CASE NOTES

GREEN v THE QUEEN*

THE PROVOCATION DEFENCE: FINALLY PROVOKING ITS OWN DEMISE?

I INTRODUCTION

Green v The Queen[1] is the latest High Court pronouncement on the law of provocation. It is a very significant case, representing as it does, a new low point in the lamentable history of the provocation defence in Anglo-Australian law. In a 3:2 decision, the court allowed an appeal against a murder conviction on the ground that the trial judge had misdirected the jury on provocation. It is, with respect, a deplorable decision. Most problematically, *Green* provides an extraordinarily expansive view of what can count as provocation, at least as far as certain (male, self-identifying heterosexual) defendants are concerned. Unwanted sexual advances may now, as this decision suggests, ground a provocation defence for a man who kills another man, if the alleged 'advance' reminds the killer that his father, and not the man he killed, sexually assaulted other members of his family. This may sound bizarre. Does it make more sense to say that a man who kills another man, claiming the dead man made unwanted sexual advances toward him, has a good chance of successfully pleading provocation, and an even better one if he can produce a 'sexual abuse factor'[2] — say, the memory that his father sexually assaulted his sisters? Perhaps not, but that is the essence of the majority judgments in *Green*.

While the decision does not explicitly elevate the so-called 'homosexual advance defence' to the status of a separate plea, that unwelcome and much-criticised North American legal development now has the imprimatur of the High Court. 'Homosexual advance' and 'homosexual panic' defences still have no formal status, but the majority judgments accept the underlying concepts which have been incorporated into pleas of provocation and self-defence in a number of recent Australian murder trials. Thanks to *Green*, homosexual men, or more precisely, dead men who are alleged to have made a sexual advance towards their killers, can be said, at law, to have 'provoked their own demise',[3] or even to have

* (1997) 148 ALR 659 ('*Green*').

[1] Ibid.

[2] Ibid 662.

[3] Susan Edwards, '"Provoking Her Own Demise": From Common Assault to Homicide' in Jalna Hanmer and Mary Maynard (eds), *Women, Violence and Social Control* (1987) 152, 159.

been killed in self-defence. Furthermore, it is notable that while the three majority judgments in *Green* are, at best, unconvincing, the two dissenting judgments are less compelling than one might have hoped, constrained as they are by the ideologically-loaded androcentric and heterosexist rules of the provocation defence. *Green* is not, however, an unmitigated disaster. Its one redeeming grace is that it makes the case for the abolition of the law of provocation overwhelming.

II BACKGROUND

Green is the latest in a spate of recent Australian murder trials in which male defendants have alleged that they acted in self-defence, or under provocation, in response to a sexual advance made by another male. This defence, which has come to be known as the 'homosexual advance defence' ('HAD'), was argued unsuccessfully in some English cases in the 1950s,[4] and with more success in later cases in the United States, where it has sometimes taken the form of a so-called 'homosexual panic defence'. By the time HAD made an appearance in Australia in the 1990s, it had been subjected to considerable critical commentary, particularly in the United States.[5] Consequently, when Australian analysts set about researching the operation of HAD in this country, they found that the cases had disturbingly 'similar scenarios and outcomes' to those in North America.[6]

The first case to be identified as utilising HAD in Australia was *R v Murley*,[7] a 1992 decision in which the defendant claimed he had attacked another man with a knife, almost decapitating him, because the victim had allegedly made a sexual advance. The defendant was acquitted. The following year, the gay press in Sydney protested about the acquittal of Christopher McKinnon who had been charged with murdering a homosexual man. Despite evidence admitted in court that McKinnon discussed the killing with friends, telling them he had 'rolled a fag', the jury acquitted him, apparently accepting that he had acted in self-defence.[8] *R v McKinnon*,[9] the first of several decisions in New South Wales identified as a HAD murder case, was to become the catalyst for demands for a

4 See generally Graeme Coss, 'Lethal Violence by Men' (1996) 20 *Criminal Law Journal* 305.

5 See, eg, Gary Comstock, 'Dismantling the Homosexual Panic Defense' (1992) 2 *Law and Sexuality* 81; Joshua Dressler, 'When "Heterosexual" Men Kill "Homosexual Men" : Reflections on Provocation Law, Sexual Advances and the "Reasonable Man" Standard' (1995) 85 *The Journal of Criminal Law and Criminology* 726; Robert Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) 80 *California Law Review* 133. This literature is critically discussed in Adrian Howe, 'More Folk Provoke Their Own Demise: Homophobic Violence and Sexed Excuses — Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence' (1997) 19 *Sydney Law Review* 336.

6 Anthony Bendall and Tim Leach, *'Homosexual Panic Defence' And Other Family Values* (1995) 9.

7 (Unreported, Supreme Court of Victoria, Teague J, 28 May 1992). The case was reported in Melbourne's gay press under the headline, 'Free to Kill! Cuts Gay Man's Throat, Gets Off', *Melbourne Star Observer* (Melbourne), 12 June 1992, 1. For an excellent analysis of this case, see Peter Johnston, '"More Than Ordinary Men Gone Wrong": Can the Law Know the Gay Subject?' (1996) 20 *Melbourne University Law Review* 1152.

8 Barbara Farrelly, 'Roll a Fag and Go Free', *Sydney Star Observer* (Sydney), 10 December 1993, 1.

9 (Unreported, New South Wales Supreme Court, Studdart J, 24 November 1993).

government inquiry into the use of a victim's sexuality as a defence to violent crimes, and specifically, into cases where juries had acquitted killers of gay men who alleged their victims made advances. Another catalyst was the forum on the 'Homosexual Panic Defence' held by gay activists in April 1994. The proceedings of the forum, published in May 1995,[10] contained an extensive list of mostly unreported New South Wales, South Australian and Victorian HAD cases. Two months later, the New South Wales Attorney-General's Department established a Working Party to review the operation of HAD in Australia.

In August 1996, the Working Party published its findings, complete with an appendix listing thirteen cases in which a homosexual advance had been alleged in New South Wales between November 1993 and May 1995.[11] After noting research indicating that anti-gay violence was increasing in Australia, the Working Party examined the key legal issues raised by HAD. First, should an allegation of a homosexual advance, without more, be sufficient to raise self-defence and provocation? Second, how difficult was it to disprove such an allegation, given that the accused is usually the only witness to the circumstances giving rise to the victim's death? The review also considered how HAD cases raised broader issues relating to the treatment of homosexuality by the criminal justice system and the community.

The legal issue which most vexed the Working Party was that of provocation. Examining the thirteen New South Wales HAD cases, it observed that in all those resulting in acquittals or verdicts of manslaughter, the jury had been directed in relation to both self-defence and provocation. The complication in the New South Wales cases was seen to be the defendants' allegations that the alleged 'sexual advance' had been followed by a violent struggle in which the victim was the primary aggressor. However, as the question of whether self-defence had been disproved was a matter for the jury to assess, the Working Party concluded that there was 'no difficulty with the content of the law of self-defence'.[12] The law of provocation was another matter however, for the question of the evidence of provocation is a matter of law for the judge to determine.

> The primary concern about the application of provocation in HAD cases is whether a non-violent homosexual advance should constitute sufficient provocation to incite an ordinary person to lose self-control and kill, and thereby be convicted of manslaughter in lieu of murder.[13]

In considering this question, the Working Party took stock of the earlier decision of *Green v The Queen*,[14] in which a majority of the New South Wales Court of Criminal Appeal took the view that a non-violent homosexual advance was not sufficient to meet the objective test of the provocation defence. Because the New

[10] Bendall and Leach, above n 6.

[11] New South Wales Attorney-General's Working Party on the Review of the Homosexual Advance Defence, *Review of the Homosexual Advance Defence* (1996).

[12] Ibid [48].

[13] Ibid [56].

[14] (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995).

