisonment under an objective test, or face a ten year prison sentence under a strict liability offence such as driving a motor vehicle causing death, has the time come to review the ascendancy of subjective tests of criminal responsibility? The only more serious offence than manslaughter is murder. The author has argued elsewhere that recklessness should be included as a fault element for murder in addition to intention.²³³ As previously mentioned, recklessness under the *Criminal Code 1995* (Cth) contains a combined subjective (the person is aware of a substantial risk that the result will happen) and objective (having regard to the circumstances known to the person it is unjustifiable to take the risk) test.²³⁴ Recklessness as defined under s 5.4 in Chapter 2 of the *Criminal Code 1995* (Cth) is a fault element for murder under s 115.1(d) of the *Criminal Code 1995* (Cth)

230 'A killing that occurs through gross negligence amounts to manslaughter in all [Australian] jurisdictions': Bronitt and McSherry, above n 153, 537 [9.155].

231 [1977] VR 430. The test in *Nydam* is followed in s 43AL Negligence of the *Criminal Code 1983* (NT): 'A person is negligent in relation to a physical element of an offence if the person's conduct involves - (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment for the offence.'

232 See, for example, s 161 of *Criminal Code 1983* (NT).

233 Andrew Hemming, 'In Search of a Model Code Provision for Murder in Australia' (2010) 34(2) *Criminal Law Journal* 81.

234 See s 5.4 *Criminal Code 1995* (Cth); s 43AK *Criminal Code 1983* (NT). This is not the common law position in Australia where recklessness is treated as subjective. Recklessness is unknown to the Griffith Codes where the baseline fault element is the objective test of negligence. In England, it is arguable that recklessness has both a subjective and objective component despite *R v G* [2003] UKHL 50 overruling *R v Caldwell* [1982] AC 341 as regards the interpretation of s 1 of the *Criminal Damage Act 1971*, because the accused's denial of awareness of a risk 'in the circumstances known to him' will always be judged against the objective standard of a person of the same age and abilities (*R v G* concerned two boys aged 11 and 12 years).

which reads as follows: ‘the person intends to cause, or is reckless as to causing, the death of, that or any other person by that conduct’.

Thus, common law reckless murder with its test of doing an act causing death knowing that it is probable that the act will cause death or serious harm,²³⁵ is essentially replicated for the fault element of recklessness under s 5.4 and s 115.1(d) of the *Criminal Code 1995* (Cth). As contended earlier in this paper, the Australian foresight bar for murder of ‘probable’, rather than the English foresight bar of ‘a virtual certainty’, arguably takes Australia close to Holmes’s objective definition of murder. Holmes concluded ‘that knowledge that the act will probably cause death, that is, foresight of the consequences of the act, is enough in murder’,²³⁶ such that where the probability is a matter of common knowledge, like leaving a newly born child naked outside, the person doing the act is guilty of murder. The facts in *R v Crabbe* are exactly on point with Holmes’s example of throwing a heavy beam from a building site down into a busy street below.

In Part II of this paper which dealt with the overlap between subjective and objective tests, s 23(1)(b) of the *Criminal Code 1899* (Qld) was discussed in the context of *Stevens v The Queen*.²³⁷ The Queensland Government has recently amended s 23(1)(b) as follows:²³⁸

- (b) an event that –
 - (i) the person does not intend or foresee as a possible consequence; and
 - (ii) an ordinary person would not reasonably foresee as a possible consequence.

The purpose of the amendment was to omit the term ‘accident’ and legislatively enshrine the ‘reasonably foreseeable consequence’ test. As discussed earlier, the word ‘accident’ (a random unexpected act) does not convey the meaning under s 23(1)(b) which is an unintended, unforeseen and unforeseeable event. With respect, the amendment is mere window dressing. The real issue remains the continued presence of s 23(1)(b) in the *Criminal Code 1899* (Qld), which was based on the Queensland Law Reform Commission’s recommendation that s 23(1)(b) should be retained.²³⁹ The Commission was apparently unable to envisage any other alternative but the repeal of s 23(1)(b), pointing out this would

235 See *R v Crabbe* (1985) 156 CLR 464, 468 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).

236 Holmes, above n 108, 53.

237 (2005) 227 CLR 319.

238 *Criminal Code and Other Legislation Amendment Act 2011* (Qld).

