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Provocation and Non-violent Homosexual Advances

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Some controversial areas of provocation have been developed to a significant extent in foreign jurisdictions before migrating to England and Scotland. The most obvious example is that of the 'battered women defence' which modifies a crucial aspect of the plea for the particular and unusual situation in hand. The same point can be said of the so-called 'non-violent homosexual advance' defence which has received a significant amount of coverage (most notably in Australia) but has yet to be discussed in any detail here. The particular aspect of provocation discussed here is the relevance of the proportionality requirement in cases of homosexual advance.

Given the lack of comment on this area in the U.K., it is helpful to outline some cases and terminology. In general, cases involve non-violent advances made by homosexual men. The kind of advance made differs widely but in all instances, the result has been to provoke a fatal attack, usually of a violent, if not frenzied kind. The accused is often described as having entered a state of mind labelled 'homosexual panic'. Examples of the provocative act and response can be found across most jurisdictions. In the English case of *R. v. Howard*¹, the deceased had enticed Howard back to his flat and grasped him by the testicles, prompting a fatal attack with a hammer. In a Scottish case, the deceased had put his hand on the accused's thigh and asked for a kiss². Examples from the Commonwealth include the Australian case of

¹ 7 Cr. App. R. (S) 130.

² *Robertson v. H.M. Advocate* 1994 JC 245

*Green v. R*³ where the deceased had slid into bed naked with the appellant and started touching his groin, whereupon the appellant attacked him with a pair of scissors. In New Zealand, the defence was allowed where the deceased had placed his hand on the accused's thigh and smiled at him, triggering a flashback to childhood sexual abuse⁴.

Contrasting approaches to the proportionality requirement

The classic doctrine of provocation requires that the response following the provocative act bears some proportionate relationship to the provocation, although exact equivalence is not required. This raises problems in relation to provocation by homosexual advance. As will be shown, it is in the nature of many cases that there will be no proportion between the provocative approach and the accused's response. However, it is well-established in Scotland that proportionality is required no matter what the specific circumstances; "(t)here must be some equivalence between the mode of retaliation ... and the provocation given"⁵. It is stated that there is no need for the response to match the provocation exactly, for the simple reason that to exactly meet the fatal response given by the accused, the victim's provocative conduct would have to show itself to be homicidal. If this were the case, the accused would be able to raise the plea of self-defence. In England, the 'reasonable relationship rule' used to apply in a similar fashion - "...fists might be answered with fists but not with a deadly weapon"⁶, but this has subsequently been overruled⁷. The question is one for the jury, and if they feel that the reasonable man would have responded as the accused did, then it does not matter that the response was disproportionately aggressive.

³ High Court of Australia, unreported - available at http://www.austlii.edu.au/au/cases/cth/high_ct/unrep349.html

⁴ *R. v. Campbell* [1997] 1 NZLR 16, available from Lexis.

⁵ Gordon, *Criminal Law*, Edinburgh, W. Green & Son, 2nd edn., 1978, para. 25-19.

⁶ Lord Devlin in *R. v. Duffy* [1949] 1 All ER 932.

⁷ For example, *R. v. Brown* [1972] 2 QB 229.

Commonwealth

The contrast in approaches adopted by different jurisdictions can be illustrated through reported decisions. With regard to the Australian position, at least in relation to New South Wales (Crimes Act 1900 (NSW) s23(3)), “...there is no rule of law that provocation is negatived if: (a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission...”. This subsection seems to have been drafted as a means of avoiding problematic areas within the definition of provocation. It also goes on to remove the need for an immediate response, thereby opening the partial defence to battered women in cases of cumulative provocation, and it seems sensible, having admitted that there are aspects of the doctrine where the common law definition now sits ill, to specifically remove them.

The Australian approach is shown in *Green v. R*⁸ where the High Court found the accused’s conviction for murder to have been based on an incorrect application of the reasonable man test, thereby amounting to a miscarriage of justice. The facts of the case support the acceptance of the homosexual advance defence in that jurisdiction. Green had been drinking one night with the deceased who was some twenty years older than him, but whom he viewed as a long-standing and trusted friend. The deceased had made an advance which Green brushed off, saying that he was not interested. Green then went to bed but was followed by the deceased who came into his room naked, got into bed with him, grabbed hold of Green and touch his groin. Green responded by stabbing the deceased to death with a pair of scissors. The

⁸ http://www.austlii.edu.au/au/cases/cth/high_ct/unrep349.html

appeal was based on the accused's increased sensitivity to unwanted sexual advances arising from his belief that his father had abused his sisters. This was rejected by the trial judge as too subjective a characteristic to impute to the reasonable man, but the High Court determined that it was relevant to the assessment of the gravity of the provocation, although not to the ordinary man's response.