South Wales Law Reform Commission had not yet released its final report on partial defences, the Working Party considered it to be inappropriate to recommend any changes to the substantive law. It therefore declined to recommend that provocation should not continue to apply in HAD cases. Instead, it recommended that where provocation was raised, there was a 'strong need to limit the role that prejudice, if any, might play in a HAD trial and jury deliberations' as well as a need to emphasise the 'significant difference' between a sexual advance and a sexual attack.[15] In view of the fact that the Working Party took account of the decision in *Green v The Queen* in making its recommendations, it is interesting to note whether the High Court took any steps to meet the 'strong need' to limit the operation of prejudice in HAD cases, when that case reached it on appeal from the New South Wales Court of Criminal Appeal.

III The New South Wales Court of Criminal Appeal Decision

Malcolm Green was charged with murdering Donald Gillies and stood trial in the New South Wales Supreme Court in June 1993. In his defence, Green claimed that the victim, Donald Gillies, had made a sexual advance and that he had killed Gillies in self-defence, or alternatively, under provocation. The alleged advance consisted of the victim getting into bed with the accused Green, and touching Green's body, including his groin. Green had responded by repeatedly punching the victim approximately fifteen times, stabbing him ten times with scissors and banging his head into the bedroom wall. The jury convicted Green of murder. He was sentenced to imprisonment for 15 years.

Green raised six grounds of appeal against his conviction. There were two main submissions. First, the trial judge had erred in law in not leaving 'evidence' of provocation to the jury — 'evidence of the appellant's special sensitivity to sexual interference'[16] and evidence of his family background going to that sensitivity. Second, the judge had erred in law in his directions as to the meaning of the ordinary person 'in the position of the appellant'.[17] The Crown conceded that the trial judge had made these errors. Relying on *Stingel v The Queen*,[18] Priestley JA confirmed that evidence of the appellant's beliefs regarding his father's sexual abuse of his sisters, would be relevant to the question arising under s 23(2)(a) of the *Crimes Act 1900* (NSW) ('*Crimes Act*'). He found that evidence of the appellant's state of mind 'concerning sexual assault of older upon younger persons' would be relevant to the issue under that section as to whether the defendant in fact lost his self-control,[19] and therefore that these grounds of appeal were valid. Priestley JA also found that the trial judge had conducted the

[15] New South Wales Attorney-General's Working Party, above n 11, [63].

[16] *Green* (1997) 148 ALR 659.

[17] *Green v The Queen* (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995) 10–11 (Priestley JA).

[18] (1990) 171 CLR 312 ('*Stingel*').

[19] *Green v The Queen* (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995) 13–15.

trial on an incorrect basis when he ruled that what is required to satisfy s 23(2)(b) is that an ordinary person in the position of the appellant could have been provoked to the response to which the appellant resorted, rather than provoked to form an intent to kill or do grievous bodily harm. However, in Priestley JA's view, any attempt by the defence to emphasise this distinction would simply serve to remind the jury of 'the savagery of the beating' and 'the terrible things' which the appellant did to the deceased to cause his death.[20]

Rejecting the appeal, Priestley JA, with whom Ireland J concurred, said that the jury had properly convicted Green of murder. Indeed, the jury 'could hardly have come to any different conclusion'.[21] The majority applied the proviso in s 6(1) of the *Criminal Appeal Act 1912* (NSW) to dismiss the appeal on the ground that no substantial miscarriage of justice had actually occurred.[22] In dissent, Smart J would have allowed the appeal, substituting the conviction of murder with a conviction of manslaughter and a 12-year prison sentence.[23]

IV THE HIGH COURT DECISION

A *The Majority Judgments*

1 *Brennan CJ*

The High Court gave five separate judgments. Brennan CJ began his by noting that '[t]he "defence" of provocation called for consideration of s 23 of the *Crimes Act*.'[24] According to sub-s (2),

> an act or omission causing death is an act done or omitted under provocation where:
>
> (a) the act or omission is the result of a loss of self-control on the part of the accused that was induced by any conduct of the deceased (including grossly insulting words or gestures) towards or affecting the accused; and
>
> (b) that conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased,
>
> whether that conduct of the deceased occurred immediately before the act or omission causing death or at any previous time.

Paragraph (b), which contains the ordinary person test, albeit with its New South Wales legislative gloss — 'in the position of the accused' — attracted the most attention in his Honour's judgment. In his view, this paragraph

[20] Ibid 28.

[21] Ibid 26.

[22] Ibid. Priestley JA did not refer explicitly to the proviso, but one of the appellant's grounds of appeal to the High Court was that the Court of Criminal Appeal had erred in applying the proviso.

[23] Ibid 56.

[24] *Green* (1997) 148 ALR 659, 660.

> requires the jury to take full account of the sting of provocation actually experienced by the accused, but eliminates from the jury's consideration any extra-ordinary response by the accused to the provocation actually experienced. Thus extra-ordinary aggressiveness or extra-ordinary want of self-control on the part of an accused confer no protection against conviction for murder.[25]

Further, it was important to note that the objective test prescribed by paragraph (b) 'turns not on what the ordinary person *would have done* in response to the provocation experienced', but on what he (or supposedly she), '*could have been induced to intend*'.[26] This was an important distinction. For example, in the case at hand,

> the jury might have been more ready to allow the possibility that an ordinary person could have been induced to intend to kill or to inflict grievous bodily harm on the deceased than to allow the possibility that an ordinary person could have been induced to batter and stab the deceased to the extent that the appellant battered and stabbed him.[27]

Given the amount of battering and stabbing inflicted by the appellant on the deceased, such a favourable reading of the provocation 'defence' must have been a great relief to Green's counsel.

Brennan CJ went on to observe that s 23, construed in the aforementioned way, operated in substantially the same way as the provisions of the *Tasmanian Code* were held to operate in *Stingel* and the way in which the common law was held to operate in *Masciantonio v The Queen*.[28] Applying s 23 to the facts in this case, he determined that 'the appellant's recollection of and sensitivity to his father's sexual abuse of the appellant's sisters' — which he designated 'the sexual abuse factor'— was relevant to the questions raised by paragraphs (a) and (b). He continued:

> The sexual abuse factor was relevant to those questions because it tended to make it more likely that the appellant was more severely provoked by the deceased's unwanted homosexual advances than he would otherwise have been and thus more likely that he had been induced thereby to lose self-control and inflict the fatal blows and more likely that the appellant was so incensed by the deceased's conduct that, had an ordinary person been provoked to the same extent, that person could have formed an intention to kill the deceased or to inflict grievous bodily harm upon him.[29]

The trial judge had therefore erred in ruling against the admission of evidence of 'the sexual abuse factor' on the issue of provocation. In Brennan CJ's view, a reasonable jury, properly directed, could have had a reasonable doubt as to whether the appellant was provoked in the legally relevant sense, if all the relevant evidence, including evidence of 'the sexual abuse factor', was put to

[25] Ibid.
[26] Ibid.
[27] Ibid 661.
[28] (1995) 183 CLR 58 ('*Masciantonio*').
[29] *Green* (1997) 148 ALR 659, 662.

them.[30] Such a jury might have found 'the real sting of the provocation' in the deceased's attempt

> to violate the sexual integrity of a man who had trusted him as a friend and father figure, in the deceased's persistent homosexual advances after the appellant had said 'I'm not like this' and in the evoking of the appellant's recollection of the abuse of trust on the part of his father.[31]

That is, the jury may well have agreed with the dissenting judge in the Court of Criminal Appeal who found the deceased's actions to be 'revolting'. While Smart J had referred incorrectly to the reaction of 'some ordinary men' rather than the reaction of the appellant, the Chief Justice returned to the ordinary person test of s 23(2)(b) and reinvested it with the gender-neutral characteristics of the *Stingel*[32] ordinary person — 'a person with powers of self-control within the range or limits of what is "ordinary" for a person of the relevant age'.[33]

A reasonable jury may have found that such an ordinary person might have been provoked to kill in the terms prescribed by the law of provocation. It was not for the court to determine these questions, 'especially when reaction to sexual advances are critical to the evaluation' of the 'degree of outrage which the appellant might have experienced'.[34] Indeed, '[a] juryman *or woman* would not be unreasonable because he or she might accept that the appellant found the deceased's conduct "revolting" rather than "amorous"'.[35] After all, the case was 'not like *Stingel*' where the provoking act was consensual (hetero)sexual activity which inflamed Stingel's jealousy; in *Green* 'the deceased was the sexual aggressor of the appellant.'[36] In Brennan CJ's view, the appellant had lost a chance of acquittal. Accordingly, Brennan CJ allowed Green's appeal, quashed his conviction and ordered a new trial.