239 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (September 2008), 9.

have far reaching consequences because accident applies generally to criminal offences and not just to manslaughter.²⁴⁰ The Commission concluded that the excuse of accident was 'a critical provision of the Code' and therefore the 'Code should continue to include an excuse of accident'.²⁴¹

The author has previously criticised the Commission for lacking vision and ignoring the *Model Criminal Code* and Chapter 2 of the *Criminal Code 1995* (Cth) as an example to follow.²⁴² The only reference to accident in the *Criminal Code 1995* (Cth) is in relation to intoxication and offences involving basic intent in s 8.2(3)²⁴³ and the word 'accident' is not defined in s 8.2.²⁴⁴ For present purposes, Odgers has made the significant comment that 'while it [accident] appears in the Griffiths Codes, the context is entirely different so that authority on those Codes provides no assistance'.²⁴⁵ Odgers further pointed out that because s 23(1)(b) *Criminal Code* (Qld) deals with an event which occurs by accident, 'it has no bearing on "conduct" under this [Cth] Code'.²⁴⁶

To illustrate the point in relation to the adoption of Chapter 2 of the *Criminal Code 1995* (Cth), the author has drafted a new proposed section for the *Criminal Code 1983* (NT) called *Assault causing death*, to deal with killings that have resulted from so called 'one-punch' assaults, which have bedeviled s 23(1)(b) of the *Criminal Code 1899* (Qld).²⁴⁷ This new section is drawn from s 281 of the *Criminal Code 1913* (WA) which deals with unlawful assault causing death, and s 174F of the *Criminal Code 1983* (NT) which covers driving a motor vehicle causing death and is a strict liability offence. This section would go into the *Criminal Code 1983* (NT) as s 188A and would be a Schedule 1 offence:

240 Ibid 184.

241 Ibid 184-185.

242 Hemming, above n 233, 85.

243 The equivalent section in the *Criminal Code 1983* (NT) is s 43AS(2) which states that: 'This section does not prevent evidence of self-induced intoxication being taken into account in determining whether conduct was accidental.'

244 The Queensland Law Reform Commission stated that for the purpose of s 23(1)(b) accident does not mean a random unexpected act but an 'unintended, unforeseen and unforeseeable event'. See Queensland Law Reform Commission, above n 239, 179.

245 Stephen Odgers, *Principles of Federal Criminal Law*, (Lawbook Co, 2007) 71.

246 Ibid.

247 The equivalent section in the *Criminal Code 1913* (WA) is section 23B(2). Western Australia has addressed the issue by introducing s 281 Unlawful assault causing death into the *Criminal Code Compilation Act 1913* (WA) in 2008. Section 281 reads as follows: '(1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years. (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.'

Section 188A Assault causing death

- (1) A person is guilty of a crime if -
 - (a) the person assaults another person; and
 - (b) that conduct causes the death of that person.
- (2) An offence against subsection (1) is an offence of strict liability.
Penalty: Imprisonment for 10 years.

To amend s 316(2) and make s 188A an alternative verdict to s 160 Manslaughter:

Section 316 Indictment containing count of murder or manslaughter

- (1) Upon an indictment charging a person with murder he may be found guilty alternatively of manslaughter, but not of any other offence except as otherwise expressly provided.
- (2) On an indictment charging a person with manslaughter, the person may alternatively be found guilty of the offence defined by section 174F(1) or section 188A.

By making the proposed s 188A an offence of strict liability and a Schedule 1 Offence (which means Part IIAA applies), this would mean that s 188A would be an offence without a fault element, and under s 43AN strict liability, the primary defence would be under s 43AX mistake of fact - strict liability.²⁴⁸ So any person who punched another and the punch caused that other's death would be liable under s 188A, unless he or she was under a mistaken but reasonable belief about facts and had those facts existed the conduct would not have constituted an offence. There is no fault element. Therefore, if the Crown failed to prove the objective fault element of negligence for manslaughter under s 43AL,²⁴⁹ then the amended s 316(2) above would allow the alternative verdict of assault causing death, which has no fault element as it is an offence of strict liability.