However, at no point did the court ever doubt that this situation amounted to provocation. This result could only be achieved by the removal of the proportionality requirement. Otherwise, Green's fatal assault could only have been justified if the deceased had attacked him in a homicidal fashion, which was clearly not the case. If provocation as a concession to human frailty is to be extended to provide a partial excuse for heterosexual men faced with a homosexual advance, then the proportionality requirement must be removed. It could be argued that, in retaining the requirement that the accused's response was in line with that of the ordinary man, a form of proportionality is still retained at an implicit level. The jury decide whether the accused has met the ordinary man test and, if the retaliation was wildly disproportionate to the provocation offered, it could be said that the jury would reject the plea. However, it is clear from the decided cases that Australian judges are prepared to accept that a frenzied and fatal response to a non-violent homosexual advance accords with what the ordinary man might do. However, the decision in *Green* was by majority. Kirby J., in dissent, stated that to allow a non-violent homosexual advance on its own to reduce murder to manslaughter excessively reduces the level of self-control expected by the criminal law. He also noted that

allowing this mitigation ran counter to current policy which sought to eradicate violent, irrational responses⁹.

The approach taken in New Zealand is similar. For example, in *R. v. Campbell*¹⁰ the appellant had been convicted of murder following a homosexual advance. The court heard of his childhood which had been characterised by serious and repeated sexual abuse. The deceased had placed his hand on Campbell's thigh and smiled at him. Campbell suffered a flashback to the pain and anger which he had felt as a child. As a result, he attacked the deceased in a frenzied way, repeatedly striking him with an axe, thinking he was attacking his childhood abuser. At trial, the judge had referred to the issue of the proportionality requirement in ways which may have created the incorrect impression that it was a legal requirement. The conviction was quashed and a new trial ordered. It was held, *inter alia*, that proportionality should not be made into a legal requirement as it was no more than a significant factor which should be taken into account when deciding other questions of fact, presumably whether the ordinary man subjected to that level of provocation would have responded in that way. Thus, as in Australia, New Zealand courts will not insist on proportion between the provocation and the response, and can allow the plea in homosexual advance cases where, by their very nature, the response can be disproportionate.

England

Likewise, in England, there is a general acceptance that the homosexual advance defence can be raised in cases of murder to reduce the charge. However,

⁹ *ibid.*, p38.

there is no discussion of the defence itself in reported cases. In *R. v. Cook*¹¹, the deceased had been in a pub and sent drinks over to Cook even though there had been no contact between them at that point. On his way home, Cook stopped to urinate and the deceased appeared behind him and indulged in what the case report describes as “...the most intimate homosexual activity” whereupon the appellant struck him to the ground and kicked him to death. His conviction for murder was replaced with one of manslaughter for other reasons, but again, this decision shows a willingness to consider the homosexual advance defence without insisting on proportionality in the response to the provocative conduct. Similarly, in *R. v. Morley*¹² the deceased had approached Morley and asked him if he was gay, but when rebuffed, had followed the accused and grabbed his crotch. In sentencing him to four and a half years for manslaughter, the court again showed willing to allow the plea of provocation despite the lack of proportionality.

Scotland

The problems raised by retaining the proportionality requirement are shown clearly in the Scottish case of *Robertson v. H.M. Advocate*¹³. Here the deceased had approached Robertson, placed a hand on his upper thigh and asked for a kiss. When rejected, the deceased produced a knife, repeated his request and then struck Robertson. At this point the accused turned round and punched and repeatedly stabbed the deceased. At trial, Robertson was convicted of murder following a direction to the jury that there had to be a reasonably proportionate relationship between the deceased’s conduct and the accused’s response. An appeal was taken on

¹⁰ [1997] 1 NZLR 16 - available from Lexis.

¹¹ 1982 Court of Appeal (Criminal Division) - available from Lexis.

¹² (1993) 15 Cr. App. R.(S) 53.

the grounds that the trial judge had misdirected the jury by failing to tell them that only a gross disproportion or cruelly excessive response would bar the plea. The High Court of Justiciary rejected this and maintained that there must be a reasonably proportionate relationship between the provocation and the response. At the trial, it was felt, following Gordon's *Criminal Law*, that it would take a "...tremendous amount of provocation to palliate the stabbing of a man to death"¹⁴ and the jury clearly felt that the deceased had not provoked Robertson to that extent.

Since the deceased had presented a knife and struck the accused, arguably Robertson should have been allowed to plead provocation when he retaliated with blows and a knife. Thus it appears that, while Scottish courts are prepared to consider that a homosexual advance might amount to provocation, their insistence on proportionality effectively bars the plea. This approach is clearly contrary to that adopted elsewhere. In the other jurisdictions examined, Robertson would have been convicted of manslaughter (culpable homicide), on the basis that he responded as the reasonable man might have responded to a homosexual advance. Indeed, the advance made went beyond some of the foreign cases illustrated; it was not simply a minor homosexual advance, such as touching, but rather developed into a threatening situation when a knife was produced. Given this increase in the provocative nature of the conduct, and that Robertson responded with the same weapons, it seems rather harsh to have denied him the plea.

Contrasting rationales

¹³ 1994 JC 245.

¹⁴ *ibid.*, p246 citing Gordon, *op. cit.*, p772.