2 *Toohey J*

A positive response to the appellant's argument, that s 23 of the *Crimes Act* was 'distinctive' and, most importantly, 'distinguishable from the common law and from comparable provisions in the Criminal Codes', formed the main thrust of Toohey J's judgment.[37] His discussion focused on the meaning of the fraught, objective, or ordinary person test — the test requiring that the alleged provocation be assessed by reference to the powers of self-control possessed by the hypothetical ordinary person. This test was to require some pummelling to meet the facts in *Green*, but the majority judges set themselves for the task. In Toohey J's case, this involved complicating the already strained rules for applying the objective test in the law of provocation.

30 Ibid 664.
31 Ibid 665.
32 (1990) 171 CLR 312, 329–32.
33 *Green* (1997) 148 ALR 659, 665.
34 Ibid.
35 Ibid (emphasis added).
36 Ibid.
37 Ibid 669–70.

Commenting on the distinction drawn between s 23(2) paragraphs (a) and (b), Toohey J agreed that 'some such distinction', as he put it, existed in the common law and the statutes.[38] But by upholding the distinction between the subjective and objective tests, Priestley JA's judgment in the New South Wales Court of Criminal Appeal did not 'resolve the way in which paras (a) and (b) mesh'.[39] Collapsing the distinction between them was to assist Toohey J in taking a favourable view of the appellant's contention that the relevant ordinary person in New South Wales was one 'in the position of the accused', one that is, with 'the attributes or characteristics of the appellant'.[40] However, this was not an easy task. One complication was the clear direction of s 23 that it is the conduct of the deceased which must cause the provocation.[41] Also, it was obvious that the 'additional words' in paragraph (b) 'must be given some work to do', but just how much more than the ordinary person conjured up in *Stingel*[42] and *Masciantonio*?[43] In Toohey J's view, not much. In *R v Baraghith*,[44] Samuels JA had suggested that 'in the position of the accused' only made the characteristics of a particular accused relevant in assessing the gravity of the alleged provocation; they were not relevant when deciding whether the accused's response was that of an ordinary person. Toohey J accepted that interpretation, 'with one qualification'.[45] While such an approach differed little from that taken in *Stingel*, it still differed.[46] He found the site of the crucial difference between s 23 and the common law in *Stingel* where the court observed:

> A projection of the 'ordinary person' of the objective test into the position of the accused at the time of the killing will, however, involve *a particular difficulty* in a case where the existence of some attribute or characteristic of the accused is relevant both to the identification of the content or the gravity of the wrongful act or insult and to the level of power of self-control of any person possessed of it.[47]

For Toohey J, *Green* was such a case because the appellant's alleged 'special sensitivity to sexual interference' could be relevant both to the gravity of the alleged provocation, and also to the level of self-control.[48] As if trial judges and juries are not already fully taxed by the task of sifting through the convoluted requirements of the law of provocation, Toohey J would have them make this further adjustment in cases of 'particular difficulty' before they apply the objective test.

[38] Ibid 669.
[39] Ibid 671.
[40] Ibid 670.
[41] Ibid 671.
[42] (1990) 171 CLR 312.
[43] (1995) 183 CLR 58.
[44] (1991) 54 A Crim R 240, 244 ('*Baraghith*').
[45] *Green* (1997) 148 ALR 659, 673.
[46] Ibid.
[47] *Stingel* (1990) 171 CLR 312, 332 (emphasis added).
[48] *Green* (1997) 148 ALR 659, 673.

A further factor complicating consideration of the ground of appeal relating to paragraph (b) was that the appellant's 'real complaint' was that the trial judge's ruling deprived the jury of the opportunity to hear evidence relevant to the gravity.[49] It was the gravity of the provocation, after all, which was crucial in cases of 'particular difficulty' such as this one. Because the jury had not been properly directed in relation to the subjective test under s 23(2)(a), it would have applied paragraph (b) by reference only to the self-control of an ordinary person without having full and proper regard to the gravity of the provocation.

Toohey J also found that the trial judge erred in determining that what is required to satisfy s 23(2)(b) is that an ordinary person in the position of the appellant could have been provoked to respond in the manner of the appellant, rather than provoked to form an intent to kill. In the Court of Appeal, Priestley JA determined that this error did not result in a miscarriage of justice. By contrast, the dissenting judge, Smart J, said that the trial judge's ruling had 'put counsel for the appellant in an impossible situation given the injuries inflicted by the appellant'.[50] Further, Smart J said, and Toohey J concurred:

> No counsel could sensibly suggest to a jury that the deceased's provocative conduct and its high degree of gravity was such as to cause an ordinary person in the position of the accused to have so far lost self control as to what the appellant did.[51]

All that counsel needed to do was to suggest to the jury that the conduct of the deceased could have provoked an ordinary person to form an intention to inflict grievous bodily harm - tellingly, 'that was sufficient and that they did not have to subject the *excessive frenzied acts* to the objective test.'[52]

Toohey J agreed, but importantly, he also thought that 'there was force' in Smart J's observation that if this were the only error made in the trial, it would be difficult arguing against the application of the proviso. Fortunately for the appellant, the errors made in relation to the complicated meshing of paragraphs (a) and (b) of s 23(2) rendered this error 'significant'. Somewhat reluctantly, Toohey J allowed the appeal, but he rejected the arguments of counsel for the appellant against a retrial. In his view, a retrial was inevitable — the killing was a 'savage' one, and it was possible that the jury which convicted the appellant had accepted the Crown's case.[53]

[49] Ibid 674.

[50] Ibid. Elaborating on this point, Toohey J said that the words 'the response to which the accused resorted' adopted by Samuels JA in *Baraghith* and followed by the trial judge in *R v Green*, focussed 'unduly on the particular acts of the accused as opposed to the formation of an intention to kill or inflict grievous bodily harm': ibid. Toohey J then acknowledged that in *Stingel* the court 'spoke of a wrongful act or an insult of such a nature "that it could or might cause an ordinary person ... to do what the accused did"': ibid, citing *Stingel* (1990) 171 CLR 312, 331.

[51] *Green* (1997) 148 ALR 659, 674.

[52] Ibid 675 (emphasis added).

[53] Ibid.

3 *McHugh J*

The factual background to the case is found in McHugh J's judgment. Green was convicted of murdering Gillies in March 1994. Gillies was 36 at the time of his death. All we are told of his life is that he was 'unmarried and lived with his mother' who was away for some days prior to the killing.[54] We are also told that he had helped the accused to find work, lent him money and been his confidant. Green was 22, had known Gillies for about six years, and regarded him as 'one of his "best friends"' and his mentor.[55] According to Green's record of interview, on the night of the killing, they had watched television and drunk alcohol. Gillies asked him to stay overnight, saying he would sleep in his mother's bedroom and the accused could sleep in Gillies' bedroom.[56] He alleged that later Gillies came into the room, got into the bed and started touching the accused. Green responded by hitting Gillies 'until he didn't look like Don to me'. But Don continued to 'grope and talk', leading Green to hit him again and stab him repeatedly with scissors. The sexual advance had reminded Green of 'what my father had done to four of my sisters' and it 'forced me to open more than I could bear'.[57] At the trial he elaborated on this answer, changing the number of sisters assaulted to two. When he was pushing Don away, he claimed to have seen 'the image of my father over two of my sisters, Cherie and Michelle, and they were crying and I just lost it.'[58]

McHugh J was utterly convinced that this story met the requirements of the provocation defence. Indeed, from his perspective, the trial judge's errors were so significant that the appellant had not had a proper trial according to law.[59] Toohey J was much more circumspect, and even Brennan CJ did not go that far.[60] How then did McHugh J come to this conclusion? He began by reviewing s 23 in the context of leading provocation cases. Interpreting the words 'in the position of the accused' as requiring that the hypothetical person be 'an ordinary person who has been provoked to the same degree of severity and for the same reasons as the accused', he continued:

> In the present case, this translates to a person with the minimum powers of self-control of an ordinary person who is subjected to a sexual advance that is aggravated because of the accused's special sensitivity to a history of violence and sexual assault within his family.[61]

Here McHugh J relied on *Stingel*[62] as authority for the view that all of the accused's characteristics, circumstances and sensitivities — including the

54 Ibid.
55 Ibid.
56 Ibid 676.
57 Ibid.
58 Ibid.
59 Ibid 686.
60 Ibid 666.
61 Ibid 682.
62 (1990) 171 CLR 312, 326.

accused's 'personal relationships and *past history*'[63] — are relevant in determining the gravity of the alleged provocation. This reading of *Stingel* assisted McHugh J in circumventing the Crown's case that the conduct of the deceased was unrelated to the accused's alleged 'special sensitivity to sexual assault'.[64] According to the Crown, the victim had made

> a non-violent homosexual advance which was unconnected with the accused's beliefs. Those beliefs related to incidents of heterosexual sexual assault by his father upon his sisters, not homosexual activity.[65]

This argument went to the heart of the matter: there was no avoiding the fact that the sexual advance to be considered here was a specifically homosexual advance. To find for the appellant, the majority judges had to frame their decisions so as to appear neutral on the homosexual question. This is how McHugh J went about this difficult task.

First, he questioned whether the advance was non-violent. According to the accused, the sexual advance became 'quite rough and aggressive', so Priestley JA was wrong to say that 'the touching was amorous, not forceful'.[66] Second, and connected, he declared that 'the fact that the advance was of a homosexual nature was *only one factor* in the case'.[67] He continued:

> What was more important from the accused's point of view was that a sexual advance, accompanied with some force, was made by a person whom the accused looked up to and trusted. The sexual, rather than the homosexual, nature of the assault filtered through the memory of what the accused believed his father had done to his sisters, was the trigger that provoked the accused's violent response. Viewed in this light, the conduct of the deceased was directly related to the accused's sensitivity. Indeed, *any* unwanted sexual advance is a basis for 'justifiable indignation', especially when it is coupled with aggression.[68]

In dismissing the appeal, Priestley JA had downplayed the fact that under s 23(2)(b), the issue of the capacity for self-control had to be measured by reference to an ordinary person who had been 'provoked to the extent that the accused had been provoked because of his special sensitivity to occurrences of sexual assault.'[69] McHugh J thus agreed with Toohey J that the trial judge's failure to relate 'the evidence of sexual assaults within the family to the s 23(2)(a) issues meant that the accused's real case on s 23(2)(b) was never put to the jury'. Given that the misdirections and 'non-directions' were serious, it was 'impossible to conclude', as Priestley JA had, that a conviction was inevitable. However, McHugh J 'would go further.'[70] Where an error in the conduct of a trial is 'fundamental', as in the present case, the question as to whether a reasonable jury

63 *Green* (1997) 148 ALR 659, 682–3.
64 Ibid 683.
65 Ibid.
66 Ibid.
67 Ibid (emphasis added).
68 Ibid (emphasis added).
69 Ibid 684.
70 Ibid.

would have convicted the accused does not arise, because in such circumstances, 'the accused has not had a trial according to law and that itself constitutes a relevant miscarriage of justice.'[71] More particularly, the trial was 'fundamentally flawed' because the accused's 'real case' on provocation was never left to the jury.[72]

As for the appellant's contention that the requirements placed upon the defence counsel regarding the addressing of the jury were a miscarriage of justice, McHugh J agreed. He concurred that it was wrong to suggest that the appellant's counsel address the jury on the basis that the defence of provocation could succeed only if it was illustrated that an ordinary person could not have been provoked to do what the accused actually did. As the majority said in *Masciantonio*,[73] 'it is now well established that the question of proportionality is absorbed in the application' of the ordinary person test. More specifically, it was established in *Johnson v The Queen*,[74] that it is 'the formation of an intent to kill or do grievous bodily harm which is the important consideration rather than the precise form of physical reaction' when assessing whether an ordinary person could have reacted in the way that the accused did. In light of these authorities, the trial judge's ruling on this question was not merely 'fundamentally flawed'; it constituted 'a denial of natural justice'.[75] Furthermore, the error had placed counsel for the accused in 'an invidious position'. He was forced by the erroneous ruling to try to persuade the jury that the ordinary person, provoked in the legally relevant way, could have 'done *what the accused did.*'[76] As McHugh J conceded, that was not an argument that many jurors would find persuasive, given '*the extensive and brutal nature of the injuries* inflicted by the accused on the deceased'.[77] The erroneous ruling forced counsel for the accused to address the jury 'under a conceptual framework that was not the law and which quite likely caused the jury' to believe that the defence of provocation was 'hopeless'.[78] However, the defence of provocation was far from hopeless in the present case. Accordingly, McHugh J allowed the appeal, quashed the conviction and ordered a new trial.

B *The Dissenting Judgments*

1 *Gummow J*

Gummow J's dissenting judgment took the form of an historical contextualisation of s 23 of the *Crimes Act*, focussing on the question of proportionality. This was an unusual strategy given that proportionality had, as he acknowledged, been 'expelled' as a requirement of the provocation defence.[79] That did not deter his

[71] Ibid.
[72] Ibid 684–5.
[73] (1995) 183 CLR 58, 67.
[74] (1976) 136 CLR 619, 639 ('*Johnson*').
[75] *Green* (1997) 148 ALR 659, 685–6.
[76] Ibid 686.
[77] Ibid (emphasis added).
[78] Ibid.
[79] Ibid 690.

Honour. He began by listing a line of authorities which had recognised that the law of provocation reflected changing social conditions and that, in particular, 'the extent of the power of self-control to be exercised by the hypothetical ordinary person is affected by contemporary conditions and attitudes.'[80] On the question of the relationship between these conditions and attitudes and the issue of proportionality, he found Lord Devlin's comments in *Lee Chun-Chuen v The Queen*[81] to be apposite:

> Provocation in law consists mainly of three elements — the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a *credible narrative* of events suggesting the presence of these three elements.[82]

Lord Devlin's point, one well taken by Gummow J, was that provocation in law 'means something more than a provocative incident.'[83] In saying that he found Lord Devlin's remarks to be helpful in considering the structure of s 23, Gummow J was careful to acknowledge that at common law the question of proportionality had been absorbed into the ordinary person test[84] and that s 23(3)(a) 'expelled' any regard of proportionality. In fact, he thought that it might have been expelled by s 23(2)(b) which does not permit any consideration of the actual act or omission of the accused causing death.[85] Nevertheless, the issue of proportionality still had some work to do in the law of provocation, as Gummow J was to demonstrate.

But first, speaking of s 23(2)(b), what did Gummow J make of the phrase 'in the position of the accused'? Did he agree that it should be subjectivised to the extent suggested by the majority judges? In his view, the word 'position' might include 'a state of affairs which includes the attributes or characteristics of the particular accused'.[86] However, the appellant's submission that 'his "whole history" was caught up' by paragraph (b) was 'too extreme.'[87] Here Gummow J exposed a serious shortcoming in the majority judgments. They focused on questions not seriously disputed by the Crown or the Court of Criminal Appeal, namely that the trial judge had made errors in determining the issues presented by paragraphs (a) and (b). However, the 'central issues' were surely raised by the Crown's main submissions to the High Court. These submissions, referred to only fleetingly in the majority judgments, were first, that the evidence relating to the appellant's beliefs and to his family history were incapable of raising an issue under paragraph (b) 'because the deceased's conduct was "relevantly unrelated"

80 Ibid 687, citing *Holmes v Director of Public Prosecutions* [1946] AC 588, 600; *Parker v The Queen* (1963) 111 CLR 610, 654; *Moffa v The Queen* (1977) 138 CLR 601, 616–17 ('*Moffa*'); *Stingel* (1990) 171 CLR 312, 327.

81 [1963] AC 220.

82 Ibid 231–2 (emphasis added).

83 *Green* (1997) 148 ALR 659, 689–90.

84 *Johnson* (1976) 136 CLR 619, 636–7.

85 *Green* (1997) 148 CLR 659, 690.