Once difficult and dated sections such as s 23 *Criminal Code 1899* (Qld) are abandoned in favour of the flexibility of a structured suite of physical and fault elements to be found in Chapter 2 of the *Criminal Code 1995* (Cth), the task of constructing new sections of a Code becomes far easier. It would not then be possible to recommend the status quo on the grounds that s 23(1)(b) was 'a critical provision of the Code' and repealing the section would have ramifications well beyond manslaughter. The real difficulty with s 23 above is that, as demonstrated in *Stevens v The Queen*,²⁵⁰ the section was drafted before the House of Lords decision in *Woolmington v DPP*,²⁵¹ and 'the floating jurisprudence

248 Under s 43AN *Criminal Code 1983* (NT) strict liability is defined as where there are no fault elements for any of the physical elements and the defence of mistake of fact under s 43AX is available. Section 43 AX requires the person to be under a mistaken but reasonable belief about the facts and had those facts existed the conduct would not have constituted an offence.

249 *Nydam v The Queen* [1977] VR 430.

250 (2005) 227 CLR 319.

251 [1935] AC 462.

on the scope and meaning of s 23, can hardly be called well settled or well understood'.²⁵²

The unsatisfactory two step process between the subjective test for murder under s 302(1)(a) and the objective test for accident under s 23(1)(b) *Criminal Code 1899* (Qld), could be readily overcome if the process of establishing the fact of a lawful killing and then characterising the killing as murder or manslaughter, with the defence of accident open for both offences, was abandoned completely. In a nutshell, the coexistence of an underlying fault standard of negligence in the Griffith Codes with the present supremacy of subjective tests is the fundamental reason why reform is needed. Notwithstanding that the residual fault element in the *Criminal Code 1995* (Cth) is recklessness, (one step up on the fault staircase of criminal liability than negligence), and that recklessness combines a subjective and objective fault element, the removal of the defence of accident and the test of an unintended, unforeseen and unforeseeable event in favour of the general principles and the definitions of concepts in Chapter 2 of the *Criminal Code 1995* (Cth) is, it is contended, the way forward.

However, this paper argues that the present definition of recklessness in s 5.4 of the *Criminal Code 1995* (Cth), which combines awareness of a substantial risk with it being unjustifiable to take the risk, should be made purely objective as follows:

A person is reckless in relation to a result if: (a) the person is aware of a substantial risk that the result will happen or if the person is not aware of a substantial risk that the result will happen and an ordinary person would have been aware of a substantial risk that the result will happen; and (b) having regard to the circumstances known to the person or to an ordinary person, it is unjustifiable to take the risk.

Effectively, the above proposed definition of recklessness applies the test in *DPP v Smith*,²⁵³ of what the ordinary person would, in all the circumstances of the case, have contemplated as the natural and probable result. Alternatively, the definition mirrors both subjective and objective 'Caldwell'²⁵⁴ recklessness.

The immediate objection to such a definition is that it blurs the line between recklessness and negligence, which Chapter 2 of the *Criminal Code 1995* (Cth) is at pains to maintain, and lowers the residual fault

²⁵² Goode, above n 88, 160.

²⁵³ [1961] AC 290, 327.

²⁵⁴ Following *R v Caldwell* [1982] AC 341, the defendant is *Caldwell* reckless if the defendant is subjectively reckless or if the defendant does not foresee the relevant risk but an ordinary person would have foreseen it.

element on the fault staircase of criminal liability. Three responses to these objections can be made. The first is the moral public safety argument put by Holmes. As mentioned earlier, for Holmes, the selection of the standard of the prudent person, the yardstick of general experience, is based on the belief that the 'object of the law is to prevent human life being endangered or taken ... to compel men to abstain from dangerous conduct ... at their peril to know the teachings of common experience'.²⁵⁵ The second response is more practical, based on some serious driving offences being strict liability offences, and manslaughter having fault elements of either recklessness or negligence.²⁵⁶ The third response is that there is in any event a thin line between recklessness and negligence - between the actual (subjective) awareness of a risk and the objective awareness of the risk based on the fact that the risk was obvious.²⁵⁷

The adoption of such an objective test for recklessness would then enable an objective test to sit within the nomenclature of Chapter 2 of the *Criminal Code 1995* (Cth). Such a test would serve to rehabilitate *DPP v Smith* in the guise of *Caldwell* recklessness on a principled basis, and avoid juries having to develop 'a split personality'²⁵⁸ when weighing up combined subjective and objective tests. The effect of incorporating solely objective tests into the fault elements of recklessness and negligence, and including recklessness as a fault element for murder as an alternative to intention, is to recast and reclaim supremacy for the role of objective tests. Effectively, objective tests are vaulted to the top of the staircase of fault liability as a measure of public protection. The purpose is to reinforce the positive duty on any State to take appropriate steps to safeguard the lives of those within its jurisdiction, and a duty to put in place 'effective criminal law provisions to deter the commission of offences against the person'.²⁵⁹