It is clear that there is a substantial difference between the Anglo-Commonwealth and Scottish approaches. The question for each legal system must be whether, as a point of principle, they wish to allow for mitigation in these circumstances. The classic justification for the existence of the provocation plea is that it provides a concession to human frailty. The doctrine acknowledges that the perfectly rational human being is a myth and that, given sufficient pressure, it is to be expected that people will 'snap' and perhaps cause death as a result. The function of the plea is to recognise that these people have not killed intentionally or in cold blood, and therefore to mitigate the charge brought against them. To reject the relevance of proportionality in homosexual advance cases allows for more frequent use of the plea; once the jury are not required to find a reasonable relationship between the provocative conduct and the response, they are much more likely to say that the accused acted as any ordinary man in his position. It could be argued that this moves the plea of provocation away from its intended arena. To dispense with proportionality means that the plea is no longer merely open to those who are subject to unreasonable levels of provocation, 'snap' and respond in whatever way is necessary to stop the provocation. It is also open to those who do not restrict their response to that which is sufficient to stop the provocation, but go much further, often to the stage of a frenzied and fatal attack. Moreover, it could also be argued that the use of the plea to mitigate killing a homosexual man implicitly renders his life less important than that of a heterosexual man, all of which would suggest that Scots law takes the more acceptable line in maintaining the need for proportionality before the plea will be accepted.

However, it is equally possible to construct arguments for the Anglo-Commonwealth approach. If the point behind the plea of provocation is to excuse a fatal attack if sufficient provocation is found, then assessment of the level of provocation offered becomes crucial. In a non-sexual case, this is an easier assessment to make; if a man approached another man in a pub, directed abusive comments towards him and tried to push him out of the way, it would clearly be acceptable for that man to respond in a like manner. In the vast majority of instances, a proportionate response would be expected, and if the provoker had the misfortune to lose his footing and hit his head on the floor, no-one would expect the accused to be held responsible for murder. However, were that same man to respond by pulling out a knife and stabbing the provoker to death, it is entirely justifiable to deny him the plea of provocation because the intensity of his response is so disproportionate.

Cases involving homosexual advances fall into two groups. Firstly, there is the serious homosexual advance, in which case a fatal assault would be less disproportionate given the gravity of what had occurred. For example, in the Australian case of *Green*, Smart J. in the Court of Criminal Appeal described the actions of the deceased (getting into bed naked with the accused, grabbing him and touching his groin) as revolting and a “serious and gross violation of (his) body and (his) person”¹⁵. Secondly, and more often, there is a relatively trivial advance which still leads to the same fatal assault, thus resulting in a high level of disproportion. Why is provocation still allowed in these latter cases? The answer must be that, although, in minor cases, the conduct when viewed in the abstract is relatively innocuous, many men would react very badly to such an approach. If a group of men

¹⁵ *Green*, http://www.austlii.edu.au/au/cases/cth/high_ct/unrep349.html

were asked to assess how provocative they would find an objectively trivial approach, the answer would probably be extremely so. If a group of women were asked the same question, the answer would probably be entirely different. Culturally, especially in the more male-oriented societies, women are exposed to unwanted trivial sexual advances on a fairly frequent basis and usually attach little significance to them. Men are far less frequently exposed to trivial homosexual advances and therefore see them as much more significant and more of an infringement of their masculinity. Herein lies the reason for the acceptance of disproportionate provocation in homosexual advance cases. Cultural conditioning and differences in psychological characteristics across the genders mean that men are far more likely to react violently to relatively little homosexual provocation. If this is accepted as a common example of human frailty in men, then there is no reason why, in contradiction to the current Scottish approach, provocation should not be allowed.

Conclusion

Arguably that the existence of the plea makes the homosexual community more vulnerable to attacks. This is true in relation to minor homosexual advances although it is upheld as a concession to human frailty, presumably in recognition of the fact that most men would view the advance as sufficiently provocative. However, in relation to serious advances, the crucial point is to assess the *degree* of provocation offered, regardless of the gender of the parties involved. If a man were to slip into bed and touch a woman in the way illustrated in *Green v. R*, then she should be able to plead provocation if she killed him because the *level* of conduct involved should be considered sufficient provocation. It should be irrelevant whether the perpetrator and

target are the same or the opposite sex. Thus the plea should apply equally to men who are approached uninvited by other men, or by women, and likewise to women who are approached by other men or women.

Thus the justifiable approach to these more serious cases is to allow the plea to anyone, regardless of gender, who has been approached sexually in a *sufficiently provocative way*. However, it should also be recognised that an approach which would not normally be sufficient could be made so by the use of a weapon. Although *any* serious and unwanted sexual advance should amount to provocation, it must be acknowledged that the reason why homosexual advances have received all the attention is that unwanted advances made towards women are far less likely to lead to a fatal assault, and it would be unusual for an advance on a man by a woman to reach a level that could be described as sufficient provocation. Nevertheless, in principle the plea should be open in any of these situations in recognition of the fact that conduct, especially sexual conduct, can reach a level which is so extreme that human frailty should be recognised.