86 Ibid 691.

87 Ibid.

to those beliefs'. Second, because the defence of provocation was rejected by the jury, no substantial miscarriage of justice had occurred.[88]

A consideration of these 'central issues' led Gummow J back to the question of the construction of paragraph (b) and, interestingly, to the concept of proportionality. Acceptance of the Crown's case did not, in his view, reintroduce 'the concept of proportionality in another guise'.[89] But in a sleight of hand, Gummow J managed to reintroduce it by declaring that *if* proportionality had been a relevant issue, it would have required cross-examination of the accused as to whether the alleged advance was rough, and whether there was anything to prevent him leaving the house, as well as cross-examination about the brutality of his attack. More specifically, had proportionality been relevant, the appellant would have been cross-examined about his 20 punches to the victim's face, the 10 stab wounds and the evidence that he banged the victim's head violently against the bedroom wall.[90]

Thus did Gummow J manage to introduce evidence as to proportionality, in defiance of his own caveats, first, that there was no longer a proportionality requirement, and second, that the issue in provocation cases was a 'different one'. The key issue was not proportionality but rather 'the relationship between the provocation offered and the circumstances constituting "the position of the accused" to which the ordinary person is to be assimilated.'[91] To elaborate, the provocation

> must be capable of precipitating or inducing an ordinary person in the position of the accused, that is to say with the beliefs or state of mind of the accused concerning certain events in his family history, to have so far lost self-control as to have informed an intent to kill the deceased, or to inflict grievous bodily harm upon him.[92]

Gummow J could not see how, on the evidence, the appellant had been provoked in this legally relevant sense. He had not been sexually abused by his father and at the time of 'the slaying', he had not seen his father for seven years. Moreover, this was not a case where the conduct of the deceased was the last episode in a series of provocations which, in that context, proved to be unbearable. It did not, for example, fit the pattern of 'domestic' relationships attended by violence. Gummow J also observed — 'without drawing any conclusion as to any significance this would have had' — that this was not a case where the accused had said that his response to the sexual advance sprang from a 'strongly felt aversion' to homosexual sex.[93] Accordingly, the trial judge had been in error when, in giving reasons for rejecting the application that provocation be withdrawn from the jury, he said that there was evidence that the accused found homosexual advances 'repugnant or offensive or insulting' and that such conduct affected him and

[88] Ibid 692–3.
[89] Ibid 693.
[90] Ibid.
[91] Ibid.
[92] Ibid 693–4.
[93] Ibid 694–5.

caused his loss of control.[94] That was not, as Gummow J observed, the burden of the evidence given by the accused. Had it been, a different question would have arisen in the application of paragraph (b) and the answer 'may well have been' that given by Priestley JA, namely, that while the ordinary person may have reacted indignantly or perhaps with blows, he (or she?) could not have been induced by such conduct to lose control so far as to have formed an intent to kill or inflict grievous bodily harm to the deceased.[95] That is, even a 'mildly' homophobic ordinary person such as the one imagined by Priestley JA would not, even in a factual situation where an appellant claimed to have a strong aversion to homosexuality, have been provoked in the legally relevant sense.

On the proper construction of s 23(2)(b), one consistent with the decision in *Stingel*,[96] the 'ultimate question' pertained to the objective standard of 'a truly hypothetical "ordinary person"'.[97] Such an ordinary person, even one with personal beliefs such as those asserted by the accused with respect to his family history, would not have met that standard.[98] Furthermore, any other construction of paragraph (b) which, 'when applied to this case produced a different result, would undermine principles of equality before the law and individual responsibility'.[99] Here, Gummow J adopted the view of Wilson J in *R v Hill* that 'any deviation' from the objective standard 'introduces an element of inequality in the way in which the actions of different persons are evaluated'.[100] He concluded that no jury, acting reasonably, could have been satisfied that the deceased's alleged provocative conduct was sufficient to 'deprive any hypothetical, ordinary 22-year old male in the position of the appellant of the power of self-control held to be legally relevant'.[101] In short, the appellant had not displayed the self-control expected of the 'truly hypothetical' ordinary person. He therefore dismissed the appeal.[102]

2 *Kirby J*

While Gummow J's dissent might be described as the 'black-letter law' judgment, Kirby J's could be characterised as the 'social context' judgment: it was the only one to contextualise the case in terms of critical scholarship on the operation of HAD overseas, and in Australia.[103] He also included far more details of the lethal attack than the other judges had provided, including the fact that the victim was 'left on the floor, face-downward, in a pool of his own blood'.[104] A consid-

94 Ibid.
95 Ibid 695.
96 (1990) 171 CLR 312, 327.
97 *Green* (1997) 148 ALR 659, 696.
98 Ibid.
99 Ibid.
100 [1986] 1 SCR 313, 343–4; 27 DLR (4th) 187, 211.
101 *Green* (1997) 148 ALR 659, 697.
102 Ibid 696–7.
103 He cites Comstock, above n 5; Dressler, above n 5; Mison, above n 5; Leslie Moran, *The Homosexual(ity) of Law* (1996); New South Wales Attorney-General's Working Party, above n 11.
104 *Green* (1997) 148 ALR 659, 698.

eration of the post-mortem examination facilitated a very detailed account of the 'ferocity and brutality' of the attack, which Kirby J then linked to the question of proportionality.[105] Like Gummow J, he was careful to note that the proportionality requirement had been modified by the common law and abolished by statute in New South Wales.[106] He then moved on to highlight a point downplayed or ignored in all the other judgments, namely that the Crown had not accepted the allegation of a sexual advance by the deceased. Its 'primary case' was that this was a premeditated killing; its 'secondary case' was that even if he had touched the appellant, such conduct could not have amounted, in law, to provocation. It followed that it was unclear whether the jury's verdict was based on the primary or secondary case.[107]

Kirby J's judgment differed from the others in still more ways. For example, he observed that Smart J's dissent in the Court of Criminal Appeal, quoted approvingly in the majority judgments, was 'even more forceful in his expression of the alleged provocation than counsel for the appellant'.[108] He also paused to consider opposing arguments related to the application of the proviso, commenting that the High Court had a 'function as the ultimate curial guardian against legal error and injustice'. Its tasks included ensuring that the proviso, which was designed to 'guard against insubstantial errors attracting a completely unmerited or disproportionate consequence', was applied correctly.[109] On the question of whether the Court of Criminal Appeal had erred because it had proceeded on the basis that the legally relevant intention of the ordinary person under s 23(2)(b) was 'an intention carried out rather than merely an intention formed', Kirby J expressed the view that this ground of appeal derived from a misreading of Priestley JA's position. This was that while the trial judge had erred, the mistake was a merely 'technical' one which did not lead to any substantial miscarriage of justice. Kirby J agreed. It was 'unthinkable' that the appellant would have been advantaged by emphasising any more than was 'absolutely necessary' a distinction between the intention to inflict 'the terrible injuries' inflicted by the accused and the legally relevant intention.[110]

Moving on to the remaining grounds, Kirby J insisted that the case should be understood not only at the general level, in relation to the law of provocation in Australia, but also specifically in the context of 'the particular case of provocation' in HAD cases.[111] He began by embarking on a defence of the court's insistence on an objective standard for self-control. That standard embodied the principle of equality before the law. Such a principle prevented juries from condoning 'human ferocity' in 'head strong, violent people' displaying a lack of

[105] Ibid 699.
[106] Ibid 700.
[107] Ibid 700–1.
[108] Ibid 704.
[109] Ibid 705.
[110] Ibid 706.
[111] Ibid.

reasonable self-control.[112] Anything less was an affront to 'civilised society'. As Gibbs J said in *Johnson*:

> An ordinary man in a civilised community would regard it as absurd, and as an affront to his notions of justice, if some trivial provocation, such as mild abuse or a light blow, were regarded as extenuating the use of savage violence. [113]

So would an 'ordinary person' (Kirby J's preferred phrase). In *Stingel*,[114] the court affirmed that subjective factors were to be taken into consideration in relation to the factual question of gravity to the particular accused, but not in relation to the power of self-control. The objective standard of the ordinary person performed that task. That approach was reaffirmed in *Masciantonio*[115] and notwithstanding criticism — notably of the 'psychological difficulties' in splitting the subjective from the objective considerations — the objective standard had stood the test of time, thanks to an 'unbroken line of decisions' in the High Court.[116]