VI THE OBJECTIVE TEST FOR PROVOCATION AND SELF-DEFENCE

The focus of this paper now turns away from fault elements to defences, mounting an argument consistent with the previous objective approach to the elements of offences - in particular, the partial defence to murder of provocation, which has been abolished in three Australian

255 Holmes, above n 108, 56-57.

256 See, for example, s 160 Manslaughter of the *Criminal Code 1983* (NT).

257 See *Simpson v The Queen* (1998) 103 A Crim R 19. See also above n 118.

258 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Fatal Offences Against the Person*, Discussion Paper (June 1998) 79, assessing the ordinary person in the law of provocation.

259 *Osman v United Kingdom* (1998) App No 23452/94 [115] cited in the Law Commission of England and Wales, 'Intoxication and Criminal Liability', Law Com No 314 (2009) 3.67.

jurisdictions,²⁶⁰ and the complete defence of self-defence, which is available in all Australian jurisdictions. Both defences have been selected because they combine a subjective and an objective test. In keeping with the argument in this paper for the reassertion of the place of objective tests in criminal responsibility, both defences have been re-written below to reflect a solely objective test, commencing with provocation.

There is a further reason for the selection of these two defences which relates to suggestions that 'there is a hierarchy of defences in terms of those that reflect most favourably on the defendant'²⁶¹ on top of which, sits the justification defence of self defence followed by the excuses of duress and necessity. Provocation straddles both justification and excuse.²⁶² Baron makes the point that justifications and excuses are not quite on a par morally: 'Given a choice between having some action of mine deemed justified and having it deemed excused, I would rather it be deemed justified. Most people would presumably share this preference.'²⁶³

In this context, it is instructive to examine the elements of the excuse of duress, which sits below self-defence and above provocation on the above hierarchy of defences, using s 10.2 of the *Criminal Code 1995* (Cth) as the vehicle of analysis.

Section 10.2 Duress

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way that the threat can be rendered ineffective [objective test of necessity]; and
 - (c) the conduct is a reasonable response to the threat [objective test of proportionality of response].

Thus, it can be seen that the elements for s 10.2 above are objective. The question being posed here is that if duress is a higher order excuse under the hierarchy of defences, then is there any reason not to apply objective tests to all defences and particularly to those which confusingly (to the jury) combine objective and subjective tests?

260 The partial defence has been abolished in Tasmania, Victoria and Western Australia.

261 Chalmers and Leverick, above n 23, 245.

262 See, for example, sections 54 to 56 of the *Coroners and Justice Act 2009* (UK), by virtue of which the defence of provocation was abolished and substituted with a new partial defence entitled 'Loss of Control'. This marks a shift from one of excuse to one of justification.

263 Marcia Baron, 'Justifications and Excuses' (2005) 2 *Ohio State Journal of Criminal Law* 387, 389.

A *Provocation*

The vehicle for the analysis of the defence of provocation is the two part test for provocation contained in s 158(2) of the *Criminal Code 1983* (NT) below which follows the unanimous High Court decision in *Stingel v R*;²⁶⁴ although the case concerned the now repealed provisions of the *Criminal Code 1924* (Tas), it applies equally to the common law.²⁶⁵

Section 158(2)

The defence of provocation applies if:

- (a) the conduct causing death was the result of the defendant's loss of self-control induced by conduct of the deceased towards or affecting the defendant; and
- (b) the conduct of the deceased was such as could have induced an ordinary person to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

Section 158(2)(a) above requires the defendant to have a loss of self-control induced by the conduct of the deceased. The High Court has allowed all of the characteristics of the defendant into the subjective test of the gravity of the provocation for the purpose of loss of self-control:

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.²⁶⁶

The subjective first limb of the partial defence of provocation as per s 158(2)(a) is a very low bar. Trial judges are reluctant to withhold a defence from the jury given the obvious likelihood of an appeal.²⁶⁷ However, Queensland has taken the very significant and commendable step of placing the legal onus on the defendant raising provocation,²⁶⁸ which injects a greater degree of objectivity into this flawed defence.²⁶⁹ Such a legislative change brings provocation in line with the other partial defence to murder of diminished responsibility, as regards the burden of proof on the defence. Where the defendant has to prove provocation on the balance of probabilities, the claim of provocation will likely need to be articulated more clearly, with the trial judge having a greater capacity to

²⁶⁴ (1990) 171 CLR 312.

²⁶⁵ *Masciantonio v The Queen* (1995) 183 CLR 58, 66.

²⁶⁶ *Stingel v R* (1990) 171 CLR 312, 326 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁶⁷ For example, *R v Rae* [2006] QCA 207 [35] (McMurdo P).

²⁶⁸ Following the enactment of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld), Queensland has placed the legal onus of proof for provocation on the defence on the balance of probabilities. See s 304(7) *Criminal Code 1899* (Qld).

²⁶⁹ See Hemming, above n 33.

prevent weak claims going to the jury. This paper supports the reversal of the onus of proof for provocation in the absence of the abolition of the defence.

Having accepted the relevance of the defendant's characteristics for the purpose of assessing the gravity of the deceased's conduct, the High Court then excluded these subjective considerations except for age when judging the effect of this conduct on the powers of self-control of the ordinary person, which finds expression in s 158(2)(b) above. The question then becomes whether the ordinary person faced by that degree of provocation could (not would), have killed the deceased. The High Court approved the following passage from Wilson J in *R v Hill*:

The objective standard ... 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 accuseds 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.²⁷⁰

The two part subjective and objective test for provocation contained in s 158(2) and derived from *Stingel v R*²⁷¹ is conceptually confused, complex and difficult for juries to understand and apply.²⁷² Professor Yeo has pointed out why jurors find the distinction between the subjective and objective components of the test so difficult:

[The test] bears no conceivable relationship with the underlying rationales of the defence of provocation ... 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. 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.²⁷³

The essential change proposed here is that the test for provocation should be solely objective and all reference to the gravity of the offence should be removed:

Section 158 Trial for murder – partial defence of provocation

- (1) A person (the defendant) who would, apart from this section, be guilty of murder must not be convicted of murder if the defence of provocation applies.

270 (1986) 1 SCR 313, 343.

271 (1990) 171 CLR 312.

272 See Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004) 26-35. There is an inherent confusion built into a test that seeks to distinguish between the gravity of the provocation from the perspective of the accused on the one hand, and an objective assessment of the reaction of the accused on the other hand.

273 Stanley Yeo, *Unrestrained Killings and the Law* (Oxford University Press, 1998), 61.

- (2) The defence of provocation applies only to a serious wrong, defined as a fear of serious violence towards the defendant or another, and if the conduct of the deceased was such as could have induced an ordinary person of the defendant's age and of ordinary temperament, defined as ordinary tolerance and self-restraint, to have so far lost self-control as to have formed an intent to kill or cause serious harm to the deceased.

The partial defence to murder of provocation is here significantly narrowed in two ways. Firstly, the defence only applies to fear of serious violence, and second, the conduct of the deceased could have induced an ordinary person of ordinary temperament to have lost self-control sufficient to kill or cause serious harm. Thus, only the most serious provocations would qualify, and the instructions to the jury would not require them to engage in mental gymnastics between the subjective gravity of the provocation and the objective assessment of whether an ordinary person could have maintained self-control. Only an objective assessment of the reaction of the accused would apply.

B *Self-defence*

Self-defence is a highly emotive but necessary defence of long standing. Nevertheless, like all defences it is open to abuse, particularly in circumstances where the alleged aggressor is dead and there were no other witnesses than the defendant. When Victoria abolished the partial defence of provocation it also introduced a new defence of defensive homicide which was designed to protect women.²⁷⁴ However, there are concerns as to the operation of the Victorian legislation. There have been thirteen defensive homicide cases since the legislation was introduced in 2005, and all the offenders were male. Twelve cases involved a male victim, and one involved a female victim.²⁷⁵ Ten of the thirteen defensive homicide convictions have been the result of guilty pleas.²⁷⁶ The average sentence imposed for the offence of defensive homicide is 8.8 years,²⁷⁷ with the highest sentence to date being 12 years imprisonment with a non-parole period of 8 years²⁷⁸ in the case of *R v Middendorp*.²⁷⁹ There is a danger that defensive homicide is provocation in a new guise.