Such an 'unbroken exposition of the Australian law of provocation' had to be adhered to in the 'factual context' of the present case.[117] Referring to the *Discussion Paper* on HAD submitted to the court by the Solicitor-General for New South Wales, Kirby J took up the suggestion therein that a non-violent homosexual advance should not constitute sufficient provocation to invoke that legal defence.[118] In his Honour's view, HAD cases demonstrated the vital importance of the court's long-standing commitment to the objective standard. After all, that standard had been upheld in the case of provocation of a heterosexual character in *Stingel*,[119] and equality demanded that it be so applied in a HAD case, especially in the context of research indicating widespread homophobic violence in Australia.[120] In that context, it would be wrong for the law to condone the idea that a non-violent sexual assault, without more, could constitute provocation. It would conflict with contemporary standards. Surely

> the 'ordinary person' in Australian society today is not so homophobic as to respond to a non-violent sexual advance by a homosexual person as to form an intent to kill, or to inflict grievous bodily harm.[121]

It followed that the idea that the ordinary 22 year-old male would lose self-control in such a situation should not be accepted as 'an objective standard applicable in contemporary Australia.'[122]

[112] Ibid 707–8, citing *R v Kirkham* (1837) 8 C & P 115, 119; 173 ER 422, 424.
[113] (1976) 136 CLR 619, 656.
[114] (1990) 171 CLR 312, 332.
[115] (1995) 183 CLR 58.
[116] *Green* (1997) 148 ALR 659, 710–11.
[117] Ibid 712.
[118] Ibid.
[119] (1990) 171 CLR 312, 318–20.
[120] *Green* (1997) 148 ALR 659, 713. His citations include Gail Mason, *Violence against Lesbians and Gay Men* (1993); Gail Mason and Stephen Tomsen (eds), *Homophobic Violence* (1997).
[121] *Green* (1997) 148 ALR 659, 714.
[122] Ibid.

Next, Kirby J turned to the appellant's argument that the words 'in the position of the accused' in s 23(2)(b) of the *Crimes Act* modified the objective test so as to require that consideration be given to the appellant's subjective experience when measuring his self-control. While acknowledging that 'some meaning must be given to the additional words' in paragraph (b), he rejected the suggestion that the amendment was 'designed to abolish the long-standing objective criterion for self-control in provocation'.[123] Under paragraph (b) the appellant had wanted to introduce such subjective considerations as the adverse effects of his family history, especially his father's sexual assaults of his sisters, on his capacity for self-control. However, if paragraph (b) was interpreted in this way, it 'might just as well not exist', in as much as it would subjectivise the ordinary person test beyond recognition.[124] Moreover, there were no less than eight 'textual, historical and policy reasons' for rejecting the appellant's argument.[125] These reasons related to the legislative history of paragraph (b), previous case law and the importance of applying provocation law consistently throughout Australia. Most crucially, the standard of self-control in New South Wales, as in the other States, is the objective standard.

Finally, Kirby J turned to the question of whether the Court of Criminal Appeal had applied the proviso correctly to the errors and misdirections of the trial judge. He found Priestley JA's reasons for doing so compelling. The sexual advance may have been a provocative act to the appellant.

> It may even have suggested to him assumptions about his own sexuality which he found confronting or offensive. But he was a 22 year-old adult male living in contemporary Australia.[126]

Furthermore, he was wearing clothes at the time of the alleged advance, these clothes were not removed, he was younger, fit and was quickly able to physically repel the highly intoxicated older man and, crucially, he never explained in evidence why he did not simply leave. There was nothing to prevent him simply walking away. It followed that his reaction to the deceased's conduct fell 'far below' the minimum limits on the power of self-control to be attributed to 'the hypothetical ordinary 22 year-old Australian male in his position'.[127] Just as in *Stingel*,[128] the alleged provocation was 'a confronting sexual challenge' and the same standard of self-control is 'demanded by our society' and by the principle of equality before the law, whether the sexual advance be heterosexual or homosexual.[129] To settle for a lesser standard of self-control would flout the 'governing principles' of equality and individual responsibility set out by Wilson J in *R v Hill*.[130] Moreover, equality demanded that the same standard of self-control

[123] Ibid.
[124] Ibid 714–15.
[125] Ibid 715–16.
[126] Ibid 718.
[127] Ibid.
[128] (1990) 171 CLR 312, 336–7.
[129] *Green* (1997) 148 ALR 659, 719.
[130] [1986] 1 SCR 313, 343; 27 DLR (4th) 187, 211, accepted in *Stingel* (1990) 171 CLR 312, 324.

be applied, whether an unwanted sexual advance be made by a man to a woman, or to another man. Such equality might 'be "revolting" to some',[131] but the court should not signal that an unwanted heterosexual or homosexual advance could found a provocation defence, for that message 'unacceptably condones serious violence by people who take the law in their own hands'.[132] There was 'no way' that the appellant's alleged memories of his father's sexual assaults could have induced an ordinary person to kill or inflict grievous bodily harm.[133] It followed that the jury's verdict was proper and inevitable. Kirby J therefore dismissed the appeal.

V Comment

In its review of the operation of HAD in Australia, the New South Wales Attorney-General's Working Party expressed concern that 'the mythical homosexual male stereotype as "predator/attacker" may have led some juries to equate a homosexual advance with a homosexual attack'.[134] Regrettably, this same stereotype has been reinforced by the majority judgments in *Green*. The case has done nothing to meet the 'strong need' identified by the Working Party to limit the operation of homophobic prejudice in HAD cases.[135] It is all very well for the dissenting judges to assume, as Gummow J did, or assert, as Kirby J did, that the ordinary person (read: man) is not so homophobic to kill a man who makes an unwanted sexual advance. However, the majority decision demonstrates unequivocally that an 'ordinary person' may do precisely that. Moreover, it is not only the majority decision that gives the lie to the capacity of the objective person to be non-homophobic. In the Court of Appeal, the majority judgments rejecting Green's appeal also failed to curb the homophobic stereotype of the predatory homosexual male. It is notable that although Priestley JA took the view that a homosexual advance without more was not sufficient to meet the objective test, he neither excluded nor condemned the idea of a homophobic defence, one based on the notion that a sexual advance by a homosexual man would be repugnant to 'an ordinary person'. Indeed, he indicated that he found the behaviour of the victim offensive and provocative:

> It is easy to see that *many an ordinary person* in the position in which the appellant was when Mr Gillies was making his amorous physical advances would have reacted indignantly, with a physical throwing off of the deceased, and perhaps with blows. I do not think however that the ordinary person could have been induced by the deceased's conduct so far to lose self-control as to have formed an intent to inflict grievous bodily harm upon Mr Gillies.[136]

[131] *Green* (1997) 148 ALR 659, 719, citing Howe, 'More Folk Provoke Their Own Demise', above n 5, 355.
[132] *Green* (1997) 148 ALR 659, 719.
[133] Ibid.
[134] New South Wales Attorney-General's Working Party, above n 11, [49].
[135] Ibid [63].
[136] *R v Green* (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995) 26 (emphasis added).

The ordinary person, in this view, is entitled to ward off a non-violent sexual advance (or is that a specifically homosexual advance?) with physical, but not murderous blows. Does the category 'many an ordinary person' include women? Did Priestley JA mean to suggest that anyone might choose to repel unwanted 'amorous physical advances', or was the 'offensive and provocative' advance he had in mind sex-specific, limited to a sexual advance made by a man to another man? For all the emphasis put on the neutrality of the objective standard in *all* the judgments in this case, it is clear that it is exclusively the latter scenario which dictates the outcome of the decision in *Green*. And once again, the objective test fails to save the provocation defence from the charge that it is a profoundly sexed excuse for murder.

So powerful is the stereotype of the predatory homosexual man that it overwhelms the facts in the case.[137] Consider its effect on the narrative provided in Smart J's dissent, quoted approvingly by Brennan CJ in the High Court.[138] Smart J regarded the deceased's actions, 'as so narrated' by the accused, as 'revolting' and it was 'unreal to suggest that in such a situation the appellant should have got up and walked away'. He was 'being grabbed' and the deceased was making 'very persistent and determined sexual advances'. And, if all this was not 'bad enough', there were further factors to be taken into account, such as the deceased's 'betrayal of trust' and friendship and his 'abuse of his hospitality' demonstrated in his attempt to coerce the appellant into providing him with 'sexual gratification'.[139] It followed that:

> The provocation was of a very grave kind. It must have been a terrifying experience for the appellant when the deceased persisted. The grabbing and the persistence are critical.[140]

And tellingly,

> some ordinary men would feel great revulsion at the homosexual advances being persisted with in the circumstances and could be induced to so far lose their self control as to inflict grievous bodily harm. They would regard it as a serious and gross violation of their body and their person. I am not saying that most men would so react or that such a reaction would be reasonable. However, some ordinary men could become enraged and feel that a strong physical reaction was called for. The deceased's actions had to be stopped.[141]

In Priestley JA's judgment, the ordinary person is judicially inscribed as a moderately homophobic person, presumably a man, who would respond to a homosexual advance with non-lethal blows. Smart J transforms the ordinary person standard into the standard of 'some ordinary men', notably extremely

[137] For a queer theory reading of the use of stereotypes, including the 'predatory–prey binary', in the majority judgments in *Green*, see Nathan Hodge, 'Transgressive Sexualities and the Homosexual Advance' (1998) 23 *Alternative Law Journal* 30.

[138] *Green* (1997) 148 ALR 659, 665.

[139] *Green v The Queen* (Unreported, New South Wales Court of Criminal Appeal, Priestley JA, Smart and Ireland JJ, 8 November 1995) 51.

[140] Ibid.

[141] Ibid 51–2.

homophobic and violent men with the power, and more crucially, the right to stop sexual advances. While Smart J was later judged to be in error in his reference to 'some ordinary men',[142] his rights-bearing violent homophobic ordinary man was to emerge triumphant in the High Court.

Reality gets turned on its head in the judgments which found for the appellant. So do the concepts of aggressor and victim. Smart J declares it to be 'unreal' to suggest that the appellant could have got up and left the house. He was being 'grabbed' by the deceased who was making 'very persistent' sexual advances, despite the fact that the appellant had hit him in the face so hard that 'he didn't look like Don to me'. Amazingly, Don continued to 'grope and talk' — to persist with the sexual advance.[143] How could the majority judges possibly find this credible if it were not for the predatory homosexual stereotype? For Smart J the provocation was 'of a very grave kind' because the persistence of the deceased would have been so 'terrifying' to the appellant. The majority in the High Court agreed. According to Brennan CJ, the 'real sting' of the provocation lay in the deceased's attempts to 'violate the sexual integrity of a man who had trusted him as a friend and father figure' and also in 'his persistent homosexual advances'. The deceased was the 'sexual aggressor'.[144] Recall that Brennan CJ believed that provocation expels from the jury's consideration 'any extra-ordinary response' or 'extra-ordinary aggressiveness' on the part of the accused.[145] As provocation did, in Brennan CJ's view, confer such protection to the appellant in this case, it follows that he did not view the homicidal attack as an act of 'extra-ordinary aggressiveness'. Punching a man's face until it is unrecognisable, stabbing him repeatedly with scissors and banging his head into a wall is not, apparently, an 'extra-ordinary response' if a sexual advance can be constructed, against the evidence, as 'forceful' and 'aggressive'.[146] The infliction of what McHugh J described as 'extensive and brutal' injuries[147] was not, apparently, an act of 'extra-ordinary aggression' in the view of the majority. Why not? Because the stereotype of the predatory older homosexual permits the reversal of aggressor and victim. The construction of the sexual advance as 'forceful' can even cancel out retaliation taking the form of 'excessive frenzied acts'.[148] Such is the advantage bestowed by the provocation defence on extremely violent men who are constructed by male judges as ordinary (or understandably violent) men, as opposed to 'extra-ordinarily' violent men.

Interestingly, by the time Brennan CJ came to reflect on the Crown's submission that the appellant's reaction to 'the conduct' fell below the standards of self-control of the ordinary person as required by paragraph (b), the ordinary person had become 'the hypothetical ordinary *man* in the position of the appellant.'[149]

[142] *Green* (1997) 148 ALR 659, 665.
[143] Ibid 676.
[144] Ibid 665.
[145] Ibid 660.
[146] Ibid 682.
[147] Ibid 686.
[148] Ibid 675.
[149] Ibid 663 (emphasis added).

While his judgment demonstrates just how far the objective test can be made to bend in favour of appellants in murder trials, that slippage from 'person' to 'man' illustrates once again the cogency of the observation that law, and the law of provocation in particular, persistently betrays its fiction of a gender-neutral legal personhood.[150] For all of the law's grand-standing efforts to endow itself with a genderless 'truly hypothetical "ordinary person"',[151] the ordinary person emerges as an ordinary man, in this case, an ordinary homophobic man who would repel a homosexual advance with blows — and possibly with lethal violence, if he could produce a 'sexual abuse factor' rendering him susceptible to sexual advances. McHugh J's disclaimer that the 'homosexual nature' of the advance was 'only one factor in the case' and that '*any* unwanted sexual advance is a basis for "justifiable indignation", especially when it is coupled with aggression', is unconvincing.[152] Does he really mean to imply that the routine unwanted sexual advance made by a man to a woman would give rise to justifiable indignation which would ground a provocation defence in the event that she killed him? Of course not. The spectre of 'a homosexual advance' made by a predatory older homosexual man looms large over and throughout the majority judgments.

Brennan CJ's token gesture in the gender-neutrality stakes is just as unconvincing. As if any 'truly hypothetical' objective analyst would believe that a 'juryman *or* woman' would accept that an unwanted sexual advance by a man towards another man was 'revolting'.[153] Of course, a jury woman might accept this, if she were properly hegemonised into understanding the homophobia felt by the 'ordinary' man on the receiving end of a sexual advance of another man. Under conditions of masculinist hegemony, such a sexual advance is perceived to be a 'grave' provocation as opposed to a normative or routinised behaviour pattern, such as the unwanted sexual advances made by men towards women on a daily basis. The ordinary standard is that of the ordinary man, and the ordinary woman has very little to do with determining what counts as 'sexual provocation', except in her capacity as the provoking victim.[154] Interestingly, the 'ordinary person' also quickly collapses into the ordinary male in Kirby J's dissenting judgment. Commenting on the 'steady insistence' on the ordinary person test in the High Court provocation cases, he observes — by way of parentheses — that all the accused in these cases had been men. At the same time, he acknowledges the related criticism of the provocation defence — that its

[150] See Hilary Allen, 'One Law for All Reasonable Persons?' (1988) 16 *International Journal of the Sociology of Law* 419.

[151] *Green* (1997) 148 ALR 659, 696.

[152] Ibid 683 (emphasis added). McHugh J's argument is marred by the same conceptual flaws as those of his source — Dressler, above n 5. Dressler's narrative of 'justifiable indignation' is critiqued in Howe, above n 5, 345, 360–2.

[153] *Green* (1997) 148 ALR 659, 665 (emphasis added).