274 *Crimes (Homicide) Act 2005* (Vic) This created s 9AD Defensive Homicide of the *Crimes Act 1958* (Vic).

275 Victorian Department of Justice, *Review of the Offence of Defensive Homicide*, Discussion Paper (August 2010) 33 [120].

276 *Ibid* 48 [200].

277 *Ibid* 34 [125].

278 *Ibid* 34 [126].

279 [2010] VSC 202. This case raised major concerns as to the operation of the partial defence of defensive homicide. Luke Middendorp who stands 186-centimetres tall and weighs more than 90 kilograms stabbed Jade Bownds, who weighed 50 kilograms, four times in the back.

This paper contends that the real lesson from the Victorian experience with defensive homicide is that all defences have unintended consequences. This means there is a need for vigilance in the form of objective tests to protect society from the abuse of worthy defences. The vehicle for the analysis of the complete defence of self-defence (no criminal responsibility attaches to the conduct), is the two part test contained in the relevant subsections of s 43BD of the *Criminal Code 1983* (NT) extracted below:²⁸⁰

Section 43BD(2)

A person carries out conduct in self-defence only if:

- (a) the person believes the conduct is necessary:
 - (i) to defend himself or herself or another person; and
- (b) the conduct is a reasonable response in the circumstances as he or she perceives them.

The key point is that the above test for self-defence is heavily subjective. Under sub-s (2)(a) above, the first limb of the test, the person must believe the conduct is necessary, is wholly subjective. Under sub-s (2)(b) above, the second limb of the test waters down the common law objective component of a reasonable response in the circumstances by the subjective qualification of the person's perception of those circumstances. There is no requirement that the perception of the circumstances be reasonable.²⁸¹

As Bronitt and McSherry point out, 'self-defence is open-ended in its formulation in the sense that there are not many substantive rules limiting its scope and it is very much a matter of fact for the jury to decide'.²⁸² This paper contends that the weakening of the objective limb needs to be rectified. An examination of the respective self-defence sections²⁸³ in

280 Similar provisions can be found in s 10.4 *Criminal Code 1995* (Cth); s 42 *Criminal Code 2002* (ACT); s 418 *Crimes Act 1900* (NSW).

281 *Zecevic v DPP (Vic)* (1987) 162 CLR 645 is the leading common law case on self-defence. Wilson, Dawson and Toohey JJ framed the critical question as follows: 'It is whether the accused believed upon reasonable grounds that it was necessary to do what he did': at 661.

282 Bronitt and McSherry, above n 153, 335, quoting *DPP Reference (No 1 of 1991)* (1992) 60 A Crim R 43, 46.

283 Section 15(1) of the *Criminal Law Consolidation Act 1935* (SA) is little more objective than those jurisdictions that have followed the *Model Criminal Code* as expressed in s 10.4 *Criminal Code 1995* (Cth). Section 15(1) above reads as follows: 'It is a defence to a charge of an offence if (a) the defendant genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; and (b) the conduct was, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat the defendant genuinely believed to exist.' The self-defence provisions of Victoria, Western Australia and Tasmania below reflect the common law as per *Zecevic v DPP (Vic)* (1987) 162 CLR 645. Section 9AC Murder – self-defence of the *Crimes Act 1958* (Vic) requires the person to believe that the conduct was necessary to defend himself or herself or another person from the infliction of death or really serious injury. Section 248(4) of

Australian jurisdictions reveals that s 271(2) of the *Criminal Code 1899* (Qld), which deals with self-defence as a defence to homicide where the *Code* distinguishes between provoked and unprovoked assault, contains the most objective test for self-defence in Australia:

Section 271(2) Self-defence against unprovoked assault

If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person cannot otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.

Under s 271(2) of the *Criminal Code 1899* (Qld) above, ‘the jury must consider first whether the accused apprehended death or grievous bodily harm and, secondly, whether the apprehension was a reasonable one’.²⁸⁴ The use in s 271(2), of the words ‘reasonable apprehension’ and the requirement that the belief be based ‘on reasonable grounds’ such that there is no alternative way of self preservation, injects a strong element of objectivity into the use of the defence.