[154] On 'sexual provocation' see Ian Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in Ngaire Naffine and Rosemary Owens (eds), *Sexing the Subject of Law* (1997) 149. For the latest in a long list of feminist critiques of gender bias in the operation of the provocation defence, see Jenny Morgan, 'Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told about Them' (1997) 21 *Melbourne University Law Review* 237.

presumed 'objective' standard is based on a concession to men's anger.[155] However, for reasons which are not made clear but which appear to relate to 'legal history', Kirby J declared that this debate could 'safely be ignored.'[156] With respect, it cannot. The decision in *Green* provides more evidence, for those who still need it, that the law of provocation operates as a profoundly sexed excuse for murder and should be abolished.[157]

Relatedly, when Kirby J claims that 'the original sources of the law of provocation may be lost in legal history',[158] he demonstrates a poor grasp of the very legal history which he believes mandates the law of provocation. The origins of that law have been meticulously traced back to the early English cases, and earlier still to Aristotle's theory of justifiable anger, in Jeremy Horder's brilliant book-length argument for the abolition of the defence.[159] Peeling back the layers of historical rationales for the defence, Horder exposes the ordinary person — or 'reasonable person' in the English cases — as a chameleon, a fiction who came into being via the case law to accommodate men's self-justifying anger.[160] Interestingly, Kirby J's legal history does stretch back to the 1970s, a time when Murphy J advocated a purely subjective test of self-control and the abolition of the ordinary person test.[161] It is surely time now for another High Court judge to champion the abolition of the provocation defence. If that seems extreme, observe that, as the *Green* case and the other leading provocation cases demonstrate, the application of the objective test is producing thoroughly 'extreme' and reprehensible images of what an ordinary person can do under provocation.[162]

Placing their faith in the objective standard, the dissenting judges in *Green* believe that the ordinary person can be judicially inscribed as non-homophobic and gender-neutral, and that the principle of equality, applied to the objective standard, can ensure equal treatment for all sexed identities in cases of sexual

[155] *Green* (1997) 148 ALR 659, 706, citing Coss, 'Lethal Violence by Men', above n 4.

[156] Ibid.

[157] See Coss, 'Lethal Violence by Men', above n 4; Howe, 'More Folk Provoke Their Own Demise', above n 5; Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence — A Victorian Case Study' in Norma Grieves and Ailsa Burns (eds), *Australian Women: Contemporary Feminist Thought* (1994) 225. Later in his judgment, Kirby J acknowledges that calls for reforming this area of law included demands for the abolition of provocation as a defence: *Green* (1997) 148 ALR 659, 711.

[158] *Green* (1997) 148 ALR 659, 707.

[159] Jeremy Horder, *Provocation and Responsibility* (1992).

[160] Ibid. See also the critique of the 'narratives of excuse' told in provocation cases in Alex Reilly, 'Loss of Self-control in Provocation' (1997) 21 *Criminal Law Journal* 320.

[161] *Green* (1997) 148 ALR 659, 709, citing *Moffa* (1977) 138 CLR 601, 626.

[162] In June 1998 the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General released a discussion paper advocating the abolition of the provocation defence. See Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, 'Chapter Five: Fatal Offences against the Person', *Discussion Paper: Model Criminal Code* (1998) 69. The Committee considered some, but not all, of the feminist arguments against the provocation defence. In particular, it is notable that while the Committee cited my critique of the operation of the homosexual advance defence, it did not consider my critique of the Victorian Law Reform Commission's empirical study of the operation of the provocation defence in that State. See Howe, 'Provoking Comment', above n 157. Compare the proposal for a reformulated objective test in New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) 31–51; 76–8.

provocation. With respect, the evidence does not support such beliefs. The objective test cannot do the work which the dissenting judges want it to do. Recall that the majority judges think they are upholding the objective test when they constitute the ordinary person as a violent homophobe, one with a right to resort to homicidal rage, depending on their circumstances and family history. Yet such is their commitment to the objective test in provocation that both dissenting judges misappropriate my argument for the abolition of the defence, citing it in support of their argument for an equal application of a supposedly neutral objective standard in provocation cases.[163]

To clinch the equality argument, Kirby J concludes his judgment with the following point. If every woman who was the subject of a non-violent sexual advance in a comparable situation to that described in the evidence in this case responded with brutal violence, killing the man and then pleading provocation, 'the law of provocation would be sorely tested and undesirably extended.'[164] With respect, the law of provocation has already been sorely tested and undesirably extended. Moreover, Kirby J's hypothetical does not make the strongest point against expanding the defence in HAD cases. Nor does he make the most of the equality argument made by feminist and gay analysts. Compare the hypothetical put in the critical literature: 'If every woman killed every man who made unwanted physical advances toward them, there would be a lot of dead men around'.[165] Must this hypothetical scenario become a reality before masculinist apologists for the provocation defence finally realise that perhaps it has, at last, provoked its own demise?

VI CONCLUSION

In an article published shortly before the High Court decision in *Green*, I argued that HAD operates in Australia in demonstrably homophobic ways and that the operation of this defence provides compelling evidence, for those who still needed it, that the provocation defence should be abolished.[166] I suggested that the case against HAD and the provocation defence had to be put as cogently and accessibly as possible if it were to have a ghost of a chance of penetrating the hegemonic heterosexist and masculinist mind set of those who are oblivious to law's complicity in men's violence against women and gay men. Clearly, I failed dismally in my bid to persuade the 'benchmark'[167] men who comprised the majority decision to think about what they do when they succumb to HAD

[163] *Green* (1997) 148 ALR 659, 696 (Gummow J) and 719 (Kirby J), citing Howe, 'More Folk Provoke Their Own Demise', above n 5. For another unconvincing defence of the objective test see Ian Leader-Elliott, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72.

[164] *Green* (1997) 148 ALR 659, 719.

[165] Kim Adams quoted in Comstock, above n 5, 100.

[166] Howe, 'More Folk Provoke Their Own Demise', above n 5.

[167] Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996) 2. The 'benchmark man' is 'the paradigmatic incarnation of legality who represents the standard against whom others are measured and who is invariably White, heterosexual, able-bodied, politically conservative, and middle class'.

scenarios in murder trials. Such is the power of the culturally-loaded, heterosexist, stereotyped image of the predatory older man and his vulnerable younger male prey. It matters not that there is no evidence, apart from the dubious statement of the killer, that the alleged sexual advance occurred. Nor is a credible narrative required. We are simply asked to believe that a severely injured man, one whose face was bashed to the point of being unrecognisable to his assailant, could and would continue to make a sexual advance on him. *Green* demonstrates that the uncorroborated and typically far-fetched story told by a young man of a sexual advance by a predatory older man — here a man who was a friend and mentor of his assailant — is one with a great deal of cultural capital under conditions of hegemonic heterosexuality.

Can the majority judges in *Green* be heard to say that they knew not what they did when they held that the trial judge made a significant error in directing the jury to have no regard to the appellant's family history of sexual violence against other family members in considering his plea of provocation? The answer is clearly no. Compelling critiques of such spurious excuses for men's violence, including those which specifically address the operation of HAD, were readily available. So were critical analyses of the 'strategies of recuperation' deployed by dominant groups to channel resistant voices, in this case the voices of survivors of men's sexual assaults, into non-threatening outlets.[168] Yet in a chilling display of recuperative power, the majority judges in *Green* reconfigured a murderously violent aggressor as a victim of the sexual assaults experienced by his sisters at the hands of his father. The decision is an affront not only to survivors of sexual assault who have not responded with homicidal violence against their assailants, let alone against their friends and mentors, but to the social movements which have fought so hard to have their grievances heard. I call on all critical commentators to condemn *Green* without reservation.[169] I also call on them to reconsider any favourable view they once might have held of the capacity of the law of provocation to deliver justice in a 'civilised society', especially one which likes to perceive itself as compassionately making concessions to an ungendered and unsexed 'human frailty'.

ADRIAN HOWE*

[168] Linda Alcoff and Laura Gray, 'Survivor Discourse: Transgression or Recuperation?' (1993) 18 *Signs: Journal of Women in Culture and Society* 260, 268.

[169] Some already have. See Graeme Coss, 'Revisiting Lethal Violence by Men' (1998) 22 *Criminal Law Journal* 5. See also the extraordinary response to Coss by Green's defence counsel, Tom Molomby, '"Revisiting Lethal Violence by Men": A Reply' (1998) 22 *Criminal Law Journal* 116. Molomby goes to great, yet palpably unconvincing, pains to insist that the *Green* case had 'nothing to do with homophobia': at 116. Astoundingly, he even goes so far as to describe Green's action of handing himself in to the police as 'a highly moral and courageous act': at 118. How could anyone, ethically, make such a claim, given the grossly amoral violence of Green's previous act of homicidal fury? For Coss's reply to Molomby see Graeme Coss, 'A Reply to Tom Molomby' (1998) 22 *Criminal Law Journal* 119.

* PhD (Melb), DipCrim (Melb), LLB (Hons) (Melb); Senior Lecturer in Law and Legal Studies, La Trobe University.