Further objectivity is evident in s 272(2), which covers self-defence against a provoked assault that causes death or grievous bodily harm, where the defence of self-defence is denied ‘unless, before such necessity arose, the person using such force declined further conflict, and quitted it or retreated from it as far as was practicable’.

The same overall result for self-defence to that presently prevailing in Queensland, without distinguishing between unprovoked and provoked assaults, could be achieved by re-writing s 43BD(2) of the *Criminal Code 1983* (NT) with greater objective content as follows:

Section 43BD(2)

A person carries out conduct in self-defence only if:

- (a) the person *reasonably* believes the conduct is necessary:
 - (i) to defend himself or herself or another person; and
- (b) the conduct is a reasonable response *in that it is reasonably proportional* in the circumstances as he or she *reasonably* perceives them.

(Words in italics added.)

the *Criminal Code 1913* (WA) states: ‘A person’s harmful act is done in self-defence if (a) the person believes the act is necessary to defend the person or another person from the harmful act, including a harmful act that is not imminent; and (b) the person’s harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and (c) there are reasonable grounds for those beliefs. Section 46 of the *Criminal Code 1924* (Tas) reads: ‘A person is justified in using, in defence of himself or another person, such force as, in the circumstances as he believes them to be, it is reasonable to use.’

²⁸⁴ Bronitt and McSherry, above n 153, 337.

In many homicide cases the victim is a silent witness. The defendant may elect to run both provocation and self-defence, which only require the defence to satisfy an evidential onus,²⁸⁵ and once these defences are allowed to go to the jury they must be negated beyond reasonable doubt. This section of the paper has made the case for the adoption of purely objective tests for both provocation and self-defence. Such a position is justified, firstly, on the ground of the inherent confusion in instructing juries based on a two part subjective and objective test, and secondly, because of the danger of the subjective test overwhelming the objective component, leading in turn to the victim's family being left with a sense of justice denied.

VI CONCLUSION

Historically there is copious authority for the objective proposition that a sane person should be able to act and think reasonably such that a failure to do so is no excuse.²⁸⁶ Holmes famously held that 'the test of foresight was not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen'.²⁸⁷ This paper, building on the measure of objectivity contained in reckless murder and constructive murder, has sought to redress the supremacy of subjective tests for criminal responsibility by tilting the balance back in favour of objective tests, and in so doing place greater emphasis on doing justice to the victim. The philosophy is unashamedly utilitarian. Underpinning this contention for a shift away from subjective tests, is the identification of an objective test for recklessness as the underlying fault element of criminal responsibility, based on the natural and probable consequences test adopted in *DPP v Smith*²⁸⁸ in the guise of *Caldwell*²⁸⁹ recklessness. Consistent with this argument, the case is also made for the adoption of purely objective tests for the partial defence to murder of provocation and the complete defence of self-defence. One of the contentions put in this paper is that if dangerous driving offences causing death carrying possible ten year prison sentences are offences of strict liability, and gross negligence manslaughter is potentially punishable by life imprisonment, then objective tests for offences of specific intent do not represent such a great shift in standard of criminal responsibility than might otherwise appear. Arguably, s 281 unlawful assault causing death, of the *Criminal*

285 With the exception of Queensland which now places a legal onus on the defendant raising the partial defence of provocation, following the enactment of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld). See s 304(7) *Criminal Code 1899* (Qld).

286 Desch, above n 106, 660-661.

287 Holmes, above n 108, 54.

288 [1961] AC 290.

289 *R v Caldwell* [1982] AC 341.

Code 1913 (WA), which requires neither intention nor foresight yet carries a possible ten year prison term, represents the shape of things to come as politicians respond to community concerns for public safety resulting from alcohol fuelled violence. The purpose behind such support of objectivity in determining criminal responsibility is grounded on the proposition that the ‘object of the law is to prevent human life being endangered or taken ... to compel men [and women] to abstain from dangerous conduct ... at their peril to know the teachings of common experience’.²⁹⁰ Jeremy Bentham, who claimed ‘the business of government is to promote the happiness of the society, by punishing and rewarding’²⁹¹ might well approve of the principle of utility guiding the hand of legislation.

²⁹⁰ Holmes, above n 108, 56-57.

²⁹¹ Jeremy Bentham, *The Principles of Morals and Legislation* (Prometheus Books, New York, 1988) 70.